

WHATCOM COUNTY HEARING EXAMINER

RE: SEPA Application)	File No. SEP2009-00132
by)	
Concrete Nor'West for)	File No. PLN2009-0013
<i>Comprehensive Plan Amendment</i>)	
)	
SEPA Administrative Appeals filed by)	
<i>Concrete Nor'West</i>)	APL2010-0004
<i>Friends of the Nooksack Samish Watershed</i>)	APL2010-0005
)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND DECISION

SUMMARY OF APPEALS AND DECISION

Appeals: Both Concrete Nor'West and Friends of the Nooksack Samish Watershed have appealed a Mitigated Threshold Determination of Nonsignificance under SEPA for the Concrete Nor'West proposed Amendment to the Comprehensive Plan Map to add to the Mineral Resource Lands Overlay 280-acres located near the South Fork of the Nooksack River, north of Wickersham in south-central Whatcom County.

Concrete Nor'West, the Proponent of the Amendment to the Comprehensive Plan Map to extend the Mineral Resource Lands Overlay to the subject property, has appealed the inclusion of a condition attached to the MDNS [Exhibit No. 6 in the Hearing Examiner file] which stated that the Amendment requested, if granted by the Whatcom County Council after review, "... shall not be effective until such time as additional environmental review is completed to address site specific issues, and a Development Agreement, pursuant to RCW 36.70B.170 and WCC 20.92.850, is entered between Whatcom County and Concrete Nor'West."

Friends of the Nooksack Samish Watershed appealed the issuance of a Determination of Nonsignificance and requested that an Environmental Impact Statement be completed prior to the Planning Commission and Whatcom County Council considering the request to extend the Mineral Resource Lands Overlay to the subject 280-acre parcel.

Decision: The Hearing Examiner has determined that the "mitigation conditions" attached to the DNS were unnecessary and/or inappropriate for a SEPA Determination and amounted to a non-legislative revision of the procedure for reviewing a site specific mining operation set forth in the Whatcom County Code.

The Appeal of Concrete Nor'West of the "mitigation conditions," attached to the DNS by the Responsible Official, is UPHELD.

The Appeal of Friends of the Nooksack Samish Watershed, requesting that the Hearing Examiner overturn the Determination of Nonsignificance issued by the Responsible Official, is DENIED.

FINDINGS OF FACT

I.

Background Information

Appellant: Appellant (s): Friends of the Nooksack Samish Watershed
Concrete Nor'West

Applicant: Concrete Nor'West

WC File # Being Appealed: SEP2009-00132

Property Location/Address: Within the NW ¼ and NE ¼ of Section 28, Township 37 North, Range 5 East, W.M.

Assessor's Parcel Numbers (APN): 370528 180450 and 370528 461325

Zoning: Commercial Forestry (CF)

Comprehensive Plan: Commercial Forestry

Authorizing Ordinances: WCC 20.92 Hearing Examiner
WCC 16.08.170 SEPA Appeals

Applicable State Law: RCW 43.21C State Environmental Policy Act
WAC 197-11 SEPA Rules
RCW 36.70B.170 Development Agreements

Applicable Local Ordinances: WCC 16.08.160 SEPA Substantive Authority
WCC 20.43 Commercial Forestry Zone
WCC 20.73 Mineral Resource Lands Special District
Comprehensive Plan, Chapter 8, Resource Lands
Comprehensive Plan, Chapter 11, Environment

Exhibits:

- 1 Administrative Appeal Application, APL2010-0004, with attachments
 - 1-1 Statement for Appeal
 - 1-2 Customer Receipt

 - 1-3 Letter dated January 11, 2010, from Lesa Starkenburg-Kroontje to Tyler Schroeder re: SEPA MDNS, File No. SEP2009-00132/Concrete Nor'West
 - 1-4 Western Washington Growth Management Hearings Board, Final Decision and Order, No. 97-2-0030c
 - 1-5 WAC 197-11-444: Elements of the environment
 - 1-6 Whatcom County Comprehensive Plan, Chapter 8-Resource Lands **Action Plan, June 2008
 - 1-7 Whatcom County Hearing Examiner Decision, City of Nooksack, APL06-0024/SEP06-0062, CMP06-0013

- 2 Administrative Appeal Application, APL2010-0005, with attachments
 - 2-1 Letter in support of Appeal, dated January 21, 2010, from David Mann and Brendan Donckers
 - 2-2 Customer Receipt
 - 2-3 Notice of Appearance dated April 28, 2010, from Lesa Starkenburg-Kroontje

