

September 14, 2023

From: Sunset Lane Association
To: Skagit County Commissioners
Subject: Special Use Permit PL 16-0056 Appeal

The Sunset Lane Association submits the following arguments to the Commissioners of Skagit County to support DENIAL of Special Use Permit PL 16-0556.

1. The hearing on June 28, 2023 should never have taken place. The Order Granting Appeal of October 15, 2021 should not have been approved, and the Skagit County Planning and Development Services (PDS) denial of the application should never have been reversed.

The Summary Decision dated July 13, 2023 included the Memorandum to Hearing Examiner (Exhibit 38). Exhibit 38 provides the following documented timeline of events leading up to this hearing:

(Note - exhibit numbers listed below are from Exhibit 38 referenced above, unless otherwise noted):

February 23, 2021 - The Board of County Commissioners remanded the matter (Resolution: R20210038) to the Hearing Examiner to determine if a Geologically Hazardous Site Assessment was needed. (Exhibit #26)

March 9, 2021 - The Hearing Examiner ordered PDS to direct the Applicant (Mr. Wooding) to provide such an assessment. (Exhibit #27)

March 23, 2021 - Skagit County PDS wrote a letter requesting the applicant prepare a Geologically Hazardous Area Site Assessment and Geologically Hazardous Mitigation Area Plan consistent with Skagit County codes 14.24.420 and 14.24.430 respectively. (Exhibit #28)

May 27, 2021 - Skagit County PDS wrote a letter reiterating additional information was requested of the applicant on March 23, 2021, and that the deadline to provide this information was 4:30 PM on July 21, 2021. (Exhibit #28)

July 20, 2021 - Mr. Taylor, the agent for the applicant, sent an email to Skagit County PDS stating, "We have contracted with Jeff Ninnenmann of Canyon Environmental Group to assist in the Hydrogeologic Critical Review."

Note: This email was included in the Civil Deputy Prosecuting Attorney for Skagit County's response to Mr. Wooding's August 3, 2021 appeal of the Skagit County PDS's application denial. This was not included in the Memorandum to Hearing Examiner (Exhibit 38).

July 21, 2021 - Skagit County PDS denied the extension request for failure to submit on or before the County's required 21 day requirement, as per SCC 14.06.105(1)(a)(i), and therefore denied the applicant's Special Use Permit Application for failure to supply the required studies within the mandated timeline. (Exhibit #28)

August 3, 2021 - Mr. Wooding and Mr. Taylor filed an appeal to the denial of the Special Use Permit application by PDS. Attached to the appeal was an email from Mr. Taylor summarizing a list of hydrogeologists he had contacted, and a list of his recent hospitalizations as an explanation for why the extension was needed. (Exhibit #29)

Note: Mr. Taylor submitted an affidavit signed September 22, 2021 listing his most recent hospitalization to CHI Franciscan Tacoma as March 2021, well before the deadline for submitting the required Geologically Hazardous Site Assessment. This was not included in the Memorandum to Hearing Examiner (Exhibit 38).

October 2, 2021 - The Civil Deputy Prosecuting Attorney for Skagit County, Jason C. D'Avignon issued a response to Mr. Wooding's permit denial appeal.

Note: This was not included in the Memorandum to the Hearing Examiner (Exhibit 38)

In his response, Mr. D'Avignon noted the following:

Section 3, Jurisdiction of the Hearing Examiner - that this decision was subject to an open record appeal per SSC 14.06.110(7)

Section 4, Standard Review - **“Wooding ‘bear[s] the burden of demonstrating that the decision of the administrative official is clearly erroneous.’ To find the County’s decision clearly erroneous, the Hearing Examiner must be ‘left with a definite and firm conviction that a mistake has been committed.’”** This is referenced to SSC 14.06.106(3)(a).

Section 6, Argument - **“Wooding could have avoided such a denial with timely and proper request for extension, but that did not occur.”** Mr.

