



Hearing Examiner's Office

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**DECISION of the
SNOHOMISH COUNTY HEARING EXAMINER**

Millie Judge
Hearing Examiner

M/S 405
3000 Rockefeller Ave.
Everett, WA 98201

(425) 388-3538
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DECISION DATE: March 10, 2011

PROJECT NAME: **MENZEL LAKE GRAVEL**

**APPLICANT/
LANDOWNER:** Menzel Lake Gravel, a division of Lake Industries, LLC
Marc Kalkoske, President
Land and Timber Services, Inc.
1830 Colby Avenue, Everett WA 98201-2231

FILE NO.: 08-110459 LU

TYPE OF REQUEST: MAJOR REVISION - CONDITIONAL USE PERMIT
APPEAL TYPE: SEPA - APPEAL OF DETERMINATION OF NONSIGNIFICANCE (DNS)

DECISION (SUMMARY): **SEPA APPEAL IS GRANTED / REMANDED TO PDS**

GENERAL LOCATION: 7800 Menzel Lake Road, Granite Falls, WA

PDS STAFF RECOMMENDATION: Approve the Conditional Use Permit Application; Deny the SEPA appeal.

INTRODUCTION

Menzel Lake Gravel ("MLG") is requesting a major revision to their Conditional Use Permit (CUP) to continue and expand the use of a gravel mine near the City of Granite Falls, Washington. A portion of the land is designated as Rural Basic-5 Acres and a portion of the land is designated as natural resource land with a Mineral Resource Overlay (MRO) according to the County's GMA Comprehensive Plan (GMACP). The current CUP for the existing property and operation expires in 2012. The proposal expands the operation to 141 acres, which includes areas that will be left undisturbed as permanent Native Growth Protection Areas (NGPAs).

The City of Granite Falls filed a timely SEPA appeal challenging the issuance of a Determination of Nonsignificance (DNS) by the Department of Planning and Development Services (PDS) for the project on various grounds. (Exhibit L.1)

A combined Type 1 appeal and Type 2 public hearing on the CUP was held over a period of three days on January 20, 26 and 27, 2011.

1. Duana Kolouskova of Johns, Monroe, Mitsunaga, Kolouskova, PLLC, Rob Hild, from Lake Industries, LLC, Marc Kalkoske from Land and Timber Services, Inc., James Gardner from Cavassa & Associates, Inc., John Laufenberg from Wetland Resources, Inc., Dave

Baumgarten from Associated Earth Sciences, Inc., Edward Koltonowski from Gibson Traffic Consultants, and John Alberti from J.R. Engineering/Quality Superior, Inc. appeared on behalf of the Applicant, MLG.

2. Ed Caine and Mark Brown appeared on behalf of PDS.
3. Paul McMurray, City Attorney, Malcolm McNaughton, Senior Planner, Warren Perkins, City Engineer, from Gray and Osborne and consultant, Siew Tan, from Pan Geo, Inc., appeared on behalf of the City of Granite Falls.
4. In addition, a number of citizens appeared and those testifying included Delia Mackie, Jack Potter, Ray Sturtz, Granite Falls City Councilman Tom Fitzgerald, Gerig Anderson, Mike Whitley, and Donn Osborne.

NOTE: For a complete record, an electronic recording of the hearing in this case is available in the Office of the Hearing Examiner.

FINDINGS OF FACT

Based on a preponderance of the evidence of record, the following Findings of Fact are entered.

1. The information set forth in the introductory paragraphs is incorporated herein by this reference. All of the exhibits shown on the master list of exhibits were entered into the record as evidence, along with the testimony of witnesses presented at the open record hearing and the tape log. The entire record was considered by the Examiner in reaching this decision.
2. MLG is requesting a major revision to their CUP (No. 03-106230-LU) for an existing commercial mineral excavation site to increase the existing 51 acre mining site by 232 acres for a total of 283 acres. Expansion of mining activities will be to the north, west and south. Of the 283 acres, 141 acres will be placed in permanent Critical Area Protection Area (CAPA) tracts. A total of 142 acres are proposed for mining activities, which is an expansion of 91 acres in addition to the existing 51 acre operation. The expansion is anticipated to provided an estimated life of potentially 75 to 100 years. After mining operations have ceased, the reclamation plan, developed with Washington State Department of Natural Resources, will be fully implemented. The proposed expansion area is divided into six sections. Mining is proposed to begin in section 1. Following completion of mineral extraction, restoration, including construction of a sound berm will commence. Mining is proposed to proceed through the successive sections, wherein 5 acres will be cleared, 5 acres will be actively mined, 5 acres will be receiving reclamation material, and 5 acres will be planted with grass and trees. It is anticipated that no more than 20 acres of the site will be actively mined at any time with additional areas of the site used for operational activities.
3. The application was originally submitted to PDS on November 18, 2008. For the next two years, the Applicant submitted various documents to PDS for review which were found to be insufficient and required additional work and re-submittal. On September 27, 2010, the Applicant's materials were determined to meet the regulatory requirements for the CUP. As of the hearing date, 271 days of the 120-day review period have elapsed. The 120-day clock was exceeded. The primary delay was related to attempts to address the requested improvements by the City of Granite Falls. Project delay also resulted from project reviews by PDS.

