



Appeal or Request for Reconsideration

Planning & Development Services · 1800 Continental Place · Mount Vernon WA 98273
voice 360-416-1320 · inspections 360-416-1330 · www.skagitcounty.net/planning

File #:
PL23-0363
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Appeal

What are you appealing?

- Appeal of an Administrative Interpretation/Decision/Action to the Hearing Examiner
- Appeal of an Administrative Order to Abate (code enforcement order) to the Hearing Examiner
- Appeal of Impact Fees to the Hearing Examiner (impact fees must be paid) (SCC 14.30.070)
- Appeal of Hearing Examiner Decision/Action to the Board of County Commissioners
- Request for Reconsideration of a Hearing Examiner Decision (SCC 14.06.180)

File # of Appealed Decision or Permit	PL16-0556	Appeal Fee	\$	PDS will calculate
Date of Appealed Decision or Permit	July 13, 2023	Publication Fee	\$	PDS will calculate

PDS staff: do not accept appeal form without full payment of fees

Appellant

Standing to appeal Permit applicant Party of Record Party subject to code enforcement order Other

Name: **Evergreen Islands**

Address: **PO BOX 223**

City, State: **Anacortes, WA** Zip: **98221** Phone: **360-202-1901**

Email: **tom.glade@comcast.net** Signature:

Attorney or Representative

None

Name: **Kyle Loring**

Address: **PO Box 3356**

City, State: **Friday Harbor, WA 98250** Zip: **98250** Phone: **360-622-8060**

Email: **kyle@loringadvising.com**

Attachments

- For any of the appeals listed above, please attach a concise statement with numbered responses to the following questions.
 1. What is your interest in this decision?
 2. How are you aggrieved by the decision you are appealing?
 3. What are the specific reasons you believe the decision is wrong?
e.g. erroneous procedures, error in law, error in judgment, discovery of new evidence
 4. Describe any new evidence.
 5. List relevant sections of Skagit County Code.
 6. Describe your desired outcome or changes to the decision.
- For a request for reconsideration of a Hearing Examiner decision, attach a statement identifying the specific errors alleged.

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3
4
5 BEFORE THE BOARD OF COUNTY COMMISSIONERS
6 IN AND FOR THE COUNTY OF SKAGIT, WASHINGTON

7
8 **In the Matter of the Appeal of Special**
9 **Use Permit, PL16-0556, for the**
10 **expansion of a gravel mine for 60**
11 **years.**

NO. PL16-0556

12 **NOTICE OF APPEAL**

13 **INTRODUCTION AND DECISION BEING APPEALED**

14 For the second time in three years, the applicant for the Lake Erie pit mine expansion
15 has declined to evaluate whether a proposal to clear more than 35 acres of land and to mine
16 60,000 tons of gravel will impact groundwater flow to the residential neighborhood
17 west/northwest of the mine, and thereby destabilize coastal bluffs that already experience
18 landslides. On February 23, 2021, the Skagit County Board of Commissioners (“Board”)
19 reversed a Hearing Examiner approval for Special Use Permit PL16-0556 (“Decision”) on the
20 grounds that the applicant had not conducted a Geologically Hazardous Area Site Assessment
21 and that Appellant Evergreen Islands had furnished evidence of springs discharging from the
22 bluffs at an elevation downgradient of the inferred groundwater level at the mine. The Board
23 remanded the matter to the Hearing Examiner to determine whether the shoreline bluffs require
24 the preparation of a geological assessment, and if so, to conduct one and impose conditions as
25 necessary to mitigate identified risks.

26 While the applicant subsequently obtained a document titled ‘Geologic Hazard Site
Assessment’ (“Wood Report”), that document did not evaluate whether the mine would increase
groundwater flow to the springs northwest. Instead, the Wood Report continued to ignore the

1 existence of those springs and deferred to the same flawed hydrology report that overlooked the
2 downgradient coastal springs in the first instance. To emphasize, no consultant has examined
3 whether the groundwater found at an elevation of 190 feet at the mine site flows down to
4 groundwater that discharges through those springs at a lower elevation of 165-175 feet, as
5 deemed highly likely by Dan McShane, a licensed engineering geologist. Nevertheless, the
6 Hearing Examiner approved the Permit on remand after concluding that a simple reference to
7 the coastal bluffs demonstrated that the consultant had reviewed this question. Consequently,
8 Evergreen Islands respectfully requests that the Board stand by its February 2021 request for
9 information about the mine's potential impacts on groundwater springs to the west/northwest,
10 and that it remand the new Hearing Examiner decision to obtain that information and examine
11 the mine's risk to the health and safety of the local residential neighborhood. A copy of the
12 Decision on remand is attached hereto as Attachment A.

13 **I. NAME, ADDRESS, AND INTEREST OF APPELLANT.**

14 1.1. Evergreen Islands can be reached as follows:

15
16 Evergreen Islands
17 PO Box 223
18 Anacortes, WA 98221
19 360-202-1901
20 tom.glade@comcast.net

21 1.2. Evergreen Islands is represented in this appeal by Kyle Loring, who can be reached
22 as follows:

23 Kyle Loring
24 Loring Advising PLLC
25 PO Box 3356
26 Friday Harbor, WA 98250
360-622-8060
kyle@loringadvising.com

1.3. Evergreen Islands has an interest as a party of record in this matter because
organizational representatives and members provided written and oral testimony to the Hearing

1 Examiner prior to the Decision and because Evergreen Islands is the party that obtained the
2 Board's initial order remanding this matter. The Skagit County Code ("SCC") defines a "party
3 of record" as "any person who has testified at a hearing or has submitted a written statement
4 related to a development action and who provides the County with a complete address, or a
5 person who has formally requested to receive information via a written statement with a
6 complete mailing address." SCC 14.04.020. Consequently, because Evergreen Islands testified
7 at the hearing and submitted a written statement related to the mine application, it has standing
8 to appeal the Decision pursuant to SCC 14.06.170(2).

9 1.4. In addition, Evergreen Islands has an interest in environmental conservation and
10 in safeguarding local communities from unnecessary and unexamined risks of development
11 proposals. Evergreen Islands is a public interest, membership organization that works to
12 conserve natural resources and protect communities in and around Skagit County and the Salish
13 Sea. Evergreen Islands is based in Anacortes. Evergreen Islands' mission is to promote, protect,
14 and defend the unique ecosystems involving the saltwater islands of Skagit County and their
15 environs as they relate to the built and natural environments. Since incorporating in 1977,
16 Evergreen Islands has focused on monitoring and supporting the responsible enforcement of
17 local, state, and national laws that protect the environment. Evergreen Islands board members
18 and members participated in the proceedings before the Hearing Examiner by testifying at the
19 hearing and submitting written comments about the mine.

20 **II. HOW APPELLANT IS AGGRIEVED**

21 2.1. Evergreen Islands and its members would be aggrieved by the Permit's
22 unexamined impacts to the health and safety of residential neighborhoods west and northwest of
23 the mine because some of them inhabit those neighborhoods and by the environmental impacts
24 associated with aggravated landsliding in the coastal bluffs there.

25 **III. SPECIFIC REASONS WHY THE DECISION IS WRONG**

26 3.1. The Decision is clearly erroneous because it approved a Mining Special Use

1 Permit without statutorily-required information for that Permit and without providing
2 information requested by the Board and Skagit County Planning and Development Services
3 (“PDS”) on remand. This section should be read in conjunction with Section IV below, which
4 references applicable sections of the Skagit County Code and identifies the application’s
5 inconsistencies with those sections.

6 3.2. The Hearing Examiner erred by approving the Permit on remand without any
7 new hydrogeological information about whether the proposed mine will increase the risk of
8 landslides in unstable slopes in a residential neighborhood to the west/northwest of the mine
9 site. On February 23, 2021, the Board remanded a previous version of the permit back to the
10 Hearing Examiner for further consideration of four matters:

- 11 • Whether the steep area to the west/northwest of the Mine requires the preparation
12 of a Geologically Hazardous Area Site Assessment, consistent with SCC 14.24.400-
13 .420;
- 14 • If so required, directing the Applicant to prepare a Geologically Hazardous Site
15 Assessment, all consistent with SCC 14.24.400-.420 and the Hearing Examiner’s
16 discretion;
- 17 • Any additional proceedings as may be necessary to take additional evidence
18 related to the Geologically Hazardous Area Site Assessment, to be managed at the
19 Hearing Examiner’s discretion; and
- 20 • The imposition of such additional conditions as may be necessary to mitigate
21 risks identified by the supplemental proceedings hereby ordered, to the extent such
22 risks can be reasonably mitigated.

23 3.3. The Board based its remand decision on the absence of a geologically hazardous
24 area site assessment and evidence from Evergreen Islands that springs in the coastal bluff to the
25 northwest of the Mine exist downgradient of the inferred groundwater level at the mine and that
26 the expanded mine would create an increased landslide risk. This information came from Dan

1 McShane, a Licensed Engineering Geologist with Stratum Group, who has conducted several
2 geological hazard assessments on the bluffs west/northwest of the proposed mine, including
3 field inspections that involved observations of exposed geologic units, hand dug test pits to
4 determine underlying soils and geology units, review of available geologic mapping, lidar
5 imagery, and historical aerial photographs and maps. Based on his geology hazard assessments,
6 perched groundwater flows out of springs and seeps in the hillside and has had a significant
7 impact on slope stability directly northwest of the mine. Mr. McShane has opined that the
8 removal of the trees, soils, and particularly the less permeable glacial till at the mine site likely
9 will allow stormwater to infiltrate into the groundwater and flow to the springs in the coastal
10 bluffs, which lie at an elevation of 165-175 feet above sea level, downgradient of the 190-foot
11 elevation that the applicant identified for groundwater at the mine site. This increased flow
12 would significantly impact the stability of the bluffs, which would in turn, significantly impact
13 homes near the bluffs. Although the application for the mine contained a hydrogeological site
14 assessment by Maul Foster Alongi, Mr. McShane determined after reviewing that report that the
15 author was unaware of the springs to the west/northwest of the mine site and therefore assumed
16 that groundwater flowed to the north based on limited information. Testimony at the June 28,
17 2023 remand hearing from the author of that report, Thomas Mullen, confirmed that he was
18 unaware of those springs when he wrote the earlier report.