D'Avignon concluded that, **“the Hearing Examiner should deny the appeal as Wooding has not carried his burden of establishing a clear error.”**

October 15, 2021 - Hearing Examiner Wick Dufford reversed the permit denial by Skagit County PDS, and ordered that the application shall remain in good standing through September 2022 (Exhibit #30).

Mr. Dufford's findings legitimizing reversal of the permit application denial were not in keeping with either Skagit County code, nor the recommendations of the County's Prosecuting Attorney, Mr. D'Avignon. The following are several inconsistencies and inaccuracies that call his findings, and therefore reversal, into question:

Noted in FINDINGS

“In arguing on Wooding’s behalf, his consultant stated that he had been hospitalized three times in 2021, and that this has made it difficult for him to pursue the application.” As established above, Mr. Taylor's last noted hospitalization was March 2021, the same month PDS requested the applicant prepare a Geologically Hazardous Area Site Assessment and Geologically Hazardous Mitigation Area Plan. This provided ample time to file for an extension and to contract with Canyon Environmental per Mr. Taylor's email referenced above (dated July 20, 2021) and renders Mr. Dufford's argument moot.

Noted in DISCUSSION

“Continuation of the mining operation near Lake Erie is not subject to any explicit regulatory oversight. Significantly, no reclamation program

presently governs the operation.” This statement is categorically incorrect. The Surface Mining Act requires surface miners to get a Reclamation Permit. The Surface Mine Reclamation Program (SMRP) is part of the Washington Geological Survey with the Washington Department of Natural Resources, who oversee reclamation compliance.

“Allowing the mine to proceed essentially unregulated presents obvious risks. The issuance of a Special Use Permit for the mine would lead to resolution of presently unanswered questions about what is to occur in the future. The answers would essentially remove environmental concerns about the end state of the property.” It is irresponsible to expect current environmental concerns to be addressed by permitting the additional mining, which has the potential to create far greater environmental concerns. This leaves the county open to subject liability.

Noted in CONCLUSION OF LAW

“A dismissal for failure to meet the 120 day time limit for submitting additional information is explicitly made appealable by SCC 14.06.105(3). This must mean that a compelling explanation can excuse the lateness.”

The Hearing Examiner’s understanding of the text of the code is factually incorrect. The text of the code reads:

SCC 14.06.105(3) A denial of an application for failure to timely submit requested information is a Level 1 decision pursuant to this Chapter, regardless of the application level of the original application. A denial for failure to timely submit requested information shall be sent via certified mail to the applicant at the address given on the application or the mailing address on record with the Assessor’s Office as appropriate. The failure of an applicant to receive the denial letter shall not affect the validity of the denial. The decision is appealable as a Level 1 decision.

Nowhere, does the text of this section of code allow for a compelling argument to excuse lateness, nor has there been an Administrative Official Interpretation (“AOI”) published in a Notice of Decision amending this language. Additionally, SCC 14.06.105(4) reads as follows:

SCC 14.06.105(4) If an application is denied for failure to timely submit requested information, an application may only reinstate review by submitting a new application consistent with all current requirements.

The application is no longer vested.

This means that the applicant did not have an avenue for appeal and the Hearing Examiner did not have the authority to overturn the permit denial. Instead, the applicant was required to resubmit the application before it could be reconsidered. The Hearing Examiner appears to have contrived a scenario in which the denial could be overturned.

For these reasons, the appeal to reverse the permit application denial was not compliant with County code, should never have been granted, the Skagit County PDS denial upheld, and the hearing on June 28, 2023 never been held, therefore negating the reason for this appeal.

This is ***cause for the Commissioners to deny the Special Use Permit PL 16-0556.***

2. Mr. Wooding failed to satisfy the requirements of the Hearing Examiner's order of March 9, 2021 and Skagit County Planning Development Services (PDS) letter of March 23, 2021, requiring the applicant provide a comprehensive Geologically Hazardous Site Assessment and Geologically Hazardous Area Mitigation Plan consistent with SCC 14.24.420 and 14.24.430 that empirically evaluated the hydrologic risk to slope stability of the coastal bluffs to the west/northwest of the mine site.