- 3 Notice of Withdrawal of SEPA DNS and Issuance of MDNS, dated December 29, 2009

- 4 Letter, dated January 11, 2010, from Lesa Starkenburg-Kroontje to Tyler Schroeder re: SEP2009-00132/Concrete Nor'West, with attachments:
 - 4-1 WAC 197-11-444: Elements of the environment
 - 4-2 Whatcom County Comp Plan, Chapt 8-Resource Lands**Action Plan, June 2008
 - 4-3 Hearing Examiner Dec, City of Nooksack, APL06-0024/SEP06-0062
 - 4-4 Western Washington Growth Management Hearings Board, No. 97-2-0030c
 - 4-5 Western Washington Growth Management Hearings Board, No. 05-2-0011
 - 4-6 Address Label, date stamped received PDS, January 12, 2010

- 5 Letter, dated December 28, 2009, to Interested/Concerned Parties, from David Stalheim re: Withdrawal of SEPA DNS, and issuance of MDNS

- 6 MDNS, SEP2009-00132, Mitigation Conditions

- 7 Re-issued MDNS Distribution List, SEP2009-00132

- 8 Revised DNS Distribution List
- 9 Revised DNS for public notice purposes, dated December 1, 2009
- 10 DNS, dated November 10, 2009
- 11 Aerial Map showing Existing and Proposed MRL
- 12 DNS Distribution List
- 13 Legal Notice, November 10, 2009
- 14 SEPA Checklist
- 15 Letter dated January 5, 2001 from Anna Martin
- 16 RCW 78.44.091: Reclamation Plans – Approval Process
- 17 Email correspondence opposing DNS, received November 19 thru December 23, 2009, addressed to Tyler Schroeder
- 18 Letter, dated December 28, 2009 from Lesa Starkenburg-Kroontje to Tyler Schroeder
- 19 Email correspondence re: DNS, addressed to Schroeder
- 20 Letter dated December 23, 2009, from Nooksack Indian Tribe to Schroeder
- 21 Email from David Mann to Schroeder, dated Dec 28, 2009, withdrawing appeal of DNS
- 22 Letter dated January 11, 2010 from Larry Kimmett to Schroeder re: opposition to MDNS
- 23 Letter dated January 15, 2010 from Lummi Indian Business Council opposing rezone
- 24 Ordinance No. 2005-024/AB2004-400
- 25 Email correspondence opposing County's Decision not to require EIS, received Dec 13 – 19, 2009
- 26 Concrete Nor'West address and phone info
- 27 Dept of Archaeology & Historic Preservation, letter dated December 15, 2009 re: Request for Archaeology Survey
- 28 Letter dated December 15, 2009 to Tyler Schroeder from Residents of Whatcom County re:

Saxon Gravel Pit Expansion, Concrete Norwest

- 29 Email Comments to Tyler Schroeder, received December 12-14, 2009, requesting EIS
- 30 Email Comments received 12/16/2009 to County Planners / Tyler Schroeder requesting EIS
- 31 Letter, stamped received December 4, 2009 to Loisann and Suzanne Shull, opposing DNS
- 32 Email Comments received in January opposing MDNS and requesting EIS to Tyler Schroeder
- 33 Certificate of Posting, date April 28, 2010
- 34 Legal Affidavit of Publication, dated April 29, 2010
- 35 Email communication regarding scheduling of open record hearing
- 36 Staff Report, dated May 7, 2010
- 37 Memorandum Submitted on Behalf of Concrete Nor'West by Lesa Starckenburg, dated May 11, 2010 [notebook with attachments]
 - 37-1 DNS, dated November 10, 2009
 - 37-2 Revised DNS, dated December 1, 2009
 - 37-3 Letter dated Dec 28, 2009, from David Stalheim to Interested/Concerned Parties
 - 37-4 WAC 197-11-444: Elements of the environment.
 - 37-5 WC Comp Plan, Chapter Eight-Resource Lands **Action Plans, June 2008
 - 37-6 Comp Plan Amendments, Chapter 2.160
 - 37-7 WCC, Chapter 20.73 Mineral Resource Lands Special District (MRL)
 - 37-8 WCC, Chapt 20.84 Variances, Conditional Uses, Admin Approval Uses, Appeals
 - 37-9 Whatcom County Hearing Examiner Decision, dated October 3, 2006, APL2006-0024/SEP2006-0062/CMP2006-0013, City of Nooksack Appellant
 - 37-10 Final Decision and Order, No. 97-2-0030c Western Washington Growth Management Hearings Board, Wells vs. Whatcom County and Freestone
 - 37-11 Final Decision and Order, Case No. 05-2-0011, Western Washington Growth Management Hearings Board, Linda Franz v. Whatcom County Council and Whatcom County Executive and James Carr
- 38 Letter dated May 10, 2010, from Concrete Nor'West to Whatcom County Hearing Examiner, re: administrative Appeals, APL2010-0004 and APL2010-0005
- 39 Friends of Nooksack Samish Watershed Hearing Brief, prepared by David Mann, dated May 12, 2010, with attachments
 - 39-1 Letter, dated May 11, 2010, from Peter Willing of Water Resources Consulting
 - 39-2 Peter Willing Vita
 - 39-3 Washington State Appeals Court, Magnolia Neighborhood v. City of Seattle
 - 39-4 WA State Supreme Court, King County v. WA State Boundary Review Board

