BEFORE THE HEARING EXAMINER FOR SKAGIT COUNTY

RE: APPEAL OF DETERMINATION OF NEED TO COMPLETE STANDARD CRITICAL AREAS REVIEW

MILES SAND & GRAVEL COMPANY and CONCRETE NOR'WEST,
Appellant,

v.

SKAGIT COUNTY,
Respondent.

APPEAL NO. PL21-0348

Application Nos.
PL16-0097 & PL16-0098

RESPONSE TO APPEAL

Skagit County respectfully submits this Response to Miles Sand & Gravel's and Concrete Nor'West's (collectively "MSG") appeal of the decision by Skagit County Planning and Development Services that standard critical areas review must be completed. The County respectfully requests the Hearing Examiner deny this appeal.

1. INTRODUCTION

MSG wants to convert 68-acres of forestland into a gravel mine.[1] This mine would be sited along the Samish River in one corner of 726 acres of contiguous ownership by MSG.[2] It is anticipated that the mine will operate for a quarter century as MSG removes about 4.3 million cubic yards of sand and gravel from the site.[3]

[1] Application for Special Use Permit, attached as Exhibit 1.

[2] Amended Special Use Narrative at 1, attached as Exhibit 4.

[3] *Id.*

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To convert this corner of forestland, MSG must use its two-mile private road to transport employees, equipment, and minerals. Previously used as a forest road, this road is being converted to a mining road that will see 46 trucks traverse it every day,[4] but at the high end there could be 294 trucks every day, or a truck about every two minutes.[5]

These mining operations—which necessarily include the converted haul road—constitute a "development activity" under the Critical Areas Ordinance.[6] Standard critical areas review is necessary.[7] Although a critical area review occurred for the mine itself, it has not occurred for the haul road.[8] As such the County withdrew the Second MDNS prior to end of the time to appeal[9] and issued a Determination of Need to Complete Standard Critical Areas Review ("Determination of Need").[10]

MSG appeals this decision.[11] MSG asks for this decision to be reversed and that "the application be again deemed complete and processed."[12] MSG believes it's entitles to this relief under the Hearing Examiner's previous decision on summary judgment[13] and, if not, because the haul road is not governed by the Critical Areas Ordinance or is exempted from standard review.[14]

These arguments fail. The Hearing Examiner lacks authority to provide the relief sought because the application cannot be heard on the merits without a threshold determination under SEPA. MSG has missed their opportunity to enforce the order and as such has waived its right to enforce the order. Furthermore, the Code is clear that the haul road, as part of the proposed development activity, does not escape the requirements of the Critical Areas Ordinance.

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[4] TRAFFIC IMPACT ANALYSIS FOR GRIP ROAD MINE 13, Gary A. Norris, DN Traffic Consultants (Sept. 10, 2020), attached as Exhibit 6.

[5] See *Id.*

[6] Chapter 14.24 SCC.

[7] SCC 14.24.060.

[8] See Exh. A to Appeal, Determination of Need to Complete Standard Critical Areas Review ("Critical Areas Standard Review has not been completed as to the whole of the proposed mine's operations.").

[9] Notice of Withdrawn Mitigated Determination of Nonsignificance, attached as Exhibit 8.

[10] Exh. A to Appeal.

[11] Appeal Letter at 1.

[12] Appeal Letter at 2.

[13] Exb. B to Appeal at 1–3.

[14] Exb. B to Appeal at 4–7.

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2. QUESTIONS ON APPEAL

1. Does the Hearing Examiner's Order on Summary Judgment preclude the decision that standard review is necessary given the current status of this matter?

2. Is the use of the haul road part of the overall development activity of the proposed mine and thus subject to the Critical Areas Ordinance?

3. JURISDICTION OF THE HEARING EXAMINER

The Determination of Need to Complete Standard Critical Areas Review is a Level I decision under SCC 12.06.050(1)(a)(xii), which is subject to appeal to the Hearing Examiner under SCC 14.24.730, SCC 14.06.110(7), and SCC 14.06.160.