(A) Despite having appealed to the Hearing Examiner for an extension of time to address these requirements based on the assertion that he needed 12 months to compile additional data and take new readings, **no new data from Canyon Environmental Group, nor any other source, was submitted. This includes the Geological Site Assessment submitted in response to the County's requirements, compiled by Wood Environmental & Infrastructure Solutions, Inc.** As such, the questions and concerns regarding water flow to the west/northwest and related impacts remain unanswered.

The following is the documented sequence of events leading to the most recent hearing and subsequent permit application approval:

March 9, 2021 - In response to the Commissioner's remand, **"the Examiner has determined that the appropriate course now is to refer this matter to Planning and Development Services (PDS) with instructions to direct the applicant to cause a Geologically Hazardous Site Assessment to be prepared and submitted to PDS."**

March 23, 2021 - Skagit County PDS's letter directs that, **"the applicant shall prepare a Geologically Hazardous Area Site Assessment associated with the steep coastal area located to the west/northwest of the mine..."** Skagit County PDS requires that the Site Assessment:

- **"Analyze the landslide risk arising from the potential for increased groundwater migration to the west/northwest of the mine due to the proposed expansion and attendant removal of soil and vegetation which could alter groundwater behavior in the vicinity of the mine.**
- **Analyze the presence of springs on the coastal bluff to the northwest of the mine that are at an elevation down gradient of the inferred groundwater level.**
- **Respond to the testimony of the professional geologist who identified that the proposed mine expansion will create an increased landslide risk."**

July 20, 2021 - Mr. Taylor, as agent of Mr. Wooding, sent an email to Mr. Kevin Cricchio of Skagit County PDS stating, **"We have contracted with Jeff Ninnemann of Canyon Environmental Group to assist with Hydrologic Critical Review."**

July 21, 2021 - Skagit County PDS denied the Special Use Permit PL 16-0556 due to Mr. Wooding's failure to submit the new Geologic Hazard Site Assessment in the timeframe required by SCC 14.06.105.

August 3, 2021 - Mr. Wooding files and Appeal or Request for Reconsideration, in which they state, **"We have a Hydrologist on board, Canyon Environmental Group, and hope to get started immediately."**

September 22, 2021 - Mr. Taylor, as agent of Mr. Wooding, signs an affidavit in which he summarizes a proposal from Canyon Environmental Group as support for the aforementioned Appeal, stating, **“12 MONTH DRILLING PROJECT. We need this time for a proper Drilling Project.”** This affirms that Mr. Wooding and Mr. Taylor were aware that additional hydrographic information and data collection was necessary to prepare the Geologic Hazard Site Assessment to meet the requirements of the PDS letter of March 23, 2021.

October 15, 2021 - Hearing Examiner Mr. Wick Dufford found Mr. Wooding and Mr. Taylor’s reasoning compelling, and reversed the denial of Application PL 16-0556, in which he decrees, **“The application shall remain in good standing through September 2022.”**

In view of the Hearing Examiners acceptance of Mr. Wooding’s proposed drilling project and timeline, and given that the prior studies submitted were found by the Commissioners and Skagit County PDS to insufficiently analyze the west/northwest water flow, one should reasonably expect that the Geologically Hazardous Site Assessment submitted would reference new data obtained by Canyon Environmental completed over the course of 12 months.

This did not occur and no new data was collected.

August 12, 2022 - Wood Environmental & Infrastructure Services, Inc. submitted a Geologic Hazard Site Assessment they prepared for Lake Erie Trucking, LLC.