4. The existing site consists of fifty-one (51) acres in existing commercial mineral excavation (Exhibit A.6). The major revision would expand the site to an additional 232 acres, which is forested, for a total of 283 acres. Current access is off of Menzel Lake Road, and the access location will be relocated approximately 100 feet to the northwest. The area of current mining activities is zoned Mineral Conservation (MC). The areas proposed for future mining are zoned R-5, with a portion of it designated as MRO in the Comprehensive Plan and the Future Land Use Map. Some on-site areas are not included within the MRO designation, but mining activities are not proposed in those areas. The on-site areas that are not proposed for mining operations are designated as NGPAs. The NGPAs include both wetlands and streams (which are critical areas), and their proposed buffer areas. Adjacent properties are zoned R-5 and includes both residential and undeveloped parcels.
5. On July 31, 2002, Snohomish County and the City of Granite Falls entered into an Interlocal Agreement on Reciprocal Mitigation of Transportation Impacts (the "ILA"). (See, Exhibit L.2(E)) One of the purposes of the ILA was to provide a framework for the reciprocal review and mitigation of interjurisdictional transportation system impacts resulting from land development. Id. The ILA states that for most County developments, compliance with the ILA would satisfy the requirements of the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, relative to mitigating impacts on City streets. However, the ILA does not limit the City's ability to request additional mitigation under SEPA, where the specific impacts are not addressed by the ILA or to request mitigation for developments outside of TSA "B." Id.
6. Under the ILA, where a County development impacts City streets, PDS is required to give the City "... notice and afford the CITY a timely opportunity for review, comment, and staff consultation as provided by the Snohomish County Code related to the impacts that COUNTY DEVELOPMENTS may have on the CITY's transportation system under the CITY's designated mitigation policies." (emphasis in original) Id. Apart from stating that it must be "timely," the agreement is silent as to when PDS must send notice to the City under Section III(D) of the ILA.
7. If the City determines that a development will impact its transportation system, the City is required to notify the County of "specific measures reasonably necessary to mitigate said impacts in accordance with the CITY's designated mitigation policies referenced in Section V." (Exhibit L.2(E), ILA at Section III(F)(1)). For each mitigation measure requested, the City must (1) identify the specific impacts and (2) reference the relevant CITY mitigation policy. Notice of the mitigation request by the City must be made *within 21 days* of the date of notice of the application provided by the County.¹ (Emphasis added). If PDS does not receive timely notice of the specific mitigating measures, PDS may assume that the City has no comments or information relating to the potential impacts of the development on its facilities, and PDS may not require any mitigation from the development for impacts to City facilities. (Id. ILA at Section III(F)(2))
8. The ILA also contains a specific provision relating to safety impacts. Mitigation of impacts on documented safety problem locations on City streets is required prior to the impacts of the traffic from County developments in order to improve such locations in accordance with adopted standards. The ILA states that if there is an identified safety problem location through which a County development places 30 or more average daily trips (ADT); or, if the County development's traffic impacts will cause a safety problem location at the time of full occupancy, then the City may request that the development not be approved until provisions are made to remedy the safety problem. (ILA at III(I), p. 5)

¹The 21 day deadline applies except where an EIS is required, in which case the review period is as provided in WAC 197-11-502.

9. On April 14, 2008, Matt Palmer from Gibson Traffic Consultants, Inc., working on behalf of MLG, sent an email to Warren Perkins, the City of Granite Falls's engineer. (Exhibit L.24) He asked what, if any, requirements there would be for the Traffic Study related to the proposed CUP expansion. Mr. Perkins responded,

Yes, we will want an analysis for the Alder and Pioneer corner. Basically this will be a turning movement analysis. Currently it is a difficult corner to negotiate in [sic] the large trucks and traffic conflicts are common as trucks cross the centerline to make the turn. Increasing the truck and traffic from 40 to 100 trips per day is a cause for concern without analysis and potential expansion of that intersection. Please include in your analysis all turning movements at the intersection . . .