4. STANDARD OF REVIEW

MSG "bear[s] the burden of demonstrating that the decision of the Administrative Official is clearly erroneous."[15] To find the County's decision clearly erroneous, the Hearing Examiner must be "left with the definite and firm conviction that a mistake has been committed."[16]

5. HISTORY OF CASE

MSG initially filed its application for a special use permit on March 7, 2016.[17] On March 22, 2016, PDS determined the application to be complete, and the matter was set for a hearing before the Hearing Examiner on December 7, 2016. Prior to that hearing it was discovered that notice of the application has not been provided to everyone entitled to notice. As a result that hearing was continued.

After giving proper notice, the County received numerous comments and determined that additional information was needed. Additional information was provided, but the County and MSG disagreed on the sufficiency of that information and the County ultimately denied the application for lack of information.[18] MSG successfully appealed. On October 17, 2019, the Hearing Examiner issued an Order Denying County's Motion for Summary Judgment, Granting Judgment to Appellants, and Ordering

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[15] SCC 14.06.160(3)(a).

[16] *Lauer v. Pierce County*, 173 Wn.2d 242, 253 (2011) (quoting *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 829 (2011)).

[17] See Exh. 1; Order Denying County's Motion for Summary Judgment, Granting Judgment to Appellants, and Ordering Further Permit Processing [hereinafter "Order on Summary Judgment"] at 1.

[18] Order on Summary Judgment at 2.

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Further Permit Processing ("Order on Summary Judgment"), which "conclude[d] that the case should move forward, with the application being evaluated on the bases of the submissions made to date."[19] Notwithstanding the Hearing Examiner's order, MSG continued to provide additional information, mostly related to traffic.[20]

On April 15, 2021, PDS issued a Notice of Withdrawal and Re-Issued MDNS ("Second MDNS").[21] The reason for this decision was "because it was discovered that some of the parties of record were not notified of the original MDNS."[22] This document also stated that PDS would not act on the proposal for 15 days, that comments were due by close of business on April 30, and that appeals had to be filed by May 14, 2021.

During that comment period, numerous comments were received.[23]. A large number of these comments addressed the fact that critical areas review had been only for the 63 acre mine site and specifically noting the presence of critical areas along the haul road, including Swede Creek.[24] No appeal was filed regarding the withdraw of the MDNS or the threshold determination.

On May 11, 2021, notice was given that the Second MDNS was being withdrawn on May 13, 2021.[25] Then on June 17, 2021, PDS issued the Determination of Need to Complete Standard Critical Areas Review. This document was a determination under SCC 14.24.080 and that

> Critical Areas Standard Review has not been completed as to the whole of the proposed mine's operations. In particular, the use of the haul road to transport minerals from the proposed mine.

The Determination of Need stated that the County had completed a site visit and "determined the likelihood of the presence of steep slopes, wetlands within 300 feet, and stream areas with 200 feet of the proposal." This decision is the subject of this appeal.

6. ARGUMENT

MSG's appeal must be denied. The County's decision to require the critical areas review was not clearly erroneous. MSG is unable to enforce the

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[19] Order on Summary Judgment at 2.

[20] Letter from John Semrau to Michael Cerbone (October 8, 2020), attached as Exhibit 5 (responding to request for information in later July 2020).

[21] Attached as Exhibit 7.

[22] Exh. 7 at 1.

[23] Attached as Exhibit 9.

[24] See Exh. 9.

[25] Exh. 8.

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Hearing Examiner's order because they waited too long to do so. Without a threshold determination the application cannot be brought before the Hearing Examiner for a decision on the merits. And the withdrawal of the threshold determination was not appealed. By waiting until now, after such a significant change and providing additional information, MSG has waived its ability to enforce the Order on Summary Judgment. Moreover, critical areas review is not preempted and applies to the conversion of forest land to mining, which includes the use of the haul road in this matter, and is not otherwise exempt from standard review.

6.1. The Order on Summary Judgment, given the current status of this matter, does not prevent the County from requiring standard critical areas review.

