

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2012-0005
Application for)
)
Thomas Fenton) FINDINGS OF FACT,
Anchor Manor, L.L.C.) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: Thomas Fenton has appealed a Determination by Whatcom County Planning and Development Services [hereinafter, Planning], dated March 6, 2012. In that Decision, Planning determined that a Wetland Critical Areas Report, prepared by SNR Company, which concluded that there were no wetlands on the subject property owned by Anchor Manor, L.L.C., was incorrect and not approved. Instead, Planning restated that an earlier Wetland Report, prepared by Northwest Wetlands Consulting, L.L.C. [hereinafter, NWC] and dated November 5, 2010, was the wetland evaluation approved.

Decision: The Decision by Planning is UPHELD and the Appeal is DENIED.

FINDINGS OF FACT

I.

Background Information

Appellant: Thomas Fenton

Property Address: 4475 Birch Bay – Lynden Road and 8060 Blaine Road
Blaine, Washington

Hearing Dates: October 4, and November 9, 2012

Exhibits:

1 PDS Cover memo, March 21, 2012, re: Administrative Appeal Application packet

- 1-1 Administrative Appeal Application
- 1-2 Customer Receipt, March 19, 2012
- 1-3 PDS Final Wetland Determination, March 6, 2012, letter to Steven Neugebauer
- 1-4 Letter dated March 15, 2012, from SNR Company, Steven Neugebauer re: Response to Final Determination, March 6, 2012
- 2 Staff / Appellant email correspondence re: scheduling Open Record Hearing
- 3 Certificate of Posting Notice of Open Record Hearing, September 13, 2012
- 4 Legal Notice of Open Record Hearing, September 20, 2012
- 5 Staff Report, September 20, 2012, with attachments
 - 5-1 Appendix A, Appeal Application, Customer Receipt, Appeal Statement, 03/15/12
 - 5-2 Appendix B, Stop Work Order, Feb 16, 2012, Notices of Violation, May 11, 2010, Notices of Penalty, March 30 and May 10, 2011, LDP App, LDP2010-80; DNS, Dec 22, 2010
 - 5-3 Appendix C, Northwest Wetlands Consulting, Delineation Reports, Aug 25 and Nov 5, 2010
 - 5-4 Appendix D, Wetland Identification and Delineation Report, prepared by SNR Company, July 21, 2011
 - 5-5 Appendix E, PDS Letter, Aug 11, 2011 re: Interdisciplinary Team Review of Development Proposal; PDS Letter, Dec 22, 2011 re: Scheduling Inspection; Email correspondence, Staff and Appellant re: Scheduling Inspection; US Army Corps of Engineers, Wetland Determination Data Form; DOE letter, Feb 16, 2012 re: Technical Assistance Site Review; Site Photos; PDS Final Wetland Determination, March 6, 2012
 - 5-6 Appendix F, Base Map; 27 pages of site inspection photos
 - 5-7 Appendix G, Attorney General of Washington, Letter August 2, 2012 re: geologist licensing
 - 5-8 Appendix H, Reference Documents: Measurements of Soil Redox Potential, Rabenhorst, Hively, James, 2009; Hydric Soil Technical Standard 2007 (NTCSH)
- 6 Hearing Memorandum of Appellant, prepared by Joseph Bowen and Paul Hirsch, dated September 27, 2012, with attachments:
 - 6-1 Exhibit A: Wetland Buffer for Offsite Wetland and Mitigation Plan for Onsite Mitigation, prepared by NWC, LLC, dated May 1, 2005
 - 6-2 Exhibit B: Letter dated August 25, 2010, from Northwest Wetlands Consulting [NWC] re: response to County's Notice of Violation, dated May 11, 2010
- 7 Declaration of Service, prepared by Jessica Moreno, September 27, 2012
- 8 Susan D. Meyer, PWS, Senior Regional Wetland Specialist, Vita

