June 1, 1999

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DECISION ON MOTION TO DISMISS MDNS; DECISION ON SHOW CAUSE ORDER

SUBJECT: Department of Development and Environmental Services File No. **L98G0003**

PACIFIC TOPSOILS
Maple Valley Facility
Appeal of SEPA Threshold Determination

Location: North of City of Maple Valley, near intersection of Lake Francis Road and Maxwell Road

Applicant: Pacific Topsoils *represented by* **Jane Koler,** Attorney At Law
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Appellant: **Rocky McNeill**, *represented by* **Richard Aramburu**, Attorney At Law
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Appellants: Four Lakes Landowners Assn.
Represented by: **Steve Scott**
16737 – 235th Avenue SE
Issaquah, WA 98027
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AND

Mazama Woods Landowners Assn.
Represented by: **Jerry Adam**
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Maple Valley, WA 98038
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Department: Development and Environmental Services, *represented by* **Richard Hudson**
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PACIFIC TOPSOILS: CHRONOLOGY

Pre-hearing conference	March 25, 1999
Pre-hearing order	April 26, 1999
• deadline for motions	April 20, 1999
• deadline for responses to motions	April 28, 1999
MDNS Addendum (with no appeal allowed) issued	April 14, 1999
Motion to dismiss MDNS	April 28, 1999
Decision on motion to dismiss	May 12, 1999
Order to show cause (why May 12, 1999 decision should not be set aside)	May 14, 1999
Examiner's memo to parties (canceling June 1, 1999 hearing)	May 19, 1999
DDES memorandum responding to show cause order	May 21, 1999
Applicant's response to show cause order	May 21, 1999

Motion and Response.

On May 14, 1999, the Appellants moved to dismiss the MDNS based on a significant difference between the area in review (12.4 acres) versus the area stated in the MDNS (6.84 acres), as well as alleged informational gaps regarding the location of work to be done. On May 12, 1999, the Examiner dismissed the MDNS, suggesting that an informationally accurate re-issuance should occur. On May 14, 1999, it became apparent that the Appellants had failed to properly serve their motion. Consequently, on that same day, the Examiner provided the DDES and the Applicant seven days to respond. As indicated in the Examiner's May 14, 1999 Order to Show Cause, the issue raised by the Appellants were too "basic and fundamental to due process to ignore." On May 21, 1999, both the Department and Applicant responded. Their arguments may be summarized thus:

- The Examiner has no authority to dismiss an MDNS.
- The MDNS is an environmental document that can be amended without re-issuance when the analysis is essentially unchanged.
- No misrepresentation has occurred.
- The project is unchanged. The project proposed in the MDNS that identifies the subject area as 6.84 acres is identical to the project covered by the amended MDNS that identifies the subject area as 12.4 acres.
- The public notice posted on the property properly identified the 12.4 acre area.

Although the SEPA notice posted on the subject property accurately identified affected acreage and zoning, the MDNS did not. The MDNS referred to stump removal, restoration and grading "on approximately four acres of a 6.87 acre parcel" classified Mineral (M). Seeking to clarify or complete that MDNS, the Department of Development and Environmental Services later issued an "addendum MDNS" that referred to the same work "on *an approximate 12.4 acre area*" classified both M (Mineral) *and RA-5* (Residential; minimum lot size five acres).

Much of the debate regarding the adequacy or appropriateness of the MDNS (and/or the public notice function of an MDNS) has been based on comparison of the 6.87 versus 12.4 acre parcels, described by the Appellant as an "eighty percent increase." However, a closer reading and comparison of the two MDNS documents reveals that the proper comparison should be between 4 acres and 12.4 acres—an increase of over threefold. Compare "on approximately *four acres* of a 6.87 acre parcel (MDNS)" to "an approximate 12.4 acre area." The pre-hearing conference record indicates continued confusion regarding the scope of work.

Authorities.

These are the authorities cited by the parties in this review:

WAC 197-11-600; WAC 197-11-600 (4)(c) ; WAC 197-11 (b)(ii); WAC 197-11-600 (3)(2); WAC 197-11-500; WAC 197-11-340 (3)(a); WAC 197-11-030 (2)(b) and -030 (2)(f).

Review.

The Examiner's review follows.

1. This is not a civil trial. It is a relatively informal administrative review that is designed to be accessible to the lay citizen. For that reason, strict adherence to legal form and format will not be required. It never has been.

2. As noted earlier, the pre-hearing order did not govern this specific issue/motion because it was not contemplated to arise. See Examiner's Order of Dismissal dated May 12, 1999.