(Exhibit L.24)

10. Seven months later, on November 18, 2008, MLG submitted its application for a major revision to its CUP. On November 21, 2008, PDS sent notice of the application to various public agencies for comment, which is evidenced by copies of the same in the record or responses referring to such notice from the affected agencies. (See, Exhibits H.1 through H.14) Although Mr. Caine testified that PDS sent notice of the application to the City of Granite Falls, a copy of such notice is not in the record before the Hearing Examiner. The City claims that it never received this notice. However, the City's consulting engineer was asked at some point by the Applicant or its consultant, Gibson Traffic Consulting, Inc., to begin working on the turning analysis the City had requested back in April, 2008. Warren Perkins testified at the hearing that his firm, Gray & Osborne, performed the traffic turning analysis for the intersection of Pioneer/Menzel Lake Road and Alder Avenue because Gibson Traffic Consultants, Inc. did not have the software. Their work was included in the Traffic Study prepared for the Applicant. (Testimony of Warren Perkins, 01/26/11)
11. On December 17, 2009, Gibson Traffic Consultant's Inc. issued its Traffic Study. (Exhibit C.1) It stated that "An AutoTurn analysis was conducted by Gray & Osborne for the intersection of Alder Avenue at Pioneer Street (Menzel Lake Road) that shows combination truck tracking does not fit within the intersection limits." (Exhibit C.1 at p. 11) The Traffic Study does not contain a specific mitigation offer from the Applicant as to the identified need for safety improvements at this intersection. (See, Exhibit C.1 at 12-13)
12. PDS received the SEPA Checklist prepared by the Applicant on December 18, 2009. (Exhibit E.1) Under SCC 30.61.100, the SEPA Checklist was required to be submitted at the same time as the development application which, in this case, was back on November 18, 2008. Although the City of Granite Falls (and MLG's own Traffic Study) identified the safety issue, the SEPA Checklist did not disclose the intersection of Alder Avenue and Pioneer/Menzel Lake Road as a safety concern, nor did it disclose any proposed measures to reduce or control the impacts of the existing safety problem, despite the fact that they are proposing to add significantly more trucks trips per day through that intersection. (Exhibit E.1; Par. 14) However, it is clear that both PDS and the Applicant were aware of the City's concern, and that Mark Brown, traffic engineer for PDS had asked the Applicant to meet with the City to discuss the issue. (See Exhibit A.20)
13. Mark Kalkoske, President of Land and Timber Services, Inc., wrote in an email to Mark Brown, that Rob Hild of MLG had met with Granite Falls Mayor Saleem on January 7, 2010, to discuss the safety concerns at the Menzel Lake/Pioneer Street and Alder Avenue intersection. (Exhibit A.20) He cited MLG's attempt to negotiate the purchase of 274 square feet of land outside the right-of-way to make the City's necessary improvements. Mr. Kalkoske asserts in this email that the City would assist it in contacting the landowner to help resolve the situation. (Exhibit A.20)

