

NOTICE OF DECISION

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

- Applicant:** Bay Baby Produce, Inc.
Conway Frontage LLC, c/o Michelle Youngquist
P. O. Box 1030
Burlington, WA 98233
- Appellants:** (1) Skagitonians to Preserve Farmland
P. O. Box 2405
Mount Vernon, WA 98273
(2) Skagit County Drainage & Irrigation Improvement District #17
17065 Britt Road
Mount Vernon, WA 98273
- Appeals:** (1) Appeal #PL15-0410 by Skagitonians to Preserve Farmland of SEPA MDNS, issued July 28, 2015 (#PL15-0292).
(2) Appeal #PL16-0120 by Skagitonians to Preserve Farmland of Grading Permit (#BP15-0915) and Floodplain Permit (#FP15-0126), issued March 3, 2016.
(3) Appeal #PL16-0122 by Skagit County Drainage and Irrigation Improvement District #17 of Grading Permit (#BP15-0915) and Floodplain Permit (#FP15-0126), issued March 3, 2016.
- Summary of Proposal:** Bay Baby Produce, Inc., Agricultural Processing Facility Project. to build a 54,939 square foot agricultural processing facility on approximately 4.8 acres of a 32+ acre site.
- Location/Land Use Designation:** 20356 Conway Frontage Road, within a portion of Sec.18, T33N, R4E, W.M. (Parcels P16813, P16815); Agricultural Natural Resource Land (Ag-NRL)
- SEPA Compliance:** Mitigated Determination of Non-Significance (MDNS), July 28, 2015
- Appeal Hearing:** August 24 and 25, 2016. Skagitonians to Preserve Farmland represented by Jeffrey Eustis, Attorney at Law; Skagit County Drainage and Irrigation Improvement District #17 represented by Peter Ojala, Attorney at Law; Bay Baby Produce, Inc. represented by John Sitkin, Attorney at Law; Skagit County represented by Arne Denney, Deputy Prosecuting Attorney.
- Decision/Date:** The MDNS and the Grading and Floodplain Permits are Affirmed.
- Online Text:** www.skagitcounty.net/hearingexaminer

PREHEARING PROCEDURE

On July 28, 2015, prior to issuing the Grading and Floodplain permits under appeal here, the County issued a Mitigated Determination of Non-Significance (MDNS) under the State Environmental Policy Act (SEPA) for agricultural processing facility project under consideration. Skagitonians to Preserve Farmland (Skagitonians) filed a timely appeal of the MDNS. In response, the Hearing Examiner entered a preliminary order holding the appeal in abeyance until the permit decisions on the project were made.

The County approved the Grading and Floodplain permits on March 3, 2016. Skagitonians appealed, as did Skagit County Drainage and Irrigation Improvement District #17 (the District). A prehearing conference was held on April 13, 2016.

Pursuant to the Prehearing Order, the District filed a Motion for Summary Judgment on May 18, 2016. Baby Baby Produce, Inc. and Skagit County (the County) filed timely responses. The Hearing Examiner denied the motion by Order dated June 3, 2016.

The parties agreed to continue the hearing, initially set for June 22, 2016, to August 24, 2016. Prehearing submissions were made pursuant to a Revised Prehearing Order, dated June 17, 2016. The hearing was held over two full days of testimony on August 24 and 25, 2016.

FINDINGS OF FACT

1. Factual matters set forth in the above “Prehearing Procedure” are adopted hereby as Findings.

2. Bay Baby Produce, Inc. (Applicant) seeks approval of the construction and operation of an agricultural processing facility, to be used for cleaning, sorting, packaging, storing and distributing pumpkins, squash, apples and other raw agricultural goods produced in Skagit County.

3. The address of the project is 20356 Conway Frontage Road (Parcel Nos. #16813, 16815). The zoning is Agricultural Natural Resources Land (AG-NRL). The location is within a portion of Sec.18, T33N, R4E, W.M.

4. The Applicant proposes construction of a 54,939 square foot facility, consisting of a 37,700 square foot manufacturing/processing portion, a 15,000 square foot covered roof processing/storage area and a 2, 239 square foot attached office, along with site improvements for paved and graveled parking and truck circulation. The proposed development would impact approximately 4.8 acres of a 32+ acre site. The impacted area is currently being farmed.

5. The building site is adjacent to and north of existing on-site structures (single-family residence and waterfall sales business), alongside a paved road to the east and near the I-5 Freeway. The majority of the property is currently farmed. The neighboring properties are principally farmland. An existing agricultural processing facility lies across open fields to the southwest.