- 9 Email correspondence from Sehmel to Meyer, Jan 3, 2011
- 10 Email correspondence from Sehmel to Katrina Jackson, Sept 17, 2010, with handwritten note re: phone call/Email, Sept 23
- 11 Soil Pit #1, color photo, dated Jan 25, 2012, submitted at hearing by Ecology
- 12 Site Photo, labeled "Bing Maps – date unknown," submitted at hearing by Ecology
- 13 Memorandum dated Oct 19, 2012 from Wayne Fitch to Michael Bobbink re: Anchor Manor Permit History
- 14 Memorandum of Appellant re: Appellant's Burden of Proof, submitted by Paul Hirsch, November 9, 2012
- 15 Cover Memo, Nov 15, 2012 re: Permit History Records, file prepared and submitted by Wayne Fitch, with attachments:
 - 15-1 PDS Case Activities for ENF2003-00387, APN 400129 032482, with attached site [color] photos
 - 15-2 Temporary Erosion and Sedimentation Control Plan for Clearing Permit Application, prepared by Pacific Survey & Engineering, CLR2003-87, with attached Clearing Permit, issued Nov 18, 2003, DNS, Oct 15, 2003, SEPA Checklist; Vicinity Map; Plat Map; PDS Receipt, 11/18/2003; Letter of Determination for Clearing Application, Nov 13, 2003; Fill, Excavation, Grading, or Clearing Permit Application, Permit Number CLR2003-0087, with Receipt, Oct 13, 2003
 - 15-3 Wetland Buffer for Offsite Wetland / Mitigation Plan for Onsite Mitigation, prepared by NWC, LLC, May 1, 2005, including Vicinity Map; PDS Chart Notes, CLR2004-0093, Applicant Ron Kilmer, 8060 Blaine Rd, APN 400129 032820; Letter, June 12, 2006 from Victor Insera to Mr. Lackey; Letter, May 24, 2006 from Jim Lackey to Planning Staff, re: Clearing Permit CLR003-0087/Sediment Control Plan Job #2002-010; Memo, June 30, 2005 from Katrina, NWC to Victor re: phone conversation and additional submittals; TESC for Clearing Permit Application, prepared by Pacific Survey, dated 12/06/04; Mitigation Approach 4.a) Mitigation Sequencing, pages 9-11; Customer Receipt, Dec 9, 2004; Plat Map; PDS Whatcom County Approved Wetland/Stream Specialists; Plat Map, Aug 27, 2004; Anchor Manor Homes, Fill, Excavation, Clearing/Conversion Site Plan information [p 3] , Dec 6, 2004, Ronald Kilmer; PDS Land Disturbance Application, CLR04-93, Dec 9, 2004; Plat Map, Aug 27, 2004; Zoning Map 2005; Memo from Victor Insera to Ali, July 5, 2005; Memo from Insera to Chester Lackey / Ali [no date]; Memo from Chester Lackey to Victor, Jun 30, 2005; Memo from Insera to Ali, Jun 27, 2005; Letter, Jun 13, 2006 from Insera to Jim Lackey; Letter, Dec 20, 2004 to Mr. Kilmer from Tina Mirabile; CAO Buffer Mitigation Map Exhibit, surveyed by

- PSE May 2005; TESC for Clearing Only, Anchor Manor Commercial Site Plan for Clearing Permit Application; Forest Practices Informal Conference Note, Jan 3, 2005; large Site Plan (2 sheets), 12/06/04; large Site Plan Preliminary Stormwater Management Design; Large Site Plan Proposed Commercial Development Exhibit, 4/10/03
- 15-4 SEP2004-0052: Fill, Excavation, Grading, or Clearing Permit Application, Permit No. LDP04-75, PDS stamped rec'd Mar 29, 2004; PDS Letter of Determination, May 4, 2004; Plat Map, Nov 20, 2003; Letter, July 13, 2004 from Shelly Varner to Lisa re: Fill and Grade ermitting, Permit #LDT2004-0075; Customer Receipts, May 5 and Jul 16, 2004; Fill and Grade Permit, issued May 5, 2004, APN 400129 032482; LDP2004-0075; Revised & Reissued DNS, Ap 19, 2004 w/ Checklist attached; Zoning Map 2003; Large Site Plans TESCP, Fill and Grade Permit, 3-29-04 [4 sheets]
- 15-5 SEP2004-0010: Land Disturbance Application, Permit No. LDP2004-0009; DOE Letter, Feb 9, 2004, to John Guenther re: SEP04-0010; Fill and Grade Permit, issued Feb 18, 2004; Plat Map; Receipts # 28200400003, and #2820040000236, Jan 2, 2004; DNS, 2/04/04, w/ Checklist attached; Letter of Determination, Feb 12, 2004 re: LDP2004-0009, Permit Processing Fees; Large Application Site Plans, Fill & Grade Permit, dated 12/29/03 [2 sheets]
- 16 Email copy of basic list of relevant delineation manual citations and issues to which they refer, submitted by Royce Buckingham
- 17 Email Memo, Nov 15, 2012 from Royce Buckingham re: Anchor Manor additional materials received from Steven Neugebauer
- 18 Hearing Examiner Memorandum, via email to Parties of Record, Nov 26, 2012 re: response to memo received from Royce Buckingham, Nov 15, 2012
- 19 Response to Hearing Examiner's Memorandum of Nov 26, 2012 re: Appellant's Post-Hearing Submissions, prepared by Mr. Hirsch, November 29, 2012
- 20 Cover Letter, Nov 14, 2012 from Steven Neugebauer, re: PowerPoint Presentation and Document Requested from SNR Company by Hearing Examiner during Oct 9, 2012 Anchor Manor Hearing, with attachments:
 20-1 Citations from Corps of Engineers Wetlands Delineation Manuals
 20-2 SNR Hearing Examiner Testimony Presentation
 20-3 CD of PowerPoint Presentation
- 21 Hearing Examiner Memorandum, December 6, 2012, with attached Hearing Examiner Close of Hearing Comments, November 9, 2012
- 22 Email communication dated 11/26/2012 between Mr. Bowen and Staff re: County's submission of Anchor Manor Permit Record File

- 23 Whatcom County's Post-Hearing Memorandum Reply to Expert Submissions and Argument, prepared by Royce Buckingham, December 14, 2012
- 24 Email from Paul Hirsch to Michael Bobbink, December 26, 2012 re: Statement of Additional Authority

Parties of Record

Thomas Fenton
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Blaine, WA 98230

Joseph Bowen
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Royce Buckingham
Whatcom County Civil Deputy Prosecutor

Tyler Schroeder, Bryan Sehmel, Wayne Fitch, Lyn Morgan-Hill
Whatcom County Planning and Development Services

Susan Meyer and Eric Stockdale
Washington State Department of Ecology
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II.

