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AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
302 SOUTH FIRST STREET
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON ADMINISTRATIVE APPEAL
AP 02 0549

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANTS: DAY CREEK STEWARDS and FRIENDS OF SKAGIT COUNTY

ASSESSOR PARCEL NO: P42079, P42078, P42104, P42105, P42077, P112511

ABBREVIATED LEGAL DESCRIPTION: The subject property is located within Section 30,
Township 35 North, Range 6 East W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of)	
)	PL02-0549
DAY CREEK STEWARDS and)	
FRIENDS OF SKAGIT COUNTY)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
Of an Administrative Interpretation)	AND DECISION
and an Associated Determination of)	
Non-Significance (DNS) Addendum)	
In Connection with an Asserted)	
Mineral Resource Overlay (MRO))	
Mapping Error)	

This appeal came on regularly for hearing on January 15, 2003. Gerald Steel, Attorney at Law, represented the appellants, Day Creek Stewards and Friends of Skagit County. Tom Karsh, Natural Resource Policy Analyst, represented the County. Tom Moser represented Day Creek Sand and Gravel.

The proceeding was an open record appeal. Testimony was heard, exhibits were admitted, and argument was given. From the record made, the Hearing Examiner enters the following:

FINDINGS OF FACT

1. On September 6, 2002, Day Creek Sand and Gravel (applicant) requested an Administrative Interpretation pursuant to SCC 14.06.040(3) relating to an asserted mapping error. The purported error was exclusion from the Mineral Resource Overlay (MRO) of all or portions of six parcels: Assessor's #'s P42079, P42078, P42104, P42105, P42077, and P112511. These parcels are within Sec. 30, T35N, R6E, WM.

2. The property is generally located in the Day Creek area and is designated Rural Resource-NRL on the July 24, 2000 Comprehensive Plan/Zoning Map. The property includes the Day Creek Sand and Gravel operation at 30881 South Skagit Highway.

3. The applicant sought MRO designation for approximately 31 acres. A little over half of this area (17.5 acres) comprises the existing Day Creek Sand and Gravel pit. The breakdown is as follows: P42104 -- 13.51 acres; P42105 -- 3.91 acres; P42078 -- 3.46 acres; P42079 -- 3.26 acres. P42077 --0.48 acres; P112521 -- 5.29 acres.

4. The existing pit is on parcels P42104 and P42105 on the north side of the South Skagit Highway. The additional acreage covered by the application is to the north



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of the existing pit. The requested new acreage covers only a portion of each of the parcels involved.

5. The nearest presently designated MRO area in the immediate vicinity lies south of the highway. Much of this area is within a wetland. On the areas north of the road that are requested for inclusion in MRO coverage, there are no critical areas.

6. The designation of MRO areas in the County was guided by the work of a Citizen's Advisory Committee (CAC). In 1992 and 1993 the CAC met to review information, data, and maps, and to draft MRO policies. The CAC delineated mineral resource areas using a base map provided by the State Department of Natural Resources (DNR). They relied on mineral resource reference maps prepared by the United States Geological Survey (USGS), and information on the location of existing permitted sites.

7. The result was the preparation of a CAC work map which ultimately became the basis for the MRO designations on the Natural Resource Lands (NRL) map adopted by the County to protect such lands county-wide. The Day Creek MRO, in its present form, is the same as depicted on the CAC work map.

8. In response to the instant application, the Administrative Official found that the USGS reference maps used by DNR and by the CAC to determine MRO designations were not accurately copied onto the County's Comprehensive Plan/Zoning map. As a result he determined that a mapping error had occurred and that the official map should be amended as requested by applicant. In so deciding, he noted that half of the property was (and is) an existing sand and gravel operation. This, he concluded, showed an obvious oversight and mapping error. The Administrative Official stated that the decision was reached without the need to reconsider or rebalance MRO designation criteria.

9. The applicant submitted a new environmental checklist in connection with the application for an Administrative Interpretation. With the decision, the Planning and Permit Center issued a document entitled "Determination of Nonsignificance Addendum. The Addendum identified prior environmental documents relating to the designation and protection of mineral resource lands in the County. These included the *Final Environmental Impact Statement for the Land Use Element, Skagit County Comprehensive Plan, June 1994* and two addenda thereto.

10. The DNS Addendum concluded that the non-project action of correcting the mapping error would not have a probable significant adverse impact on the environment. The Addendum states that it adds information but does not substantially change the analysis of significant impacts or alternatives in the existing environmental document.

