BEFORE THE HEARING EXAMINER OF THURSTON COUNTY

In the Matter of the Application of

MAYTOWN SAND AND GRAVEL, LLC

SUP No. 02-0612

FRIENDS OF ROCKY PRAIRIE'S HEARING BRIEF FOR THE SEPA APPEAL

Appeal of the 2011 MDNS Decision of SUP 02-0612

No. 2010102512

I. Introduction

The Friends of Rocky Prairie ("FORP") submits this Hearing Brief as allowed by the Hearing Examiner under the Second Pre-Hearing Order. FORP’s Pre-Hearing Brief clearly establishes the facts and law relevant to decide this issue. However, FORP will use this Hearing Brief to respond to Maytown Sand and Gravel’s ("MSG") Pre-Hearing Brief as well as show the County violated the State Environmental Policy Act ("SEPA") when processing this amendment application. Below is a short summary of this process.
The County allowed MSG to amend the 2005 MDNS in order to gain compliance with long-passed deadlines. The County should not have done this. This is crux of the problem and from whence all the further confusion ensues. Once the County agreed to amend the 2005 MDNS it decided to allow for public input on the amendments via a SEPA process. However, the County then decided that the SEPA process would only examine the new water monitoring plan and timeline amendments and that it was a new proposal. This is apparently to prevent review of the 2005 MDNS, which the County itself argued during the Five-Year Review likely does not protect all the critical areas on the mine site. But this limited review and description of the “new” proposal has created the bizarre situation whereby an amendment to a water monitoring plan, which only exists because of the proposed mine, has its own MDNS and is somehow separate from the 2005 MDNS, even though it is specifically amending conditions of the 2005 MDNS. Unfortunately, this equivocating by the County has created a process that ultimately pleases no one and was wrong from the beginning.

The Hearing Examiner can easily remedy the confusion created by these decisions. Instead of looking at whether the County was wrong to classify the amendments as an “Action” under SEPA as argued by MSG, or whether the County failed to properly review existing environmental documents as argued by FORP, the Hearing Examiner should simply step back and look at the facts from a distance. What this case is all about is whether Conditions 6A and 6C of the 2005 MDNS have been amended or changed. If the answer is yes, then the County violated SEPA, the Thurston County Code, and well-established Washington land use law because the 2005 MDNS is a final land use decision that was never appealed and it is much too
late to do so now. It is clear that this process has amended the 2005 MDNS. Therefore, it was unlawful and the 2011 MDNS must be overturned.

a. The Facts Show This Process is Amending the 2005 MDNS, Which is Improper Because the 2005 MDNS was Not Appealed

What is most important, and what FORP cannot stress enough, is that the amendments sought by MSG and approved by Thurston County ("County") are amendments to the 2005 Mitigated Determination of Non-Significance ("2005 MDNS") and not to the Special Use Permit ("SUP"). Regardless of how the County and MSG label the amendments, it is impossible to amend the conditions in question through an amendment to the SUP, because these conditions do not exist in the SUP; they only exist in the 2005 MDNS.

As the Hearing Examiner noted in the Decision on the Five-Year Review of this SUP, "The December 16, 2005 hearing examiner SUP decision contains 23 lettered conditions, A though W. SUP condition A requires compliance with the MDNS conditions, and MDNS condition 32 requires compliance with SUP conditions, rendering both duplicative and without independent performance obligation."\(^1\) Therefore, there is no independent performance obligation under the SUP to meet the water monitoring conditions contained in the 2005 MDNS. The obligation to comply with Conditions 6A and 6C of the 2005 MDNS comes from the 2005 MDNS. The Hearing Examiner further clarifies this fact holding, "Thus, MDNS condition 6 preamble contains an affirmative performance requirement and each of the six lettered subparts contains performance requirements."\(^2\) The County and MSG’s assertion that this process is

\(^{1}\) Hearing Examiner Decision Five-Year Review Findings ¶ 12 fn 9.
\(^{2}\) Id.
seeking to amend the SUP is wrong because these conditions do not exist in the SUP. There is no independent performance obligation found in the SUP to begin water monitoring surveys within 60 days of SUP issuance or to field verify off-site wells within one-year of SUP issuance. These are the conditions that are being amended in this process and are found only in the 2005 MDNS.

This fact is crucial because as MSG correctly states in its Pre-Hearing Brief, “The 2005 MDNS was issued, not appealed, and became final in 2005.” MSG refers to the 2005 MDNS as “unassailable” and “a final decision that remains effective.” Therefore, by its own admission, MSG cannot seek to amend the 2005 MDNS because it became final when it was not appealed.

This is why MSG and the County are strenuously, but vainly, attempting to label this an amendment to the SUP. However, despite the many times the County and MSG say it is an amendment to the SUP, the facts do not lie. There is no Condition 6A or 6C in the SUP. There is no independent compliance obligation to comply with Conditions 6A or 6C in the SUP. What is actually being amended is the 2005 MDNS. This is improper because MSG did not appeal the 2005 MDNS. Therefore, the County’s decision to approve the amendments to the 2005 MDNS must be overturned.