In a letter to the Appellant, dated March 6, 2012, Planning concluded that, pursuant to the Whatcom County Critical Areas Ordinance, a Wetland Report, prepared by SNR Company, relating to properties owned by the Appellant, at 4475 Birch Bay – Lynden Road and 8060 Blaine Road, was inaccurate and not approved. The SNR Report indicated that there were no wetlands onsite and Planning determined that, based on a prior report, and

the recent information provided by the interdisciplinary team, there were jurisdictional wetlands on the Anchor Manor, L.L.C. site.

The issue before the Hearing Examiner is whether or not Planning erred in not approving the Determination by SNR Company that there were no jurisdictional wetlands onsite.

III.

In order to put the issues before the Hearing Examiner in a proper context, it is instructive to review the regulatory history referencing the Appellant's properties over the last ten years.

On October 7, 2003, Planning started an enforcement action, ENF2003-00387. In this enforcement action, Staff documented clearing on the subject properties [stump removal] without a Land Disturbance Permit and directed the owner of the property, Anchor Manor, L.L.C., represented at that time by Ron Kilmer, to apply for a Clearing Permit. The Application was received in October 2003. The Application was reviewed by Planning, a SEPA Determination of Non-Significance was made, and Planning issued a Clearing Permit for the work that had already been completed.

During the processing of the Clearing Permit in October 2003, Planning Staff inspected the site on November 22, 2003, and determined that there was a regulated wetland located to the south of the Appellant's property and that a portion of a 100-foot buffer from this wetland extended into the southern portion of the property. There was no mention of a wetland on the Anchor Manor site.

On January 2004, a Land Disturbance Permit Application, LDP2004-0009, was filed with Planning seeking a permit to allow the stockpiling of 2100 cubic yards of materials in an area west of the area that Planning currently has now concluded contains a wetland. The site was inspected in 2004, a SEPA Determination of Non-Significance was issued, no critical areas assessment was requested, and the Land Disturbance Permit was approved. Again, there was no indication of wetlands on the site.

On March 29, 2004, an additional Land Disturbance Permit Application was received. The application requested a Land Disturbance Permit to remove an average of approximately 12-inches of topsoil over the entire cleared portion of the subject properties in

preparation for site development. This application received a SEPA Determination of Non-Significance, no critical areas assessment was required, no site inspection took place, and a permit was approved. This permit allowed the removal of topsoil in an area that Planning now identifies as Wetland A.

On December 14, 2004, an application for a Clearing Permit was received by Planning. The requested permit was to clear an area on the southern portion of the property, which included part of a buffer of the offsite wetland to the south. Planning required a Critical Areas Mitigation Plan to be prepared to address work done in the wetland buffer of the offsite wetland. The report was prepared by NWC, LLC, dated May 1, 2005, and filed with Planning. The Mitigation Plan submitted addressed only the new proposed clearing at the very southern end of the property, an area determined to include a regulated wetland buffer for an offsite wetland to the south. The May 1, 2005, NWC Plan and Wetland Delineation did not address the areas to the north, which had already been cleared and graded under prior Land Disturbance Permits. These areas to the north contained what Planning now has concluded are two jurisdictional wetlands. The May 1, 2005, Mitigation Plan Report prepared by NWC did reference a "previous study," prepared by MRM Consulting. NWC indicated that the MRM Report concluded there were no jurisdictional wetlands on the properties which are the subject of this Appeal and that the MRM Consultant's Report referenced in the 2005 Mitigation Plan prepared by NWC indicated that the properties which are the subject of this Appeal only contained uplands. However neither Planning nor the Appellants have located the study by MRM referenced in the 2005 Wetland Mitigation Plan and its contents are unknown.

The 2005 Wetland Mitigation Plan was accepted by Planning. The Plan was prepared to mitigate the impact of clearing, on the subject properties, of approximately 9282-square feet of buffer of an offsite wetland. The Applicant for the Clearing Permit impacting the buffer for the offsite wetland to the south was Ron Kilmer on behalf of Anchor Manor, LLC. The May 1, 2005, Wetland Buffer and Mitigation Plan was prepared by Katrina Jackson of NWC. The Plan specifically limits itself to review the very southern portion of the Appellant's property, which in 2005 remained un-cleared. This area was not covered by the previous Land Disturbance Permit, which allowed topsoil removal in preparation for

development of the cleared portions of the property which contained what have now been determined to be Wetlands A and B. The area which was the subject of the December 6, 2004, Wetland Buffer Delineation, addressed only an area of approximately 100-feet by 830-feet, an area, which at that time was still partially vegetated and which was on the southern boundary of the subject properties, and did not address the issue of wetlands on the Anchor Manor parcels.

