



DYKES EHRLICHMAN LAW FIRM

Land Use, Real Estate, & Environmental Law

October 7, 2022

Via Electronic Mail:
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Mr. Andrew Reeves
Skagit County Hearing Examiner
c/o Ms. Mona Kellog
Dept. of Community Development
1800 Continental Place
Mount Vernon, WA 98273

Re: PL16-0097, PL16-0098, Appeal No. PL22-0142
Concrete Nor'West/Miles Sand and Gravel SUP

Dear Examiner Reeves:

Toward the end of the consolidated permit and appeal hearing referenced above, you invited comment from counsel on two issues: (a) possible permit hearing procedure if SEPA MDNS remanded; and (b) a party's proposed conditions for Hearing Examiner consideration. We are writing to address both questions. As you know, we represent Cougar Peak, LLC and the McLeod family, owners and caretakers of approximately 800 acres of rural forested land directly adjacent to the proposed gravel mine.¹ Thank you for the opportunity to submit these comments on these two issues.

A. Case Law Concerning the Single, Open-Record Hearing Rule in State Law.

At the conclusion of the hearing, you invited us to present case law citation in support of our position that the Special Use Permit ("SUP") hearing could not be simply "frozen" or put on hold intact, while a remanded SEPA threshold determination was processed, reissued and possibly appealed.² It is our position that a remand of the SEPA MDNS voids the MDNS and without it, there is no basis to hold a hearing on the underlying permit, which is based on that particular MDNS. This approach is consistent with the holding in *Puyallup v. Pierce County*.³ Thus, the SUP hearing could not simply be put in a frozen state and revived when a new MDNS is issued, with limited testimony on how the new MDNS affects the SUP. In other words, the entire SUP proceeding is stale, moot and does not relate to a matter in front of the Hearing Examiner when the MDNS is voided. This is a jurisdictional question.

¹ Wallace Groda, who is not our client but was a witness in our case, submitted his own list of proposed conditions at Exhibit 49, S-16.

² To be clear, our statement of position has been in the context of a party opposing the proposed conditions of approval for the Special Use Permit and not as an intervenor party the SEPA appeal; our motion to intervene was denied at the outset of the proceeding based on the applicant's objection.

³ This case is distinguishable from the circumstances decided in *Pierce*, where the court determined that the voiding of an MDNS did not void decisions or process that were not dependent on that MDNS. *City of Puyallup v. Pierce Cnty.*, 500 P.3d 216, 220 (Wash. App. 2021) ("Decisions based on a void determination are also void. See *King County v. Wash. State Boundary Review Bd.*, 122 Wash.2d 648, 667, 860 P.2d 1024 (1993)." *Id.*

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There is case law disfavoring the bi-furcation of SEPA appeals from the open record hearing on the underlying permit action, e.g., a conditional use permit decision. Our supreme court overturned a local decision by Kittitas County because the County held a closed record SEPA appeal but then separately held an open record hearing on a conditional use permit. *Ellensburg Cement Prod., Inc. v. Kittitas County, et al.*, 179 W.2d 737, 317 P.3d 1037 (2014). The court held that RCW 36.70B.010(2) and RCW 43.21C.075(3)(b) read together require the county to “consolidate an appeal of [SEPA] determinations ... with a hearing or appeal on the underlying governmental action by providing for a *single simultaneous hearing*,” RCW 43.21C.075(3)(b) (emphasis added). *Id.* at 1043 (emphasis in the court's decision).⁴

The remand of the SEPA MDNS remand poses the same problems confronted earlier in this case. The Hearing Examiner considered the risk of possible violations of the single simultaneous hearing rule in RCW 36.70B.010(2) and RCW 43.21C.075(3)(b), i.e., if evidence and testimony in the SEPA appeal are bifurcated from the evidence and testimony on the underlying permit, and members of the public are not afforded the opportunity at open hearing to comment on expert testimony brought up only in the SEPA appeal portion of the case. That problem arises in part because the SUP conditions expressly incorporate the SEPA MDNS conditions.⁵ The violations of law occur if the SEPA MDNS conditions are crafted based on a record that is not available in the public permit hearing proceeding, and then introduced into the permit decision by incorporating the separate MDNS conditions as underpinning for the project compliance with permit code requirements.

There would be obvious savings to the County by not having to repeat the SUP hearing simply because the SEPA determination is remanded. The intertwining of the SEPA decision with the SUP decision make that desired savings problematic in terms of state law and policy.