MSG's primary basis for appeal is that the parties are bound by the Order on Summary Judgment.[26] Yet this decision does not justify reversing the decision to require critical areas review. The decision to require critical areas review is a direct result of the withdrawal of the first MDNS—which MSG had no expectation would be identical to the 2016 MDNS. The application cannot be heard on the merits without a threshold determination. The Hearing Examiner, given the appeal brought, cannot change this. Moreover, MSG waived it ability to enforce the agreement when it failed to act prior to preserve the ability of the application to be heard on the merits.

6.1.1. The Hearing Examiner lacks the authority to provide MSG the relief they seek.

MSG's requests the Determination of Need "be reversed and the application be again deemed complete and processed."[27] But the Hearing Examiner lacks the authority to do so because the appeal is limited to the administrative official's decision that was appealed.[28] Even if there is a legal basis for the Hearing Examiner to overturn the County's decision to require standard review, the application is not in a position to be heard on the merits without a threshold determination. To grant the relief requested the Hearing Examiner would have to review the unappealed decision to withdraw the threshold determinations. Consequently, the Hearing Examiner is without authority to grant the relief sought by MSG.

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[26] Exh. B to Appeal at 1–3.

[27] Letter from William Lynn to Hearing Examiner [hereafter "Appeal Letter"] (June 24, 2021) at 2 (appealing decision).

[28] See SCC 14.06.110(7)–(13).

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The withdrawal of the threshold determination significantly affects MSG's ability to enforce the Order on Summary Judgment at this time. A necessary premise of the Order was the existence of sufficient information to hear the application on the merits.[29] That is no longer the case because the threshold determinations were withdrawn.[30]

The threshold determination was withdrawn and reissued on April 15, 2021.[31] This withdrawal and reissue correct the fact that some of the parties of record were given proper notice of original MDNS.[32] Notably, this MDNS *was not* a facsimile of the original MDNS. For starts it reflected the substantial amount of information received since the original MDNS. This new and additional information included information provided by MSG after the Hearing Examiner's decision.[33] Unsurprisingly, the Second MDNS also included additional mitigating conditions.[34]

Once the MDNS was withdrawn, MSG had absolutely no expectations that the outcome be identical to the original MDNS. Yet MSG did not appeal the decisions to withdraw the threshold determinations. The decision to withdrawal the MDNS was an administrative decision, since it was a decision involving the applicability of specific law[35] that was not subject to additional discretionary review.[36] Thus it would appealable as a Level I Decision.[37] Yet there was no appeal of this decision. Had the Appellants wanted to enforce the decision, that would have been the opportunity to do so because a successful challenge would have preserved the application in a position where it could be heard on the merits.

MSG has appealed the decision that critical areas standard review is necessary for the whole of the mine's whole operation, and that review has not occurred as to the haul road. The Hearing Examiner's jurisdiction in this matter is whether this decision is clearly erroneous.[38] Therefore, the Hearing Examiner is not empowered to consider another prior unappealed decision.[39]

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[29] Order on Summary Judgment at 2.

[30] See SCC 14.06.120(5).

[31] Exh. 7 at 1.

[32] *Id.*

[33] See Exh. 5; Exh. 7.

[34] Compare Exh. 3 at 1, with Exh. 7 at 3–4 (listing traffic analysis documents received after the Order on Summary Judgment and including conditions 9–15).

[35] Specifically, the decision to withdraw concerns SCC 16.12.070 (incorporating WAC 197-11-340(3)(a) concerning the withdrawal of a DNS);

[36] SCC 14.06.040(4).

[37] SCC 14.06.050(1)(a)(xii).

[38] SCC 14.06.160(3)(a).

[39] See Exb. B to Appeal at 2–3 (discussing the rule of finality).

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6.1.2. MSG waived its ability to enforce the Summary Judgment Order by failing to do so earlier.