19 3.4. On March 9, 2021, the Hearing Examiner forwarded the remand request to PDS,
20 which directed the applicant to prepare a Geologically Hazardous Area Site Assessment that
21 addressed the following specific site elements:

- 22 • Analysis of the landslide risk arising from the potential for increased
23 groundwater migration to the west/northwest of the mine due to the proposed
24 expansion and attendant removal of soil and vegetation which could alter
25 groundwater behavior in the vicinity of the mine;
- 26 • Analysis of the presence of springs on the coastal bluff to the northwest of the

1 mine that area at an elevation down gradient of the inferred groundwater level; and

- 2
- Respond to the testimony of the professional geologist who identified that the
- 3 proposed mine expansion will create an increased landslide risk.

4 3.5. After obtaining a proposal in 2021 from a consultant that would have evaluated
5 the mine's impacts on groundwater discharging from the springs, the applicant hired a different
6 consultant in 2022, Wood Environment & Infrastructure Solutions, Inc. The Wood Report
7 prepared by that consultant failed to analyze the landslide risk that could be created by increased
8 groundwater migration to the west/northwest of the mine site. The Wood Report did not
9 acknowledge or evaluate the downgradient springs in the coastal bluffs, and instead assumed
10 that the groundwater at the site flows to the north based on the earlier hydrogeological reports
11 that likewise ignored those springs and that led to the Board's remand of the permit. Based on
12 this unevaluated assumption, the Wood Report concluded that the mine would not impact the
13 coastal bluffs.

14 3.6. A third-party review engaged by PDS likewise did not independently assess
15 whether groundwater flows downgradient from the mine site at 190 feet above sea level to 165-
16 175 feet above sea level in the coastal bluffs. That document states that the author did not find
17 discrepancies in the earlier Maul Foster Alongi reports, but does not acknowledge the
18 discrepancy between the groundwater elevations at the mine site and the lower elevations of the
19 springs in the unstable coastal bluffs. That document ignores the coastal bluffs to the northwest
20 altogether, instead referring to springs in the Dodson Canyon area to the west/southwest of the
21 mine site, and the higher groundwater elevation there of 200 feet above sea level. The review
22 also vaguely referred to a previously undiscussed "regional aquifer" that presumably would be
23 distinct from groundwater at the mine site, without providing any evidence of the existence of
24 such a feature in the vicinity of the mine site.

25 3.7. The Hearing Examiner erred in deferring to the Wood Report and the third-party
26 review that failed to examine the question posed on remand – whether groundwater flows from

1 the mine site to the unstable coastal bluffs to the west/northwest of the site and, if so, whether
2 removing more than 35 acres of trees, shrubs, soils, and less permeable glacial till will increase
3 the amount of groundwater that flows from the mine site to the bluffs and further destabilize
4 them and the residential neighborhood above them.

5 3.8. Specifically, the Hearing Examiner erred when he issued the following findings
6 of fact:

7 3.8.1. FOF No. 7 – that, relying on the three previous studies cited above, Wood
8 determined that groundwater flow from the mine site flows north and northeast, toward
9 Lake Erie, not west or northwest toward the coastal bluffs.... *Wood did not make an*
10 *independent determination of the groundwater flow at the site. Instead, Wood accepted*
11 *the prior assertions of groundwater flow direction without assessing whether it was*
12 *based on incomplete information.*

13 3.8.2. FOF No. 7 – that the bluffs are too far away (300 to 800 feet), and
14 groundwater from the site does not flow in that direction. *According to evidence from*
15 *Dan McShane, it is highly likely that some volume of groundwater flows from the higher*
16 *elevation at the mine site to the lower elevation in the coastal bluffs west/northwest of*
17 *the site.*

18 3.8.3. FOF No. 7 – that the mine would not affect the elevation of the
19 groundwater table, because the excavation at the mine will not extend down into the
20 groundwater table. *The evidence showed that by removing the till layer above the sand*
21 *and gravel to be excavated, the mine would allow stormwater to infiltrate into and*
22 *recharge the underlying aquifer, likely affecting the elevation of the groundwater table.*

23 3.8.4. FOF No. 7 – that stormwater from the mine will be managed and
24 infiltrated on site and would not affect slope stability. *There is no evidence in the record*
25 *that stormwater will be managed at the site. The application assumes that stormwater*
26 *will infiltrate into the ground at the site.*

1 3.8.5. FOF No. 9 – the implication that the Watershed Company indicated that
2 it did not find anything that would call into question the determination that groundwater
3 flows in a northeasterly direction (in other words, away from the coastal bluffs), as
4 opposed to a review of data collection and analysis. *The Watershed Company did not*
5 *make such a broad statement in its report.*

6 3.8.6. FOF NO. 9 -- that the Watershed Company provided an additional report
7 in which it had reviewed a test well dug in 2017 for the project and had determined that,
8 consistent with other reports, groundwater flow was likely to the north/northeast. *The*
9 *Watershed Company did not review a test well.*

10 3.8.7. FOF No. 16 – that Mr. Mullen acknowledged the existence of springs in
11 the coastal bluffs to the northwest of the mine site. *Mr. Mullen was not aware of the*
12 *existence of the springs in the bluffs and testified that: (1) he had not looked into the*
13 *issue since his initial reports; (2) he had not received Dan McShane’s report until one to*
14 *two days before the hearing; and (3) he had not reviewed McShane’s opinions about the*
15 *seeps northwest of the mine site.*

16 3.8.8. FOF No. 18 – that Dan McShane “acknowledged that groundwater from
17 the mine flows east.” *Mr. McShane has opined that shallow water above the till layer*
18 *likely follows the surface topography and flows to the east, but that once the largely-*
19 *impervious till layer is removed in order to mine the underlying sand and gravel, the*
20 *infiltrated stormwater will increase the amount of water in the aquifer that likely*
21 *discharges to the landslide area.*

22 3.8.9. FOF No. 18 – that the issue of changed direction of groundwater flow is
23 the main issue that Dan McShane believes requires additional study. *Mr. McShane*
24 *opined that the issue that requires additional study is the amount of increased volume of*
25 *groundwater that would flow to the west/northwest once the till layer is removed above*
26 *the sand and gravel to be mined.*

1 3.9. The Decision also includes the following erroneous conclusions of law (“COL”):

2 3.9.1. COL No. 2 – that the Geologically Hazardous Area Site Assessment
3 drafted by Wood is consistent with SCC 14.24.400-.420.

4 3.9.2. COL No. 2 – that the geologically hazardous areas site assessment is
5 compliant with the Board of County Commissioner’s order on remand.

6 3.9.3. COL No. 2 and associated findings of fact – that the proposed mine
7 expansion is not being built within 200 feet of a known or suspected risk, as
8 contemplated in SCC 14.24.420(1), and that a geologically hazardous site assessment
9 would not normally be triggered in the first place under SCC 14.24.420(1).

10 3.9.4. COL No. 2 and associated finding of fact – that a geologically hazardous
11 site assessment was ordered out of an abundance of caution.

12 3.9.5. COL No. 2 – that the Hearing Examiner has the discretion to waive
13 Skagit County Code requirements.

14 3.9.6. COL No. 2 and associated finding of fact – that the applicant’s
15 geologically hazardous area site assessment is adequate to the task required on remand
16 to assess the possibility that groundwater flow altered by the proposed mine expansion
17 could affect the coastal bluffs northwest of the site.

18 3.9.7. COL No. 3 and associated finding of fact – that the preponderance of the
19 evidence supports the conclusions of the Wood Report that the proposed mine would not
20 jeopardize the stability of the coastal bluffs to the northwest of the proposed mine
21 expansion, including the findings that:

22 3.9.7.1. the author of the Wood Report was aware of the seeps or
23 springs that emerge from the coastal bluffs northwest of the mine site;

24 3.9.7.2. that the author concluded independently that the proposed
25 mine expansion will not affect the groundwater seeping from the coastal bluffs;

26 3.9.7.3. that the author concluded that groundwater beneath the

1 mine flows north and northeast, rather than merely repeating that assumption
2 from the earlier hydrology study;

3 3.9.7.4. that Thomas Mullen drilled three test wells in and around
4 the mine pit;

5 3.9.7.5. that the applicant made a *prima facie* showing that
6 groundwater flows from the mine site will not increase the jeopardy of the
7 northwestern bluffs;

8 3.9.7.6. that the applicant's reviews and the County's third-party
9 reviewer did not overlook the northwestern bluffs or that Mr. Wentworth and Mr.
10 Mullen provided specific discussion of those bluffs;

11 3.9.7.7. that the County's third-party reviewer was not confused
12 about which bluffs were supposed to be the subject of a geologically hazardous
13 area site assessment;

14 3.9.7.8. that Dan McShane believes that groundwater at the site
15 currently flows exclusively to the north/northeast;

16 3.9.7.9. that Dan McShane supplied no groundwater flow analysis
17 of his own, that his concern about northwestern groundwater flow is speculative,
18 and that his concerns have been considered by the Wood Report and third-party
19 review;

20 3.9.7.10. that Mr. McShane commented that the applicant should
21 drill wells on properties not owned or controlled by the applicant;

22 3.9.7.11. that there is no evidence showing a substantial likelihood
23 that northwestern flow will occur;

24 3.9.7.12. that the Wood Report and third-party review made any
25 conclusion related to northwestern groundwater flow based on on-site wells and
26 topographical review;

1 3.9.7.13. that further assessment of the dangers to the northwestern
2 bluffs has occurred;

3 3.9.7.14. that the existing evidence shows groundwater flow from
4 the mine site that does not jeopardize the northwestern cliffs, and none of the
5 evidence put forward in rebuttal shows otherwise; and

6 3.9.7.15. that the evidence in the record is sufficient to satisfy the
7 order on remand.