- 40 Letter dated May 13, 2010, from Larry Kimmett
- 41 Letter dated May 18, 2010, from Paul Brass
- 42 Letter, not dated, from Suzanne and Loisann Shull
- 43 Letter, dated May 21, 2010, from Ken Carrasco
- 44 Letter, dated May 2010, from Bonnie Rice
- 45 Reply Memorandum Submitted on Behalf of Concrete Nor'West, by Lesa Starkenburg-Kroontje, dated May 21, 2010

Parties of Record:

Friends of the Nooksack Samish Watershed
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Gendler & Mann
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Bonnie Rice
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David Stalheim, Tyler Schroeder, Doug Goldthorp
Planning and Development Services

II.

Concrete Nor'West has docketed a request with the Whatcom County Council to have the subject 280-acre parcel, owned by Concrete Nor'West and adjacent to their existing surface mine near the Nooksack River in south-central Whatcom County, added to the Mineral Resource Lands Overlay, Chapter WCC 20.73 of the Whatcom County Zoning Ordinance.

If the request was granted, the property would remain in the Commercial Forestry Zoning Designation, but could be available for surface mining pursuant to the requirements of the Mineral Resource Lands Overlay set forth in Chapter 20.73.

Whatcom County Planning and Development Services is the lead agency reviewing the Concrete Nor'West proposal, pursuant to the State Environmental Policy Act. Concrete Nor'West filed with Whatcom County an Environmental Checklist [Exhibit No. 14] describing the proposal as a Comprehensive Plan Amendment request and analyzing the environmental consequences of approval for the proposal as nonexistent because this was not a project specific proposal and did not have any impacts, and full environmental review would take place at the time an actual permit application for mining activity on the site was submitted to Whatcom County.

The Whatcom County Planning Director, as the Responsible Official under SEPA, originally issued a Determination of Nonsignificance without "mitigation conditions" on November 10, 2009. On December 1, 2009, the Director reissued the Determination as a Revised Determination of Nonsignificance, again without "mitigation conditions." The revised DNS was issued because the original DNS had not been sent to approximately 34-concerned citizens who had requested notification. This second DNS extended the original comment period.

During the second comment period, extensive and numerous public comments were submitted. On December 28, 2009, the Director issued a Notice of Withdrawal of the SEPA

Determination of Nonsignificance and issued a Mitigated Determination of Nonsignificance, dated December 29, 2009, with “mitigation conditions,” which read as follows:

Mitigation Conditions

The threshold determination for the Comprehensive Plan amendment (PLN2009-00013) is a phased SEPA decision pursuant to WAC 197-11-060(5). Phased review is appropriate when the sequence is from a non-project document to a document of a narrower scope such as a site specific analysis. As such, this determination is based on a non-project action which seeks to amend the Comprehensive Plan to include a mineral resource overlay (MRL) designation on Commercial Forest lands.

This Threshold Determination shall be supplemented with site specific environmental review at the time of a development application and a new threshold determination shall be issued prior to issuance of any underlying permits. The site specific environmental review will address probable adverse environmental impacts from the proposal, including but not limited to issues related to dust, noise, traffic, groundwater, water quality and archaeological resources.

The amendment of the Comprehensive Plan to include the subject property in a MRL designation shall not be effective until such time as additional environmental review is completed to address site specific issues, and a Development Agreement pursuant to RCW 36.70B.170 and WCC 20.92.850 is entered between Whatcom County and Concrete Nor’West. [Emphasis added].

