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 SUP AMENDMENT

Appeal for the SUP Amendment 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 incorporates by reference the factual background found in FORP’s Pre-Hearing Briefs and SEPA Appeal Hearing Brief.

a. The SUP is Invalid and Therefore Cannot be Amended

FORP incorporates by reference the arguments made in support of this issue in its Pre-Hearing Brief on the SUP Amendment. An invalid or expired permit cannot be amended. Furthermore, it is appropriate for the County to examine the validity of any permit for which the
applicant submits an application to amend it. The County has the authority to determine if the SUP held by the Port expired or is otherwise invalid. The law does not allow Ports to be gravel miners, as admitted by the Port in its five-year review response brief.

The County and Port’s reliance on the improper issuance of a building permit in contravention of the 2005 MDNS to forestall expiration of the permit is misplaced. Any activities engaged in by the Port after the Port of Olympia cancelled the Interlocal Agreement in June 2008, including applying for the building permit, were done without any legal authority to do so. An unlawful act cannot be used to forestall the expiration of the SUP. The Port took a risk in acquiring property outside of its jurisdiction. The Port is allowed to sell the property, but it cannot act beyond its authority to do so. Since there was no Interlocal Agreement authorizing the Port to engage in activities in the Port of Olympia’s district the SUP expired and cannot be resurrected through an amendment.

b. The New Water Monitoring Plan Actually Decreases Environmental Protection for the Off Site Wetland. This is Contrary to the Settlement Agreement and the County Should Deny the Amendment

The original Groundwater Monitoring Plan was the result of over a year of negotiations between the County, the original applicant, and several Conservation Organizations. The Conservation Organizations only agreed to the original Plan once there were assurances that the water quality and quantity monitoring would be sufficient to protect the environment. The original Plan was created in response to the Settlement Agreement, which was signed by the
original applicant, Jay Allen, and Black Hills Audubon Society ("BHAS"), although the Nature
Conservancy, DFW, the Department of Ecology, and the County were all involved.¹

The Settlement Agreement provided a fund of $325,000 for the Conservation
Organizations to use for monitoring aquifer levels on the adjacent DFW property. This is
particularly important because federally listed water howellia and the Oregon spotted frog (on
the Washington endangered species list) live in wetlands that are dependent on the health of the
aquifer. Both of these listed species are extremely sensitive to changes in hydrology. The
protection of this habitat was, and is, very important to the Conservation Organizations.
However, due to the lack of timely funding of the Conservation Fund coupled with the failure to
comply with Conditions 6A and 6C of the 2005 MDNS, there is little baseline data to accurately
determine changes in hydrology due to mining activities once it starts.

In a series of letters from February 2010 through January 2011, BHAS repeatedly asks
the County that BHAS be included in any discussions regarding water monitoring since it was a
signatory to the Settlement Agreement. The February 8, 2010 letter shows BHAS’s concern that
water monitoring did not begin on time and therefore valuable baseline data was lost.² This letter
also reaffirms BHAS’s concern over the water howellia and Oregon spotted frog and their
susceptibility to seasonal water level changes. BHAS then reminds the County; “The settlement
agreement reached was intended to provide for a lengthy period of monitoring with significant
baseline data that would capture seasonal as well as yearly data. The logical assumption was, and
is, that one year of data would be insufficient because it would not capture yearly variation.”³

¹ Port of Tacoma’s Pre-Hearing Brief 3: 11.
³ Id.
In the October 2010 letter, BHAS again informs the County of its concern that the failure to comply with the timing conditions of 6A and 6C hamper BHAS’s ability to protect the Class A wetlands. BHAS states that the failure to commence background water monitoring within the specified timeframe of the 2005 MDNS goes directly against why it decided to compromise and withdraw its appeal of the MDNS. BHAS expected the gathering of significant baseline data to be accomplished through the applicant’s compliance with the timing requirements of the MDNS. Since this did not occur, there is real concern that it will be difficult to adequately protect the wetland.

Finally, in January 2011 BHAS submitted another letter to the County. This letter objects to the County’s failure to include BHAS in the creation of the new water monitoring plan. BHAS states that the County needed to seek input from BHAS prior to creating a new Plan since BHAS was a signatory to the Settlement Agreement. The County, however, did not seek input from BHAS prior to drafting and issuing the new Plan.

The SUP amendment that proposes to add the new water monitoring plan must be denied by the County because it actually decreases environmental protections. The new Plan will not provide a significant enough set of baseline data in order to adequately protect the wetland habitat of the federally listed water howellia and the state listed Oregon spotted frog. The new Plan fails to keep the intent of the old Plan, which was the result of protracted negotiations.

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

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On February 2, 2011, FORP submitted a SEPA comment letter to the County objecting to certain aspects of the proposed water monitoring plan. Therefore, MSG’s statement in its Pre-Hearing SUP Amendment Brief that “no one made any comments objecting to the 2011 plan or the substance of the proposed amendments” is not accurate. FORP’s arguments regarding MSG’s assertion that “no one challenges the wisdom of adopting the SUP Amendments” are found in FORP’s Hearing Brief for the SEPA Appeal. It is incorporated by reference into this brief.

II. CONCLUSION

The proposed amendments to the SUP, coupled with the non-compliance of the conditions they seek to amend, actually decrease environmental data collection prior to mining. This is clearly contrary to the original conditions found in the 2005 MDNS and to the Settlement Agreement, which was the catalyst for the original water monitoring plan. Because these amendments change the intent and requirements of the original conditions to the detriment of environmental protection, the County must deny the application.

Dated this 7th day of March 2011

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7 MSG Pre-Hearing Brief in Support of SUP Amendment ¶ B 4: 17-18.
8 Id. at ¶ B 4: 14.

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