

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2012-0002
Administrative Appeal) APL2012-0008
Application by)
)
Lummi Rock, L.L.C., Appellant) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEALS AND DECISION

Appeals: The Appellant, Lummi Rock, has appealed a Stop Work Order pursuant to the Whatcom County Zoning Ordinance, WCC, Title 20, and a separate Appeal of two Stop Work Orders, a Notice of Violation, and Monetary Penalties, issued pursuant to the Whatcom County Shoreline Management Program, WCC, Title 23.

Decision: Lummi Rock, LLC and Whatcom County Planning and Development Services are to comply with the Hearing Examiner's Decisions as set forth in the Conclusions of Law herein.

FINDINGS OF FACT

I.

Open Record Hearing: October 17, 2012

Parties of Record:

Lummi Rock, L.L.C.
c/o Lesa Starkenburg-Kroontje
PO Box 231
Lynden, WA 98264

Tyler Schroeder, Bryan Sehmel, Douglas Goldthorp
Planning and Development Services

Royce Buckingham
Civil Deputy Prosecutor

Meredith Moench
The Lummi Island Conservancy
PO Box 213
Lummi Island, WA 98262

Leslie Martin Dempsey
1109 Beach Avenue
Lummi Island, WA 98262

Jeffrey Otis
Otis Land Use Consulting
393 Bobbyann Road
Eastsound, WA 98245

Janice Holmes
2722 West Shore Drive
Lummi Island, WA 98262

Exhibits

- 1 Staff Report, October 4, 2012, with attachments
 - 1-1 Appendix A, pages A-1 thru A-6: Cover Letter, Feb 9, 2012, from Lesa Starkenburg; Admin Appeal Application APL2012-0002, Feb 9, 2012; Statement of Appeal; Stop Work Order #1, Jan 31, 2012; Customer Receipt, Feb 9, 2012;

Pages A-7 thru A-14: Admin Appeal Application APL2012-0008, June 18, 2012; Statement of Appeal; Customer Receipt, June 18, 2012; Stop Work Order #2, June 4, 2012; Stop Work Order #3, June 4, 2012; Notice of Violation, June 4, 2012;

Page A-15: Cover Letter, Aug 24, 2012, from Lesa Starkenburg-Kroontje re: Notice of Appeal to Whatcom County Council to Review an Administrative Decision, Aug 24, 2012 [A-16], w/ Statement for Appeal [A-17] and Notice of Penalty, SMP, July 23, 2012 [A-18]; Notice of Violation, Nov 23, 2011[A-24]; Procedures for Conducting Pre/Post-Deprivation Hearings [A-26]
 - 1-2 Appendix B, pages B-1/2: Notice of Violations, Dec 22, 2010; B-3/4, Letter, from Lesa Starkenburg-Kroontje, Oct 6, 2011, re: dismissal of appeal; B-9, Letter, Nov 23, 2011 re: Unpermitted Shoreline

Developments; B-13: Letter, Dec 30, 2011, from Lesa Starkenburg-Kroontje re: PDS requested applications; B-15: PDS Letter, Jan 19, 2012 re: Required corrective actions; B-19: Notice of Withdrawal of Revised SEPA DNS, SEP2011-0060, January 19, 2011; B-21: PDS Letter, Dec 22, 2010, Notice of Violations; B-23: Starkenburg-Kroontje Ltr, Oct 6, 2011, re: pending appeal of Notice of Violation, Dec 22, 2010; B-29: Starkenburg-Kroontje Ltr, Jan 20, 2012 re: request pre-deprivation hearing; B-31: Starkenburg-Kroontje Ltr, Jan 30, 2012 re: response to County statements in ltr, dated Jan 19, 2012; B-35: PDS Ltr, Jan 31, 2012 re: response to admin pre-deprivation hearing; B-43: Starkenbur-Kroontje Ltr, Feb 2, 2012, re: request for post-deprivation hearing; B-45: Starkenburg-Kroontje ltr, Feb 10, 2012, re: proposed limited access exemption; B-47: Starkenburg-Kroontje ltr, Feb 27, 2012 re: clarification on PDS direction & requirements; B-53: PDS ltr, Mar 22, 2012 re: response to admin post-deprivation hearing; B-55: PDS ltr, Feb 16, 2012 re: proposed amendment to ADM2007-0022; B-57: PDS ltr, Mar 26, 2012 re: revision to letter dated Feb 16, 2012; B-59: PDS ltr, June 4, 2012 re: outstanding corrective actions; B-75: Starkenbur-Kroontje ltr June 8, 2012, re: request for pre-deprivation meeting; B-87: Starkenburg-Kroontje ltr June 25, 2012 re: ENF2011-0117; B-90:PDS ltr, Jan 26, 2012 re: Determination Completeness, SHR2012-0002 / SHC2012-0003; B-91:PDS ltr Nov 23, 2011, re:Unpermitted Shoreline Developments; B-96 Lummi Rock Fax Cover Sheet w/ Hydraulic Project Approval, Lummi Rock Pile Replacement, Feb 28, 2006 to Jan 31, 2007; B-107: PDS ltr March 9, 1999 re: legal nonconforming status for 10 existing moorage dolphins; B-109: Sehmel email to Starkenburg, Jun 28, 2012 re: delay in Stop Work Order decisions; B-111: Sehmel email, July 5, 2012 re: update on Lummi Rock; B-113: PDS (2) ltrs, July 23, 2012 re: decision on final pre-deprivation hearing; B-127: Starkenburg-Kroontje ltr, July 27, 2012 re: response to PDS (2) ltrs, July 23, 2012; B-129: Sehmel email to Starkenburg, July 31, 2012 re: Post dep hearing request; B-131: Starkenburg-Kroontje cover ltr, July 27, 2012 re: ENF2011-0117 attachments; B-135: Starkenburg-Kroontje letter, Aug 6, 2012 to Sam Ryan re: attached notes for reference