Apparently Billy Kilmer, who is named on the 2005 NWC Wetland Buffer and Mitigation Plan [and who is deceased] and Tom Fenton, who has handled the enforcement and permit issues since 2010, including this Appeal, were co-owners of Anchor Manor, L.L.C. The properties were purchased by Anchor Manor, LLC, with the intent of developing the site with a strip mall. The subject property is in the southeast portion of the intersection of Birch Bay-Lynden Road and Blaine Road and was, and currently is, zoned General Commercial. This site contains a gas station and mini-mart, built around 1990. Anchor Manor, LLC also developed a parcel to the east of these properties as a single-family residential development on urban density-sized lots.

The two parcels which make up the subject site were cleared before 1970. Prior to the construction of the gas station in approximately 1990, the site had been used for many years as pasture and as a hay field.

IV.

After the enforcement action and clearing permits granted in 2004 and 2005, there was no further known activity involving this parcel until 2010. On February 16, 2010, Planning issued a Stop Work Order. The violation was described as "regulated fill and grade activity within a critical area (wetland and/or its associated buffer). No permits authorizing work." Mr. Fenton testified at the hearing that he had the opportunity in early 2010 to obtain excess pit-run from offsite; that he needed to remove the pit-run material immediately and had it trucked over and stockpiled on the subject property without permits. This activity led to the Stop Work Order.

The 2010 violation was the second time that materials were stockpiled on the property and/or that clearing and grading work was done on the property by Anchor Manor,

L.L.C., prior to obtaining required permits.

The 2010 Stop Work Order was followed up with a Notice of Violation on May 11, 2010. Thereafter, a Notice of Penalty was issued by Planning on March 30, 2011, and again on May 10, 2011. The Notice of Violation and the two Notices of Penalty all contained sections informing Mr. Fenton of his right to appeal. No Appeals were filed.

In response to the Stop Work Order and Notice of Violation, the Appellant hired Northwest Wetlands Consulting [NWC], who prepared and filed a Wetland Delineation Report on August 25, 2010. This Report indicated that there were three small wetland areas onsite, but that they were exempt from wetland regulations because of their type and size.

A site inspection was done after the NWC Report of August 10, 2010, by Planning's Code Enforcement Officer and resulted in an email to NWC from the Code Enforcement Officer indicating it appeared to him that the wetlands onsite were larger than described in the August 25, 2010, Delineation Report. This email requested an onsite meeting with the NWC Biologist who did the report. At some point, this onsite meeting took place and as a result, on November 5, 2010, NWC filed a revised report, which concluded that there were two jurisdictional wetlands, designated as Wetland A and Wetland B on the site.

Both the August 25 and November 5, 2010, NWC Wetland Delineation Reports identify wetlands onsite. The latter identifies larger wetland areas. The type of wetlands onsite are exempt from regulation if they are less than one-tenth of an acre [WCC 16.16.610 E]. After the second site visit and prior to the November 5, 2010 report, NWC concluded that the wetlands were jurisdictional because they were larger than thought to be at the first determination. It is worth noting, as did NWC, that the initial determination was during the dry season, August 25, and second report was at a wetter time of year, November 5, 2010.

Mr. Fenton's testimony is that he was aware of the second Wetland Delineation and that he later hired SNR to obtain a second opinion. Mr. Fenton indicated he met Steven Neugebauer at a Property Rights meeting and thereafter hired Mr. Neugebauer's company, SNR, to do a Wetland Delineation on the property. Mr. Neugebauer is the Principal Hydro-Geologist/Engineering Geologist for SNR Company. He is a licensed Hydro-Geologist. On cross examination, he acknowledged his connection with property rights groups who

believe, amongst other things, that wetlands and critical areas regulation, along with other property regulation, has gone too far and raises constitutional property rights issues. Mr. Neugebauer also testified that he believes that both Planning Department Staff and the Department of Ecology are "agenda driven," suggesting that their wetland work is biased. Mr. Neugebauer testified that true wetlands are relatively rare in the Puget Sound lowlands and that there are no wetlands on the Anchor Manor site.

V.

SNR prepared a Wetland Determination, dated July 21, 2011. This Determination was presented to Planning. After review of the Determination prepared by SNR, Planning invoked WCC 16.16.245 [Whatcom County Critical Areas Ordinance] to obtain outside expertise to assist the Technical Administrator for Critical Areas in handling the contradictory conclusions filed by NWC and SNR. The team included Staff members with Critical Areas expertise from Whatcom County Planning and Development Services and from the Washington State Department of Ecology. Mr. Neugebauer also took part in the site investigation. The site inspection was done on January 25, 2012. The Department of Ecology prepared a letter dated February 16, 2012, addressed to Planning. This letter concluded that there were jurisdictional wetlands onsite and that they were reasonably and adequately described by the Wetland Report prepared by Northwest Wetlands Consulting on November 5, 2010.