6. The site has little contour, but there is a slight rise which runs southeast to northwest, intersecting a small portion of the west side of the proposed building. Runoff flows westerly from this rise across an open agricultural field.

7. During the application process, the Applicant provided and the County reviewed the following:

- (a) SEPA Environmental Checklist, received June 15, 2015.
- (b) Updated SEPA Environmental Checklist, received July 2, 2015.
- (c) Wetland Reconnaissance and Addendum, dated April 24, 2015 and June 24, 2015.
- (d) Site plan and existing conditions map
- (e) Drainage Analysis, Sound Development Group, November 19, 2015
- (f) Updated Drainage Analysis, Sound Development Group, January 12, 2016
- (g) Geotechnical Engineering Report, June 20, 2015
- (h) Permit applications – grading, floodplain, septic soils, access
- (i) Correspondence responding to agency and public comments

8. The MDNS issued July 28, 2015, contained the following conditions:

- (1) Temporary erosion/sedimentation control measures, as approved by Skagit County Department of Public Works, shall be in place prior to the placement of any fill material. The applicant shall maintain all temporary erosion/sedimentation control measures in accordance with the Skagit County Drainage Ordinance. Said measures shall remain in place until completion of the project.
- (2) The applicant shall comply with Northwest Clean Air Agency requirements.
- (3) The applicant shall comply with the provisions of Chapter 14.32 of the Skagit County Code, the Skagit County Drainage Ordinance, as it relates to increased runoff resulting from additional impervious surfaces.
- (4) The applicant shall comply with Fire Code Standards.
- (5) An engineered soils compaction report shall be required for all structures placed on fill material.
- (6) The applicant shall comply with all relevant provision of 14.24 (Skagit County Critical Areas Ordinance) of the Skagit County Code.
- (7) A Construction, or Industrial, Stormwater General Permit (NPDES) may be required by the Department of Ecology (WSDOE) for this project. Contact WSDOE Bellingham Field Office at (360) 715-5200 to determine if an NPDES permit is required.

9. In their appeal of the MDNS, Skagitonians raised the following issues (paraphrased):

- (1) The MDNS fails to fully consider negative and irreversible impacts to prime agricultural soils, aesthetic scenic resources, the project's relationship to existing land uses and plans as well as the short and long range cumulative impact of converting farmland within the I-5 corridor.

- (2) The MDNS is improperly limited to the project area and does not consider the entire agricultural land base the project is purporting to serve.
- (3) The MDNS did not disclose information related to the increase in stormwater runoff and its probable impact on adjacent agricultural properties and the District. Though the project is required to comply with the County's drainage ordinance, there is no way to know if such compliance will be sufficient to mitigate the project's significant impacts.
- (4) The MDNS does not disclose information on the probable impacts of placement of 15,000 cubic yard of fill within the 100-year floodplain.

10. In their appeal of the Grading and Floodplain Permits, Skagitonians raised the following issues (paraphrased):

- (1) Flow control is required by the Skagit County Code.
- (2) Proposed water quality control is insufficient.
- (3) Various problems exist with location of sewage drain field
- (4) Geotechnical report does not address infeasibility criteria for stormwater infiltration or alternate stormwater treatment BMPs (Best Management Practices).
- (5) Wetland delineation is flawed.
- (6) Environmental review has been improperly segment and piecemealed.
- (7) A traffic study should have been conducted prior to permit issuance.

11. In their appeal of the Grading and Floodplain Permits, the District incorporated the issues raised by Skagitonians and raised the following issues (paraphrased):

- (1) Applicant did not engage in prior consultation with the District.
- (2) Applicant has not demonstrated they are exempt from SCC 14.32.080.
- (3) Applicant must provide flow control for stormwater. No analysis of downstream effects was provided
- (4) Treatment for processing water and storm water was not adequately addressed.
- (5) Applicant has not disclosed how it will control and mitigate impacts to the District. Plans have not been circulated to the District.

12. Under the zoning ordinance, agricultural processing facilities are expressly listed a permitted use in the Agricultural –Natural Resource Land (Ag-NRL) zone. SCC 14.16.400(2)(c),

13. The subject site is within an agricultural scenic corridor along Interstate-5, recognized as such by the State Legislature. The recognition, however, is just that. No standards or implementing regulations exist or are contemplated.

14. Sound Development Group LLC produced a Drainage Analysis on November 19, 2015 and provided an updated version dated January 12, 2016. The work was endorsed by a professional engineer. Based on computer analysis of data, the report calculated that the increase in runoff from the site for the 100-year flow frequency would be 0.49 cfs. The threshold for

requiring flow control is a 0.50 cfs increase. As a result, no flow control is provided for the project. A stormwater detention vault is not proposed.