The Director also sent a letter, [Exhibit No. 5], dated December 28, 2009, addressed to “Dear Interested/Concerned Parties,” explaining the newly issued Mitigated DNS. This letter acknowledges that the proposal is a non-project action seeking to amend the Comprehensive Plan and would authorize or allow Concrete Nor’West to apply for subsequent permits to mine. It was pointed out that the subsequent applications would be subject to additional environmental review under SEPA, that phased review of the application was appropriate, and that the revised SEPA decision adding the above “mitigation conditions,” “... makes clear that this Threshold Determination cannot be used for subsequent permit development applications, and must be supplemented with new information and a new Threshold Determination.” The Appellant, Concrete Nor’West, acknowledges the accuracy of this statement.

The Director goes on in the letter, dated December 28, 2009, to address the portion of the “mitigation conditions,” addressing future process by stating as follows:

We also recognize that the decision to designate the land for potential gravel extraction is a significant public policy question. The Whatcom County Comprehensive Plan recognizes and encourages

that adequate mineral resources be designated in Whatcom County. Yet, the designation of this land could occur without the decision-makers having site specific environmental review documents available for their consideration.

The revised SEPA decision requires that additional public review would be necessary before a Comprehensive Plan amendment would become effective. A Development Agreement, authorized pursuant to RCW 36.70B.170 and WCC 20.92.850 would require additional public hearings and a decision of the Whatcom County Council before staff would be authorized to approve any site specific development applications for the extraction of mineral resources on the property.

Concrete Nor'West objects to the portion of the "mitigation conditions," which reads as follows:

The amendment of the Comprehensive Plan to include the subject property in a MRL designation shall not be effective until such time as additional environmental review is completed to address site specific issues, and a Development Agreement pursuant to RCW 36.70B.170 and WCC 20.92.850 is entered between Whatcom County and Concrete Nor'West.

It is the position of Concrete Nor'West that under current law a Mineral Resource Lands Designation becomes effective when approved by the Whatcom County Council; that site specific environmental and other impact issues are to be dealt with, pursuant to the process set forth within Chapter 20.73 of the Whatcom County Code; and that the requirement for a Development Agreement approved by the Whatcom County Council amounts to a revision of the currently existing legal procedures for reviewing a surface mine proposal set forth in the Whatcom County Code.

III.

Appellants, Friends of the Nooksack Samish Watershed, appealed the SEPA MDNS, arguing that the Responsible Official's MDNS, which deferred all consideration of environmental effects of mining on this site until a specific project application for actual mining was received, that this decision was in error, and that an EIS considering at least some of the potential, significant adverse impacts of future mining at this location should be prepared and be available to the decision-makers (the Whatcom County Planning Commission and the Whatcom County Council) before the Planning Commission makes its Recommendation and the Whatcom County Council makes its Decision on the proposed Comprehensive Plan Amendment which would put the subject property within the Mineral Resource Lands Overlay.

The Hearing Examiner file includes a large number of written comments from citizens concerned about impacts of a mining operation on that site. In general, these concerns relate to protection of the aquifer and possible impacts on private wells in the area; impacts on the quality of

life including noise, dust, and traffic impacts; impacts on property values; impacts on local tourist-related businesses in the immediate vicinity of the proposed expanded MRL; possible impacts on farming in the area; and adverse impacts on the Nooksack River and the current attempts to restore endangered fish species using the river.

Comments from both the Lummi Nation and Nooksack Indian Tribe raised concerns about the impact of mining in this area on salmonid populations and water quality in the Nooksack River. These comments, along with numerous other comments, point out that a great number of salmon restoration projects have been completed in this general area, and that there are a number of threatened salmonid species and trout that could be affected should the mining change conditions, including water temperature and water quality, within the Nooksack River.

In addition, comments were received from the Washington State Department of Archeology and Historic Preservation, stating that the area has a high potential for archeological resources and burials and requesting a professional archeological survey. The comments from the Lummi Nation and Nooksack Indian Tribe Officials also raised concern about impacts on cultural resources.

IV.

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.