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3 2005 MDNS Conditions 6A and 6C respectively.
4 MSG Pre-Hearing Brief ¶ A 7: 18-19.
5 MSG Pre-Hearing Brief 1: 18, ¶ A 9:10-11.
6 FORP incorporates by reference the arguments supporting this issue, and all other issues, made in its Pre-Hearing Brief.
b. The Relevant Facts Require That Issues Related to Existing SEPA Documents Are Within the Scope of this Hearing

In the Pre-Hearing Brief from MSG, it argues that the scope of the SEPA appeal should be limited to “relevant issues.”\(^7\) FORP agrees with this statement, but vehemently disagrees with MSG’s definition of “relevant.” Both the County and MSG erroneously believe that a lead agency can fulfill its SEPA obligations in making a threshold determination by using a nearly blank environmental checklist. The County for its part claims that it “did review the 2005 MDNS as part of SEPA review for this proposal,”\(^8\) and states that the 2011 MDNS is “substantially based on analysis of information obtained from the following documents and site visits.”\(^9\) Found in the list of “following documents” are the “Expanded Environmental Checklist” from July 2002, the “supplement to Expanded Environmental Checklist” from September 2005, and the 2005 MDNS.\(^10\) The use of existing documents to meet a lead agency’s SEPA obligations, as the County did in this instance, is a relevant fact to this proceeding.

As argued in FORP’s Pre-Hearing Brief, SEPA law requires any agency relying on existing environmental documents to meet its SEPA obligations to review these documents.\(^11\) Moreover, if there is new information on a proposal’s probable adverse significant environmental impact a new threshold determination is required.\(^12\) This proposal appears to be an amendment to an existing proposal, as explained above, and as the County acknowledges noting that the approval sought by MSG, “involves a decision on the specific mining project that will

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\(^7\) MSG Pre-Hearing Brief ¶ A 17.
\(^8\) County Staff Report pg. 12.
\(^9\) 2011 MDNS pg. 3.
\(^10\) Id.
\(^11\) FORP Pre-Hearing Brief paragraphs b, c, and d.
directly modify the environment.”\textsuperscript{13} Furthermore, the County acknowledges, “the conditions being amended came from the original SEPA review.”\textsuperscript{14} Under SEPA law however, when using existing environmental documents, it does not matter whether it is a revised or new proposal. FORP’s Pre-Hearing Brief makes it clear that existing documents (1) can be adopted, (2) can be incorporated by reference, (3) can have an addendum created, or (4) a supplemental EIS can be created. The County initially stated it would adopt the 2005 MDNS\textsuperscript{15}, but decided against adopting the 2005 MDNS when the 2011 MDNS was actually issued a month later. However, the County cannot ignore its responsibilities under SEPA, which is what the facts show happened.

The County, while simultaneously claiming it relied on 2002 and 2005 Environmental Checklists as well as the 2005 MDNS to make its threshold determination for the 2011 MDNS, also rejects any responsibility for review of the 2005 MDNS even though the County knows of new information that shows significant environmental harm that was not considered in the 2005 MDNS could result.\textsuperscript{16} This is improper under SEPA Rules. To summarize:

- The County relied on these existing documents because “the checklist submitted for the amendment proposal was not complete in itself, [but] the County did have all the information it needed to conduct a thorough SEPA review of the proposal.”\textsuperscript{17}

\textsuperscript{12} WAC 197-11-600(3)(b)(ii).
\textsuperscript{13} County Staff Report pg. 11.
\textsuperscript{14} Id.
\textsuperscript{15} Amended Notice of Application pg. 7 Note C.
\textsuperscript{16} Id. at 12-13.
\textsuperscript{17} Id. at 13.
The County is aware and testified during the Five-Year Review as to the existence of several acres of critical areas and habitat that were not included in the 2005 MDNS.

The Board of County Commissioners’ decision in the Five-Year Review agreed with County staff that it is likely that critical areas as defined by the 2002 Critical Areas Ordinance were missed during the initial environmental review and remanded the Hearing Examiner’s decision to determine this fact.18

This new information indicates the mining project will have a significant adverse impact on the environment and the new water monitoring plan is a mandatory part of this project. Therefore, you cannot divorce the new plan from the adverse environmental impacts it is now known the mine will cause.