- 1-3 Appendix C: Pages C-1 thru C-43, Site Photos
- 1-4 Appendix D: Pages D-1 thru D-33, Aerial Site Photos/Maps
- 1-5 Appendix E: Page E-1, PDS Case Activities for SHX99-0014; E-3, Exemption from Shoreline Management Program, Shoreline Substantial Development Permit Requirement, SHX99-0014, March 9, 1999; E-11, Hydraulic Project Approval, issued Feb 24, 1999

- 2 Legal Notice of Open Record Hearing, October 4, 2012
- 3 Staff and Applicant email correspondence re: scheduling
- 4 Email requests for Notice of Open Record Hearing
- 5 Letter dated Oct 11, 2012, from Leslie Martin Dempsey in support of Whatcom County enforcement
- 6 Letter, dated Oct 11, 2012, from Janice Holmes in support of Whatcom County's findings of violations
- 7 Comments, dated Oct 12, 2012, from The Lummi Island Conservancy re: support of Whatcom County, enforcement actions, with the following color attachments:
 - Attachment A: legend identifying Forage Fish
 - Attachment B: Photos Conveyor Loading at Pier (2)
 - Attachment C: Photos Dust release-barge loading (2)
 - Attachment D: Accessory Moorage photos, Mar 6, 2010 and Sept 1, 2008
 - Attachment E: Accessory Moorage photos, Mar 8, 2012 and July 30, 2011
 - Attachment F: Oil and Sediment photos, Feb 27, 2012 and March 24, 2011
 - Attachment G: Sediment photo, April 6, 2011
- 8 Comments from Otis Land Use Consulting, dated Oct 12, 2012 re: Lummi Rock Appeal of Stop Work Orders, with attachments:
 - 8-1 Otis Land Use Consulting, Letter, dated Feb 13, 2012 re: Lummi Rock Barge Conveyor Project
 - 8-2 Whatcom County Hearing Examiner Decision, Administrative Appeal of Quarry Committee of Lummi Island, APL97-0003 / APL96-0004, dated July 30, 1997
 - 8-3 Whatcom County Planning and Development Services Administrative Approval Use Permit Decision for Lummi Rock, LLC, ADM2007-0022, dated Dec 19, 2007
- 9 Email Comments from Linde Risdon, Oct 14, 2012, re: Lummi Rock Stop Work Orders
- 10 Email Comments from Steven Beatty, Oct 14, 2012, re: Lummi Is Quarry
- 11 Lummi Rock Hearing Brief [3-ring white binder], prepared by Lesa Starkenburg-Kroontje, dated October 15, 2012, with attachments:
 - 11-1: Lummi Island Quarry Operators, chronology 1950 to present
 - 11-2: Whatcom County Hearing Examiner Decision, Admin Appeal of Quarry Committee of Lummi Is, APL97-0003/APL96-0004, July 30, 1997

- 11-3: Whatcom County Agenda Bill 1998-171C and Ord No. 98-082
 - 11-4: Declaration of Kyle Bride, Oct 11, 2012
 - 11-5: Declaration of David Grainger, Oct 12, 2012
(A) Hydraulic Project Approval, August 17, 2006; (B) Letter dated August 3, 2005 from Robert Martin to Jena Strachila re: replace mooring dolphins and missing and broken wood piles; (C) Storm Water Pollution Prevention Plan
 - 11-6: PDS Admin Approval Use Permit for Lummi Rock, ADM2007-0022, 12/19/07
 - 11-7: DNR Reclamation Plan for Lummi Island Quarry, March 15, 2007
 - 11-8: PDS SEPA Checklist, Mining Block 3, Lummi Is Quarry, 04/26/2007
 - 11-9: Letter, 02/10/12 from Lesa Starkenburg-Kroontje re: ENF2011-0117
 - 11-10: Proposal for Access, March 20, 2012
 - 11-11: GeoEngineers, October 12, 2012, Access Road Evaluation
 - 11-12: Letter, 08/24/2012 from Starkenburg-Kroontje to County Council re: ENF2011-00117
 - 11-13: PDS Letter, March 26, 2012 re: Revised Proposed Amendment to ADM2007-0022, Regulatory Analysis
- 12 Letter dated Dec 18, 2011 from Tammy and Jim Strong to Douglas Goldthorp re: rationale for allowing the movement and continued operation of the Lummi Island Quarry
 - 13 Declaration of David Grainger, dated October 15, 2012, with attachments:
 - 13-1 Email correspondence betw Chris Hatch, Aug 14, 2012, and Wayne Fitch and Bryan Sehmel re: Request and Authorization to stay one stop work order, email string dates beginning July 26, July 31, Aug 9, Aug 10, ending Aug 14, 2012
 - 14 Email, Oct 15, 2012 from Holly Bays re: Support for County's decision re: stop work orders
 - 15 Email, Letter Oct 15, 2012 from Hilary Croft re: Comments on Appeal of Stop Work Orders
 - 16 Certificate of Service, Kelsey Wemp, October 15, 2012
 - 17 Memorandum from Doug Goldthorp dated October 16, 2012 re: Access Rd
 - 18 Letter in Support of Whatcom County Stop Work Orders, 10/14/2012, by Kent Nielsen, with attachments:
 - 18-1: Attachment #1 LISE quarry monitor report
 - 18-2: Attachment #2 Aerial photograph of access road
 - 18-3: Attachment #3 Letter to Mr. Doug Goldthorp