The proposed 280-acre expansion of the Mineral Resource Lands Overlay to include the subject parcel, pursuant to the request of Concrete Nor'West, requires a Comprehensive Plan Amendment. SEPA review process of the proposed Comprehensive Plan Amendment is the first step in review of the proposed Comprehensive Plan Amendment. After SEPA issues have been resolved, the Planning Department will review the proposed Amendment. It will be set for public hearing in front of the Whatcom County Planning Commission, and Whatcom County Planning and Development Services Staff will prepare and present a Staff Report to the Planning Commission. Public testimony will be taken. At the end of the Planning Commission proceedings, the Planning Commission will make a Recommendation, and the matter, along with the record before the Planning Commission, will be placed in front of the Whatcom County Council. The Council can either approve or deny the requested Mineral Resource Lands expansion. The Whatcom County Council, should it choose, can hold a public hearing prior to any vote on the proposed Comprehensive Plan Amendment.

If the Council approves the Amendment, that approval can be appealed to the Growth Management Hearings Board, pursuant to the Growth Management Act. Growth Management Hearings Board Decisions can be appealed to the Courts.

If the property is ultimately included in the Mineral Resource Lands Overlay, the underlying

zoning will remain Commercial Forestry and the property owner can seek a discretionary Administrative Approval Use Permit to mine some, or all, of the site, pursuant to Chapter WCC 20.73. WCC 20.73 sets forth the process or procedure for obtaining a permit to mine and the criteria that Planning and Development Services Staff are to use in determining whether or not to grant administrative approval for the mining and, if granted, what Conditions of Approval are required in order to meet the requirements of Chapter WCC 20.73. Prior to making a decision, Whatcom County Planning, as the lead agency, will require SEPA review and issue a Threshold Determination of either Environmental Significance, which would require an Environmental Impact Statement or a Determination of Nonsignificance, which could include specific conditions to mitigate potential adverse environmental impacts not otherwise covered by current regulations.

In determining if, and under what conditions, an administrative approval for surfacing mining should be granted, the administrative decision-maker [Historically, the Whatcom County Geologist has reviewed and ruled on surface mining permit applications.] is to require at a minimum that the activity adhere to the Development and Performance Standards of WCC 20.73.700.

The notification requirements for administrative approval of a proposed surface mine have been expanded to cover all property owners within 1,000-feet of the external boundaries of the subject property. Other than the expanded notice provisions, the Administrative Approval Uses Permit section is processed using procedures and criteria set forth in WCC 20.84.235. This section gives the Planning Department the authority and responsibility to approve or deny Administrative Approval Uses Applications. The administrative decision is to be based upon compliance with the Development Standards established for the proposed use, in this case, WCC 20.73, as well as the Conditional Use Criteria set forth in WCC 20.84.220.

The Conditional Use Criteria of WCC 20.84.220 requires that the use be harmonious and in accordance with the objectives of the Whatcom County Comprehensive Plan and the applicable zoning regulations. Additionally, it sets forth a number of requirements which can be used to either condition the permit, or, in an appropriate situation, deny it. These additional criteria are aimed at appropriately mitigating the impacts of the proposed use on the surrounding community. If these impacts cannot be reasonably mitigated, denial of the permit application would be appropriate.

Pursuant to WCC 20.73 and 20.84, decisions of the Planning Department on Administrative Approval Use Permits are appealable to the Whatcom County Hearing Examiner. In the case of surface mining permit appeals, WCC 20.73 provides that the appeal to the Hearing Examiner is subject to *de novo* review. *De novo* review allows the Parties to create a new and complete record before the Hearing Examiner and allows the Hearing Examiner to make a decision without referring to or granting deference to the administrative decision made by Planning.

The decision by the Hearing Examiner on the appeal of the administrative decision, and on any appeals of the SEPA Threshold Determination made on the mining application, may be appealed to the Whatcom County Council and, ultimately, to the Courts.

II.

The “mitigation conditions” placed on the DNS issued by the Responsible Official for this proposed Comprehensive Plan Amendment delayed the effective date of the approval of the Comprehensive Plan Amendment until such time as a site specific application for mining on this site was approved by the Whatcom County Council. It further modified the procedural requirements for obtaining a mining permit, as set forth in WCC 20.73 and WCC 20.84, to require the Applicant to enter into a Development Agreement, pursuant to State law and subject to approval by the Whatcom County Council.

If allowed to stand, the “mitigation conditions,” placed on the DNS by the Responsible Official, would modify legislatively adopted procedural requirements for the Amendment of a Comprehensive Plan contained in the Revised Code of Washington. It would also rewrite the procedural requirements in the Whatcom County Code, adopted by the Whatcom County Council, and set forth in WCC 20.73 and WCC 20.84, for obtaining a permit for surface mining.