March 31, 2023 - The Watershed Company, the County’s third party reviewer, submitted a memorandum to Mr. Cricchio in **“Response to Evergreen Islands communication of 11/18/2022 re: Lake Erie Pit.”** In this memorandum, Mr. Alan Wald states, **“The methods and results of the groundwater flow assessments are presented in several reports:**

- **Maul Foster, Alongi (MHA) Hydrologic Site Assessment Report. Lake Erie Pit Expansion. Bellingham, WA December 2, 2016**
- **Maul Foster, Alongi (MHA) Observation Well Installation. Lake Erie Pit Expansion. Bellingham, WA September 28, 2017**
- **Northwest Groundwater Consultants (NGC). Lake Erie Pit Well Recommendations. Coeur d’Alene, ID March 11, 2019**

The ‘Wood Environmental & Infrastructure Solutions, Inc. (Wood). Geological Site Assessment. Lake Erie Pit 1 Expansion. Kirkland, WA August 11 2022’ uses the aquifer properties and groundwater flow characteristics from these reports.”

This shows that Mr. Wooding’s Wood study did not perform any of the aforementioned drilling, nor did it analyze the water flow or springs to the west/northwest of the mine, as those areas were not studied in the previously submitted assessments. As such, the analysis required by the County and Commissioners has not been completed, and the question of water flow and springs to the west/northwest has not been addressed.

(B) The Hearing Examiner’s findings dated July 13, 2023 approving the permit application does not compellingly argue that the groundwater and landslide analysis requested by the Commissioners and Skagit County PDS has been satisfied. Both his findings and the Wood

report are riddled with inconsistencies, and include information that leads to the conclusion that mining has caused past slope destabilization.

Stated in the Hearing Examiner's findings of July 13, 2023:

Noted in GEOLOGICALLY HAZARDOUS SITE ASSESSMENT

“[The] Wood [report] determined that: ‘The head scarp of the nearest coastal bluff is approximately 300 feet northwest of the northwest sidewall.’ The actual distance from the property line is 266 feet, which is not accurately represented in the report. This is well within the Skagit County's 300 foot Critical Area Review boundary. This same head scarp is noted in the Wood report Section 2.2 Site Research (referenced the Skagit County LIDAR map):

“The map clearly depicts evidence of landslides along the coastal bluffs west of the site and grading due to the mining on the site.”

This statement directly links mining activity to prior Critical Area landslides.

“[The] Wood [report] stated that the proposed expansion would not have any impact on the bluffs.” This is in reference to Section 4.3 Coastal Bluffs, which reads: **“The studies concluded the proposed site development will not impact the groundwater table or the stability of the coastal bluffs.”**

However, the studies referenced include the Maul Foster Alongi study of 2016, which states: **“Groundwater flow beneath the proposed mine expansion should have no effect on nearby slope stability,”** The Wood report irresponsibly advanced the assertion from a potential to an absolute without any new data or points of reference.

“Wood determined that groundwater flow from the mine site flows north and northeast, toward Lake Erie, not west or northwest towards the coastal bluffs.” In reviewing the Wood report Figures 3 and 4, which were taken directly from Maul Foster Alongi (2016), the inferred water table has a 200 feet Mean Sea Level (MSL) high point approximately 2000 feet from the west property line, and a level of approximately 180 feet MSL at the west property line. This indicates an east to west flow.

“The bluffs are too far away (300-800 feet), and groundwater from the site does not flow in that direction.” This is in reference to the Section 4.3 Coastal Bluffs of the Wood report. In direct contradiction, Figure 2 in the Wood report shows that the Inferred Groundwater Flow Direction, as depicted by the solid blue lines, show the flow direction from the current mine and Parcel P19158 (included in the expansion proposal) to be north with only a slight easterly component. Sunset Lane, Rosario Road, and the landslide bowl to the south of Sunset Lane are in the direct path of the inferred groundwater flow depicted. The Maul Foster Alongi report notes, **“a smaller groundwater flow component appears to be north-northwest.”** In addition to the Maul Foster Alongi report, the third party report from The Watershed Company and the Wood report both utilize this data, thereby validating the concern that groundwater is flowing towards the coastal bluffs west/northwest of the proposed mining site and requires further study.

