

BEFORE THE OKANOGAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF CUP 2019-7 AND SEPA APPEAL

MILLER GRAVEL PIT

CUP APPLICANT: OKANOGAN COUNTY PUBLIC WORKS

SEPA APPELLANT: METHOW RIVER RANCH II HOMEOWNERS ASSOCIATION

SUMMARY, FINDINGS OF FACT, ANALYSIS, CONCLUSIONS, AND DECISION

This matter, an application for a conditional use permit (CUP) and appeal of the SEPA determination associated with the CUP was heard by the Okanogan County Hearings Examiner on November 14, 2019, and December 5, 2019.

SUMMARY

An application has been submitted by Okanogan Public Works to permit surface mining for a gravel pit on property owned by Claude Miller. The CUP would allow 148.66 acres, over three parcels, to be used for screening, crushing, cold mix asphalt batching, blasting, and stockpiling. Mining will not exceed a depth of 60 feet. The hours of operation will be 6:00 am to 8:00 pm.

Okanogan County Public Works will be paving the intersection of Hwy 153 and Danzl Rd. and approximately 275 feet of the pit access road. During the initial operations of the pit and the improving of the haul road, traffic will be increased to 5-20 trips per day approximately. During crushing operations and manufacturing of cold mix asphalt, trucks & heavy machinery will operate inside the pit site. Workers going to & coming from work at the site would increase traffic in the vicinity. This would generate approximately six to twelve vehicle trips per day and last from 5-10 weeks. When stockpiled materials are hauled out by county crews, the number of trips may vary from no activity to several trips per day. During road construction or chip seal projects, the average daily trips will increase and be commensurate with the project size generating approximately 5-20 trips per day.

The project site will use water for dust abatement from an existing permit exempt well. Additional water, if necessary, will be imported by truck from other off-site sources.

The site is located at 1175 Hwy 153 Methow, WA 98834 and covers parcels 3123310006, 3023064004, and 3022011005.

The County SEPA official, Interim Planning and Community Development Director, Angela Hubbard (Hubbard) issued a final mitigated determination of non-significance (MDNS) on October 14, 2019. The MDNS included 13 mitigation measures. The MDNS noted that any appeal was to be submitted by November 1, 2019.

An appeal of the SEPA determination was timely filed on November 1, 2019 by the Methow River Ranch II Homeowners Association (HOA). The fees for the SEPA appeal were received by Okanogan County on November 5, 2019.

FINDINGS OF FACT

1. This application process is authorized and outlined in OCC 17A.310 "Conditional Use Permits."
2. The Okanogan County Hearing Examiner is authorized to hear this matter and his decision is final and binding subject to the appeal provisions found in Okanogan County Code §2.65.140.
3. The zoning designation is Rural 1, under OCC Title 17A Zoning.
4. The legal owner of this property is Claude Miller.
5. The site is located at 1175 Highway 153, Methow WA 98834 on tax parcel numbers 3123310006, 3023064004, 3022011005.
6. On August 15, 2019 an application for a CUP was submitted by Okanogan County Department of Public Works.
7. The application was deemed complete and vested as Miller Pit CUP 2019-7.
8. On August 27, 2019 a notice of application and Threshold SEPA Mitigated Determination of Non-Significance (MDNS) for CUP 20 19-7 was sent to adjacent landowners within 300 feet of the applicant's parcel.
9. On August 27, 2019 the Office of Planning and Development forwarded to commenting agencies the notice of application and Threshold SEPA Mitigated Determination of Non-Significance (MDNS), as well as application materials and the signed Threshold SEPA Determination for CUP 2019-7 for their respective review and comment.
10. On August 28, 2019 a notice of application and Threshold SEPA Mitigated Determination of Non-Significance (MDNS) for CUP 20 19-7 was published in the Methow Valley News.
11. On August 29, 2019 an announcement of application and Threshold SEPA Mitigated Determination of Non-Significance (MDNS) for CUP 20 19-7 was published in the Gazette-Tribune, legal periodical of record.
12. On October 14, 2019 a notice of Final SEPA Mitigated Determination of Non-Significance and public hearing date of November 14, 2019 was sent to adjacent landowners within 300 feet of the applicant's parcel and to additional commenters.
13. On October 14, 2019 the Office of Planning and Development forwarded to commenting agencies the notice of Final SEPA Mitigated Determination of Non-Significance (Final MDNS) and public hearing date of November 14, 2019, as well as the signed Final SEPA Determination for their respective review and comment.
14. On October 16, 2019 a notice of Final SEPA Mitigated Determination of Non-Significance (Final MDNS) and public hearing date of November 14, 2019, was published in the Methow Valley News.
15. On October 17, 2019 a notice of Final SEPA Mitigated Determination of Non-Significance (Final MDNS) and public hearing date of November 14, 2019 was published in the Gazette-Tribune, legal periodical of record.