8 **IV. RELEVANT SECTIONS OF SKAGIT COUNTY CODE**

9 Applicable sections of the Skagit County Code and related errors in the Permit approval
10 include the following:

11 4.1. SCC 14.16.440. Mineral Resource Overlay. The application requirements at
12 SCC 14.16.440(8)(b) and (8)(g), the hearing examiner review criteria at SCC 14.16.440(9), and
13 the incorporation by SCC 14.16.440(11) of the requirements at SCC 14.16.900 are applicable.

14 4.2. SCC 14.16.440(8)(b) requires a report by a qualified geologist, hydrogeologist,
15 or licensed engineer that characterizes the area's groundwater, including: (a) a description of the
16 geology and hydro-geology of the area, such as the delineation of aquifer, aquitards, or
17 aquicludes, hydrogeologic cross-sections, porosity and horizontal and vertical permeability
18 estimates; (b) a determination of the direction and velocity of ground water movement, water
19 table contour and potentiometric surface maps, if applicable; and (c) a map containing the limits
20 of the mine, buffer zones, location of all ground water wells within 1 mile distance down
21 gradient from the property boundaries, location of all perennial streams and springs, and
22 definition or specification of locations of aquifer recharge and discharge areas. *The Wood*
23 *Report that the Hearing Examiner relied upon did not include a map showing the wells and*
24 *springs in the vicinity of the mine property—the applicant still has not acknowledged the*
25 *downgradient springs to the northwest of the site—and therefore also has not determined the*
26 *direction and velocity of groundwater movement at the site absent this information.*

1 4.3. SCC 14.16.440(8)(g) requires the identification and description of those critical
2 areas designated and regulated by Chapter 14.24 SCC, together with any critical areas studies
3 required by Chapter 14.24 SCC. *The application did not identify and describe unstable slopes to*
4 *the west and northwest or substantively evaluate the proposed mine's impacts on those unstable*
5 *slopes.*

6 4.4. SCC 14.16.440(9)(a) requires the Hearing Examiner to evaluate mining special
7 use permits against the Skagit County Code's special use approval criteria and also imposes the
8 burden of proof on the applicant to show that impacts are mitigatable to warrant permit
9 approval. *The application omits information that would be necessary to demonstrate that the*
10 *mine project's potential slope instability impacts are consistent with the special use criteria and*
11 *that they are mitigatable and have been properly conditioned to mitigate their impacts.*

12 4.5. SCC 14.16.440(9)(b) directs the Hearing Examiner to consider the requirements
13 of Chapter 14.16 SCC as minimum standards based on unique site-specific factors or conditions
14 as appropriate to protect public health, safety, and the environment. *The mine proposal does not*
15 *offer sufficient information to determine whether it meets the minimum standards of Chapter*
16 *14.16 to protect public health, safety, and the environment. For example, the Wood Report does*
17 *not evaluate the impacts of deforestation, soil, till, and rock removal on the slopes to the*
18 *northwest.*

19 4.6. SCC 14.16.440(9)(c) states that appropriate site-specific conditions shall be
20 required to mitigate existing and potential incompatibilities between the mineral extraction
21 operation and adjacent properties. *The lack of information about the mine's potential impacts on*
22 *the adjacent unstable slope prevented the identification and application of mitigating conditions*
23 *to address that risk.*

24 4.7. SCC 14.16.440(9)(d) requires appropriate site-specific conditions to mitigate
25 stormwater runoff and erosion impact. *The absence of sufficient, accurate information about the*
26 *hydrogeologic regime at the mining site prevented the requisite examination and application of*

instability. Mr. McShane argues that this chain of possibilities demands further investigation, including test wells dug off-site of the mine to the northwest.

The Hearing Examiner is not persuaded by Mr. McShane's attack on the work of Mr. Wentworth, Mr. Mullen, and The Watershed Company. Mr. McShane has not demonstrated that groundwater will flow to the northwest if the proposed mine expansion is excavated. He supplied no groundwater flow analysis or modeling of his own to show a northwestern flow under various configurations of the mine. His concern about northwestern flow is speculative. That speculation has now been considered in the Wood Assessment and The Watershed Company's review, and those authors did not see any reason to believe northwestern flow would occur.

It is true that the Applicant and third-party reviewers themselves have not conducted groundwater flow analysis or modeling under various configurations of the mine. Part of Mr. McShane's attack on their work is that they should have performed such analysis, including the digging of test wells to the northwest, on the properties not owned or controlled by the Applicant. The Hearing Examiner agrees that such investigations would have led to a stronger, more persuasive Geologically Hazardous Areas Site Assessment, but, in the absence of evidence showing a substantial likelihood that northwestern flow will occur, it is not reasonable to require the Applicant or the County to conduct offsite, physical investigations to rebut speculation that it might occur. A speculative attack on the Geologically Hazardous Areas Site Assessment is not enough to outweigh the authors' and reviewers' conclusions, which were based on on-site wells as well as topographical review.

The order on remand required further assessment of the dangers to the northwestern bluffs. That assessment has now occurred. Not every assessment requires new test wells or modeling. Many assessments (including Mr. McShane's own reviews) are based on a simple site visit and a review of the existing data. Although more testing and more data would always be welcome, the Hearing Examiner cannot conclude that they would be required here. The existing evidence shows groundwater flow from the mine site that does not jeopardize the northwestern cliffs, and none of the evidence put forward in rebuttal shows otherwise. The Hearing Examiner concludes that the Geologically Hazardous Areas Site Assessment, and the evidence in the record, is sufficient to satisfy the order on remand. *Findings 1 – 33,*

4. **Additional conditions are necessary to mitigate risks identified during the supplemental proceedings.** County staff recommended the Hearing Examiner retain the conditions of approval set forth in the original decision and add five new conditions relating to the geotechnical work that has been performed on remand. County staff recommend that recommendations set forth in the Geologically Hazardous Areas Site Assessment, and The Watershed Company's Third-Party Review, be added to the

Findings, Conclusions, and Decision on Remand
Skagit County Hearing Examiner
Lake Erie Pit, LLC SUP
Special Use Permit, No. P16-0556

1 *mitigating conditions.*

2 4.8. SCC 14.16.900. Special use permits. A special use permit must demonstrate
3 that the proposed activity will not adversely affect or prevent those uses normally allowed
4 within the respective district. The applicant bears the burden of proving through evidence in the
5 application that:

6 (A) The proposed use will be compatible with existing and planned land use.

7 (B) The proposed use complies with the Skagit County Code.

8 (C) The proposed use will not create undue noise, odor, heat, vibration, air and
9 water pollution impacts on surrounding, existing, or potential dwelling units,
10 based on the performance standards of SCC 14.16.840.

11 (D) The proposed use will not generate intrusions on privacy of surrounding
12 uses.

13 (E) The proposed use will not cause potential adverse effects on the general
14 public health, safety, and welfare.

15 (F) For special uses in Industrial Forest—Natural Resource Lands, Secondary
16 Forest—Natural Resource Lands, Agricultural—Natural Resource Lands, and
17 Rural Resource—Natural Resource Lands, the impacts on long-term natural
18 resource management and production will be minimized.

19 (G) The proposed use is not in conflict with the health and safety of the
20 community.

21 (H) The proposed use will be supported by adequate public facilities or
22 services and will not adversely affect public services to the surrounding areas, or
23 conditions can be established to mitigate adverse impacts on such facilities.

24 (I) The proposed use will maintain the character, landscape and lifestyle of the
25 rural area. For new uses, proximity to existing businesses operating via special
26 use permit shall be reviewed and considered for cumulative impacts.

Due to the mine's potential to increase groundwater flow to the unstable coastal bluffs to the northwest and the concomitant risk of landslides in the residential neighborhood there, the application does not demonstrate that the proposed mine complies with the Skagit County Code,

1 *that it will not cause potential adverse effects on the general public health, safety, and welfare,*
2 *that it is not in conflict with the health and safety of the community, and that it will maintain the*
3 *character, landscape, and lifestyle of the rural area that has grown up around the site.*

4 4.9. SCC 14.24.410(2). The slopes immediately to the west and northwest of the
5 mine property qualify as landslide hazard areas pursuant to SCC 14.24.410(2) because they are:
6 (a) areas designated in the Department of Ecology, Coastal Zone Atlas of Washington as
7 Unstable, with a recent slide; (b) slopes with a gradient of 15% or greater than intersect
8 geologic contacts with permeable sediments overlying low-permeability sediment or bedrock
9 with springs or groundwater seepage; (c) slopes of 40% or steeper with a vertical relief of 10
10 feet or more; (d) areas of previous failure such as landslides or failures as observed in the field
11 or as indicated by official maps; and (e) potentially unstable areas resulting from rapid stream
12 incision, stream band erosion, and undercutting by wave action. SCC 14.24.410(2)(a), (b)(i),
13 (c), (d), and (e).