There is no authority allowing the Responsible Official to use his SEPA authority to set aside the statutory process requirements for obtaining a permit to mine, as set forth in the Whatcom County Code, by requiring a different process determined by the Responsible Official to be more appropriate. Neither the Responsible Official nor the Hearing Examiner has any authority to revise the Whatcom County Code. As pointed out by the Applicant, Concrete Nor’West, “Process is not an element of the environment subject to review under SEPA.”

It was inappropriate for the Responsible Official to use the substantive power under SEPA to attach conditions to a Determination of Nonsignificance which both changed the process for the adoption of Comprehensive Plan Amendments under State law, and the process for obtaining a permit for site specific surface mining, pursuant to the Whatcom County Code.

The Appeal of Concrete Nor’West of the “mitigation conditions” should be upheld. The portion of the “mitigation conditions,” which did not involve the process for obtaining a Comprehensive Plan Amendment approval and/or future approval of a permit to mine, just restated existing law, and did not mitigate environmental impacts.

III.

A more difficult issue to resolve is the issue raised by Friends of the Nooksack Samish Watershed. Friends argues that at least some of the potential impacts of actual mining on this site should be the subject of an Environmental Impact Statement in order to provide the Planning Commission and Whatcom County Council with sufficient environmental information to decide whether the proposed expansion of the Mineral Resource Lands Overlay proposed by Concrete Nor’West should be approved.

Concrete Nor’West argues that the proposal is a non-project action, that prior to any mining taking place on this site, Concrete Nor’West would be required to address significant adverse environmental impacts, if any, as part of the process for obtaining an actual site specific permit for

any mining on the property.

The Responsible Official acknowledged the appropriateness of a phased review under SEPA which would not require an assessment of the environmental impacts of actual mining on this site until an application for a permit to mine was received and processed.

This Hearing Examiner reached the same conclusion in a prior case involving a proposed Comprehensive Plan Amendment to expand the Mineral Resource Lands Overlay to add an approximately 25-acre parcel to the MRL Overlay [Whatcom County Hearing Examiner file, APL2006-0024]. The Hearing Examiner's Decision was summarized on the first page of the decision as follows:

Decision

The Whatcom County Hearing Examiner concludes that future review of a mining project on the property will be subject to requirements for environmental analysis and mitigation, both under SEPA and pursuant to Whatcom County regulation of Mineral Resource Lands, including meeting the requirements for a permit to conduct surface mining. This will provide adequate analysis of and specific mitigation for any adverse environmental impacts of actual surface mining on this site.

Concrete Nor'West has submitted and cited two decisions of the Western Washington Growth Management Hearings Board dealing with the Whatcom County Comprehensive Plan and Zoning Ordinance in reference to designating Mineral Resource Lands and to obtaining site specific permits in Whatcom County for actual mining.

In the matter of Sherilyn C. Wells, et al., v. Whatcom County, Western Washington Growth Management Hearings Board, Case No. 97-2-0030c, 1998. [Exhibit 4-4 in the Hearing Examiner file], in reference to issues raised by Friends in this appeal, the Growth Management Hearings Board stated as follows:

“Similarly, there is no evidence in the record that the County's mineral lands designations create prohibited impacts on residential uses. Although existing mining activity should be conserved by mineral lands designation, it will not necessarily be enhanced. As the County stated, mineral lands designation is not a right to mine. CP Policy 8P-4 provides:

Allow mining within designated MRLs through zoning and a discretionary and administrative permit process, requiring:

1. on-site environmental review, with county as lead agency, and
2. application of appropriate site specific conditions, and
3. notification to neighboring property owners within 1,000 feet to

4. insure opportunity for written input and/or appeal, and access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

The record does not support Petitioners' arguments that residential uses will be impermissibly impacted by mineral lands designation. Project-specific review will provide the opportunity for residents likely to be affected by a mining proposal to voice their concerns to the County." [At page 10].

As can be seen from the above quote, Whatcom County had taken the position, before the Hearings Board, that a Mineral Resource Lands designation is not a right-to-mine. The Board accepted the County's argument that later project specific review provides the necessary opportunity to raise concerns about actual impacts of a mining proposal.