16. A public notice was posted for the duration of the public comment period. The applicant was given the affidavit of public notice. An affidavit of public notice was submitted to Okanogan County Planning and Development prior to the hearing date of November 14, 2019.
17. A public hearing before the Okanogan County Hearings Examiner was held November 14, 2019 and continued on December 5, 2019. At those hearings, staff, the applicant, the appellant, and members of the public were given the opportunity to enter testimony into the public record. The entire record was left open until the close of the hearing on December 5.
18. The entire Office of Planning and Community Development (OPCD) file was entered into the record as if fully set forth in this decision.
19. In terms of the SEPA appeal, pursuant to OCC 14.04.220(5), *"In all cases where an open record hearing is required for the underlying application, any hearing to consider an appeal brought under this section shall be consolidated with the open record hearing."* In this case the open record hearing on the CUP and the SEPA appeal were consolidated.
20. Prior to the hearing(s) and during the hearing(s), there was substantial written commentary regarding the merits of the CUP and the adequacy of the MDNS¹. The principal objections to the project centered around noise, traffic impacts, miscellaneous negative environmental consequences, and aesthetic considerations. Oral testimony at the hearings centered around similar concerns.
21. In addition to individuals, the owner of land, Claude Miller, was represented by Alexander Mackie, Attorney at Law (Mackie). The appellant was represented by Mark Ryan, Attorney at Law (Ryan).
22. All testimony was taken under oath.
23. The appellant did comment on the Threshold Determination and thus has standing pursuant to OCC 14.04.220(A)(2).
24. The CUP application is the first in a series of permits the applicant must obtain. The CUP authorizes only the land use and the specific details of the gravel pit operation must be approved through the permitting process of RCW 78.44.
25. There was testimony at the hearing that the proposal was inconsistent with the County Comprehensive Plan. County staff provided a written analysis that the proposal was consistent with the Comprehensive Plan citing Chapter 4, Page 22. The Okanogan County Planning Director (in this case interim) is vested with the duty of administering the zoning code adopted pursuant to the Comprehensive Plan. OCC 17A.10.040.
26. The County staff report and the applicant both assert that the County needs a new source of gravel for the Methow area. The existing pits are depleted and if this site is not developed, or another source found, the gravel materials would have to be trucked from a

¹ The commentaries are too voluminous to include in this decision. All that information is contained in the file of record at OPCD.

site in the Okanogan area, a distance of about 40 miles or so, depending on where the gravel is delivered.

27. The decision by the SEPA responsible official (Hubbard) is to be given “substantial weight.” RCW 43.21C.075(3)(d) as adopted by OCC 14.04.220.
28. The legislative intent statement of RCW 78.44 ... ” *recognizes that the extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation. It is not possible to extract minerals without producing some environmental impacts.*”
29. RCW 78.44.011 provides [in part] “*It is the intent of the legislature to clarify that surface mining is an appropriate land use, subject to reclamation authority exercised by the department of natural resources and land use and operation regulatory authority by counties...*”
30. In order for an appeal to be successful when submitted by an organization (in this case the HOA), at least one of the members must suffer “direct and immediate impact” from the proposed project, rather than “remote and speculative” allegations of harm.² The appellant submitted two declarations from members of the HOA alleging harm.
31. The burden of proof with respect to the SEPA appeal lies with the appellant.
32. The burden of proof with respect to the merits of the CUP (land use decision) lies with the applicant.

ANALYSIS

Timeliness of the appeal

Since the SEPA appeal was filed on November 1, 2019 and the fees for that appeal were received on November 5, 2019. OPCD originally argued that the appeal was time-barred because the required fees were not paid prior to the appeal period expiration. According to testimony by Hubbard, she conferred with the Okanogan County Prosecutor’s office and was advised that the SEPA appeal should go forward.

Mackie cites several passages from the Okanogan County code, concluding that the fees must be paid within the appeal time frame. However, none of those code sections specifically state so, only stating that the fee must be paid. On balance, and in the interest of full public participation and preservation of the rights of all parties, it is the opinion of the Hearing Examiner that the fees being paid a few days late is more of a clerical and less a substantive error.³ The appeal is allowed to go forward.

Arguments on SEPA appeal

The appellant makes several arguments, which are addressed as follows:

² See Mackie letter dated December 3, 2019.

³ It has not escaped the Hearing Examiner’s attention that not having fees paid at the exact time of application for the appeal could open the door to long delays in fee payment, or lack of payment altogether, but in this case it was just a few days, and the fees were paid. This decision should not be construed to allow long delays in payment of fees.