14 4.10. SCC 14.24.420. This section requires the preparation by a qualified professional
15 of a geologic hazard site assessment for the mine because it lies within 200 feet of an area of
16 known or suspected risk for geologically unstable condition and the geologic condition may
17 pose a risk to life and property, or other critical areas on and off the project area. SCC
18 14.24.420(1). Skagit County's geologically hazardous site areas assessment requirements also
19 direct applicants to provide a site plan that indicates the location of all significant geologic
20 features like "springs" and "seeps," and to describe the extent and type of vegetative cover, and
21 provides that the County's Administrative Official may require additional site assessment
22 elements. SCC 14.24.420(2)(a), (b), and (g).

23 4.11. *While the applicant has now obtained a document titled a geologically*
24 *hazardous area site assessment, that document does not provide a site plan that shows springs*
25 *and seeps in coastal bluffs to the west and northwest of the site. Nor does it describe the extent*
26 *and type of vegetative cover at the site and assess likely groundwater impacts from removing*

1 *that vegetation and glacial till. And last, the Report does not evaluate the potential for the*
2 *mining operations to increase the volume of groundwater that exits the ground through springs*
3 *downgradient of the mine site's inferred groundwater level and to cause landslides in the*
4 *unstable bluffs west and northwest of the site. A licensed engineering geologist hired by*
5 *Evergreen Islands has identified this as a meaningful risk associated with the removal of trees,*
6 *shrubs, soils, and the underlying, low-permeability glacial till at the mine site. That action will*
7 *increase groundwater recharge in a manner that has the potential to impact the deep-seated*
8 *landslide areas to the west/northwest because it is highly probable that the mine site lies within*
9 *the groundwater recharge area for the slide areas.*

10 4.12. *The applicant also has not responded to the additional information requests set*
11 *forth by the County. The applicant has not analyzed the landslide risk arising from the potential*
12 *for increased groundwater migration to the west/northwest of the mine, has not analyzed the*
13 *presence of downgradient springs on the coastal bluff northwest of the mine, and has not*
14 *responded to Dan McShane's testimony that the proposed mine expansion will create an*
15 *increased landslide risk.*

16 4.13. SCC 14.24.430. Geologically hazardous area mitigation standards. *The*
17 *applicant has not caused the preparation of a mitigation plan by a qualified professional to*
18 *address items such as stormwater.*

19 **V. DESIRED OUTCOME/RELIEF REQUESTED**

20 Evergreen Islands respectfully requests the following relief:

21 5.1. that the Board of County Commissioners reverse the Hearing Examiner's July
22 13, 2020 decision approving Special Use Permit PL16-0556 as clearly erroneous, vacate the
23 permit, and adopt its own findings, conclusions, and decision based on the record before the
24 Hearing Examiner; or

25 5.2. that the Board reverse the Hearing Examiner Decision and remand the matter to
26 the Hearing Examiner again to ascertain the project's impacts on the adjacent unstable coastal

1 bluffs to the west and northwest of the site; and

2 5.3. Such other and further relief as the Board deems just and equitable.

3
4 Dated this 26th day of July, 2023.

5 Respectfully submitted,

6 LORING ADVISING PLLC

7
8 By



9 Kyle A. Loring, WSBA No. 34603
10 Attorney for Evergreen Islands
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ATTACHMENT A

**BEFORE THE HEARING EXAMINER
FOR SKAGIT COUNTY**

In the Matter of the Application of)	No. PL16-0556
)	
Bill Wooding, on behalf of)	Lake Erie Pit Special Use Permit
Lake Erie Pit LLC)	
)	
)	FINDINGS, CONCLUSIONS,
<u>For a Special Use Permit</u>)	AND DECISION ON REMAND

SUMMARY OF DECISION

The request for a mining special use permit to allow the expansion of an existing gravel mine located in the vicinity of Lake Erie, off Rosario Road on Fidalgo Island, from its current 17.78 acres to the proposed 53.5 acres, is hereby **APPROVED**. Conditions are necessary to address specific impacts of the proposal.

SUMMARY OF RECORD

Hearing Date:

On June 28, 2023, the Hearing Examiner held an open record hearing on remand from the Skagit County Board of County Commissioners, utilizing a hybrid approach allowing for participation in person or through remote access technology.

Testimony:

The following individuals presented testimony under oath at the open record remand hearing:

- Kevin Cricchio, County Senior Planner
- Todd Wentworth, Wood Environment & Infrastructure Services, Inc.
- William Wooding, Applicant Representative
- Thomas Mullen, Northwest Groundwater Consultants
- Kyle Loring, Attorney for Appellant Evergreen Islands
- Dan McShane, Stratum Group
- Tom Glade, Evergreen Islands
- Marlene Finley, Evergreen Islands
- Brian Wetter, Evergreen Islands
- Micael Raphael, Evergreen Islands
- Konrad Kurp, Evergreen Islands
- Jan Heald Robinson, Evergreen Islands
- Linda Dobbs, Evergreen Islands
- Brinkley Meyers
- Franky Parker
- Jake Olliffe

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Heidi Fish
Deanna Claus
Stewart Toshach
Ellen Bynum, Friends of Skagit County

Exhibits:

The following exhibits admitted into the record during the August 26, 2020, open record public hearing¹ for the Hearing Examiner's original decision on this matter, which the Hearing Examiner issued on November 30, 2020:

1. Staff Report, dated August 26, 2020
2. Special Use Permit Application and Narrative, received December 2, 2016
3. Skagit County Zoning and Assessor's Map, dated July 28, 2020
4. Site Plans, dated September 28, 2016
5. Notice of Development Application, published February 2, 2017
6. SEPA Environmental Checklist, dated June 8, 2017
7. SEPA Mitigated Determination of Nonsignificance, dated December 3, 2018, and Associated SEPA Staff Report
8. Critical Areas Reconnaissance by Skagit Wetlands and Critical Areas, dated February 24, 2017
9. Hydrogeologic Site Assessment Report by Maul Foster Alongi, dated September 28, 2016
10. Observation Well Installation Letter Report by Maul Foster Alongi, dated September 28, 2017
11. Letter from McLucas and Associates, Responding to the Del Mar Comment Letter, dated December 19, 2018
12. Letter from Northwest Groundwater Consultants, Responding to the Del Mar Comment Letter, dated January 3, 2019
13. Lake Erie Pit Well Reconnaissance by Northwest Groundwater Consultants LLC, dated March 11, 2019
14. Lake Erie Gravel Pit Traffic Impact Analysis by Gibson Traffic Consultants, Inc., dated September 2016
15. Addendum to the Lake Erie Gravel Pit Traffic Impact Analysis by Gibson Traffic Consultants, Inc., dated May 12, 2017
16. Traffic Memorandum by Skagit County Public Works, dated March 1, 2018
17. Supplemental (traffic) Memorandum by Skagit County Public Works, dated May 2, 2018
18. Lake Erie Pit air quality best management practices by Maul Foster Alongi, dated September 15, 2016
19. Lake Erie Pit Expansion Noise Study by Acoustics Group, Inc., dated September 16, 2016
20. List of Neighboring Property Owners and Parties of Record Notified of the Public Hearing, undated

¹ The August 26, 2020, hearing continued on October 14, 2020. *Exhibit 24.*

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21. First Round of Comment Letters, various dates
22. Applicant Responses to Comment Letters, dated April 19, 2017
23. Second Round of Comment Letters, various dates

The following exhibits were admitted into the record during the June 28, 2023, open record public hearing on remand:

24. Hearing Examiner's [Original] Decision, dated November 30, 2020
25. Appellant Evergreen Islands' Appeal to the Board of County Commissioners, dated December 14, 2020
26. Resolution R20210038, Board of County Commissioners' Remand to Hearing Examiner, dated February 23, 2021
27. Hearing Examiner's Order Referring Matter to Planning and Development Services, dated March 9, 2021
28. Letters from PDS to Applicant, various dates:
 - a. Letter from PDS to Applicant Request Additional Information, dated March 23, 2021
 - b. Letter from PDS to Applicant with Deadline for Additional Information, dated May 27, 2021
 - c. Letter from PDS Denying SUP Application, dated July 21, 2021
29. Applicant's Appeal of PDS Denial of SUP, dated August 3, 2021
30. Hearing Examiner's Order Granting Appeal and Reversing Denial, dated October 18, 2021
31. Geological Hazard Site Assessment, prepared by Wood Environment & Infrastructure Solutions, Inc., dated August 11, 2022
32. Evergreen Islands Response to Geological Hazard Site Assessment, dated November 18, 2023, with attached Assessment by Stratum Group, dated November 15, 2022
33. Third-Party Review of Geological Hazard Site Assessment, prepared by The Watershed Company, dated January 18, 2023
34. Evergreen Islands Response to The Watershed Company Third-Party Review, dated March 3, 2023, with attached Response to Third-Party Review by Stratum Group, dated March 2, 2023
35. Revised Third-Party Review of Geological Hazard Site Assessment, prepared by The Watershed Company, dated January 18, 2023²
36. Notice of Public Hearing, published June 8, 2023
37. Skagit County GIS Map of Subject Parcels and 300-Foot Buffer, undated
38. Addendum to Staff Report, dated June 28, 2023
39. Memorandum to Hearing Examiner, dated June 28, 2023
40. Third Round of Public Comments, various dates
41. Staff Hearing Presentation, presented June 28, 2023
42. Presentation of Tom Glade, presented June 28, 2023

² The revised exhibit was received March 31, 2023, but was still dated January 18, 2023.