15. The design as proposed, in fact, contemplates that there will be a net decrease in stormwater discharge easterly to the ditch connecting to the Drainage District's system. Instead of detention, dispersion will be used for the portion of the runoff that sheet flows to the west across the open field.

16. The drainage analysis was prepared in accordance with a hydrograph method based on the Santa Barbara Unity Hydrograph, a method approved by the County. Under the then effective code, downstream effects analysis was not required.

17. The project will employ best management practices (BMPs) for water quality control. The principal BMP is the proposed use of 1402 linear feet of biofiltration swales which will provide treatment. The swales will discharge to the roadside ditch along the Conway Frontage Road. The use of low impact development (LID) techniques were not deemed feasible. Again, the evaluation was endorsed by a licensed engineer.

18. Process water will not be allowed to affect water quality. The project proponent testified that process water generated will be stored in a tank and ultimately disposed of off-site to a sewer system. No contamination from the septic system is likely because rain water will be intercepted before reaching the drain field.

19. Traffic impacts were initially addressed in the SEPA checklist. This preliminary analysis was sufficient for threshold determination purposes. In this case a Traffic Impact Analysis would not be required until the submission of a building permit application. However, such an analysis was, in fact, submitted in June of 2016. The analysis showed that with the new daily and peak hour trips generated during the peak 3-month period, study intersections would operate at acceptable levels of service or better, so that additional capacity mitigation will not be required.

20. The wetlands review is contained in two documents submitted by Graham-Bunting Associates, dated April 24, 2015 and June 24, 2015. Jurisdictional wetlands were not identified within 300 feet of the proposed project activities. On September 1, 2015, Graham-Bunting sent the project consultant a letter showing that the project is not within a protected review area and, therefore, does not require a habitat assessment. There is no evidence in the record to substantiate that the project will have an adverse impact on migratory birds. There was no testimony regarding asserted flaws in the wetland delineation.

21. When the MDNS was issued, the County had held a pre-application conference, received a wetland reconnaissance, received a geotechnical engineering report, reviewed environmental checklists, looked at comment letters, and was in receipt of a site plan and existing conditions map. The location within the valley and within the District was well-known. Subsequently more detailed information was acquired which added to knowledge of the project, but this information did not substantially contradict what was known when the MDNS was

issued. During the SEPA process, no one asked for preparation of an environmental impact statement.

22. The Skagitonians case focused principally on the drainage report done by the Applicant and reviewed by Skagit County. Their expert criticized the use of the Santa Barbara Urban Hydrograph, arguing that it is both outdated and ill-suited to the multiple-rainfall conditions of the site. He challenged the conclusion that flow control is not needed for this project. He emphasized that the 0.49 cfs figure relied on is very close to 0.50 cfs which triggers flow control. He said that models may not be precisely accurate at the margins and that a margin of error should have been employed. He urged that a detention vault be required. He also argued against relying on bioswales to meet water quality standards, predicting excessive turbidity from dirt in the parking area.

23. In sum, the Skagitonians' expert advocated the use of more up-to-date and site-appropriate analytical methods following the current version of the Skagit County stormwater management ordinance. The ordinance has recently been substantially revised, but this project vested to the prior version.

24. The County Department of Public Works reviewed the drainage analysis using the information provided and the prior code. They examined the points of latitude for engineering inputs and determined that the inputs used were proper. Testimony for Public Works was that the work done was technically correct. They concluded that the analysis adequately addresses stormwater runoff and water quality.

25. The Applicant's drainage expert, a professional engineer under whose supervision the drainage analysis was prepared, testified convincingly that neither he nor his staff did anything to manipulate the data. The results they got were what the computer gave them, given the inputs. He said that the model was run several times and that lower figures for offsite runoff were obtained on other runs.

26. Testimony was given by a commissioner for the District. He said the District has no objection to the proposed use, but that their drainage system is at capacity and cannot tolerate any increases in water. He said they had expected detention of stormwater to be a feature of the project.

27. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over these appeals. The Appellants have the burden of proving that the administrative decisions appealed were “clearly erroneous.” SCC 14.06.110(11).

2. The Order Denying Motion for Summary Judgment, entered June 3, 2016, determined that the County was not required to consult with the District before issuing the grading and floodplain permits which have been appealed.