14. On January 13, 2009, PDS notified the City that it had received comments on the safety concerns presented by the intersection of Alder Avenue and Pioneer, and asked the City to comment. (Exhibit A16) The City responded within seven days, in a letter dated January 20, 2009, wherein Mayor Lyle Romack raised the intersection of Menzel Lake Road/Pioneer Street and Alder Avenue as a safety concern, requesting that a turning analysis and improvements be identified to allow for safe passage of trucks through the intersection without creating conflicts with other traffic, that right-of-way be acquired and the improvements constructed. (Exhibit H.2) The City's letter did not cite to specific City SEPA policies or to any specific section of the ILA as the basis for its request.
15. On February 12, 2010, Mr. Kalkoske wrote a letter to Mark Brown, notifying the County of their failed efforts (which had included help from various City officials), to reach the landowner (Delia Mackie) for the purposes of negotiating the purchase of 274 square feet of land to construct the right-of-way improvements at the Alder Avenue/Pioneer/Menzel Lake Road intersection. In that letter, Mr. Kalkoske stated that the Applicant was willing to purchase the needed right-of-way, to add landscaping and other amenities and deed it to the County, but that the owner was not interested in negotiating with them. (Exhibit A.21)
16. On March 8, 2010, the City of Granite Falls wrote to PDS recommending that the proposed major revision to the CUP be denied for (among other reasons) safety concerns associated with the intersection of Alder Avenue and Menzel Lake Road, as well as the lack of sidewalks along Menzel Lake Road for pedestrians and bicyclists. (Exhibit H.3) The request for denial of the project based on documented safety concerns is allowed under the ILA. (Exhibit L-2, ILA at Section III(I)).
17. The Granite Falls School District had similarly requested restriction or denial of the proposed application in its notice dated December 16, 2008, and letter dated March 16, 2009, based on traffic safety along Menzel Lake Road (inadequate lane width), and at the intersection of Pioneer and Alder Avenues (unsafe turning radius), and including the impact on school bus routes from the additional traffic volumes resulting from the proposed development. (Exhibits H.11 and A.18)
18. On October 15, 2010, PDS issued a Determination of Nonsignificance (DNS). (Exhibit E2B) The DNS states that "[t]his decision was made after "review by Snohomish County of a completed environmental checklist and other information on file with this agency and such information is adopted herein by reference. This information is available for public review upon request." *Id.* The public comment period on the DNS expired on November 22, 2010. Notice of the DNS, Concurrency and Traffic Impact Fee Determinations and Open Record Hearing was mailed to the City of Granite Falls, along with other agencies and parties on October 21, 2010 (Exhibit F.1), published and posted as required by the County Code. (Exhibits F.2 and F.3)
19. PDS met in person with representatives of the City of Granite Falls on November 17, 2010 about its concerns over the project and the SEPA determination.
20. On November 19, 2010, two days before the close of the comment period, PDS issued a Revised DNS, in response to the City's comments and concerns. Four changes were made to the DNS. One change added a sentence that reads, "Traffic mitigation is required pursuant to Chapter 30.66B SCC." Under the Section entitled, "Voluntary Offers," the first sentence was changed to read, "This threshold determination was reached on the basis of mitigation offered voluntarily by the developer in order to meet the regulatory requirements." Finally, under the Section entitled "Mitigation Measures," the threshold determination was changed, deleting the sentence that read, (~~"Mitigation measures are required to achieve acceptable project impact levels and are based on the County's substantive authority under SEPA and Chapter 30.61 SCC to require such impact~~

mitigation.”)) (Exhibit E.2B) This sentence was replaced with the following: “No mitigation measures are required under the County’s substantive authority under SEPA and Chapter 30.61 SCC to require such impact mitigation.” The revised DNS did not extend the public comment period. (Exhibit E.2A)

21. After receiving comments, PDS modified the DNS based on WAC 197-11-340(2)(f). Notice of the modification was required to be sent to all agencies with jurisdiction. PDS sent notice to the City.
22. The City of Granite Falls appealed the DNS on November 22, 2010. The City challenges the DNS on several grounds:
 - (a) The initial DNS and revised DNS contain contradictory statements and are erroneous;
 - (b) The DNS and revised DNS fail to address the probable significant adverse environmental impacts of the Menzel Lake gravel expansion proposal, including impacts to the intersection of Alder Avenue and Pioneer Street, the need for sidewalks along Alder Street, and the need for road maintenance mitigation.
 - (c) The DNS and revised DNS are erroneous as they rely on incorrect traffic assumptions and analysis; and
 - (d) The ILA requires a voluntary (mitigation) agreement between the City and Applicant to address the impacts of the proposal. (Exhibit L.1)

The City seeks to have the DNS overturned as clearly erroneous and wants PDS to issue a threshold Determination of Significance (DS) or a Mitigated Determination of Nonsignificance (MDNS) that adequately mitigates the significant adverse environmental impacts raised by the City, and provides for mitigating conditions (including, but not limited to, a new voluntary mitigation agreement between the City and Applicant). The City is also requesting changes be made to the Traffic Study and traffic mitigation impact fee. The City did not request that an EIS be required. *Id.*