After receipt of the Department of Ecology letter, Planning issued a formal Determination on March 6, 2012, concluding that there were jurisdictional wetlands onsite, that the Wetland Delineation Report by NWC, dated November 5, 2010, properly identified these, that the SNR conclusion that there were no wetlands onsite was inaccurate and that the SNR Wetland Report was not approved.

The Planning Determination of March 6, 2012, was appealed by Anchor Manor, LLC. The Appeal was filed in a timely manner.

In support of the Appeal, SNR prepared a lengthy Appeal Statement [43 pages], dated March 15, 2012. The Appeal Statement restates SNR's conclusion that there are no wetlands onsite and that the site did not contain hydric soils, saturated soils, or "Aquic

conditions." The Appeal Statement also alleged that the Determination of SNR, prepared by a licensed Hydro-Geologist, could not be challenged by wetland experts who were not licensed Hydro-Geologists. The Appeal Statement argued that Planning Critical Areas Staff and the Department of Ecology Wetlands Specialist had not done a "comprehensive wetland determination," where SNR in fact had done a "comprehensive wetland determination," as that term is used in the 1987 Army Corps of Engineers Wetlands Manual. The Appeal Statement also argued that the Wetlands Manual did not use the best science available, and that the Report done by SNR was both a Comprehensive Evaluation, which is allowed by the Manual, and used the best available science standard.

The Appeal led to creation of a written record and two days of public hearing.

Expert witnesses, presented on behalf of Planning, included Lyn Morgan-Hill, Senior Planner with the Whatcom County Planning Department, who testified that she had completed a certified course in Wetland Delineations conducted by the Army Corps of Engineers and had over her professional history done hundreds of wetland determinations. She testified that she had reviewed the second wetland evaluation prepared by Katrina Jackson of NWC, which concluded that there were two jurisdictional wetlands on the property, and that she took part in the "interdisciplinary" site inspection and review with the Department of Ecology. Ms. Morgan-Hill testified that in her opinion there were two jurisdictional wetlands on the Appellant's property, approximately as delineated as Wetlands A and B in the NWC Wetland Report of November 5, 2010.

Planning called Eric Stockdale from the Washington State Department of Ecology as an expert witness at the hearing. Mr. Stockdale established a twenty year history as a Wetland Scientist and Specialist, with approximately twenty years of history working with wetland issues for King County and the Department of Ecology. He testified he has taken part in hundreds of wetland delineations or reviews of wetland delineations. He testified that he sat through the testimony of Susan Myers, the Senior Wetland Specialist for DOE, and that she appeared to have properly used the 1987 Wetland Delineation Manual and the appropriate regional supplements that apply to Western Washington in reaching her expert opinion that the site contained wetlands.

Mr. Stockdale testified, in his opinion, Mr. Neugebauer, the Appellant's expert, did not appropriately use the Corps Manual, used methods inconsistent with the Manual, and testified that the use of well logs by Mr. Neugebauer was an example of a method not consistent with the Manual.

Susan Meyer also testified on behalf of Planning. Ms. Meyer indicated that she is a Wetland Specialist with the Washington State Department of Ecology; that she has 22-years of experience working with wetland reports and delineations; has worked with the Department of Ecology since 1998; and that her current title with DOE is Regional Wetland Specialist. She testified to certification as a Wetland Scientist and that she has done hundreds of wetland delineations and hundreds of reviews of wetland reports.

Ms. Meyer was part of the team of experts, which investigated the Appellant's property after the conflicting wetland reports were filed with Planning. She testified that she did her work in a manner consistent with the 1987 Army Corps of Engineers Wetland Manual and the appropriate regional supplements. She testified as to the flaws she believed were inherent in Mr. Neugebauer's methods; that Mr. Neugebauer does not use commonly accepted practices in his wetland evaluations; and that she found wetlands on the site and in the areas that had been identified by Katrina Jackson as jurisdictional wetlands in the NWC Report of November 5, 2010. She indicated that she did not delineate the boundaries of the wetland and does not know the size of these wetlands, but that the areas onsite identified as wetlands by NWC do meet all of the parameters and requirements to be classified as a wetland.

VI.

Consistent with his Wetland Report and with the Appeal Statement he prepared for the Appellant, Mr. Neugebauer testified that there were not wetlands on the site. He testified that there are no hydric soils; that there is no wetland hydrology; and that the absence of wetland hydrology means that there can be no wetland on the site.