- 19 Request from Meredith Moench, Lummi Is Conservancy to add attached photograph of oil sheen observed in vicinity of accessory moorage at Lummi Rock Quarry, dated May 7, 2012 to Exhibit 7, October 12 comments
- 20 Additional Comments from Meredith Moench, dated October 18, 2012, with attachments:
Page 3: Attachment A aerial photo of existing road on eastern edge
Page 4: Attachment B Site Plan GeoEngineers eastern rd alternative
Page 5: Attachment C Site Photo, 02/21/12 Sediment Discharge –turbidity
Page 6 -14: Memo from Meredith Moench, Oct 17, 2012 re: ownership
Page 15-17: Memo from Moench to Bobbink, Oct 18, 2012 re: Accessory Moorage [Stop Work Order No. 3: Usage
Page 18-25: Memo from Moench to Bobbink, Oct 18, 2012 re: Accessory Moorage [Stop Work Order, No. 3]
- 21 Letter from Lummi Island Conservancy dated Oct 19, 2012 from Meredith Moench re: additional comments
- 22 Comments from Steve Russell, dated Oct 22, 2012
- 23 Email Comments from Lisa Bride to Hearing Examiner, 10/19/2012
- 24 Comments from Howard Olson [not dated]
- 25 Memo dated Oct 22, 2012 from Doug Goldthorp to Michael Bobbink re: Additional Staff Comments
- 26 Post-Hearing Memorandum re: Deference to Agency and Burden of Proof, submitted by Royce Buckingham, October 25, 2012, with attached Declaration of Mailing, October 25, 2012 and *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wash.App.408 (2012) 255 P.3d 448, and *Sleasman v. City of Lacey*, 159 Wash.2d 639 (2007) 151 P.3d 990
- 27 Supplemental Brief, submitted by Lesa Starkenburg-Kroontje, 10/29/2012
- 28 The Hearing Examiner of the City of Bellingham, Rules of Practice, 10/29/2012 [submitted by Lesa Starkenburg-Kroontje]
- 29 Citizen's Guide to Hearing Examiner Services, City of Bellingham, December 2009 [submitted by Lesa Starkenburg-Kroontje]
- 30 Whatcom County's Post Hearing Memorandum Reply to Appellant, submitted by Royce Buckingham, November 1, 2012
- 31 Aerial photo with Scenic Estates Community plat map overlay and "red and

blue roads" highlighted

II.

Lummi Rock, LLC operates a shoreline rock quarry on the east side of Lummi Island and east of a large, small lot subdivision, known as Lummi Island Scenic Estates.

Lummi Rock currently conducts mining operations under an Administrative Permit Approval granted by Whatcom County under the file number ADM2007-000022. Quarry operations can be traced back to 1933 and more or less regular operations have taken place on the site since 1964 or 1965.

III.

Following Whatcom County Planning and Development Services [hereinafter, Planning] Administrative Approval of ADM2007-00022, potential problems with the quarry operations were brought to the attention of Planning and Planning Staff conducted a site inspection at the quarry in July 2010. Staff requested a survey of the site which was provided in October 2010, conducted a follow-up inspection on December 12, 2010, and issued a Notice of Violation on December 22, 2010, with a list of the following violations:

1. Inaccurate and misrepresentative site plans were submitted in application materials, which have led to an inaccurate authorization of ADM2007-00022.
2. Unpermitted surface mining defined by WCC 20.97.434 subject to the Washington State Surface Mining Act (SMA), RCW 78.44, and as regulated by WCC 20.73.130, has occurred outside the MRL boundary and permit area of ADM2007-00022, specifically identified as:
 - a. Substantial unpermitted rock excavation estimated on the order of 200,000 tons, and up to about 125 feet beyond the south MRL boundary and subject to the SMA, on Lummi Rock LLC property, APN 370124 191084.
 - b. Unpermitted rock excavation onto the neighboring property owned by Mr. Dale Granger, APN 370124 064062, beyond the MRL boundary and subject to the SMA.

- c. Unpermitted rock excavation to develop a service area on Lummi Rock LLC property, APN 370124 064212, beyond the west MRL boundary and subject to the SMA.
- d. Unpermitted ancillary surface mining activity, such as new road construction and use, service area construction and use, and vehicle and materials storage, beyond the west MRL boundary and subject to the SMA on Lummi Rock LLC property, APN 370124 065212.

Lummi Rock appealed the December 22, 2010, Notice of Violation. However, the Appeal was later withdrawn after Lummi Rock and Planning Staff reached an agreement under which Lummi Rock agreed to take certain corrective actions, including the submission of an application to revise the mining approval under ADM2007-00022. The violations noticed on December 22, 2010, are not before the Hearing Examiner. However, follow-up Stop Work Orders and Penalties were later issued and these included at least some of the violations from the 2010 Notice of Violation.

IV.

The Lummi Island quarry site is surrounded on all sides by properties zoned Rural Forest. The quarry access to public roads is accessed via Beach Avenue. The access point into the quarry is at its northwest [water side] corner. Beach Avenue runs through Lummi Island Scenic Estates. The quarry itself is buffered from Scenic Estates by large forested parcels to the west side of the quarry and the east side of Scenic Estates.