The doctrine of waiver applies to rights to which a party is legally entitled.[40] A right can be waived by the intentional and voluntary relinquishment of that right, and this waiver may be inferred from circumstances indicating an intent to waive.[41]

MSG certainly had a right to enforce the Order on Summary Judgement. But until this appeal that was not the decision MSG made. The decision of MSG to not attempt to enforce the Order until now provides a clear inference of their intent to waive their right to enforce the Order. In particular, MSG did not seek to enforce the Order when the County requested additional information. Nor did MSG attempt to enforce the order when the threshold determinations were withdrawn.

6.2. Chapter 14.24 of the Skagit County Code applies to the haul road and requires standard critical areas review.

The Skagit County Critical Areas Ordinance ("CAO"), chapter 14.24 SCC, applies to "to any land use or development under County jurisdiction within the geographical areas that meet the definitions and criteria for critical areas regulation as set forth" in the CAO.[42] Forest practices are generally outside the County's jurisdiction.[43] Standard review and written authorization is required, unless specifically exempted, for "any land use activity that can impair the functions and values of critical areas or their buffers, including suspect or known geologically hazardous areas, through a development activity or by disturbance of the soil or water, and/or by removal of, or damage to, existing vegetation".[44] As relevant here, use and maintenance of a road associated with a pre-existing commercial use is exempted from standard review.

Here, the haul road, as part of the mine operations, is subject to the Critical Areas Ordinance and standard review is required. The Forest Practices Act does not preempt the County's authority because the development activity is a conversion of forest land. The haul road is part of the overall development activity. And the road is not exempted from standard review because it is not associated with a pre-existing commercial use.

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[40] *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409 (2011) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954)).

[41] *Id.*

[42] SCC 14.24.040(a).

[43] See RCW 76.09.240.

[44] SCC 14.24.060.

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6.2.1. The County's regulation of the haul road as part of the mining operations is not preempted by the Forest Practices Act.

The Forest Practices Act generally preempts local authority over forest practices.[45] But state law specifically exempts local land use and development regulations if: (1) the forest permit application states there will be a conversion; (2) there is "no permit system solely for forest practices"; (3) they are not inconsistent with the Forest Practices Act and its regulations; and (4) they do "not unreasonably prevent timber harvesting"."[46]

In this matter we have a clear conversion and the application of the Critical Areas Ordinance in this matter is not a permit system solely for forest practices, is not inconsistent with the Forest Practices Act, and does not prevent timber harvesting. In fact, Skagit County is *required* by the Forest Practices Act to regulate "[f]orest practices classified as Class IV, outside urban growth areas …, involving either timber harvest or road construction, or both on … Forestlands that are being converted to another use".[47] These regulations are required to "protect critical areas" under the Growth Management Act.[48] The Forest Practices Act does not apply when the development activity is a conversion of forest land.

The County is not attempting to regulate any forest practices in this matter, but rather apply its Critical Area Ordinance to development activity that constitutes a conversion of forest land.

MSG points to the definition forest practices as provided in the RCW 76.09.020(17)(a).[49] But this definition alone does not define the County's authority in this matter because the development activity here is a conversion of forest land—and there is no dispute that the mine operations constitute a conversion. As noted above the Forest Practices Act specifically provides for county authority where forest land is being converted. This is reflected in the definition of Forest Practices contain in the County Code, which mirrors the RCW's language but specifically excludes conversions.[50]

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[45] RCW 76.09.240(6).

[46] RCW 76.09.240(6)(a).

[47] RCW 76.09.240(1)(a)(ii)(A).

[48] RCW 76.09.240(2). Notably, DNR is prohibited from regulating such activites. RCW 76.09.240(3).

[49] Exh. B to Appeal at 4.

[50] SCC 14.04.020.

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A. Hauling minerals is not a forest activity.

The hauling of minerals for this gravel pit is not a forest activity. A "forest road" is defined as a road used for "forest practice", which in turn is defined as "any activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber, or removing forest biomass…."[51] Mining operations are not included in this definition.[52]

MSG points to the fact that the definition of "development" does not include "activities meeting the definition of forest practices" and "internal logging roads".[53] But the proper definition to judge this by in contained in the Code and it specifically excludes conversions, which is clearly what is occurring in the development of a gravel mine. Furthermore, because of this conversion, the roads are no longer simply internal logging roads but are mining haul road associated with the mining operations.