Mr. Neugebauer is a Hydro-Geologist, licensed with the State of Washington. He testified that he has been doing wetland work since 1985; that he has done numerous wetland studies in Whatcom and Skagit Counties. He points out that he has identified and

delineated wetlands, and that he did offsite mitigation for the Anchor Manor development. Mr. Neugebauer testified that the lack of saturated soils and hydric soils eliminates the possibility of there being wetlands on the subject site. On more than one occasion, Mr. Neugebauer testified that ground water hydrology was the key to determining the existence of a wetland; that based on the topography of the area, well logs, and the approximately 10-foot deep test pits he had dug made it clear that there was not ground water hydrology on this site and therefore no wetland. He identified the standing water onsite as ephemeral ponding associated with disturbed land; that in order to have wetlands and "aquic" conditions, there would have to be ground water within 12 to 18-inches of the surface and that the water identified on this site is surface water and not ground water, therefore foreclosing the possibility of a wetland on this site. He testified that he did not identify any saturated soils and that there were no signs of hydric soils on the site. He also testified that he did not see any clearly hydric plants; that the plants identified onsite in the areas identified by the other experts as wetland vegetation could live in either wetland or upland areas, and since there was a lack of soil saturated with water, the plants identified were not hydric even though they could live in saturated wetland soils that are hydric. In addition, he testified that there were no hydric soils because there was no ground water saturation.

VII.

Photographic evidence, testimony of Mr. Fenton, testimony of Planning Staff and DOE Staff, and the testimony of Mr. Neugebauer, all, indicate that there are wet areas, with standing water, at times, on the site. In fact, the site has drainage ditches which are believed to go back to the farming days and indicate that the site has been a wet area for decades. Mr. Neugebauer suggested that these wet areas were a result of impounding of stormwater sheet flow as a result of manmade changes in the topography and drainage of the site and that impounded runoff is not the same as wetland hydrology. Overall, the evidence indicates a long history [more than 40 years] of wet conditions which lead to the creation of drainage ditches, probably associated with farming, to drain the site. A long history of wetness onsite supports, without confirming, the conclusion reached by all the experts, except Mr. Neugebauer, that there are areas of hydric soils onsite.

VIII.

Mr. Neugebauer testified, and referenced in his report, that wetland hydrology is related to ground water pressure and that saturated soils from a wetland perspective are very unique and result from pressure-created atmospherics filling all of the pores in the soil so that it can no longer handle additional water. The required pressure levels can be quantified with piezometers or tensiometers. Hydric soils result from reduced oxygen due to saturation. Apparently this can also be quantified. None of the experts used quantitative measurement to buttress their conclusions. Mr. Neugebauer pointed out that he had some of the equipment to measure or quantify oxygen content but that the "interdisciplinary team" did not want to use them. He does not explain why he didn't use these scientific methods, either before or after he wrote his report, or at, or after the site investigation done by the interdisciplinary team.

Mr. Neugebauer claims that he only does "Comprehensive" Wetland Evaluations; points out that "Comprehensive Evaluations" are allowed by the 1987 Manual; and that is why his evaluations use different methods from the "routine evaluation" methods described in the 1987 Manual and used by the other experts involved in this case.

Mr. Neugebauer's methods were criticized by the other wetland specialists, who had investigated and concluded that there were wetlands on this site. Mr. Neugebauer states that the 1987 Manual allows more flexibility in doing wetland determinations and delineations. He points out language which indicates that "Comprehensive Evaluations" can sometimes be used on a very complex situation or where a legal action is involved.

The 1987 Manual does indicate that, for most sites, a routine evaluation is adequate. Mr. Neugebauer sets forth his argument in his Appeal Statement, a 43-page explanation he prepared on behalf of Anchor Manor, and which is Exhibit No. 1-4 in the Hearing Examiner file. On page 33 of this Appeal Statement, he quotes from page 24 of the Keys to Soil Taxonomy, Eleventh Edition, Soil Survey Staff, 2010, the section on "Aquic Conditions." The materials quoted identify as an element of aquic conditions, saturation "characterized by zero or positive pressure in the soil water." This section goes on to recommend the use of a well sealed piezometers or tensiometers for measuring saturation in problem situations. As best the Hearing Examiner can understand Mr. Neugebauer's arguments, Mr.

Neugebauer believes there are no wetlands onsite because there are no areas with aquic conditions and therefore the hydrology required for a wetland does not exist on this site. He criticizes the other team members as follows:

The other team members did not discuss what type of saturation was present to cause the aquic conditions they believed they observed. ... They did not discuss the issues with water pressure that must be at least one atmosphere per the NRCS or greater than atmospheric by the Corps in the Corps [sic] manual." [Exhibit 1-4, p 34]

Mr. Neugebauer does not explain why his detailed Wetland Report, his detailed Statement of Appeal, or his testimony at the hearing, also, does not address water pressure measurements or oxygen content measurements or other scientific quantifiable means.

Mr. Neugebauer presents Sections of the 1987 Manual related to the comprehensive approach to wetland determinations [Exhibit 1-4, p 19]. The Section quoted states, as follows:

"22. Comprehensive approach. The comprehensive approach requires application of quantitative procedures for making wetland determinations. It should seldom be necessary, and its use should be restricted to situations in which the wetland is very complex and/or is the subject of likely or pending litigation. Application of the comprehensive approach (Part IV, Section E) requires a greater level of expertise than application of the routine approach, and only experienced field personnel with sufficient training should use this approach."