23. PDS concedes in its Staff Recommendation that the City of Granite Falls provided timely comments relative to the DNS. (Exhibits K, H.15 and H.16) However, at the public hearing, Ed Caine testified that it was his opinion that the City was late in responding to the notice of application and, therefore, PDS was not able to require the mitigation they are requesting from MLG. PDS’s position on appeal is that the revised DNS makes it clear that any mitigation required of MLG is based on the regulations set forth in the Snohomish County Code, and not through the exercise of its SEPA substantive authority. (Exhibit K) PDS also asserts that the City failed to communicate its acceptance or rejection of voluntary mitigation offers as to sidewalks and traffic impact fees from MLG, and that the City’s lack of timely response under the ILA rendered PDS unable to request it from MLG.
24. As to the SEPA Checklist, PDS asserts that “[t]he Environmental Checklist consists of 16 elements. PDS has evaluated each element of the checklist in reaching the determination that the proposed project will not have a probable significant adverse environmental impact.” (Exhibit K) But, PDS and MLG had prior knowledge of the City’s traffic and safety concerns, to the point where the intersection conflicts were analyzed in the Traffic Study, yet PDS raised no objection to the deficiencies in the SEPA Checklist, which was devoid of any discussion of these issues under the Transportation Section. Given MLG’s lack of disclosure of the safety concerns raised by the City in the SEPA Checklist, PDS had the legal authority to withdraw the DNS pursuant to WAC 197-11-340(3)(a)(iii), but did not do so.

25. PDS is legally required to comply with the terms and conditions of the ILA, and is required to invoke its SEPA substantive authority to impose mitigation on behalf of the City of Granite Falls where the City determines that a development impacts its streets². (ILA at Section III(F)) In the present case, PDS appears to have sent notice to the City on or about November 21, 2008, which the City claims it never received. The City says it received notice on January 13, 2009, and they responded to it on January 20, 2009. Although PDS contends that the City was late in responding under the terms of the ILA, PDS did nothing to make the City believe that its comments would not be considered. In fact, PDS took steps that showed they were informed of, and were working to resolve, the City's traffic safety concerns as part of the permitting process up until it began its SEPA threshold determination process. Specifically, MLG was required to perform the requested turning analysis at the intersection of Alder and Pioneer and included it in their Traffic Study. MLG was requested to meet with the City about its concerns on January 6, 2009 by Mark Brown. Finally, MLG was required by PDS to attempt to acquire the right-of-way necessary for the intersection improvements. Accordingly, the Examiner finds that if PDS had a right to object to the City's mitigation request as untimely under the ILA, it waived that right in January, 2009, when the City formally responded to the Notice of Application and PDS failed to reject its comments as untimely.
26. Under the terms of the ILA, the City requested denial of the project, given that the safety improvements to the intersection of Alder and Pioneer cannot be completed at this time. The Hearing Examiner finds that the condition of this intersection presents a "significant" adverse environmental impact that was not mitigated at the time of the threshold determination. (WAC 197-11-794) Under those conditions, a DS must be issued, and an Environmental Impact Statement must be prepared. (WAC 197-11-360) This is mandatory under SEPA. (To avoid a DS and preparation of an EIS, an applicant must show that proposed mitigation precludes significant impacts and is enforceable). (See, Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*. Ch. 13, §13.01(Matthew Bender). This was not done in the present case.
27. Additionally, the City was allowed to request denial of the permit under these circumstances pursuant to Section III(I) of the ILA. This is not, as PDS characterized it, merely a political issue. Although it is clear that a developer cannot be required to mitigate more than its proportionate share of a safety impact, the remedy for a known, documented, safety problem is not to allow a project to move forward that exacerbates those safety concerns without mitigation; the appropriate remedy is the issuance of a DS, the preparation of an EIS, and the potential denial of the proposed CUP for its failure to provide for the public health safety and welfare. Instead, PDS incorrectly assumed that it could not do anything about the safety issues raised by the City once the Applicant had exhausted its efforts to purchase the needed right-of-way. This was an error.
28. Any Finding of Fact in this decision which should be deemed a conclusion is hereby adopted as such.

²PDS at least has the obligation to consider the impacts of a development on the City's transportation system when those impacts are identified by the City, and act on that information in making its SEPA threshold determination. Given the way in which PDS issued its DNS, revised DNS, and the Staff Recommendation, it is unclear from the record before the Examiner whether this was done. When considering mitigation, the Examiner's statement that "PDS must exercise its SEPA substantive authority under the ILA" is tempered with the understanding that PDS has the independent duty to determine whether requested mitigation is appropriate, the proportionate share of the mitigation attributable to the Applicant and whether the County finds that the request is grounded in fact.