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record remand hearing:

FINDINGS

Procedural History

1. On August 26, 2020, and continued on October 14, 2020, the Hearing Examiner held an open record public hearing to consider a request by Bill Wooding, on behalf of Lake Erie Pit, LLC (Applicant), to expand an existing gravel mine located in the vicinity of Lake Erie, off Rosario Road, from its current 17.78 acres to the proposed size of 53.5 acres. Following the hearing, the Hearing Examiner issued a decision approving the expansion of the gravel mine, subject to conditions. Following the Hearing Examiner's decision, Evergreen Islands (Appellant), a nonprofit corporation based on Fidalgo Island, appealed the decision to the Skagit County (County) Board of County Commissioners. *Exhibit 38, Addendum to Staff Report, pages 1 through 4; Exhibit 24; Exhibit 25; Exhibit 39.*
2. On February 3, 2021, the Board of County Commissioners adopted Resolution R20210038, remanding the matter to the Hearing Examiner, under the Skagit County Code (SCC), in the following terms:

Pursuant to SCC 14.60.170(10)(3),³ this matter is hereby REMANDED to the Skagit County Hearing Examiner for further consideration of the following matters:

- Whether the steep area to the west/northwest of the Mine requires the preparation of a Geologically Hazardous Area Site Assessment, consistent with SCC 14.24.400-.420.
- If so required, directing the Applicant to prepare a Geologically Hazardous Area Site Assessment, all consistent with SCC 14.24.400-.420 and the Hearing Examiner's discretion; and
- Any additional proceedings as may be necessary to take additional evidence related to the Geologically Hazardous Area Site Assessment, to be managed at the Hearing Examiner's discretion; and
- The imposition of such additional conditions as may be necessary to mitigate risks identified by the supplemental proceedings hereby ordered, to the extent such risks can be reasonably mitigated.

³ As of the date of this decision, SCC 14.60.170 is no longer a valid citation. The correct citation for appeals to the Board of County Commissioners would now be SCC 14.06.170.

All other issues raised by the Appellant on this appeal are hereby DENIED, and the Hearing Examiner in all other respects is AFFIRMED.

Exhibit 38, Addendum to Staff Report, pages 1 through 4; Exhibit 26; Exhibit 39.

3. The Hearing Examiner directed Skagit County (County) staff to require the Applicant, Lake Erie Pit, LLC, to prepare a Geologically Hazardous Area Site Assessment, whereupon County staff was to provide an amended staff report to the Hearing Examiner. Pursuant to the Hearing Examiner's direction, County staff sent several letters to the Applicant requesting the Applicant to supply the required information. County staff decided that the Applicant's response to these requests was not timely, and on July 21, 2021, staff informed the Applicant that the application was denied for lack of timely response. The Applicant appealed this denial to the Hearing Examiner, who reversed the denial in an order dated October 18, 2021. The Hearing Examiner ordered the Applicant to provide a Geologically Hazardous Area Site Assessment by the end of September 2022, which the Applicant subsequently did. Following several rounds of review by the County, its third-party consultant The Watershed Company, and members of the public, including the Appellant, Evergreen Islands (all discussed below), the County set a new date for a public hearing on remand for the Hearing Examiner to consider the Geologically Hazardous Area Site Assessment and issue a decision on remand, consistent with the direction of the Board of County Commissioners in Resolution R20210038. *Exhibit 38, Addendum to Staff Report, pages 1 through 4; Exhibits 30 through 36; Exhibit 39.*
4. Consistent with the Board of County Commissioners' direction, the Hearing Examiner will not revisit issues other than those related to the Geologically Hazardous Area Site Assessment and the County staff and public responses thereto. All other findings and conclusions set forth in the original decision, dated November 30, 2020, remain undisturbed and are hereby incorporated by reference. *Exhibit 24.*

Notice of Public Hearing on Remand

5. On June 8, 2023, the County published notice of the public hearing on remand. The notice was published in the *Skagit Valley Herald* newspaper, posted on the subject property, mailed to neighboring landowners within 300 feet of the subject parcel, and mailed and emailed to all parties of record. *Exhibit 38, Addendum to Staff Report, pages 1 through 4; Exhibit 36.*

Issues on Remand

6. County staff reviewed the Applicant's Geologically Hazardous Area Site Assessment, and the materials provided by the Applicant and public in response thereto, to determine whether the Geologically Hazardous Area Site Assessment satisfied the direction of the Board of County Commissioners. Staff reviewed the materials submitted, the special use permit criteria, the Hearing Examiner's original decision, and the previous issued SEPA

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MDNS. Staff concluded that these materials were adequate to respond to the Board of County Commissioners remand, and that the proposed expansion should be approved, subject to both the conditions in the Hearing Examiner's original decision and five new conditions recommended by staff. *Exhibit 38, Addendum to Staff Report, pages 1 through 4; Exhibit 7; Exhibit 24; Exhibits 31 through 35; Exhibit 39.*

Geologically Hazardous Area Site Assessment

7. The Geologically Hazardous Area Site Assessment (Wood Assessment) was prepared by Wood Environment & Infrastructure Solutions, Inc. (Wood), on August 11, 2022. The Assessment involved a site visit to the existing gravel pit and the proposed expansion area. The Assessment also relied on previously published reviews of site geology and groundwater:

- Lake Erie Pit Well Reconnaissance (NWGC, 2019)⁴;
- Observation Well Installation (Maul Foster Alongi, 2017)⁵; and
- Hydrogeologic Site Assessment Report (Maul Foster Alongi, 2016).⁶

Wood also reviewed County LIDAR imagery for evidence of erosion along the coastal bluffs northwest of the site—the steep areas identified by the Board of County Commissioners as the reason for the remand. Wood determined that:

The head scarp of the nearest coastal bluff is approximately 300 feet northwest of the northwest sidewall of the existing Pit 1 and is approximately 800 feet northwest of the proposed expansion. Rosario Road runs between the site and the coastal bluffs, and the cut slope between Rosario Road and the site is clearly visible. The cut slope graded for Rosario Road is not considered a geologic hazard as it is not a natural slope but is an engineered and maintained slope.

Relying on the three previous studies cited above, Wood determined that groundwater flow from the mine site flows north and northeast, toward Lake Erie, not west or northwest toward the coastal bluffs. In a section of the Assessment devoted specifically to the coastal bluffs, Wood stated that the proposed expansion would not have any impact on the bluffs. The bluffs are too far away (300 to 800 feet), and groundwater from the site does not flow in that direction. Nor would the mine affect the elevation of the groundwater table, because excavation at the mine will not extend down into the groundwater table. Stormwater from the mine will be managed and infiltrated on site and would not affect slope stability. *Exhibit 31.*

Evergreen Islands Response to Geologically Hazardous Area Site Assessment

⁴ In the record as Exhibit 12.

⁵ In the record as Exhibit 10.

⁶ In the record as Exhibit 9.

8. The first response to the Wood Assessment came from Evergreen Islands, the Appellant to the Hearing Examiner's original decision. Evergreen Islands submitted a comment dated November 18, 2022, with an attached review by geologist Dan McShane, of Stratum Group, dated November 15, 2022. In his November 2022 review, Mr. McShane called the County's attention to a March 23, 2021, communications between County staff and the Applicant (Exhibit 28), which occurred following the remand from the Board of County Commissioners but before the Applicant had submitted any responsive materials. In the March 23, 2021, communication, County staff requested that the Applicant supply certain specific analyses in respond the remand:
- 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.

Mr. McShane argued that the Wood Assessment had not supplied analysis of these specific issues. Instead, the Wood Assessment had simply relied on the three earlier reports, which, according to Mr. McShane, did not analyze the groundwater flow direction toward the coastal bluffs, did not discuss the presence of springs in the coastal bluffs, and did not respond to Mr. McShane's earlier comments. *Exhibit 28; Exhibit 32.*

Third-Party Review

9. The next response came from the County's third-party reviewer, The Watershed Company, which reviewed both the Wood Assessment and Mr. McShane's November 2022 response. In its Third-Party Review, the Watershed Company reviewed the three groundwater analyses that the Wood Assessment had relied upon, and which Mr. McShane had called inadequate. The Watershed Company found no discrepancies or inaccuracies in the data collection or analysis, nor anything else that would call into question the determination that groundwater flows in a northeasterly direction (in other words, away from the coastal bluffs). According to The Watershed Company:

The lithology is reasonably consistent with the well logs, the groundwater levels were developed from a comprehensive mass well measurement, and the flow paths were plotted perpendicular to the groundwater surface contours. The aquifer is well characterized at recorded depths and static water levels. The prevailing groundwater flow path is to the north and northeast of the proposed project.

The Watershed Company discussed the mine's potential to threaten bluffs to the west and southwest of the proposed mine expansion and found that the bluffs were 800 to 1,000 feet from the proposed expansion area. It concluded that groundwater seepage coming from the bluffs is likely from a regional aquifer. The Watershed Company found no reason to conclude that the proposed mine would change the rate or volume of groundwater seeping from the bluffs.