1. Traffic impacts: The appellant argues that there will be significant new traffic on Highway 153. There is substantial evidence in the record, however, that the net increase in traffic would be de minimis. The County Engineer submitted estimates of traffic volumes generated by the operation, but testified that the net increase in truck traffic, in particular would essentially be zero since the proposed pit would be providing only a different source of materials than would otherwise be hauled from the existing pit near Okanogan, since the operations involving use of gravel products, by the County, would continue regardless. It is even arguable that there would be a net decrease in overall truck traffic impacts on the public road system since without this pit, the gravel would be hauled from the pit near Okanogan.
2. Noise impacts: The appellant argues that members of the HOA would be significantly affected by noise from the gravel mining operation. The two HOA members have part time residences that are roughly 2.5 miles from the proposed gravel pit. The County Engineer testified they conducted noise level readings at one of the County operating pits during rock crushing operations and found that noise levels from the operation were less than the ambient noise level within a short distance from the pit. The declarations provided by the appellant that they would be harmed are speculative and not supported by any evidence in the record.
3. Visual impacts: It is recognized by the Hearing Examiner that the view of this property from other properties will be changed and could be construed to be unsightly. However, the site is zoned for this use and the appellant's expectation that the view from their properties would never be changed is unreasonable and not supported by law.⁴ Gravel pits are permitted as conditional uses in the zoning code of Okanogan County and reasonable conditions can be imposed to mitigate the aesthetic impacts to the extent feasible.
4. Water and hydrology: The appellant argues that there will be substantial impacts to the ground water supply in the area. The applicant, on the other hand, has amply demonstrated that they are aware of the restrictions on use of the existing well and are duty-bound not to violate those restrictions. The applicant agrees to truck water in from other sources should it be needed. The burden of proof is on the appellant and the appellant has not provided any compelling evidence, other than speculation, that there will be a significant adverse environmental impact from use of the well.
5. Endangered species: There is no substantial evidence provided by the appellant or in the record that would allow the Hearing Examiner to conclude that there would be any measurable impact to any endangered species. The argument by the appellant is merely speculative and the appellant offered no evidence to the contrary.
6. Hazardous materials: The appellant argues that the applicant has not adequately addressed impacts that might occur due to fuels spills, etc., and suggests that the applicant should do a further analysis to insure there is no environmental impact. However, the burden of proof is on appellant and the applicant is not mandated to prove a negative. In addition, as noted in the findings above, the specific details of the pit operation are to be addressed in the surface mining permit to be issued by

⁴ See citations in Mackie letter of Dec. 3, 2019

DNR and that permit is subject to SEPA review. The applicant has provided no testimony or evidence, other than speculative, that there is a probable and significant adverse environmental impact.

CONCLUSIONS

1. A complete application was received and vested under the Okanogan County Zoning Code 17A.
2. All procedural requirements have been met in accordance OCC 17A.3.10 "Conditional Use Permits" as well as for the SEPA determinations and appeal procedures.
3. The proposal is compatible with the Okanogan County Zone Code and Comprehensive Plan.
4. All aspects of development must comply with the conditions of approval.
5. A Threshold SEPA Mitigated Determination of Non-Significance (MDNS) was issued by the Okanogan County SEPA responsible official. All comments received during the comment period were evaluated for consideration of the final SEPA determination. A final SEPA Mitigated Determination of Non-Significance (MDNS) was issued by the Okanogan County SEPA responsible official. An appeal was received.
6. The appeal of the MDNS was timely filed.
7. The declarations of the HOA members alleging harm were speculative and unpersuasive.
8. The decision of the responsible SEPA official was given substantial weight.
9. The conditions imposed will protect public health, safety, morals and general welfare.
10. Comments from the public and state, federal, and local agencies were received, reviewed, and considered in analysis of this proposal.
11. The conditions imposed are not unnecessarily onerous.
12. Conditional approval of this application will be consistent with previous proposals of the same nature and scope.
13. The arguments made in the SEPA appeal, and addressed in the above analysis, do not lead to a determination that there would be any significant adverse environmental impact that could not be mitigated by the MDNS and further permitting requirements.

DECISION

Based upon the information contained in the application materials, and additional information provided at the hearing(s), and the findings, analysis and conclusions provided herein, CUP 2019-7 is **APPROVED**, subject to the conditions noted below, and the SEPA appeal is **DENIED**:

CONDITIONS OF APPROVAL

1. All the mitigations outlined in the final MDNS dated October 14, 2019 are hereby incorporated in their entirety.
2. The project will proceed in substantial compliance with the application as presented.
3. The applicant will obtain the necessary Surface Mining Approvals from appropriate State agencies prior to operation.
4. Any expansion in the nature and scope of the operation will require amendment to this Conditional Use Permit through the Okanogan County Office of Planning & Development.
5. All appropriate State and County permits shall be obtained and maintained current throughout the life of this project. If a permit requirement is discovered at any point in the operation of this project, the Office of Planning and Development shall be notified immediately of the permit requirement.

Dated this 9th day of December 2019.

OKANOGAN COUNTY HEARING EXAMINER



DAN BEARDSLEE

Anyone aggrieved by this decision has twenty-one (21) day from the issuance of this decision pursuant to OCC 2.65.140 to file an appeal with Okanogan County Superior Court, as provided for in RCW 36.70C.

Any aggrieved party or agency that believes the final decision of the examiner is unsound based upon errors in procedure, law, interpretation of adopted policy, fact, judgment, or the discovery of new factual evidence which, by due diligence, could not have been found prior to the examiner hearing may make a written request for reconsideration by the examiner within fourteen (14) days of the filing of the written record of decision. The request for reconsideration shall be submitted to the department on forms provided by the department. Reconsideration of the decision is wholly within the discretion of the examiner; if the examiner chooses to reconsider, it may be revised as deemed appropriate and may issue a revised record of decision within ten (10) days of the reconsideration heard by the examiner. A request for reconsideration is not a prerequisite to an appeal.