Noted in CONCLUSIONS BASED ON FINDINGS

“The Hearing Examiner exercises his discretion to conclude that the Geologically Hazardous Area Site Assessment is compliant with the Board of County Commissioners’ order on remand.” In view of the aforementioned lack of requested information, the Hearing Examiner’s evaluation is incorrect, to which he then agrees:

“The Geologically Hazardous Area Site Assessment prepared by Wood does not, strictly speaking, comply with SCC 14.24.420.” The Geologically Hazardous Area Site Assessment prepared by Wood does not comply with SCC 14.24.420 acknowledging that the Skagit County PDS and the County Commissioner’s requirements failed to be met.

“The proposed mine expansion is not being built within 200 feet of a known or suspected risk, as contemplated in SCC 14.24.420(1), nor within ‘a distance from the base of a landslide hazard area equal to the vertical relief,’ as also contemplated in SCC 14.24.420(1). The existing mine is approximately 300 feet from the bluffs.” This is false. Parcel P19158 of the proposed expansion is 125 feet from the head scarp of Dodson Canyon, as measured using the parcel map on the Skagit County website. Per the Skagit County South Fidalgo Island Stormwater Management Plan, **“the very steep slopes of the canyon are the headscarps of an active landslide area.”** All documents, applicants, consultants, The Skagit County Planning & Development Services and the Hearing Examiner are all silent regarding this fact.

The Hearing Examiner’s conclusions referenced the work of Mr. Mullen, a licensed geologist and the author of the Maul Foster Alongi and Northwest Groundwater Consultants, in stating, **“Mr. Mullen is the only person who has performed a physical investigation of groundwater flow at the mine site. He drilled three test wells in and around the mine pit.”** This statement misrepresents Mr. Mullen’s contribution.

1. Mr. Mullen did not drill any wells.
2. Only one well was drilled. The work was performed by Aquatech, with Mr. Mullen observing.
3. The two other wells referenced were pre existing - one on Mr. Wooding’s property, and another on Parcel P19127.

“The County’s third-party reviewer, The Watershed Company, agreed with the methodology employed in the Wood Assessment by Mr. Wentworth, which in turn relied on the data generated by Mr. Mullen. Thus, the Hearing Examiner concludes that the Applicant made a *prima facie* showing that groundwater flows from the mine site will not increase the jeopardy to the northwestern bluffs.” The County and Commissioners required Mr. Wooding to analyze the presence of springs on the coastal bluff. Such analysis was not included in the Wood assessment, as Mr. Wooding indicated would be completed in his denial appeal. Had Mr. Wooding gathered the data and analysis as requested, decisions could be made based on empirical evidence and not by a singular impression.

It is clear that the County’s requirements have not been met, and the concerns regarding hazardous mining impacts have not been adequately analyzed. No new data has been submitted, and what has been is inconsistent and incomplete. There is no further clarity regarding landslide

risks or risks to existing springs, nor does Mr. Wooding seem compelled to complete the County required data gathering that would answer these questions.

This is ***cause for the Commissioners to deny the Special Use Permit PL 16-0556.***

3. The permit application, Skagit County PDS, Hearing Examiner's findings of July 13, 2023 in favor of the permit, and, Geological Hazardous Area Studies fail to recognize key facts that would have triggered County required Critical Areas review under SSC code 14.24.

In the Hearing Examiner's decision of July 13, 2023, he stated, "**The proposed mine expansion is not being built within 200 feet of a known or suspected risk, as contemplated in SCC 14.24.420(1), nor within 'a distance from the base of a landslide hazard area equal to the vertical relief,' as also contemplated in SCC 14.24.420(1).**" This statement is false. Parcel P19158, included in the proposed mine expansion permit, is 125 feet from the head scarp of Dodson Canyon (as measured using Skagit County's iMap website). Per the Skagit County South Fidalgo Island Stormwater Management Plan (SFSMP) dated July 2010, "**The very steep slopes of the canyon are the head scarps of an active landslide area.**" This directly contradicts the Hearing Examiner's assertion.