The Administrative Approval issued in 2007 expanded the existing quarry onto an adjacent 9.5-acre site to the west of the existing quarry and within the Mineral Resource Lands Overlay. The MRL Overlay covers about twenty acres and all the lands within this MRL area are subject to mining under current permits.

The Settlement Agreement between the County and Lummi Rock arising out of the December 2010 violations, included an agreement by Lummi Rock to

apply for a Revision to ADM 2007-00022 to relocate a road (unpermitted) being used to access the upper area of the rock quarry from the west to the east side of the quarry. This would increase the buffer between Lummi Island Scenic Estates and use of the road, minimizing impacts on the residents of Scenic Estates.

V.

On January 19, 2012, Planning issued a Notice of Intent to issue a Stop Work Order, a Notice of Penalty, and a Notice of Withdrawal of a revised SEPA DNS. Lummi Rock requested and was granted a pre-deprivation hearing. This hearing was held on January 30, 2012, and a decision on the pre-deprivation hearing was issued by Planning on January 31, 2012. The pre-deprivation hearing resulted in issuance of the Stop Work Order.

The January 31, 2012, Stop Work Order described the violation as:

“construction and use of an unpermitted and expanded access road, an expanded service and storage areas-ancillary to surface mining activity-beyond the western Mineral Resource Lands [MRL] boundary.”

The Stop Work Order indicated that the corrective action was:

Discontinue any and all use of the unpermitted road and service/storage areas. To achieve this, you shall physically restrict access to the road to make it impassable to vehicles. You shall propose a restriction method within ten days.

Lummi Rock appealed the issuance of the Stop Work Order and the matter is now before the Hearing Examiner as APL2012-0002.

VI.

In 2007, when the expansion of the quarry was approved administratively by Planning, the Administrative Approval Decision, stated in Finding of Fact No. II, as follows:

Access is proposed to continue through the existing location used by the owner's operators. Traffic frequency is not anticipated to increase, with approximately 10 percent of material used on the island, primarily for residential development, and the balance barged off-island to mainland markets.

As indicated above, there is an access road from the bottom of the site to the public road, Beach Avenue. This provides access for employees and equipment to the lower portion of the rock quarry and provides a haul road for the materials leaving the site to be used on the island.

The quarry had a ramp/dock structure prior to approval of ADM 2007-00022, which expanded the quarry site. Materials meant for off island markets were and are loaded onto barges and towed to off island delivery points.

The existing access road through the adjacent Rural Forest zoned parcel to the quarry has a fork in it within the Rural Forest zone, and two private roads fork off and continue through the parcel and access the upper one-third of the approved quarry extraction area. The roads accessing the upper quarry areas are best illustrated by Exhibit No. 31. At the hearing, they were described as the "red" road and the "blue" road, because of the color of the lines representing the roads as they appear on this exhibit. The Whatcom County Geologist, when approving the permit, apparently intended access to be limited to the single road which runs from the northwest corner of the quarry to Beach Avenue, and not to include use of either the "blue" or "red" road. It appears he was unaware of the historical use of the "blue" road.

The "blue" road has historically been used to access the upper portion of the quarry. The maps submitted with the application for the quarry expansion in 2007 included the "blue" road. A SEPA Checklist for the 2007 rock quarry expansion identifies two separate entrances to the rock quarry, presumably, the

one at the bottom of the quarry, which connects to Beach Avenue, and the "blue" road which was used to access the upper areas of the quarry.

What is known as the "red" road was widened and improved, after approval of ADM 2007-0022, in order to provide an additional access point to the highest reaches of the current boundaries of the rock quarry. According to Lummi Rock, this was done because an accident on the "blue" road raised safety concerns. The "red" road is the road that is the subject of the Stop Work Order, issued January 31, 2012. The "red" road was clearly not part of the 2007 permit application and the improvements to and the lengthening of the road took place a few years after the 2007 permit approval. Lummi Rock acknowledges that the work done on the "red" road and the use of the road as a mining service road were undertaken without permit review. Lummi Rock also concedes that a service and storage area, ancillary to surface mining activities, located in the Rural Forest zone, between the quarry and Scenic Estates, was recently expanded without permits.

VII.

Part of the agreement between Lummi Rock and the County relating to the Notice of Violation issued in 2010, included a proposal to allow access to the MRL from the east side of the quarry on a parcel zoned Rural Forest. Lummi Rock agreed to apply for a Revision to their Permit to allow construction and use of an eastern access road instead of the western roads ("red" and "blue") accessing the upper portions of the quarry. When the Stop Work Order and Notice of Violation were issued in January 31, 2012, Planning also gave Lummi Rock notice that they were placing on hold a pending application proposing expansion of the MRL. The application to expand the MRL to the east is still on hold. This expansion would increase the size of the MRL to the east and requires approval of a Map Amendment by the Whatcom County Council.

The agreement between Lummi Rock and Planning, which led to the withdrawal of the original Appeal of the Notice of Violation, dated December 22, 2010, anticipated that Lummi Rock would create a new access road in areas zoned Rural Forest to access the eastern side of the existing rock quarry, stating as follows:

“...to relocate the access to the east of the current utilized access. The owner will submit an amendment to AMD2007-00022 with forty-five (45) days to relocate the current utilized access, to correct site plans, location of access roads, location of shoreline infrastructure and documentation of associated permitting, machinery storage, service, storage and processing areas, and the location of property and MRL boundaries as defined by professional assessment.” [Exhibit No. 11, Lummi Rock’s Hearing Brief, at p. 6]

Lummi Rock failed to meet the agreed 45-day deadline to submit the Revision Request and Planning responded to the missed deadline and the ongoing use of the “red” road, by issuing the Stop Work Order, dated January 31, 2012.