3. As to concerns regarding the delay and cost arising from these circumstances, the entire issue could have been avoided by paying genuine attention as to the purposes of public notice and the public information function of an MDNS (see paragraphs 10, 5, 6 and 4, below). Such attention would have compelled MDNS re-issuance.

4. A scrivener's error? However innocent and benign the cause, the result was an MDNS that grossly misstated the affected acreage. No actual change in project plans? Same answer. What if an MDNS erroneously indicated 10 acres of project area instead of 100 acres? Would we just wink at such a clerical error and issue an addendum with no right of appeal? Of course not. We must consider the interpretation of a *reasonable person*. The judgment and response of the reasonable person certainly will be different with respect to 100 rather than 10 acres.

The claim of clerical error does not assuage. Nor does the 80% difference between 6.87 acres and 12.4 acres—or, for that matter, the threefold increase from 4 acres to 12.84 acres. It is not merely the response of the Appellants that we are to be concerned about. We must be aware of the probable response of any *reasonable person* in the community who must make a decision regarding how or whether to respond to the MDNS.

5. An MDNS is more than a mere "environmental document." It is a *decision.* It is a very important decision called *threshold determination.* Such a decision is appealable. Obviously, when a citizen decides whether or how to respond to an MDNS, it is fundamental and essential that the citizen finds accurate information in that MDNS. Good government demands no less.

6. The issue at this juncture is not whether the Department or other agencies made correct substantive decisions regarding MDNS issuance, mitigating measures established, or related matters. Rather, the issue is whether an inquiring citizen would have received accurate information at a time when s/he could still make a decision whether or not to file an appeal.

7. The untimeliness of the Motion to Dismiss MDNS—assuming momentarily that it was in fact untimely—was remedied by allowing response periods for the Department and the Applicant. However, the Examiner has taken the position that: a)the pre-hearing order does not govern this matter (see Decision dated May 12, 1999); and, b) the issue of the public notice aspect of due process is so basic and fundamental that it *must* be addressed (see Decision dated May 12, 1999). Those conclusions are adopted here also.

8. The Department has chosen not to reissue the MDNS in part because in the Department's judgement, there is no new information that warrants reissuance. The Applicant makes this same argument ("There has been no change in the scope of the proposal."). The plans on file, before and after, remain the same. This position, however, avoids the issues of adequate notice and adequate public information.

9. The pre-hearing conference record shows that indeed, the Department suggested that two alternative approaches to remedying MDNS/notice adequacy concerns: a) republish/reissue, or b) issue an Addendum that—as it turns out—cannot be appealed. The pre-hearing order omits mention of the second and now contested approach. The pre-hearing order closes with this admonition: "Any requested corrections or clarifications to this order must be filed within one day of receipt." No such request was filed by any party.

   The pre-hearing conference record also shows that the Examiner expressed concern several times regarding the adequacy of notice. The Addendum MDNS with no right of appeal does not remedy problems of notice and full disclosure to the public.

10. The burden on the Appellant to present a complete statement of appeal is considerable (KCC 20.24.090; Examiner's Rules, Section IV.). It is not conceivable that an appellant could present a sufficient statement of appeal based upon an inaccurate MDNS. When an Addendum MDNS makes the correction with no right of appeal, it thwarts the right of the public to obtain the necessary information upon which to base a statement of appeal.

Indeed, in this case, the pre-hearing conference record shows considerable confusion at the outset regarding the scope of the proposal. A comparison of the MDNS and the Amended MDNS, reviewed in paragraph 4., above, suggests that the confusion continues yet. This is entirely too late in the process to make the clarifications necessary to enable a member of the public to perfect a statement of appeal—particularly when those clarifications are made after the appeal period has expired and no new appeal period is provided.

11. The Applicant and Department argue that the notice contained accurate information and that only the MDNS did not. Therefore, the reasoning goes, there is no notice problem. That concern is addressed in review paragraph nos. 4,5,6 and 10 of this Order, above.

12. The Examiner's authority to dismiss an MDNS lies in KCC 20.24.080, which authorizes the Examiner to grant appeals—in this case, the appeal of an MDNS.

13. The Examiner's May 12, 1999 Order to Dismiss is adopted and incorporated here by this reference.

ORDER:

The Motion to Dismiss MDNS is GRANTED. The Examiner's May 12, 1999 Order to Dismiss MDNS is AFFIRMED.

ORDERED this 1st day of June, 1999.

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R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 1st day of June, 1999, to the parties and interested persons shown on the attached list.

RST:sje
Attachment
Sepa\L98G0003 NO4