CONCLUSIONS OF LAW

The Examiner having fully reviewed the entire record, the testimony provided at the public hearing, the Findings of Fact, and being fully informed hereby enters the following Conclusions of Law:

1. The Hearing Examiner has jurisdiction to decide this Type 2 permit application pursuant to SCC 30.72.060 and Chapter 30.42C SCC.
2. The Examiner has appellate jurisdiction over the appeal of the DNS as a Type 1 application pursuant to SCC 30.61.300 and SCC 2.02.100. The appeal was combined with a Type 2 hearing on the CUP.
3. As to the SEPA appeal, the Hearing Examiner reviews the Responsible Official's decision in an appellate role and must accord substantial weight to the agency's threshold determination. (SCC 30.61.310(3)) The Appellant has the burden of proof. The Examiner must uphold the Responsible Official's DNS unless she determines that the decision was clearly erroneous, and may only overturn the DNS if, after reviewing the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. (SCC 30.61.310(1). See *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994)).
4. The State Environmental Policy Act of 1971 (SEPA) was enacted to "promote the policy of fully informed decision making by government bodies when undertaking 'major actions significantly affecting the quality of the environment.'" (RCW 43.21C.090) Prior to undertaking or licensing a land use activity, Snohomish County must issue a threshold determination, which is a determination of whether the project is likely to have a "significant adverse impact to the environment." The term "significant" is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." (WAC 197-11-794) As pointed out in the SEPA Handbook, what is significant is often non-quantifiable. It involves the physical setting, and both the magnitude and duration of impact.
5. In this case, PDS issued a DNS. A DNS is issued when the Responsible Official has determined that the proposal is unlikely to have significant adverse environmental impacts, or that mitigation has been identified that will reduce impacts to a nonsignificant level. (See *Department of Ecology, SEPA Handbook at 29*)
6. WAC 197-11-158 defines the decision making process the Responsible Official must undergo in making a threshold determination in a GMA jurisdiction. It states:
 - (1) In reviewing the environmental impacts of a project and making a threshold determination, a GMA county/city may, at its option, determine that the requirements for environmental analysis, protection, and mitigation measures in the GMA county/city's development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project.

- (2) In making the determination under subsection (1) of this section, the GMA county/city shall: (a) Review the environmental checklist and other information about the project; (b) Identify the specific probable adverse environmental impacts of the project and determine whether the impacts have been: (i) Identified in the comprehensive plan, subarea plan, or applicable development regulations through the planning and environmental review process under chapter 36.70A RCW or this chapter, or in other local, state, or federal rules or laws; and (ii) Adequately addressed in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws by: (A) Avoiding or otherwise mitigating the impacts; or (B) The legislative body of the GMA county/city designating as acceptable the impacts associated with certain levels of service, land use designations, development standards, or other land use planning required or allowed by chapter 36.70A RCW; (C) Base or condition approval of the project on compliance with the requirements or mitigation measures in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws; and
- (3) Project specific impacts that have not been adequately addressed as described in subsection (2) of this section might be probable significant adverse environmental impacts requiring additional environmental review. Examples of project specific impacts that may not have been adequately addressed include, but are not limited to, impacts resulting from changed conditions, impacts indicated by new information, impacts not reasonably foreseeable in the GMA planning process, or impacts specifically reserved in a plan EIS for project review.
- (4) In deciding whether a project specific adverse environmental impact has been adequately addressed by an existing rule or law of another agency with jurisdiction, the GMA county/city shall consult orally or in writing with that agency and may expressly defer to that agency. In making this deferral, the GMA county/city shall base or condition its project approval on compliance with these other existing rules or laws.
- (5) If a GMA county/city's comprehensive plan, subarea plan, or development regulations adequately address some or all of a project's probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this section, the GMA county/city shall not require additional mitigation under this chapter for those impacts.
- (6) In making the determination in subsection (1) of this section, nothing in this section requires review of the adequacy of the environmental analysis associated with the comprehensive plans and development regulations that are being relied upon to make that determination.

7. The SEPA threshold determination process has been streamlined under the GMA. Through RCW 43.21C.240 and implemented through WAC 197-11-158, the SEPA Rules allow GMA

jurisdictions to issue a DNS even for projects that might otherwise seem to be large projects that would generate significant impacts, if those projects can be adequately mitigated under the jurisdiction's GMA development regulations and other SEPA policies. (See WAC 197-11-158; *Moss v. Bellingham*, 109 Wn.App. 6, 18-26, 31 P.3d 703 (2001)(court affirmed MDNS for an 80-lot subdivision)). Therefore, the mere fact that a DNS was issued in this case is not determinative; rather, the question is whether the county's regulations provide adequate mitigation of the impacts.