In its January 18, 2023, report the Watershed Company also provided its own additional report, dated November 25, 2022, regarding the project, in which it had reviewed a test well dug in 2017 for the project and had determined that, consistent with other reports, groundwater flow was likely to the north/northeast. *Exhibit 33.*⁷

Evergreen Islands Response to Third-Party Review

10. On March 3, 2023, Evergreen Island provided a response to the Third-Party Review, with an attached report by its geologist, Mr. McShane, dated March 2, 2023. In his March 2023 review, Mr. McShane argued that The Watershed Company had focused on bluffs to the west and southwest of the proposed mine site, not bluffs to the west and northwest of the site. Mr. McShane argued that the springs in the coastal bluffs to the northwest of the site had never been identified or discussed by anyone other than himself, and this omission was not consistent with the County's guidance of March 23, 2021 (Exhibit 28). He also argued that there has never been any direct measurement of groundwater elevations between the mine site and the northwest bluffs—all previous assessments were based on measurements nearby, but not directly along that flow path. Mr. McShane argued that these previous assessments were flawed even on their own terms, in that water levels measured directly by Northwest Groundwater Consultants (NWGC) (one of the three studies relied on by the Wood Assessment) were 50 feet and 35 feet lower than those identified on the groundwater contour map produced by Maul Foster (the other two of the three studies relied on by the Wood Assessment). Mr. McShane argued that springs in the coastal bluffs to the northwest of the site were a major driver of the slopes' instability, and that groundwater flow to the bluffs, if it does indeed occur, could contribute to these springs. According to Mr. McShane, "The role of groundwater flow to the bluff remains unevaluated." *Exhibit 34.*

Public Comments

11. The County received public comments from dozens of individuals. In summary, the overwhelming majority of these comments called for additional studies of slope stability. Commenters argued that the materials submitted on remand did not constitute a new study but merely a rehash of old material. Commenters argued that the proposed mine expansion would further destabilize bluffs in the area (not just the bluffs to the northwest,

⁷ A revised version of the Third-Party Review (Exhibit 33) appears in Exhibit 35, but that exhibit merely changes the format of the Exhibit 33 version. It does not change the text. *Exhibit 38, Addendum to Staff Report, page 3; Exhibit 35.*

but also to the west and southwest) and that houses atop the bluffs could be jeopardized as a result. Several of the comments identified the presence of springs in the coastal bluffs. Some of the comments also raised issues unrelated to slope stability, such as noise, traffic, and air quality, each of which, commenters argued, would be worsened by the proposed mine expansion. *Exhibit 39.*

12. One of the comments included an attached geological assessment, the “Geary Preserve Bluff Geological Assessment,” prepared in support of Skagit County project no. 21-051, and dated August 12, 2021. The Geary Preserve Assessment analyzed coastal bluffs to the west/northwest of the mine site—the same that are the basis for the remand—albeit the Geary Preserve Assessment was for a project unrelated to the proposed mine expansion. The Geary Preserve Assessment observed “intermittent seepage within the lower exposed bluff as well as widespread colluvium at the base of the bluff.” The Geary Preserve Assessment found that:

Drainage patterns near the bluff crest were altered by development of the road and parcels, along with roadside ditch installation. As the headscarps for these large landslides are some distance from the beach and separated by narrow channels, landslides of this type are likely not triggered by marine erosion and rather by groundwater, surficial wetness, and the stratigraphy of the bluff, although long-term wave attack does result in the bluffs being in an “oversteepened” condition in much of the bluff shore. Bluff toe erosion from wave attack was not commonly observed during our field visit.

However, the Geary Preserve Assessment did not analyze groundwater flow direction in the vicinity of the coastal bluffs or the mine site. It did not mention the mine as a contributor to the altered drainage patterns that affect the stability of the bluffs. Instead, as quoted above, it cited the development of the roads and parcels, which lie closer to the bluffs than the mine site does. The Geary Preserve Assessment specifically cited the actions of some homeowners as contributing to the erosion of the coastal bluffs, including “performing maximum view enhancement actions by topping or excessively limbing trees, likely contributing to increased slope instability.”

The Geary Preserve Assessment recommended restrictions on coastal homeowners’ activities, including avoiding topping trees and less-aggressive limbing of trees. It recommended that homeowners use swales to deal with stormwater whenever possible, rather than tightlines down the bluffs, and that any tightlines that are necessary be made of high-density polyethylene instead of cheaper, more failure-prone plastics. In some cases, the Geary Preserve Assessment stated that houses that are too close to the bluffs may need to be relocated landward: “House relocation is becoming more common in the greater Puget Sound area ... and offers owners more security and the ability to work on

other long-term issues.” The Geary Preserve Assessment did not analyze the existing mine or the proposed mine expansion, nor did it include any recommendations for or against mine expansion. *Exhibit 39.*

Testimony

13. Kevin Cricchio, County Senior Planner, testified generally about the application, the procedural history of the case, and the County’s review of the materials provided on remand. He testified that the project site has had an active mine on the properties since the 1960s. The proposal includes the expansion of an existing gravel and sand mine operation from approximately 17.78 acres to approximately 53.5 acres. The site is accessed from Rosario road from a gated gravel driveway. The mining operation proposes to remove approximately 60,000 tons per year of gravel and sand for approximately 60 years for a total of approximate 3,600,000 tons of material. There will be no rock screening, rock crushing, or blasting. A 100-foot buffer will be maintained around the site.

Mr. Cricchio set forth the procedural history of the original decision, the appeal, the remand, the denial of the application, and the reversal of the denial, leading to today’s hearing on remand. He described the Geologically Hazardous Area Site Assessment and the third-party and Appellant reviews thereof. Based on the Geologically Hazardous Area Site Assessment, Mr. Cricchio recommended approval of the mine expansion with five new conditions, as well as leaving undisturbed the conditions of approval in the Hearing Examiner’s original decision. The five new conditions include reimbursement of the County for the expense of Third-Party Review, plus compliance with the recommendations in the Geologically Hazardous Area Site Assessment and Third-Party Review reports. Mr. Cricchio acknowledged that he is not a geologist, but the geologists’ reviews and recommendations struck him as adequate and reasonable to allow the project to move forward. *Testimony of Kevin Cricchio.*

14. Todd Wentworth is the consulting geotechnical engineer to the Applicant and the author of the Geologically Hazardous Area Site Assessment. He testified that he relied on the hydrogeology reports cited in his report to determine that groundwater would not flow in the direction of the coastal bluffs to the northwest of the mine site. He concluded that standard mine buffers and the normal mine reclamation process would be adequate to protect slopes in the vicinity. He did not see any reason to require the Applicant to take any mitigation measures other than those that would apply to any mine anywhere.

Mr. Wentworth acknowledged, in response to the testimony of Dan McShane (summarized below), that groundwater does seep out of the coastal bluffs to the northwest of the mine site. He deferred to hydrologist Thomas Mullen (whose testimony is also summarized below) as to whether the mine would change the flow direction of groundwater. But, if the mine did not change the flow direction of groundwater, then Mr.

Wentworth was comfortable in his assessment that the mine would not increase the danger of slope instability. *Testimony of Todd Wentworth.*

15. William Wooding is the Applicant Representative and owner of the mine. He testified that the mine pit has actually been there since the 1930s. He had been the owner and operator since the 1960s. He recognized that his mine required a special use permit because it had exceeded certain limits in the code. He testified that the actual volume of material leaving the mine would, in all likelihood, be far lower than the numbers Mr. Cricchio had cited as a possible maximum. He affirmed that, in his opinion and experience, water from the mine had always drained to the north or east, not the west. *Testimony of William Wooding.*
16. Thomas Mullen, geologist, is a project consultant for the Applicant. He is affiliated with Northwest Groundwater Consultants (NWGC). He prepared some of the underlying hydrology reports upon which Mr. Wentworth based the Geologically Hazardous Area Site Assessment. Mr. Mullen testified that he did a well reconnaissance in March 2019 in which he measured groundwater levels in three wells in and around the mine pit. Based on these measurements, he concluded that groundwater was flowing off the site in a north/northeasterly direction.

Mr. Mullen acknowledged the existence of springs in the coastal bluffs to the northwest of the mine site, as identified in the review of Mr. McShane. He testified that he did not believe groundwater flow from the mine site would have a detrimental effect on those springs. He acknowledged that he had not reviewed the Geologically Hazardous Area Site Assessment.

In response to Mr. McShane's testimony (summarized below) and Mr. Wentworth's testimony (summarized above), Mr. Mullen testified that there are no groundwater monitoring wells to the northwest of the mine site. He testified that excavation of the mine will not go down to the groundwater table but rather will be 50 to 100 feet above groundwater. He believed that stormwater conveyances would mitigate any infiltration of stormwater into the groundwater table and thus, nothing about the mine's operation would affect the groundwater table in the vicinity of the coastal bluffs. *Testimony of Thomas Mullen.*

17. Kyle Loring, attorney for Appellant Evergreen Islands, argued that the Board of County Commissioners had remanded the Hearing Examiner's original decision to consider issued raised by geologist Dan McShane regarding groundwater flow, and that the materials now before the Examiner did not consider those issues. Mr. Loring argued that, although some groundwater may flow north or northeast, as described by Mr. Mullen, it did not preclude that other groundwater may flow northwest—a possibility, he argued, that has never been studied by any of the reviewers. He said the Geologically Hazardous

Area Site Assessment simply assumed away the issue by relying on earlier groundwater studies that were already in the record prior to the remand. No new, physical investigations have been conducted. The third-party reviewer also did not conduct its own physical investigations and even appeared to misunderstand which coastal bluffs concerned the County Commissioners—the northwestern bluffs, not the southwestern bluffs or Dodsen Canyon. *Testimony of Kyle Loring.*