During February and March 2012, Lummi Rock attempted to reach an agreement with Planning which would allow them to use the “red” access road and the equipment storage and staging area. Planning rejected these requests. After further review by the County Geologist, Lummi Rock was notified by a Staff letter, dated March 26, 2012, that Planning had concluded they do not have the authority to grant the requested ADM Revision to allow an access on the east side, stating as follows:

“As WCPDS examined the issues regarding the pending enforcement actions involving the western non-MRL surface mining road, it became apparent that we do not have the authority to grant a surface mining road anywhere outside the subject MRL, as has been discussed along the eastern side of the mine.” [Exh #11 at p. 8]

Planning has taken the position that, when necessary, one (and only one) access road connecting a mineral resource excavation site to the public roads is allowed outside of the boundary of the MRL Overlay. In this case, Planning has now concluded that the existing access road between Beach Avenue and the northwest corner (at the bottom) of the quarry site is the only road that can be allowed outside of the MRL. All other roads associated with mining activity must be located on a property included in the MRL Overlay. This conclusion would not allow Lummi Rock to use either the "red" or the "blue" roads and, further, would not allow a new road to access the rock quarry from the Rural Forest zoned parcels to the eastern boundary of the MRL.

Lummi Rock uses the "blue" and "red" roads to gain access to the upper part of the rock quarry for equipment and employees. They also now use the "red" road to move rock product consisting of large rock products from the top of the site, through the adjacent Rural Forest zoned parcels, to the lower access point to the quarry where it can then be loaded on barges for water transport off island. Much of the rock product produced on the upper portion of the site can safely be placed down an internal bank within the extraction site. Lummi Rock proposes limited use of the "red" road to allow them to truck the large rock product, that cannot be safely moved to the bottom of the quarry internally for loading and barging offsite, four days out of every thirty [30]days with hours limited to between 9 a.m. and 4 p.m.

The Lummi Rock quarry rises from the southern shoreline of Hale's Passage up a steep slope in an area surrounded by Rural Forest zoned parcels. Rural Forest zoned parcels separate the rock quarry from the residentially developed Scenic Estates. At this point in time, significant mining takes place on the upper levels of the quarry and Lummi Rock cannot move employees and machinery to these upper levels without use of an external access road such as the "blue" or "red" road, or a new road on the eastern side of the quarry. Because

of the steepness of the slope, and possibly because of prior decisions made by Lummi Rock, or its predecessors, in determining their mining plans, it is not possible to reach and mine the upper areas of the rock quarry without a second roadway outside of the MRL. Also, it is not possible to transport the large rock product produced on the upper portion of the site down to the loading pier, and then to market, without a road which accesses the upper portion of the quarry through an area outside of the MRL, and which reenters the MRL at the bottom of the quarry site, allowing access to the dock and barges.

In addition to requesting some use of the "red" haul road outside of the MRL boundaries, Lummi Rock is requesting limited use of the equipment storage and repair yard, also located outside of the MRL to the west of the quarry. It is not clear from the record how long the equipment storage site outside of the MRL has been used in conjunction with mining activities. Potentially, it is a legal nonconforming use. However it is uncontested that the storage and service areas have been expanded without permits. If established as a legal nonconforming use, it can be expanded if a Conditional Use Permit can be obtained. If it is not a legal nonconforming use, it must be moved onto the MRL site.

Lummi Rock is requesting both use of the road outside of the MRL, and use of the service and storage area outside of the MRL, on a restricted and temporary basis until such time as they can get the appropriate permits. The Stop Work Order prohibits this.

VIII.

Lummi Rock claims that the current Stop Work Orders in place effectively shutdown the mining process. This is not supported by the record. Lummi Rock currently has equipment already in the upper portion of the quarry. Lummi Rock also can deliver materials, other than large rock, by funneling them down the slope internally and barging them off the island. Testimony indicates that only 10% of

the product is large rock. The record also indicates that it may be possible to get large rock from the top of the site to a point where it can be trucked to the barges through the use of a crane. However it is not clear how practical a solution that would be. It is possible that Lummi Rock needs to use the existing roads to the west, within the Rural Forest zone, to get the crane and associated equipment in place. The record is not clear as to what impact, if any, inability to move large rock material from the top of the quarry would have on other operations at the upper levels of the quarry.

IX.

In addition to the Stop Work Order regarding the use of the "red" road, the "blue" road, and the equipment storage and repair site in the Rural Forest zone to the west of the mining site, additional Violation Notices and Stop Work Orders were issued by Whatcom County on June 4, 2012. Associated with the various Violation Notices and Stop Work Orders were Notices of Penalty. Lummi Rock has appealed the Stop Work Order and Violation Notices issued that day to the Whatcom County Hearing Examiner. These Appeals constitute the matter which is the subject of this Decision.

Additionally, Lummi Rock appealed the fine penalties to the County Council and, at this time, the imposition of the penalties is not before the Hearing Examiner.

The first Stop Work Order issued on June 4, 2012, addressed the ongoing use of the "red" and "blue" roads and has been addressed above.

A second Stop Work Order, issued on June 4, 2012, described the violation and corrective action required as follows:

The notices address: 1) Ceasing the unpermitted accessory moorage of barges in Smuggler's Cove; 2) Ceasing use of the unpermitted commercial pier facility [including removing

all conveyor equipment from SMP jurisdiction (200-feet from the ordinary high water mark)]; and 3) Requiring submittal of an engineered stormwater plan.