8. If there are significant adverse impacts that either are not or cannot be mitigated, an EIS is required. (WAC 197-11-330(4)) A project cannot be approved with a DNS or an MDNS if it has significant adverse environmental impacts that are not mitigated; that can only be done after an EIS is completed. (See WAC 197-11-340) It is a procedural requirement of SEPA; significant impacts must be addressed through an EIS, they cannot simply be addressed through a study that "takes the place of an EIS."
9. The Hearing Examiner has considered the process used by PDS in this case to make its SEPA threshold determination, as well as the substantive conclusion reached by the SEPA Responsible Official. Based on the entire record, the Hearing Examiner is left with a definite and firm conviction that procedural and substantive errors were made, and that the resulting threshold decision was clearly erroneous. These mistakes require correction before the Examiner can issue a final decision on the merits of the request for a major revision to the CUP.
10. The specific SEPA procedural errors that occurred are as follows:
 - A. The Applicant failed to timely submit the SEPA Checklist at the time of submittal of its application, which is required under SCC 30.61.100(1). The lack of submittal deprived the City and other agencies of adequate notice of the Applicant's environmental analysis for well over one year during the permitting process. The City of Granite Falls was entitled to receive the SEPA Checklist along with the notice of application sent by PDS under the ILA. The inclusion of the SEPA Checklist would have provided the City with important information that MLG had not identified various traffic and transportation system impacts resulting from its development, and it would have alerted them to the fact that MLG was not proposing mitigation for those impacts.³
 - B. The SEPA Checklist was deficient in that it failed to adequately identify the impacts of its proposal on the City's transportation system. (See, SEPA Checklist at p. 10, Question 14 (d)) With regard to required road or street improvements, MLG stated, "Yes, the County is requiring that Menzel Lake Road be widened to 20 feet along the project frontage of Menzel Lake Road." *Id.* Although frontage improvements are required, the record shows that several other transportation impacts were known that

³ Although the Hearing Examiner is sensitive to the issue of how much must be known by an applicant (in terms of preparing studies and reports that will inform it and PDS about the impacts of its development), at the time it submits a complete application. However, the County Council has already decided this issue and clearly specified in adopting its SEPA regulations that the SEPA Checklist is to be prepared and submitted at the earliest time possible in the permitting process—at application submittal. (SCC 30.61.100(1)) In order to adequately respond to the questions in the SEPA Checklist, the applicant may need to perform certain studies or reports to be informed about its project impacts and to consider whether the development regulations provide adequate mitigation or whether additional mitigation should be offered to avoid a negative threshold determination (i.e., the issuance of a Determination of Significance or "DS").

should have been disclosed and discussed. Specifically, the SEPA Checklist was deficient in at least the following ways:

- MLG failed to disclose that its project would place significantly more (up to 200 average trips per day) truck trips through the intersection of Alder Avenue and Pioneer Street in the City of Granite Falls, which is an intersection that is already a safety hazard. MLG proposed no mitigation for these impacts. The record shows that MLG was on notice of this issue seven months prior to the submittal of its application.
- MLG did not disclose the severity of the impact on the integrity of the roadway pavements that its proposal would generate through increased truck traffic, nor did they propose mitigation for those increased impacts. The record shows that MLG was already paying the City certain fees under its existing CUP to mitigate for general impacts of the development on the Granite Falls community. This Agreement was executed in 1996, prior to the SEPA-based ILA for impact fees signed between the City and County. (Exhibit A.8) MLG knew or should have known that its proposed major revision would add additional impacts on City streets. The SEPA Checklist does not adequately disclose the impact or the proposed mitigation for it. Instead, they simply wrote in response to the question about proposed measures to reduce or control transportation impacts, **“The County requires payment of mitigation fees. There is also an existing agreement with the City of Granite Falls to pay impact fees based upon yardage in and tonnage out.”** *Id.* (See, SEPA Checklist at p. 10, Question 14 (g)). This response is plainly inadequate. The City performed an analysis of this issue using its own consultant, PanGEO. The Geotechnical Report “Roadway Pavement Assessment” concluded that the increased truck traffic resulting from MLG’s proposal will reduce the useful life of the existing street pavements, requiring more frequent maintenance and pavement reconstruction. (Exhibit L.17)
- Finally, MLG did not address in the SEPA Checklist whether its proposal, which would add an average of 132 more truck trips per day along Alder Avenue within the City limits, required new sidewalks and/or bike lanes to provide safe walking conditions for pedestrians, bicyclists and especially children going to and from two schools fronting along Alder Avenue. (Exhibit E.1) The SEPA Checklist does not disclose the safety impact or the proposed mitigation for it, if any.