B. Proposed Special Use Permit Conditions.

In addition to the conditions proposed in the Staff Report, Exhibit , at _____, Cougar Peak LLC and the McLeod family propose the following conditions or revisions to staff-proposed conditions:

1. Prior to commencing operations, the applicant is required to file a certificate of compliance with the Hearing Examiner demonstrating completion of the following.
 - (a) The applicant shall install and maintain automatic traffic counters at the mine entrance to and from Grip Road and provide Skagit County monthly printouts of all traffic entering and exiting the mine, indicating time of day, type of vehicle and whether loaded or unloaded;
 - (b) Acquisition of right-of-way and construction of road widening and striping at any curve or corner on Grip Road to the standard shown on Figure B-6 of the County adopted Road Standards (Exhibit 18); the applicant shall obtain the written approval of the County Road Engineer for plan approvals, construction methods, and

⁴ The court imagined a circumstance not in the record in which a simultaneous SEPA appeal and permit hearing are held, offering dicta suggesting that the hearings and decisions could be held “in sequence.” *Id.* at 1043-44. However, the court was not confronting the obvious difficulties encountered in the current case before this Hearing Examiner – issues sorted out in a number of prehearing discussions and in side bars with counsel for the parties at hearing.

⁵ During the hearing, all parties and the Hearing Examiner affirmed that the MDNS conditions would be binding on the operation and would be incorporated as Special Use Permit conditions.

inspection of completed construction, which shall become exhibits to the record in this proceeding;

Nothing in this condition prevents the applicant from negotiating payment of a proportionate share of costs for the improvements to be completed prior to operation of the mine. This permit may be extended for twelve months in the event the applicant and the county have not reached agreement, provided regular monthly negotiations are continuing to identify road improvements and cost allocations.

2. The mine operation is limited to ingress and egress of trucks or truck/trailer combinations capable of transporting sand, rock or gravel from the mine in the amount of 11,900 trips per calendar year total (ingress and egress) (prorated in the year that operations commence). The average of 46 trips per day shall be determined based on this annual average (or prorated annual average in the first year of operation).
3. For extended hours, no more than six truck trips per hour are authorized (one every 10 minutes). The applicant's intended operation up to 30 trips per hour shall be authorized by the Directors of Public Works and PDS under "extended circumstances" only on rare occasions for periods of time not to last more than two hours per approval, not to exceed ten events per calendar year. In the event of emergencies, deliveries at that rate up to four hours per approval may be authorized based on a written statement of the emergency and the phone and email contact information for the contact person at the city, county, agency or public district requesting the emergency response. The trips for "extended circumstances" shall be counted against the limit on annual trips per year.
3. Between the weekday hours of 7:00 a.m. and 5:00 p.m., none of the truck or truck/trailer traffic capable of transporting sand, rock or gravel shall utilize any portion of Grip Road east or west of the mine during the time any private or public school bus is present on Grip Road on a regular schedule. For purposes of this condition and unless otherwise verified by the applicant based on published school bus schedules, it is assumed the school buses will be utilizing Grip Road between the hours of 6:45 a.m. and 9:00 a.m. and between the hours of 2:45 p.m. and 4:15 p.m (Exhibit 49, S-9).
4. The mine operator shall monitor truck or truck/trailer combination access to and from the Grip Road mine and adopt measures ensuring that no more than two trucks or combinations are present on any portion of Grip Road at any one time.
5. Within six months and prior to operation of the mine the Public Works Director shall conduct a study of speed limit safety on Grip Road, mail notice of the study availability for public comment to each taxpayer of record on Grip Road and Lillian Lane, and thereafter consider the reduction in posted speed limits by class of vehicle to 25 miles per hour in areas of driveways and school bus stops.
6. On portions not already being improved under Condition No. 1, above, the applicant shall widen driveway entrances on Grip Road within the Right of Way with a gravel or asphalt apron and culvert to standards approved by the Director of Public Works, if requested in writing by the driveway landowners.

Our post-hearing brief will outline why the law requires conditions necessary to bring the proposed operation in line with Skagit County's adopted standards for mining proposals. As you know, we are of the firm conviction that those standards require protection of public safety on Grip Road in rural Skagit County. We also are confident that Skagit County ordinances grant you the authority to impose these conditions.

In our view, the record now contains substantial evidence to support your use of that authority as proposed here. That record includes the lack of Grip Road traffic safety analysis by the applicant; the narrowness of existing roadway widths; the proposed type of vehicles and frequency which increase the frequency of potential encounters resulting in high risk of injury or death to school children and local residents.

Thank you for considering the above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'TE', with a long horizontal flourish extending to the right.

Tom Ehrlichman

cc: Counsel for all Parties
Mr. Neal McLeod, Cougar Peak, LLC