Therefore, the fact that 1) the County knows of new information that the mine will adversely impact the environment unless modified, and 2) the County relied on existing environmental documents that do not contain this information to make the threshold determination for the 2011 MDNS means the County violated WAC 197-11-600(3)(b)(ii).

c. FORP Did Comment on the 2011 Groundwater and Surface Water Monitoring Plan and Stated it Would Have Environmental Impacts

MSG claims “FORP made no comments on the 2011 Plan, which encapsulates nearly the entire substance of the SUP amendments.”19 This is not accurate. On February 2, 2011 FORP submitted a comment letter regarding the SEPA determination issued by the County.20 In the

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18 The Board of County Commissioner’s Decision on the Five-Year Review Appeal is incorporated by reference once it is issued. It is due by March 14, 2011.
letter, FORP makes it clear that requirements in the original groundwater monitoring plan that
the Port failed to comply with are not required in the 2011 Plan. The failure of the Port to
continually monitor, starting 60 days from issuance of the permit, for all the criteria, including
water level, will not be cured by the 2011 Plan. At the end of 2009, only nine monitoring reports
had been submitted to the County as required under 2005 MDNS Condition 6C.\textsuperscript{21} The County
estimated that at that point the Port should have filed “at least 23 reports.”\textsuperscript{22} Additionally, the
reports are only from 14 well sites.\textsuperscript{23} None of these reports included data on “water level, water
quality or background conditions” and some did not include temperature.\textsuperscript{24} Mr. Kain states
clearly, “The reports, as submitted, are not acceptable.”\textsuperscript{25}

Therefore, between issuance of the SUP in 2005 and December 2009, a period of four
years, the Port was out of compliance with 2005 MDNS Condition 6C. This is not just a timing
issue or an issue related to whether there are 17 or 16 wells or stations. Even for the limited
number of wells that were surveyed none of the surveys were complete. This means that the
continuous water monitoring data required by the original Groundwater Plan was lost. Despite
the County’s assertion that this loss of data is irrelevant and the new Plan better because the data
is newer, misses the intent of Condition 6C. New data is not better when you are trying to
establish a reliable baseline of information to determine impacts of mining. In fact, it is just the
opposite. A smaller data set does not allow for a more robust assessment of the effects mining
activities versus pre-mining conditions. The natural variations of seasons over several years are

\textsuperscript{21} Email from Mike Kain to Jeff McCann Dec 11, 2009.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
needed to determine what true “background” conditions are. A sample size of a year is insufficient. The new Plan fails to recognize this fact.

MSG claims that the new Plan increases monitoring conditions and leads to three years instead of one year of data. But as the County made clear, by the end of 2009 no reports that were filed were acceptable. So MSG cannot claim that any reports submitted prior to 2010 provide any useful data. Therefore, the claim that three years of data now exist is not accurate. Additionally, the increased monitoring conditions only relate to contaminants and not to water quantity. The increased conditions do nothing to protect the wetland down gradient of the mine site, which is habitat for the federally listed water howellia and the Oregon spotted frog. This site was to be monitored by the Conservation Organizations as a result of the Settlement Agreement. However, because the funds were not offered until three years after the permit was issued no monitoring occurred. Therefore, because the Port failed to gather the required baseline data and did not fund the Conservation Organizations there is no data upon which to base any mitigation or corrections to mining if there is an environmental impact. There will not be sufficient data to backup claims of harm. Because the new Plan does not account for this overall lack of data, which was envisioned in the Settlement Agreement, it does not provide the same environmental protections as the original Plan. Furthermore, the original Plan required that monitoring begin at issuance of the SUP, thus being even more stringent in its requirements regarding timing.

Finally, the new Plan did not consider the ecological changes that have occurred on the site since the original Plan was drafted. The new Plan may “only” change the timing of deadlines and number of contaminants to be monitored, but it relies on the old environmental data and
conditions of the site from the original Plan. The County claims it used the 2005 MDNS and other existing SEPA documents when evaluating the new MDNS and new Plan, as the 2010 Environmental Checklist submitted for the amendment was incomplete. However, during the Five-Year Review the applicant’s environmental consultant testified that the area is a “dynamic ecosystem” and admitted that conditions have changed on this site since the original environmental review. There is no indication in the 2011 MDNS that the County considered whether any of the ecological changes on the mine impact the new Plan. Therefore, the new Plan fails to account for the ecological changes on the site and therefore it is not known what environmental impacts may occur.

II. CONCLUSION

The proper scope of the issues in this case includes the existing environmental documents the County relied on to meet its obligations under SEPA. The new Plan is not an independent proposal but is instead a requirement of the mining process. The mine is governed by the 2005 MDNS and therefore that MDNS’s adequacy is relevant to the issues. Even if the County relied only on the water monitoring elements of the existing SEPA documents to analyze the environmental impacts of the MDNS amendments, it was still improper because these documents fail to consider the changes to the site. The new Plan provides less environmental protection than the old Plan, as FORP commented during the SEPA comment period.

26 MSG Brief in Support of Approving MDNS ¶3 13.
27 County Staff Report pg. 13.
Dated this 7th day of March 2011

[Signature]

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28 Mr. Roy Garrison, testimony at Five-Year Review. All testimony, documents, exhibits from the Five-Year Review are incorporated by reference.