These deficiencies in the SEPA Checklist left the SEPA Responsible Official with inadequate information upon which to base a threshold decision. PDS could have requested additional information or could have performed its own studies; however, that did not occur in this case. (SCC 30.61.100(3), SCC 30.61.070) The City and School District raised these issues with PDS in their comments, yet no changes were made to the SEPA Checklist. The resulting threshold determination was flawed as a result.

- C. In making its threshold determination under SEPA, PDS is required to identify the impacts of a proposed development and make an independent review of those disclosed by the applicant in the SEPA Checklist. (WAC 197-11-330) In the present case, PDS ignored significant adverse environmental impacts to the City’s transportation system in issuing the DNS. All of this information is in the record in

the form of communications from the City of Granite Falls, School District and citizens who wrote letters or testified at the public hearing. It is possible that PDS could have issued a MDNS, which could have listed the identified adverse environmental impacts, and how they were mitigated by certain specified regulations found in Chapter 30.66B SCC, offers of mitigation from the Applicant, or conditions of approval proposed by PDS. But, PDS chose not to take this step.

- D. In issuing the DNS, PDS erred in failing to specifically state *which impacts* of the development it found, and what, if any, mitigation of those impacts was achieved through the application of Chapter 30.66B SCC. It is simply not enough to cite to the Code as a whole in broad statements. SEPA requires more specificity than that. PDS has a duty to list each significant adverse impact of a development and whether a specific section of the County Code, proposed conditions, or offered mitigation provides adequate mitigation of such impacts. Without such information, the Hearing Examiner cannot determine whether the CUP should be approved.
 - E. In terms of the substantive challenges to PDS's threshold determination, the City alleges that the DNS and revised DNS fail to address the probable significant adverse environmental impacts of the Menzel Lake gravel expansion proposal, including impacts to the intersection of Alder Avenue and Pioneer Street, the need for sidewalks along Alder Street, and the need for road maintenance mitigation. The Hearing Examiner agrees. The City proved that these significant adverse environmental impacts exist, and the Examiner further concludes that they have not been addressed through the DNS, offers of mitigation or proposed conditions from PDS. As a result, the Hearing Examiner concludes that the DNS was clearly erroneous and, under the circumstances either a DS or a MDNS should have been issued.
11. The Hearing Examiner concludes that procedural and substantive errors were made and the SEPA appeal should be granted. The threshold DNS should be reversed and remanded to PDS for further analysis and the completion of a new threshold determination.
 12. Any Conclusion of Law in this Decision, which should be deemed a Finding of Fact, is hereby adopted as such.

DECISION

1. The SEPA appeal is granted. The SEPA Threshold Determination is vacated and remanded to PDS for further consideration and the issuance of a new Threshold Determination. The consideration of the Conditional Use Permit application is stayed pending remand.
2. On remand, the SEPA Responsible Official shall consider the specific traffic and transportation issues set forth in the current record. In particular, the threshold determination should consider the significance of the following impacts, the need for mitigation (including the proportionate share attributable to this development), and the source of such mitigation requirements for the following adverse impacts:
 - (a) the intersection conflict at Alder Avenue/Pioneer/Menzel Lake Road;

- (b) the need for sidewalks along Alder Avenue within the City limits to protect pedestrians and school children from increased truck traffic; and
 - (c) impacts to the integrity of the pavement and the need for maintenance, repair and replacement of City streets from increased truck traffic.
3. The public hearing is continued for a period of six months and the record will be reopened to accept the new threshold determination when PDS has completed its work. PDS shall establish a new hearing date and provide notice to all parties of record. If PDS is ready to proceed at an earlier time, it shall notify the Clerk of the Hearing Examiner and a hearing shall be scheduled at an earlier time.
4. At the continued hearing, the Applicant, PDS, parties of record and the public may provide testimony and evidence solely related to the off-site transportation issues raised in the new SEPA threshold determination and any changes to the project proposal resulting from the same, as well as any proposed mitigation and/or proposed conditions of approval.

Dated this 10th day of March, 2011.


Millie M. Judge, Hearing Examiner

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