In a second decision by the Western Washington Growth Management Hearings Board, Case No. 05-2-0011, [Exhibit 4-5 of the Hearing Examiner's file] the Hearings Board addresses a Determination of Nonsignificance for the proposed addition of Mineral Resource Lands to the MRL Overlay, stating as follows:

"The SEPA process is staged in Whatcom County, applied both programmatically and specifically, and is not complete for a mineral resource lands matter until a final determination is made on an administrative approval permit for mining operations. Petitioner participated in this SEPA process to date and, in her case briefing, did not demonstrate that the County failed to properly utilize that process in issuing a DNS on the subject MRL designation. The County's arguments are persuasive." [at page 23]

The Responsible Official acknowledged this policy of Whatcom County to review and address, under SEPA, impacts of a proposed mining operation at the time there is an Administrative Approval Use Permit Application for a mining operation. Whatcom County has routinely not required a SEPA review of environmental issues related to actual mining operations during the process of determining whether or not to designate specific properties as Mineral Resource Lands, but instead considering the Comprehensive Plan Amendment to be a non-project action not subject to an impact analysis until an actual permit application has been filed. The Responsible Official acknowledged this policy in his letter of December 28, 2009, Exhibit No. 5, and through his three Threshold Determinations of Nonsignificance. None of the Threshold Determinations contained "mitigation conditions," designed to deal with potential adverse impacts from actual mining on this site.

Friends argues that this ongoing policy is in error and that at least some analysis of the actual potential adverse impacts from mining needs to be done under SEPA at the point where a specific project property may be placed within a Mineral Resource Lands Overlay.

In support of this position, Friends mainly relies on King County v. Washington State

Boundary Review Board for King County, et al, 122 Wash.2d 648, 860 P.2d 1024 (1994), hereinafter referred to as Black Diamond. In Black Diamond, the Supreme Court was dealing with an Annexation by the City of Black Diamond of lands in unincorporated King County approved by the King County Boundary Review Board. The Washington State Supreme Court in a 5-3 decision held that an Environmental Impact Statement should have been prepared for the proposed annexations, reversed the Determination of Nonsignificance issued by the City of Black Diamond and remanded the matter with the requirement that an Environmental Impact Statement be prepared and that the Board re-open its hearings to consider the Environmental Impact Statement, and then issue a new decision.

The three Justices who dissented argued that an Environmental Impact Statement was not required at this point because future allowed and potential uses were speculative.

In Black Diamond, the Supreme Court concluded as follows:

We therefore hold that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action. [at page 12].

The Court also points out in a footnote that agencies can limit the scope of the EIS to “the level of detail appropriate to the scope of the non-project proposal,” citing WAC 197-11-442 (2). In support of the Court’s decision, the Court pointed out that a likelihood of development of the annexed property was unquestionable and that, if annexed, “they will by force of law become part of the Black Diamond Urban Growth Area.”

The Hearing Examiner reads this decision to indicate that there is no clear or absolute line of demarcation between project specific applications requiring full environmental review and non-project applications, which are often exempted from environmental review because the impacts of future development may be speculative.

In Black Diamond, the Court concluded that the annexation action itself would unquestionably result in future development which could have significant adverse environmental impacts. In this case, future mining on this site, if added to the MRL Overlay, is not a foregone conclusion.

In this appeal, the Hearing Examiner does not believe that expanding the Mineral Resource Lands Overlay, the subject site will unquestionably lead to new or different development than that which is currently allowed. It will allow applications for surfacing mining on the site where they are prohibited at this time. But the surface mining activity will only be allowed after a full environmental review and findings by decision-makers that both the specific development standards,

both for surface mines and the more general Conditional Use Criteria, can be met.

IV.

A careful reading of the Whatcom County Comprehensive Plan establishes that the legislative body envisioned a two-step approval process prior to the granting of surface mine permits. Pursuant to the Growth Management Act, Whatcom County is required to identify mineral resource lands of value and to provide a regulatory framework which allows surface mining in appropriate situations.

The first phase of determining whether or not surface mining should take place in a given area is the application of the Designation Criteria for Mineral Resource Lands set forth in Chapter 8 of the Whatcom County Comprehensive Plan, starting on page 8-29. These criteria direct the Planning Commission and the Whatcom County Council when considering proposed additions to the MLR Overlay. Concrete Nor'West would have to convince the decision-makers that the site which they wish to incorporate into the MRL Overlay meets these Designation Criteria. These criteria do not require a complete investigation of potential significant environmental impacts of future mining, prior to designating a property as a Mineral Resource Land.