He then goes on to state that SNR always conducts comprehensive studies, which are much more detailed and provide a much higher level accuracy when compared to the routine approach, which is usually adequate to identify wetlands, and which was used by the other members of the team.

However, as can be seen in the quote above, the "comprehensive approach" requires the application of quantitative procedures. Nowhere in SNR's Report or in Mr. Neugebauer's testimony were any results arising from quantitative procedures or measurements quoted or presented. Since SNR did not apply quantitative procedures from making a wetland determination on this site, it would appear from SNR's own exhibit that they did not use a comprehensive approach.

IX.

SNR's Report, as well as the other reports and information submitted by Wetland Specialists, are based on site observations. Since the SNR Report is also a qualitative report, SNR has shown no reason to deviate, as it surely did, from a general application of the methods set forth in the Manual.

If we accept SNR's suggestion that regulatory agency Staff are "agenda driven" [i.e. biased in favor of finding wetlands], and if we accept Planning's position that SNR represents a Property Rights' agenda, and is biased, it would appear that the only unbiased reports in the file are those prepared by Northwest Wetlands Consulting. NWC identified wetlands on the site. After a second site investigation, at the request of Planning, NWC concluded that the wetlands onsite are large enough to be jurisdictional wetlands subject to the Whatcom County Critical Areas Ordinance.

X.

As can be seen from the findings above, there are a number of experts with sufficient expertise to be qualified to give an expert opinion as to the existence of wetlands on the Anchor Manor site. An opinion from Planning Staff, the Wetland Specialist for the Department of Ecology, and wetland reports prepared by Northwest Wetlands Consulting, there are wetlands on the site.

This conclusion is directly in conflict with the conclusion issued by SNR that there are no wetlands on the site.

When faced with conflicting expert testimony, the 'Trier of Fact' is required to determine the credibility of the witnesses and to determine the weight that should be given to their testimony. In this case, the Hearing Examiner concludes, as a factual matter, that the preponderance of the evidence establishes the existence of two wetland areas on the Anchor Manor property, as described in the NWC Report of November 5, 2010, that are jurisdictional wetlands subject to the Whatcom County Critical Areas Ordinance.

The weight of the evidence in the record establishes the existence of wetland hydrology, in the form of saturated soils; the existence of hydric soils; and the existence of

wetland vegetation in the areas delineated as jurisdictional wetlands by NWC.

XI.

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.

This Appeal was filed in a timely manner and the Hearing Examiner has the jurisdiction to resolve the issues raised by the Appeal. Contrary to the Appellant's assertions in their Pre-Hearing Brief, the only matter properly before the Hearing Examiner is the determination made by the Critical Areas Technical Administrator that the Wetland Report filed by SNR was inadequate and incorrect and that the Wetland Report filed by NWC, dated November 5, 2010, was the Wetland Delineation and Report approved by the Technical Administrator.

II.

The Appellant's Pre-Hearing Memorandum, Exhibit No. 6 in the Hearing Examiner's file, under Relief Requested, asked the Hearing Examiner to dissolve the Stop Work Order issue by Whatcom County Planning and Development Services on February 16, 2010; to lift any and all fines and penalties laid against Appellant, pursuant to Enforcement Action, ENF2010-0033, and to dismiss said Enforcement Action.

The Appellant failed to appeal the Notice of Violation, dated May 11, 2010. The Appellant, also, did not file an Appeal of the Notice of Penalties issued on March 30, 2011, and on May 10, 2011.

The Appellant was informed of its right to appeal these written Notices. Having failed to file an Appeal in a timely manner, the issues of the Notice of Violation and the penalties imposed are not before the Hearing Examiner.

III.

The failure of the Planning Department to address wetland issues between 2003 and 2005, while granting permits, including Land Disturbance, in what is now considered a regulated wetland is unfortunate, and to some extent should be embarrassing.

However the Hearing Examiner finds no legal basis which would allow the Hearing Examiner to consider the issuing of the permits, along with the associated Determinations of Non-significance issued under SEPA, to be used as a bar against Planning, currently enforcing the Critical Areas Ordinance to wetlands existing on the Anchor Manor site.

These prior errors may form the basis for some kind of equitable relief. However, applying legal equitable principles is beyond the jurisdiction of the Hearing Examiner and lies in the jurisdiction of the Superior Court.

The Hearing Examiner acknowledges that the wetlands in question are of low quality and acknowledges that the Planning Department, in the past, granted permits to allow the owner of the property to disturb areas, which have now been identified as jurisdictional wetlands. If the Hearing Examiner's Decision that there are jurisdictional wetlands onsite becomes a Final Decision, it is likely that the wetlands in question can be filled and that the Appellant's obligation under the Critical Areas Ordinance can be met by a modest amount of offsite mitigation.

IV.

SNR has argued that the current Manuals and documents, which have been adopted, and which contain the guidelines and methods now used to identify and delineate wetlands, do not meet current best available science criteria. Implicit in this argument is the assertion that the Manuals can be disregarded through a showing in an individual case that they do not reflect best available science.