SEPA MDNS APPEAL

3. Procedurally there was no error in the timing of the MDNS. By the date of issuance, the County was in possession of considerable information about the project. A pre-development meeting had been held. A SEPA checklist had been submitted and then updated. A site plan had been received. Comment letters had been reviewed. The SEPA rules emphasize that the threshold determination should be made “at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.” WAC 197-011-055. The principal features and impacts of this proposal had been identified by July 28, 2015 when the MDNS was issued.

4. The MDNS should be sustained, unless either (a) the threshold determination was not based on information reasonably sufficient to evaluate the environmental impacts of the proposal, or (b) the project, as conditioned, is likely to have a significant adverse environmental impact. WAC 197-11-330, 335, 340.

5. The Applicant presented substantial information about the project and its potential environmental impacts. The Examiner holds that the information submitted was reasonably sufficient to evaluate the environmental impacts of the proposal.

6. The record does not sustain a determination of “clear error” as to likelihood of significant adverse environmental impacts.

(a) The proposed use is expressly allowed in the agricultural zone. It does not conflict with the Comprehensive Plan, but even if it did, the zoning would govern.

(b) By function the proposed structures are agricultural structures and, therefore are not subject to the special siting criteria of SCC 14.16.400(6).

(c) The project is in aid of agricultural production elsewhere in the valley, and thus the loss of this five acres to production is not necessarily a negative impact on farmland in the area overall.

(d) No indirect impacts of the project, such as effects on sprawl, were shown.

(e) While the project is within a corridor recognized by the legislature as having special value for viewing agriculture, the designation is simply descriptive and has no legal force. The site is in an area where both agricultural fields and agricultural structures occupy the present viewscape. No objective evidence was provided that the proposal would adversely affect the aesthetics of the corridor significantly or at all.

(f) There was no proof of adverse impacts from the project on migrating waterfowl.

(g) The issue of stormwater runoff was extensively treated in the Drainage Analysis performed for the project. The Examiner is unable to conclude that likely significant adverse impacts to adjacent agricultural properties from project-induced stormwater runoff was shown.

(h) There was no proof that the proposed fill within the 100-year floodplain would be the source of significant adverse environmental impacts.

PERMIT APPEALS

6. The Grading Permit (#BP15-0915) and Floodplain Permit ((#FP15-0126) sought in the instant case are “development permits” as defined by SCC 14.04.030.

7. Under Skagit County’s vesting rule, SCC 14.02.050, an application for a development permit vests at such time as a complete application is filed with Planning and Development Services and required permit fees are paid. The vesting date in this case is December 23, 2015.

8. Substantial amendments were made to the County’s drainage ordinance, effective January 1, 2016. But, the project in question vested to the prior version of the stormwater management regulations. (Exhibit C-15). References to the drainage ordinance herein are to that prior version.

9. Under SCC 14.32.040(d), projects which do not increase the 100 year, 24-hour storm peak discharge from within the boundaries of the project more than 0.5 cfs are exempt from the provisions of SCC 14.32.080(3). Based on the professional drainage analysis performed and reviewed by the County, the subject development qualifies for this exemption.

10. SCC 14.32.080(3) relates to stormwater quantity control and, among other things, limits peak stormwater discharge rates from the development site for the 10 and 100 year frequency 24-hour storm events to pre-development peak stormwater runoff rates. Notwithstanding the exemption from this standard, the instant record does not demonstrate that the proposed development will violate it.

11. The upshot is that, unless the only drainage analysis actually performed is rejected, flow control is not required.

12. The Examiner was not persuaded that the project will result in offsite water quality problems. Under normal conditions, the bioswales should eliminate turbidity. In any event, turbidity is a short term and short range problem not likely to do measurable harm.

13. The County, on review, concluded that the drainage analysis complied with the applicable law. The Examiner agrees. Moreover, while other methods of analysis might have been used, the assertion of no increased storm runoff from the project site into the District's works was not shown to be clearly wrong.

13. Other issues raised by the permit appeals are either unproven or without merit.

14. Overall, then, the "clearly erroneous" standard was not met by the appellants in the permit appeals.

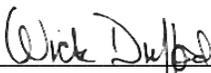
15. Under SCC 14.06.110(11), "the Hearing Examiner shall not overturn or modify the Administrative Official's decision unless he or she finds it was clearly erroneous." Accordingly, the imposition of additional conditions at this juncture is beyond the Examiner's power.

16. Any finding herein which may be deemed a conclusion is hereby adopted as such.

ORDER

The MDNS (PL15-0292), the Grading Permit (BP15-0915) and the Floodplain Permit (FP15-0126) are affirmed.

DONE, this 21st day of September, 2016.



Wick Dufford, Hearing Examiner

Transmitted to Parties, September 21, 2016

See Notice of Decision, page 1, for appeal information.