On the other hand, Goal 8-P of Chapter 8 of the Whatcom County Comprehensive Plan, Policy 8-4, specifically states that environmental review and the application of appropriate site specific conditions be determined through an administrative permit approval process, pursuant to the Zoning Ordinance, requiring notification to property owners within 1,000-feet of the boundary of the site, to ensure opportunity for written input and/or appeal and granting access to *de novo* review by the Hearing Examiner.

These Comprehensive Plan Policies are carried out by the development regulations of WCC 20.73 and application of the Conditional Use Criteria of WCC 20.84, which included a finding that a site specific proposed mining operation be consistent with the Goals and Policies of the Whatcom County Comprehensive Plan.

In regard to Resource Lands, Comprehensive Plan Goal 8-Q, dealing with fish and wildlife, reads as follows:

Goal 8-Q: Ensure that mining avoids adverse impacts to the habitat of threatened and endangered fish and wildlife species.

In order to approve a specific mining operation, the decision-maker would have to conclude that this Goal has been met. In the case of this subject parcel, there is a reasonable amount of evidence already in the record which suggests that there is a potential for adverse impacts to the habitat of threatened and endangered fish species. The Applicant would be required to establish that mining could take place at this location while avoiding these potential adverse impacts, or the application to mine could be denied based on lack of consistency with the Comprehensive Plan.

Additionally, if an Environmental Impact Statement is required for proposed mining on this

site, the decision-maker has substantive authority under SEPA to attach conditions to an administrative permit approval for a mining operation necessary to mitigate specific, identified adverse environmental impacts, or to deny a permit or approval, using substantive authority of SEPA, based on a finding that the mining proposal would result in probable significant adverse environmental impacts identified in the Final Environmental Impact Statement. WCC 16.08.160.

V.

The Hearing Examiner's reading of the Comprehensive Plan in relation to mineral resource lands and surface mining, along with the adopted regulations applying to the Mineral Resource Lands, anticipated a bifurcated review process in which the Whatcom County Council would determine what properties to place within the MRL based on specific Designation Criteria referring mainly to the value and location of non-metallic mineral deposits while leaving the determination of the impacts and approval or denial of specific mining operations to an administrative permit approval process, with *de novo* appeal to the Hearing Examiner.

Whatcom County has specifically argued before the Growth Management Hearings Board that this is the process chosen and the Hearings Board has upheld this bifurcated process as being appropriate and legal.

Whatcom County could have chosen a different process, could have Designation Criteria which would include a full environmental review of mining impacts and could have allowed mining on mineral resource lands to be an outright permitted use once a property is designated as a Mineral Resource Land. Whatcom County has chosen to take a different path. This path is consistent with the general division between project actions and non-project actions allowed under SEPA.

VI.

The Threshold Determination of the Responsible Official under SEPA is entitled to substantial weight. Friends has failed to show sufficient evidence of a substantial likelihood of a significant environmental impact should the Whatcom County Council approve the request to include the subject property within the Mineral Resource Lands Overlay.

The SEPA Determination relates to a non-project action which requires an application for Administrative Approval Use Permit for a surface mining permit in the future. The application for an Administrative Approval Use Permit is for actual mining and will be subject to full environmental review at the time an actual mining proposal is submitted. At the time the application is submitted and reviewed, Whatcom County has full authority to require an Environmental Impact Statement, if deemed appropriate by the Responsible Official; to attach substantive mitigation conditions to any Determination of Nonsignificance; to deny, based on the substantive authority under SEPA, any permit application, which has been subjected to the requirement for an Environmental Impact Statement; and to deny or condition any permit application based on the criteria set forth in WCC 20.73 and WCC 20.84.235, including, by reference, the Conditional Use Criteria of WCC 20.84.220, which allow a permit application to be denied based on its failure to establish that it is harmonious

and in accordance with the general and specific objectives of the Whatcom County Comprehensive Plan.

VII.

The decision of the Responsible Official to issue a DNS for the proposed addition of the 280-acres to the Mineral Resource Lands Overlay should be upheld. The request of Friends of the Nooksack Samish Watershed that the Hearing Examiner overturn the DNS issued and require an EIS should be denied.

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 Appeal of Concrete Nor'West of the Mitigation Conditions attached to the DNS by the Responsible Official is UPHELD.

The Appeal of Friends of the Nooksack Samish Watershed requesting that the Hearing Examiner overturn the Determination of Nonsignificance, issued by the Responsible Official, 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 16th day of June 2010.

Michael Bobbink, Hearing Examiner