6.2.2. The use and maintenance of the road to haul minerals from the gravel mine constitutes a "development activity" under SCC 14.24.060.

The development activity is the mine itself, and this activity includes the use of the haul road. It is inappropriate to consider the use of the road by itself. Standard critical areas review is for the "development activity" and not the individual components of the development activity.

MSG's argument is premised on the definition of the word "development."[54] It argues based on that definition that it does not include the use and maintenance of the road because it is a forest practice[55] and otherwise does not satisfy the definition of development because the use maintenance of the road for mining operations would not include alteration to structures, dredging, drilling, dumping, etc.[56] This argument fails because it focuses on the road itself and not the full development activity.

The correct analysis is not to look at a component of the mine's operations to determine whether it is a development, but whether it is part of the overall development activity. This is because Section 14.26.060 does not limit the applicability to "developments" alone, but to "development

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[51] WAC 222-16-010.

[52] RCW 78.44.031(8) (including transporting minerals as mine operations).

[53] Exb. B to Appeal at 4. (quoting SCC 14.04.020).

[54] *Id.*

[55] See supra § 6.2.1.

[56] Exh. B to Appeal at 4.

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activities." "Development activity" is not directly defined by the Code,[57] but its usage does provide evidence of its definition. In particular, Section 14.24.070 provides a list of "developments, land use activities and associated uses [that] are allowed without critical areas review." If development activities was co-extensive with developments there would be no need for the Code to include "land use activities and associated uses" in describing the nature of acts that are exempt. Clearly development activities includes not only "developments" as defined by the Code, but also its associated uses, such a haul road for mining operations.

6.2.3. The use and maintenance of the road to haul minerals from the mine is not a pre-existing commercial usage and thus not exempt under SCC 14.24.070(3) because it.

MSG asserts that if the Critical Areas Ordinance did apply, under SCC 14.24.070(3) the haul road is specifically exempted from standard review as a pre-existing commercial use.[58] Section 14.24.070(3) provides that standard review is not required for "[n]ormal and routine maintenance or repair of … private roads … associated with pre-existing … commercial development". Notably, this exemption is only for standard review and the landowner has obligations under the critical areas ordinance.[59]

To begin with, there is no associated pre-existing commercial development as no mine current exists. To be sure, MSG's view is that logging is the pre-existing commercial activity. But this view is fatally flawed. The Code requires a direct link between the use and maintenance of the road and the existing commercial development. Here, the use and maintenance of the haul road for mining operations has absolutely no association with the forest activities. This requirement of a direct relationship reflects the broad application of the Critical Areas Ordinance while also recognizes that once critical areas review has occurred there is not a need for continual review for the associated uses that were authorized.

That is to say, this exception presumes any necessary standard review occurred by the development existed in the first instance. The pre-existing development was authorized with normal and routine maintenance or repair taken into account. This is evident in the obligations that exist where the exception applies; a landowner would be unable to satisfy their duty if the

[57] This phrase does have a definition in SCC 14.04.020, but that definition is limited to chapter 14.30 SCC.

[58] Exh. B to Appeal at 3.

[59] SCC 14.24.070(3).

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critical areas were unknown in the first instance. That is not the case here. Standard review has never occurred.

A. MSG has conceded that they seek more than simply normal and routine maintenance or repair of the haul road.

MSG acknowledges that in preparation of anticipated mining operations that they are engaging in improvements to the haul road.[60] This is more than is required for continued use and maintenance of road for forest practices but is solely to enable its use as part of mining operations. It is the County's understanding that this would occur within 200 feet of Swede Creek, which is indisputably a critical area. This alone requires standard critical areas review.

7. CONCLUSION

For the above reason, the Hearing Examiner should deny the appeal.

DATED this 28th day of July, 2021.

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[60] Exh. B to Appeal at 4 (noting "the only activity potentially planned for the road is the paving of a single, short section where the grade is greater than 12%.")

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