This is not the law. Critical Areas Ordinances are required by the Growth Management Act. The Growth Management Act [GMA] requires municipal governments to adopt ordinances to protect critical areas, including wetlands, and requires that these ordinances are to be based on best available science. The GMA requires best available

science is to be used by the legislative bodies when adopting ordinances implementing the GMA, such as the Critical Areas Ordinance.

Any argument that the Whatcom County Critical Areas Ordinance failed to implement or use best available science would require an Appeal of the adoption of the Ordinance to the Growth Management Hearings Board, in a timely manner. The current Whatcom County Critical Areas Ordinance has gone through the planning process required by the Growth Management Act and cannot now be attacked on a case by case basis for failing to incorporate best available science.

The Hearing Examiner is required by law to presume that the Whatcom County Critical Areas Ordinance, and other land use ordinances, adopted pursuant to the GMA are consistent with the Growth Management Act and have incorporated best available science.

V.

The Hearing Examiner has limited jurisdiction. The Hearing Examiner does not have jurisdiction to rule on equitable issues, constitutional issues, or the legality of the ordinances adopted by the Whatcom County Council and incorporated into the Whatcom County Code.

In relation to this case, the authority of the Hearing Examiner in regard to the Critical Areas Chapter of the Whatcom County Code, WCC 16.16, is set out in that Chapter.

WCC 16.16.240.C.3, grants the Hearing Examiner the authority to hear appeals of Administrative Decisions made by the Technical Administrator, pursuant to the Critical Areas Ordinance.

WCC 16.16.280, allows appeals of Final Administrative Orders or Determinations. In this case, the Technical Administrator made a Final Determination approving a Wetland Report, submitted by NWC and rejecting a Wetland Report, submitted by SNR. SNR filed a timely Appeal.

WCC 16.16.280.C, reads as follows:

16.16.280 Appeals.

- C. The appeal will be upheld if the applicant proves that the decision appealed is clearly erroneous or based upon error of law.

The clearly erroneous standard puts a high burden of proof on the Appellant. It requires the Appellant to provide clear, cogent, and convincing evidence that the determination was in error.

In this case, the Hearing Examiner has concluded that the Determination reached by the Technical Administrator is supported by a preponderance of the evidence. Not only does the Appellant's case fail to establish clear, cogent, and convincing evidence of error by the Technical Administrator, the record as a whole establishes that the Technical Administrator made a proper Determination.

If, as is common for an Appeal before the Hearing Examiner, the Hearing Examiner had the right to determine the issue *de novo*, the Hearing Examiner would have found, as did the Technical Administrator, that there were low quality, jurisdictional wetlands on the site, as described in the NWC Wetland Report, dated November 5, 2010.

VI.

Designation and rating of wetlands is addressed in WCC 16.16.610. Paragraphs A and B of this Section, read as follows:

- 16.16.610 Designation, rating, and mapping – Wetlands.
- A. Wetlands are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Swamps, freshwater and saltwater marshes, bogs, and some meadows are examples of wetlands. Some riparian areas adjacent to streams are also wetlands.
 - B. Wetlands shall be identified in accordance with the requirements of RCW 36.70A.175. Unless otherwise provided for in this chapter, all areas within the county meeting the criteria in the Washington State Wetlands Identification and Delineation Manual (Ecology Publication 96-94) or the U.S. Army Corps of Engineers Wetlands Delineation Manual, 1987 Edition, and

corresponding guidance letters, regardless of any formal identification, are hereby designated critical areas and are subject to the provisions of this article.

Based on the Findings of Fact, the Hearing Examiner concludes that the two wetland areas identified on the Anchor Manor property do meet the definition of wetlands as set forth in Paragraph A, above. SNR's reliance on an argument, based on a lack of ground water hydrology, appears to be misplaced, since the definition of wetlands as described and set forth in WCC 16.16.610, above, specifically allows for soil saturation from "... surface or ground water"

The Hearing Examiner finds that Wetlands A and B, on this site, were identified in accordance with the criteria of the Manuals and documents set forth in Paragraph B of WCC 16.16.610, above, and therefore are critical areas, subject to the provisions of the Wetlands Section of the Whatcom County Code [Article 6 of Chapter 16.16 of the Whatcom County Code.]

The requirements of Paragraph B, above, specifically requires any areas within Whatcom County, meeting the criteria in the named Wetland Manuals, to be designated as critical areas and subject to regulation as wetlands.

Even if the record did establish that the Manuals in question were no longer best available science, both Planning and the Hearing Examiner would be required to designate as critical areas all properties meeting the criteria in the Manuals until such time as an amended or new Ordinance goes into effect.

VII.

The Hearing Examiner should enter a Decision denying the Appeal and upholding the Determination of the Technical Administrator of the Whatcom County Critical Areas Ordinance.

VIII.

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

The Appellant has failed to establish that the Decision by the Technical Administrator, finding jurisdictional wetlands on the Anchor Manor property was clearly erroneous or based on an error of law. The Decision of the Technical Administrator is upheld and the Appeal is denied.

**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 23rd day of January 2013.



Michael Bobbink, Hearing Examiner