18. Dan McShane, geologist from the Stratum Group hired by Evergreen Islands, testified about his review of the Geologically Hazardous Area Site Assessment prepared by Wood and the Third-Party Review prepared by The Watershed Company. Mr. McShane testified that he had done some earlier work on the coastal bluffs to the northwest of the mine site, which is how he knew about the springs in the bluff in the first place. He described the springs as evidence of a “blowout failure,” a form of slope instability, a photograph of which is in his report of March 2, 2023 (attachment to Exhibit 34). Mr. McShane testified that the LIDAR imagery (also in Exhibit 34) shows that slope failures intrude quite far landward of the coast, such that groundwater from the mine site could, potentially, interact with the slope failures. He acknowledged that groundwater from the mine flows east, but he said that flow direction was due to the presence of a layer of glacial till. If glacial till were to be removed in the course of mining, the groundwater flow direction could change. Potentially, it could flow to the northwest and interact with the slope failures, by contributing additional groundwater to the groundwater that already seeps out from the coastal bluffs to the northwest. This possibility, of changed groundwater flow, is the main issue he believed required additional study. Mr. McShane acknowledged that he, himself, had not studied whether groundwater would flow to the northwest if mining were expanded. He testified that the elevation of the springs of 165 to 175 feet implied that groundwater, or at least a portion of groundwater, was “probably” flowing northwest, because the springs are downgradient of groundwater at the mine site. He thought that the proposed mine could “very well” affect the groundwater table at the coastal bluffs, because the groundwater table at the proposed mine site is higher than the springs and because the mine could remove some of the overlying glacial till which current directs groundwater to the northeast. *Testimony of Dan McShane.*
19. Tom Glade, the vice president of Evergreen Islands, testified that slope erosion reaches all the way to Rosario Road. There have been landslides in the area in the past, and the bluffs are eroding during storms. He testified that the mine expansion would jeopardize Rosario Road. *Testimony of Tom Glade.*
20. Marlene Finley is on the board of directors of Evergreen Islands. She testified that the application is not ripe for decision because the application is incomplete. She said the materials still do not address risks from landslide, so the materials are not responsive to the County staff and County Commissioners’ concerns. *Testimony of Marlene Finley.*

21. Brian Wetter is a member of Evergreen Islands. He described the history of the organization as a 501(C)(3) organization in existence in and around Fidalgo Island since 1978. He spoke highly of Applicant Mr. Wooding's community activities over many years. Mr. Wetter said the Applicant's geotechnical consultants had served him poorly because they were still failing to analyze the risks that the County Commissioners raised. No new work had been done, and no new on-site data has been collected. *Testimony of Brian Wetter.*
22. Micael Raphael is a member of Evergreen Islands. She lives approximately 1,200 feet from the proposed mine expansion. She argued that a Department of Ecology map shows that 50 percent of all water will run west of the mine toward the coastline. She said that previous studies in the area had revealed issues related to slope instability. She said the mine expansion would jeopardize lateral slope support on properties adjacent to the mine, in violation of SCC 14.26.465. *Testimony of Micael Raphael.*
23. Konrad Kurp is a member of Evergreen Islands and a civil engineer. He testified favorably about the Applicant as a person, but he said the proposed mine expansion still needed review because the geologists had not done the work required. Seepage on the northwest cliffs implies there is an underlying clay layer that pushes the water out of the cliff face. The mine is above that clay layer. The increase in groundwater infiltration at the expanded mine site is significant, because the clay layer will have been removed by mining. The clay layer currently forces runoff to the northeast, but once it is gone, groundwater may run in a different direction. Mr. Kurp recommended that the mine not be expanded. *Testimony of Konrad Kurp.*
24. Jan Heald Robinson is on the board of Evergreen Islands and a neighbor of the existing mine pit. She said that members of the community who oppose the mine are not newcomers. Her own family has been there since in the 1890s. She testified that 16 homes on the bluff above Burrows Bay will be placed at risk by the expansion of the mine. An additional 75 homes risk losing their water systems. Rosario Road was also placed at risk. She said that new studies were required prior to approval of the proposed mine expansion, as requested by the County. *Testimony of Jan Heald Robinson.*
25. Linda Dobbs is a member of Evergreen Islands and a member of the Sunset Lane Homeowners Association (HOA). The HOA is very close to the entrance to the pit, north and west of the mine site along the bluff. She said one of the member homeowners had suffered one of the cliff blowouts. Ms. Dobbs said the Commissioners had one requirement: an analysis of groundwater to the northwest. She said no such analysis had been done. *Testimony of Linda Dobbs.*
26. Brinkley Meyers testified that she and her husband live in one of the houses on Rosario Road that are at risk. She was the commenter who had submitted into the record the

“Geary Preserve Bluff Geological Assessment” in Exhibit 39. She said the Geary Preserve Assessment directly contradicted the Applicant’s materials with regards to groundwater flow and rainwater flow. Ms. Meyers testified that the slope below her property is eroding. She said the Skagit County Shoreline Master Program recommending halting any works in the area because of its instability. She said the County had told her she couldn’t build so much as a stairway down the bluff, so she did not understand why the nearby mine could be expanded. *Testimony of Brinkley Meyers.*

27. Franky Parker is the president of the Sunset Lane Homeowners Association. He testified that every member of the HOA is opposed to the mine expansion. He said blowouts in the bluff are already happening. He said the absence of groundwater monitoring wells to the north and northwest of the mine was unacceptable. He said that County property was available for wells to be drilled. He said the Geary Preserve Assessment shows depression erosion to the northwest of the mine site. Mr. Parker said that there could be another clay layer that nobody knows about. In addition, he said that mine reclamation would not occur for 60 years, so water seepage needed to be analyzed now. He said the new analysis was based on old data, which did not look at the west side of Rosario Road but only at the east of the Rosario Road. *Testimony of Franky Parker.*
28. Jake Olliffe testified that the mine expansion will collect more water. The additional water will lead to more danger for nearby homes. The springs in the bluffs are already substantial—so much so that his dog can drink from them. *Testimony of Jake Olliffe.*
29. Heidi Fish testified that the County’s first priority should be to keep the community safe and healthy and harmonious. She said there needed to be new hydrological studies to assess the direction of groundwater flow. She said the slopes are not stable, and her own backyard is eroding. She also said the gravel pit wall was not stable. She urged the Hearing Examiner to deny the application outright. *Testimony of Heidi Fish.*
30. Deanna Claus testified favorably about the Applicant’s character. She said the expansion of the pit was a scary idea because of the slope instability. She said the mine was already quite large and would only be more daunting if the mine were enlarged. She also wondered whether the expanded pit would affect nearby homes’ water wells. *Testimony of Deanna Claus.*
31. Stewart Toshach is an environmental scientist who lives adjacent to Dodsens Canyon. He said the mine would affect his property. He argued that the purpose of the permit should be to mitigate environmental harms from past mining, not to allow new mining. Mr. Toshach said that the proposal would outlive the Applicant. He argued that the data in the record was insufficient to evaluate groundwater impacts to Dodsens Canyon. Groundwater impacts to Dodsens Canyon and other bluffs could jeopardize homes. Mr. Toshach said that building permits for other projects in the area force homeowners to

build 300 feet back from the slope and face other permitting hurdles due to the slopes' instability. Yet this mine, a far larger project, was being allowed to proceed. He said geotechnical drilling in many locations around the site was the only way to learn which direction the groundwater flows. *Testimony of Stewart Toshach.*

32. Ellen Bynum is the executive director for Friends of Skagit County. She said the mission of Friends of Skagit County is to appeal bad land use decisions. She said the County had failed to obtain sufficient information to evaluate the proposed expansion. There was insufficient information about groundwater flow, groundwater levels, hydrological mapping, identification of aquifers, and springs and seepage from the bluffs. Ms. Bynum suggested that the Applicant be required to submit a mining plan and furnish the missing information. She said the County should bring in consultants to reduce the risk if the County was not able to evaluate the risk itself. *Testimony of Ellen Bynum.*

Staff Recommendation

33. Mr. Cricchio testified that the County staff recommends that the Hearing Examiner approve the SUP request, with five new conditions. *Testimony of Kevin Cricchio; Exhibit 38, Addendum to Staff Report, page 4.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner generally has jurisdiction to hear and decide requests for special use permits (SUPs) related to mining. *SCC 14.16.440(9)*. The Board of County Commissioners remanded the Hearing Examiner's original decision for further consideration by the Hearing Examiner in Resolution R20210038, dated February 23, 2021. *Exhibit 26.*

Criteria for Review on Remand

As noted above, the Board of County Commissioners upheld the Hearing Examiner's original decision on all issues, except the Hearing Examiner was required to consider the following on remand:

- Whether the steep area to the west/northwest of the Mine requires the preparation of a Geologically Hazardous Area Site Assessment, consistent with SCC 14.24.400–.420.
- If so required, directing the Applicant to prepare a Geologically Hazardous Area Site Assessment, all consistent with SCC 14.24.400–.420 and the Hearing Examiner's discretion; and
- Any additional proceedings as may be necessary to take additional evidence related to the Geologically Hazardous Area Site Assessment, to be managed at the Hearing Examiner's discretion; and

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- The imposition of such additional conditions as may be necessary to mitigate risks identified by the supplemental proceedings hereby ordered, to the extent such risks can be reasonably mitigated.

Exhibit 26.