Pursuant to the Zoning Ordinance – Title 20, WCPDS is issuing a Notice of Penalty for failure to comply with the stop work order dated Jan. 31, 2012.

The violation alleged is not contested by the Applicant and the Applicant submitted the requested Shoreline Permit Applications, seeking permits to authorize the construction and use of the pier facility, including the use of the conveyor for barge loading equipment, to load barges.

The Stop Work Order issued June 4, 2012, included violations that were part of a Notice of Violation, dated November 23, 2011. Pursuant to the November 23, 2011, Notice of Violation, Lummi Rock submitted the requested Shoreline Permits in January 2012. A Determination of Completeness was issued by Planning on January 26, 2012. The Public Hearing on these Appeals was conducted on October 17, 2012. As of that date, Whatcom County had not further processed the Shoreline Permits. While the violation was alleged and admitted to in November 2011, the first Stop Work Order regarding the use of the barge loading facility and conveyor belt was not issued until June 4, 2012. The issuance of this Stop Work Order is part of this Appeal.

A third Stop Work Order was also issued on June 4, 2012 and described the violation and corrective action as follows:

Description of Violation: Unpermitted Development including installation and/or use of moorage dolphins for accessory moorage of barges within and/or abutting mapped eelgrass beds, resulting in an emergency situation with a significant threat to the environment.

Corrective Action Required: Cease any and all use of the unpermitted moorage dolphins. You shall remove any existing barge(s) within 14 days and cease to moor

any vessels in Whatcom County SMP jurisdiction until you have received permit approval.

This is apparently the first time the accessory moorage of barges using dolphins at the eastern end of Smuggler's Cove was raised by Planning as an issue. At this point, it is not clear when the pilings in the eastern end of Smuggler's Cove were originally installed and further not clear when the use of these pilings for barge moorage associated with mining on this site began. It is possible that this moorage is a pre-existing legal nonconforming use. However, the Applicant has not attempted to obtain that status to date. Whatcom County does have a process where the legality of uses that are currently nonconforming can be determined. This use is within the navigable waters of the United States and of Whatcom County. It is in the Aquatic Zone as far as the Shoreline Management Regulations are concerned. Establishment of this kind of use on a more or less permanent basis associated with shoreline mining does require Shoreline Permits unless established as a legal nonconforming use. Additionally, there is no evidence that Lummi Rock owns the underlying seabed at this location. And further, there is no evidence that the owner, whether private or the State of Washington, has granted Lummi Rock the right to use the site. The record indicates that the moorage site is within eelgrass beds and there is the possibility that long-term, ongoing moorage at this location could have a negative impact on the eelgrass beds and, perhaps, on the species associated with them.

X.

Historically, at least in recent years, most of the material from the quarry has been transported offsite through the use of barges. Prior to the construction of the new loading facility, barges were loaded by tying up to a ramp extending into the water. Dump trucks would drive up the ramp, onto the barge, and dump the load. Machinery was used on the barge to move materials around and when the barge was full, the barge would be towed to a delivery point.

The new loading facility, consisting of a number of dolphins for barge moorage, a new pier extending from the moored barge facility onto the uplands of the mining area, and the location and use of a conveyor belt system, which allowed materials to be loaded onto a conveyor and conveyed over the water to be dumped on a moored barge, appears to have been constructed in 2006 or 2007. It is admitted that the new construction of the commercial pier facility, barge loading structure, and conveyor equipment, within shoreline jurisdiction, was done so without permits. Apparently, Lummi Rock continued to use the facility from the date of the original Notice of Violation until the Stop Work Order was issued on June 4, 2012.

XI.

While the use of moorage dolphins or piles, located in the eastern end of Smuggler's Cove, in association with mining, has not been established as a legal nonconforming use or legalized through Shoreline Permits, Lummi Rock did obtain a related Hydraulic Project Approval from the Washington State Department of Fish and Wildlife on February 28, 2006. This approval apparently allowed the replacement of three pilings in the eastern end of Smuggler's Cove. The Hydraulic Project Approval also approved the replacement of a number of pilings in the vicinity of the original barge loading ramp and in the vicinity of the unpermitted barge moorage and commercial pier facility constructed in 2006 or 2007. The diagram attached to Hydraulic Approval indicates that four "missing piles" were part of the project approved. Two of these "missing piles" appear to have been part of the unpermitted barge moorage site associated with the new pier and conveyor loading system.

XII.

On March 9, 1999, Whatcom County Planning and Development Services reviewed a request from Ace Rock, LLC, the predecessor of Lummi Rock, for legal nonconforming status for ten existing moorage dolphins located at Smuggler's

Cove. Planning's file on this 1999 application indicates that the moorage dolphins existed on site since 1965, prior to the adoption of the Whatcom County Shoreline Management Program in 1976. Planning further noted that it was verified that as many as twelve moorage dolphins and six to eight pilings were placed on the site in 1965, and that they would get knocked down from time to time and have to be replaced. This finding was made by Marilyn Bentley, Senior Land Use Specialist, at that time. It can be found in Attachment B to the Staff Report, on page 107. The Hearing Examiner file in this matter does not contain any indication of where the dolphins and pilings found to be legally nonconforming were located, but the letter does indicate that photographs from the early 1960s show the dolphins in place. Ms. Bentley granted legal nonconforming status "for the ten subject moorage dolphins (shown on your plan) at Smuggler's Cove."