The Skagit County PDS fact sheet submitted by Mr. Wooding on December 22, 2016 required answers to the following questions regarding Critical Area Indicators:

- (A) Are you aware of any environmental documentation that has been prepared related to critical areas that includes the subject area?** Mr. Wooding responded NO. However, much of the proposed mine expansion area falls within the ½ Mile Stream Buffer (SCC 14.24.310(1)(a)(iv)). This is a Category 1 Aquifer Recharge Area.
- (G) Are there slopes of 15% or greater?** Mr. Wooding responded NO. The SFSMP notes that Dodson Canyon has a "**very steep slope**", and it is empirically greater than 15%.
- (I) Do you know of any landslide hazard areas?** Mr. Wooding responded NO. The SFSMP directly states that Dodson Canyon as "**an active landslide area.**"

Mr. Wooding completed a Skagit County PDS SEPA Environmental Checklist on June 8, 2017.

Section B Environmental Elements

1. Earth (d) Are there any surface indicators or history of unstable soils in the immediate vicinity? Mr. Wooding responded NO. Given the acknowledgement of the presence of landslides by the Skagit County SFSMP, Geological Hazard Maps in the Geologically Hazardous Areas section of the Skagit County PDS website, and the firsthand experience of landslides in and around the mine area by residents, this is a false statement. Additionally, the SFSMP states, "**Slope instability in the study area is the result of above-normal groundwater pressures in soil. The water may be naturally occurring groundwater, infiltrated septic drainfield water, or surface water redirected from its natural path. In all cases, water is a key component.**" In this document, both Dodson Canyon and Sunset Lane are called out as areas of concern.

3. Water (c) Water runoff (including stormwater) Describe the source of runoff (including stormwater) and method of collection and disposal, if any (including quantities known). Mr. Wooding responded: There will be very little surface runoff,

because of the high permeability of the gravel surface. As the mine progresses, the site mining will be a bowl situation, whereby there will not be runoff to the neighboring properties. All runoff will be contained on site.” The Wood report states **“stormwater will infiltrate into the subsurface, there will be no impact on the downgradient groundwater conditions.”** SFSMP, Table ES-1, Summary of Recommendations, states **“Limit infiltration in the following areas” “East of Rosario Road (south of MarineDrive).”** This area referred to in the SFSMP encompasses the entire proposed mine expansion. Mr. Wooding’s plan is in conflict to the SFSMP.

As stated in the SFSMP, **“Miller’s slope stability map classifies the lower part of Dodson Canyon as Class 3, the most unstable category, and the upper part as Class 2, the intermediate category. The Coastal Zone Atlas indicates that Dodson Canyon is Unstable.”** As such, SSC 14.24.410 classifies Dodson Canyon as a **“known or suspected erosion hazard”** and **“landslide hazard.”** Given that Dodson Canyon is well within the previous 200 foot Geologically Hazardous Area boundary, effects of the mine expansion on the Canyon should have been noted and studied pursuant to County code.

Mr. Wooding’s responses on his Special Use Application and subsequent filings have did not note this fact, thereby failing to alert Skagit County PDS staff to trigger the necessary investigations.

This is ***cause for the Commissioners to deny the Special Use Permit PL 16-0556.***

IN SUMMARY:

1. Special Use Permit PL 16-0556 was allowed to proceed counter to numerous Skagit County codes. This should never have occurred, and the application denial should have been upheld in October 2021.
2. The reports and analysis done by the applicant fail to meet the requirements set forth by Skagit County PDS and the Commissioners to analyze the groundwater and landslide risks to the west/northwest bluffs.
3. Ample evidence has been presented to support the presence of landslides within the mine’s Critical Area, including along Sunset Lane, Rosario Road, and Dodson Canyon.
4. The applicant’s Wood report acknowledges that mining activity has been a cause of prior landslides.

Approval of the Special Use Permit PL 16-0556 would potentially place the health, safety, and property of Skagit County citizens at risk. We do not know what these unknown risks could be as they have not been sufficiently analyzed nor identified by the County or applicant, regardless of multiple procedural opportunities to do so.

We ask the Commissioners to DENY the Special Use Permit PL 16-0556.

Franky L. Parker
President
Sunset Lane Association