Conclusions Based on Findings

1. **The steep area to the west/northwest of the Mine requires the preparation of a Geologically Hazardous Area Site Assessment, and one was submitted by the Applicant.** The Hearing Examiner previously determined that a Geologically Hazardous Area Site Assessment was required in his order dated March 9, 2021. A Geologically Hazardous Area Site Assessment is warranted in light of the many homes that lie atop the coastal bluffs to the west and northwest of the proposed mine expansion, the known history of erosion and landslides atop those bluffs, and the disagreement among professional geologists about the safety of the proposed mine expansion with regards to its potential impacts to groundwater flow. *Findings 3; 6 – 33.*
2. **The Geologically Hazardous Area Site Assessment is consistent with SCC 14.24.400–.420 and the Hearing Examiner’s discretion.** The Hearing Examiner exercises his discretion to conclude that the geologically hazardous area site assessment is compliant with the Board of County Commissioner’s order on remand. The Geologically Hazardous Area Site Assessment prepared by Wood does not, strictly speaking, comply with SCC 14.24.420. That section requires specific elements to appear in an assessment, including:
 - (a) A site plan depicting the height of slope, slope gradient and cross section indicating the stratigraphy of the site. The site plan shall indicate the location of all existing and proposed structures and any significant geologic features such as outcrops, springs, seeps, ponds, streams or other water bodies; and
 - (b) An assessment of the geologic characteristics and engineering properties of the soils, sediments, and/or rock of the subject property and potentially affected adjacent properties. Soils shall be described in accordance with the Unified Soil Classification System; and
 - (c) A description of load intensity, surface and groundwater conditions, public and private sewage disposal systems, fills and excavations and all structural development; and

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- (d) A description of the extent and type of vegetative cover including tree attitude; and
- (e) For potential coastal bluff geologic hazards: estimate of the bluff retreat rate, which recognizes and reflects potential catastrophic events such as seismic activity or a 100-year storm event; and
- (f) For potential landslide hazards: estimate slope stability and the effect construction and placement of structures will have on the slope over the estimated life of the structure. Quantitative analysis of slope stability or slope stability modeling may be required by the Administrative Official; and
- (g) Additional site assessment elements may be required by the Administrative Official.

SCC 14.24.420(2).

Here, the Wood Assessment does not include an estimate of the coastal bluff retreat rate (criterion (e)), nor an estimate of the coastal bluff's slope stability over the life of structures placed atop the bluff (criterion (f)). The Hearing Examiner concludes, however, that such elements are not necessary in this case. 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; the proposed expansion is approximately 800 feet. Thus, under SCC 14.24.420(1), a geologically hazardous site assessment would not normally be triggered in the first place. Instead, a geologically hazardous site assessment has been ordered out of an abundance of caution in light of the possibility of groundwater flow from the proposed mine expansion to the bluffs northwest of the site. Given that the trigger for the assessment falls outside the strict requirements of the code, the Hearing Examiner will exercise the discretion afforded him by Resolution R20210038 not to require strict adherence to the elements of an assessment. The Applicant's Geologically Hazardous Area Site Assessment, as will be discussed below, is adequate to the task required on remand: to assess the possibility that groundwater flow altered by the proposed mine expansion could affect the coastal bluffs northwest of the site. *Findings 1 – 33.*

- 3. The preponderance of the evidence supports the conclusions of the Geologically Hazardous Areas Site Assessment.** The Geologically Hazardous Areas Site Assessment prepared by Wood concluded that the proposed mine expansion would not jeopardize the stability of the coastal bluffs to the northwest of the proposed mine expansion. Author Todd Wentworth was aware of the seeps or springs that emerge from

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the coastal bluffs northwest of the mine site. He concluded these seeps or springs are from groundwater. He concluded, however, that groundwater from the proposed mine expansion will not affect the groundwater seeping from the coastal bluffs. That being the case, Mr. Wentworth concluded, in a section of his Assessment specifically devoted to the coastal bluffs, that the mine expansion would not affect the bluffs.

Mr. Wentworth's conclusion that groundwater from the mine expansion will not affect the northwestern coastal bluffs was predicated on his conclusion that groundwater beneath the mine flows north and northeast, not northwest. That conclusion, in turn, was based on the work of hydrologist Thomas Mullen. 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. Based on those three test wells, as well as the topography of the site, he concluded that groundwater flows north and northeast.

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 of the northwestern bluffs—which, as the public testimony and the Geary Preserve Assessment showed, are already unstable and prone to landslides and erosion due to both natural conditions and the actions of homeowners developing their properties atop the bluffs, as well as drainage impacts from Rosario Road.

It is not the case that the Applicant's reviewers and the County's third-party reviewer overlooked the northwestern bluffs. On the contrary, in the testimonies of Mr. Wentworth and Mr. Mullen, and in the written reports of Mr. Wentworth and The Watershed Company, the northwestern bluffs are specifically discussed. It is true, as Mr. Loring noted, that one paragraph in The Watershed Company's January 18, 2023, Third-Party Review is devoted to bluffs to the southwest of the proposed mine. However, that same review also references Evergreen Island's concerns about bluffs to the northwest of the proposed mine, so it is not the case that The Watershed Company was confused about which bluffs were supposed to be the subject of the Geologically Hazardous Areas Site Assessment.

Dan McShane argued, in his written reviews and in his oral testimony, that it is possible that groundwater will flow to the northwest if the proposed mine expansion is excavated. His argument is predicated on the belief that the reason groundwater currently flows to the north/northeast is because of a layer of glacial till. If that layer is removed during mining, then it is possible groundwater will no longer flow north or northeast. It may flow somewhere else, including northwest. If it does flow northwest, it may contribute to groundwater seeping out from the coastal bluffs, which would, in turn, contribute to their

conditions of approval for the proposed mine expansion. In addition, County staff recommends that the Applicant reimburse the County for the costs the County has incurred in obtaining the Third-Party Review and providing public notice of the remand hearing. The Hearing Examiner agrees that these are reasonable conditions. *Findings 6 and 33.*

DECISION

Based on the preceding findings and conclusions, the Hearing Examiner orders that the original decision, dated November 30, 2020, be **MODIFIED** to include the following new conditions, to supplement the conditions set forth in the original decision:

1. Development shall comply with all recommendations and requirements of the Geologically Hazardous Areas Site Assessment dated August 11, 2022, prepared by Wood Environment and Infrastructure Solutions, Inc.
2. Development shall comply with all recommendations and requirements of the Third-Party Review performed by the Watershed Company, dated January 18, 2023, including the attachment thereto, dated November 22, 2022.
3. All applicable permits (local, state, and federal) must be secured before any mining excavation activities begin onsite. Copies of permits shall be provided to the Skagit County Planning & Development Services Department.
4. The Applicant shall be responsible for reimbursement to Skagit County Planning & Development Services Department for the full cost of mailings and newspaper publication associated with the Notice of Development Application, Notice of Issuance of SEPA MDNS, Notice of Hearing, and Notice of Decision. Payment shall be made prior to any work beginning onsite and grading permit application submittal and/or issuance.
5. The Applicant shall be responsible for reimbursement to Skagit County Planning & Development Services Department for the full cost of Third-Party Review of the Geologically Hazardous Areas Site Assessment. Payment shall be made prior to any work beginning onsite and grading permit application submittal and/or issuance.

DECIDED this 13th day of July 2023.



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Hearing Examiner

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instability. Mr. McShane argues that this chain of possibilities demands further investigation, including test wells dug off-site of the mine to the northwest.

The Hearing Examiner is not persuaded by Mr. McShane's attack on the work of Mr. Wentworth, Mr. Mullen, and The Watershed Company. Mr. McShane has not demonstrated that groundwater will flow to the northwest if the proposed mine expansion is excavated. He supplied no groundwater flow analysis or modeling of his own to show a northwestern flow under various configurations of the mine. His concern about northwestern flow is speculative. That speculation has now been considered in the Wood Assessment and The Watershed Company's review, and those authors did not see any reason to believe northwestern flow would occur.

It is true that the Applicant and third-party reviewers themselves have not conducted groundwater flow analysis or modeling under various configurations of the mine. Part of Mr. McShane's attack on their work is that they should have performed such analysis, including the digging of test wells to the northwest, on the properties not owned or controlled by the Applicant. The Hearing Examiner agrees that such investigations would have led to a stronger, more persuasive Geologically Hazardous Areas Site Assessment, but, in the absence of evidence showing a substantial likelihood that northwestern flow will occur, it is not reasonable to require the Applicant or the County to conduct offsite, physical investigations to rebut speculation that it might occur. A speculative attack on the Geologically Hazardous Areas Site Assessment is not enough to outweigh the authors' and reviewers' conclusions, which were based on on-site wells as well as topographical review.

The order on remand required further assessment of the dangers to the northwestern bluffs. That assessment has now occurred. Not every assessment requires new test wells or modeling. Many assessments (including Mr. McShane's own reviews) are based on a simple site visit and a review of the existing data. Although more testing and more data would always be welcome, the Hearing Examiner cannot conclude that they would be required here. The existing evidence shows groundwater flow from the mine site that does not jeopardize the northwestern cliffs, and none of the evidence put forward in rebuttal shows otherwise. The Hearing Examiner concludes that the Geologically Hazardous Areas Site Assessment, and the evidence in the record, is sufficient to satisfy the order on remand. *Findings 1 – 33,*

4. **Additional conditions are necessary to mitigate risks identified during the supplemental proceedings.** County staff recommended the Hearing Examiner retain the conditions of approval set forth in the original decision and add five new conditions relating to the geotechnical work that has been performed on remand. County staff recommend that recommendations set forth in the Geologically Hazardous Areas Site Assessment, and The Watershed Company's Third-Party Review, be added to the

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conditions of approval for the proposed mine expansion. In addition, County staff recommends that the Applicant reimburse the County for the costs the County has incurred in obtaining the Third-Party Review and providing public notice of the remand hearing. The Hearing Examiner agrees that these are reasonable conditions. *Findings 6 and 33.*

DECISION

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5. The Applicant shall be responsible for reimbursement to Skagit County Planning & Development Services Department for the full cost of Third-Party Review of the Geologically Hazardous Areas Site Assessment. Payment shall be made prior to any work beginning onsite and grading permit application submittal and/or issuance.

DECIDED this 13th day of July 2023.



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