XIII.

Lummi Rock, for the most part, admits the violations asserted. The exception may be that some of the uses, listed as violations may actually constitute legal nonconforming uses, such as the ten dolphins and pilings, granted that status in 1999. However, to date, Lummi Rock has not requested that status for possible, legally nonconforming use or structures.

Lummi Rock has requested the Hearing Examiner to review the Notices of Violation and associated Stop Work Orders and to provide some kind of clear guidance (a pathway) which can lead to resolution of these issues.

XIV.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

An important issue which needs resolution deals with the issues of the use of access roads and the storage and repair facilities outside of the MRL boundaries.

The construction of what has been called the "red" road occurred without permits and after approval of the quarry expansion in 2007. Lummi Rock must either obtain the permits necessary for the construction and use of the "red" road, or cease using it. The "blue" road was identified in the application materials submitted by Lummi Rock for the proposed 2007 expansion, approved through ADM2007-00022. Since the intended use of this road to access upper portions of this site was disclosed in the application materials for the 2007 Permit, and since this road had been used for that purpose prior to the quarry expansion in 2007, the Hearing Examiner finds that it is appropriate to allow continued use of it under the 2007 Administrative Approval until such time as the access road issues are finally resolved.

II.

The "red" road was constructed and used without needed permits and the Stop Work Order forbidding its use was and is appropriate. It is currently Staff's position that this road can never be permitted for use in conjunction with the mining activities because its use constitutes surface mining activities outside of the Mineral Resource Lands Overlay. The County Geologist, who is the Technical Administrator for mining activity in the County, has concluded that no more than one access road to a quarry located outside of the MRL is allowed. Since Lummi Rock has an existing access road from public roads to the lower part of the MRL site, it is Planning's position that all other roads used in association with mining activities must lie within the MRL. This conclusion means that the "red" road

cannot be used or approved and that no road on the east side of the quarry can be constructed and used to access the quarry unless the MRL zone is expanded to include the area of an additional access road.

Lummi Rock disagrees and cites a Hearing Examiner Decision, APL2010-0009, the Velacich Appeal, and a Superior Court ruling. In Velacich, the Hearing Examiner concluded that an access road outside of the MRL was allowed to connect the quarry site to a public road. In that case, the Hearing Examiner stated, "Road access is clearly an incidental and accessory use in all of the Zoning Designations in Whatcom County."

The Velacich Appeal did not address the issue of whether or not more than one access road through non-MRL private lands is allowed. There is nothing in the County Ordinances regulating mining activities that expressly limits access to a quarry from parcels not within the MRL Overlay to one access point on one road. In this case, it is clear that, at this time, in order to mine the upper areas of the site, and to get large rock product from the quarry to the market, Lummi Rock requires an additional access or service road outside of the MRL, or an expansion of the MRL to facilitate construction of such a road.

Planning takes the position that the hardship Lummi Rock now finds itself in is self-imposed and that with a proper excavation plan Lummi Rock could have mined the site in a way that would allow access to the upper portions of the site through roads internal to the rock quarry itself. There is not enough information in the record regarding topography of the site and the history of mining on this site to support this conclusion. The purpose of the Mineral Resource Lands Special District is set forth in WCC 20.73.010, and reads as follows:

20.73.010 Purpose

The primary purpose of this district is to implement the mineral resource lands designation of the Comprehensive Plan, established pursuant to

RCW 36.70A.170, by allowing the type of activity that encourages and supports the opportunity for the extraction of minerals in areas of Whatcom County designated as containing resources viable for long-term commercial extraction. This district is also designed to discourage incompatible uses from locating upon mineral resource lands where the extraction of minerals occurs or can be anticipated. [Emphasis added].

It is consistent with the stated purpose of the MRL to allow adequate access to all portions of the quarry's site in order to provide reasonable excavation and exhaustion of the mineral resource which lead to placing the site in the MRL district [subject to Administrative Approval, which requires meeting the Conditional Use Criteria of WCC 20.84.220].

Surface mining is defined in WCC 20.97.434, as follows:

20.97.434 Surface mining.

"Surface mining" means the process or business of extracting materials, including but not limited to sand, gravel, shale, rock, coal, soil, peat, or clay, from an open excavation in the earth.

It is Planning's interpretation of this definition that the uses to which the Applicant has been putting the "blue" and "red" roads are "Surface mining" and cannot take place outside the MRL district, with the exception of a single access point between the MRL district lands and public roads.

The Hearing Examiner concludes that this is an unduly restrictive interpretation of the Code and that the County can approve more than one access road to a Mineral Resource Lands quarry if consistent with the criteria for an Administrative Approval for mining activity, including the Conditional Use Criteria, and where it is necessary to allow reasonable access to the mineral supply. The

access point or points should be the one(s) necessary and should minimize adverse impacts on other uses in the area. The Hearing Examiner decision set forth in this paragraph is a Final Decision and should be appealed by Planning if Planning believes that is in the public interest. Without an Appeal, Planning is required to consider and, where appropriate, consider and allow more than one access road outside the MRL boundaries.

III.

Planning is to accept and process Revision to the 2007 Administrative Approval Use Permit. Lummi Rock has applied for a Revision to ADM 2007-00022. Planning is required to process it. This does not require Planning grant approval to a requested Revision. Should Planning deny the request, Lummi Rock can utilize their rights to Appeal the denial to the Hearing Examiner and beyond. A Revision Request could include a request for use of the "red" road and/or an application for an additional access road on the eastern side of the mining site, to allow access to and excavation of the top of the upper area of the mining site. The Hearing Examiner is not requesting that Planning approve the requested revisions, but requiring that they process them.

IV.

Since mining access to the upper portion of the existing quarry may ultimately require expansion of the MRL, the Hearing Examiner concludes that it is appropriate at this time to lift the hold on the application to expand the MRL and to allow Lummi Rock to seek approval of an expanded MRL. Ultimately, the Whatcom County Council can approve or deny any proposed expansion.

V.

The Hearing Examiner has decided to maintain ongoing authority in regard to the violations and Stop Work Orders appealed to the Hearing Examiner in a timely manner.

VI.

In regard to the Stop Work Order requiring Lummi Rock to cease using the new conveyor belt loading facility, constructed in shoreline jurisdiction without permits, the Hearing Examiner concludes that the Stop Work Order is, at this time, appropriate and should remain in place. The conveyor and other easily removable parts of this shoreline facility should be moved beyond the 200-feet of shoreline jurisdiction.

In regard to the barge mooring in the eastern end of Smuggler's Cove, the Hearing Examiner has concluded that there is a reasonable possibility that the mooring dolphins and piles, used in this area for moorage associated with transport of mined rock, may constitute a legal nonconforming use based on the Determination by Planning in 1999. However, it has not been established that the regular and long-term mooring of empty barges on this site, as part of the mining operation, existed prior to the Shoreline Management Act, is a legal nonconforming use. The Applicant either needs to establish the legal nonconforming use of the dolphins and pilings for moorage purposes associated with the quarry, or obtain a shoreline permit. Considering the fact that this moorage site is within or abutting mapped eelgrass beds, which are now protected habitat conservation areas, the Applicant should consider proposing an alternative moorage site for empty barges away from mapped eelgrass beds. Such a proposal could be added to the pending shoreline permit applications and processed with them.

Lummi Rock is required to use the original loading facility and methods in use prior to the construction of the new unpermitted pier facility and prior to the issuance of ADM 2007-00022, which is the most recent Administrative Permit regarding mining on this site.

The right to continue mining within the boundaries of the MRL, using the old loading systems, will be allowed to continue. However, the Hearing Examiner

orders that Lummi Rock submit to Whatcom County a proposed drainage plan which includes appropriate restoration of the mining site along the shoreline, where restoration is possible without substantially interfering with the process of loading barges and transporting materials offsite. The Hearing Examiner will consider shutting the quarry down if there is not prompt and immediate action regarding stormwater drainage. The record clearly indicates significant and large clouds of materials, probably rock dust, and other sediments into Smuggler's Cove and Hale's Passage from the portion of the site which has been mined or cleared down to the Ordinary High Water Mark. The purpose of reclaiming (restoring top soil and appropriate vegetation) the mined area within shoreline jurisdiction is to assist in the elimination of the sedimentary materials leaving the site and to provide protection to the near shore aquatic environment. While the Hearing Examiner realizes that reclamation itself is normally within the jurisdiction of the Washington State Department of Natural Resources, the Hearing Examiner believes that Whatcom County has jurisdiction to require shoreline reclamation where necessary [as here] to protect the shoreline environment and shoreline processes.

The drainage plan and reclamation of shoreline area requested shall be submitted to Planning, Public Works, and the Hearing Examiner within forty days.

VII.

Planning is directed to process, in a timely manner, PLN2011-00009, which would increase the size of the MRL, if the Applicant wishes this matter to proceed. The Hearing Examiner believes that Lummi Rock is probably correct in pointing out the Code Section used to suspend the processing of the proposed Map Amendment to increase the MRL, is not authorized by WCC 20.94.080.2 since the requested Map Amendment does not fall within Title 20, the Whatcom County Zoning Ordinance.

In any case, denial of processing of the Map Amendment, while insisting, at the same time, that all service roads to the upper portion of the quarry must remain within the MRL and, therefore, effectively cutting off access to the upper levels of a mining site already approved for excavation, is inconsistent and places Lummi Rock in a "catch-22."

The Hearing Examiner also directs Planning to process the shoreline permits in an expedited manner. The Hearing Examiner sees nothing to be gained by refusing to process the permits already applied for, along with any amendments to them. The shoreline permit process can be used to benefit the public interest and address and minimize environmental damage to the shoreline and waters of Hale's Passage and Smuggler's Cove. Since the permit applications were determined to be complete in January 2012, the Hearing Examiner requires that Planning prioritize action on these permit applications, which have been before Planning for nearly ten months.

VIII.

The Hearing Examiner is setting a hearing date on January 16, 2013, at 1:30 p.m. [unless moved on the request of the Parties] to review compliance by Lummi Rock and the processing of the various permits and proposed Map Amendment by Planning. At that time, the Hearing Examiner will consider modifications to the Stop Work Orders, as appeared justified at that time. Such modifications may include shutting down the mining facility completely, allowing the "red" road to access the top of the mining location on a temporary basis, and other modifications as appear necessary to protect the environment and public health and welfare, while also allowing Lummi Rock a method to responsibly excavate the quarry materials within the existing MRL.

IX.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted

as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

Lummi Rock, LLC and Whatcom County Planning and Development Services are to comply with the Hearing Examiner's Decisions as reflected in the above Conclusions of Law.

**NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF
THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any party of record, or any County department.


Appeal to County Council. Within ten business days of the date of the decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830. A copy of this document is available for review at the County Council Office.

After an appeal has been filed and the Council office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 20th day of November 2012.



Michael Bobbink, Hearing Examiner