11. The Staff Report says that the conclusion of no probable significant environmental impact was based on the following: a) the administrative interpretation is programmatic; b) it only corrects a mapping error; and c) future expansion of the



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existing mining operation would require a Special Use Permit with additional project-related SEPA review.

12. The present Day Creek Sand and Gravel pit was recognized as a non-conforming use by the County in November of 1995. Evidence was accepted that the pit was established in 1960 and had been operated continuously through 1994. Subsequently, a reclamation plan, dated June 11, 1996, was filed with the DNR. The geographic area of the operation was represented to be 17.9 acres.

13. The level of operations over the 20 years prior to 1995 was extremely modest. Apparently operations at the pit have been substantially increased in recent years.

14. The Day Creek MRO in its present position is the same as depicted on the CAC work map and on official Natural Resource Lands maps adopted on September 16, 1996, June 1, 1997, February 9, 1999, and July 24, 2000.

15. The mineral resource reference maps (Hearing Exhibit B-6) relied on by the Administrator show the general outline of sand and gravel deposits. The principal basis for the "mapping error" decision was a determination that the acreage which is the subject of the request is included in an area shown on the maps to contain such deposits.

16. At the time when the CAC was developing its work map, the science of mapping was much less sophisticated than it is today. GIS mapping was not then available. Exhibit B to Hearing Exhibit C-2 is a digitized composite of the sand and gravel deposits shown on the USGS reference maps overlaid on current GIS generated parcel maps.

17. This composite of sand and gravel areas from the reference maps encompasses those acres which the applicant seeks to include in the MRO and more. However, the composite representation did not exist when the CAC developed its work map.

18. The CAC work map faintly shows an erased line about a quarter of a mile north of the boundary that was adopted for the MRO. The applicant contends that this line was

with the notation, "remove." These were, in fact, removed from the adopted MRO. The appellant asserts that the removals were made in order to accommodate a since rejected standard by which no parcel of less than 10 acres should be within an MRO or within a quarter mile of an MRO. The erasure of the line to the north, they argue, was probably



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occasioned by application of this lot size criterion.¹

20. Neither the applicant nor the appellant were able to prove their rival “erasure theories.” Both arguments depend on inferences. On this record, there is no conclusive explanation of why the CAC failed to draw the MRO around the lands the applicant now seeks to have placed there.

21. Nevertheless, it is apparent that an error was made. The reference maps provide no basis for putting the MRO south of the present pit where the CAC placed it. There is nothing there to justify the designation decision actually made in terms of available information on resource location.

22. The conclusion of error, however, does not answer the question of exactly where the CAC intended the Day Creek MRO to be. While the resource maps were used in delineating the initial MRO areas county-wide, obviously other criteria were also applied. This has to be the case because the adopted MRO does not reflect an attempt to simply reproduce all known sand and gravel deposits shown on the reference maps. Some lands that could have been included on the basis of the maps was either left out or removed.

23. In this case, the evidence shows only that the requested lands could have been included in the initial MRO consistent with the resource information available. The evidence does not show that, but for the mapping error, these acres would have been included. There is no way, on this record, to determine where the boundary around the “qualifying” land in the Day Creek area was intended to be. Even adopting the applicant’s erasure theory would not encompass all of the land that might have been included.

24. Eventually, when the Comprehensive Plan was adopted in July of 2000, a final set of MRO designation criteria were approved. But these criteria were not the basis for the earlier mapping done by the CAC. The present criteria evolved over time and took their present form long after the CAC work map was completed.

25. The designation criteria that ultimately were adopted for the Comprehensive Plan would have to be used in any new MRO designation effort. See Comprehensive Plan, Land Use Element, Objective 6. The adopted designation criteria deal with more than the presence of the resource. The Comprehensive Plan says that designating the MRO shall focus on a number of factors: Included are general land use patterns in the area (residential densities and adjacent land uses), availability of utilities, availability and adequacy of water supply, surrounding parcel sizes, surrounding land uses, division or zoning for urban or small lots, accessibility and/or distance from point of use, physical

¹ There is no presently effective designation criterion that relates to a 10-acre lot size. The 10-acre figure relates rather to a density concern. The density within the area proposed for the Day Creek MRO and within a quarter mile is less than one dwelling unit per 10 acres, meeting the adopted criterion of CP 4A-6.3 and CP 4A-6.8.



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and topographic characteristics of the mineral resource site, depth of the resource, depth of the overburden, physical properties of the resource, life of the resource, resource availability in the region, and potential effects on public drinking water, sediments and pollutants. See CP 4A6.3.

26. The six parcels that are the subject of the instant mapping error proceeding are also the subject of a pending request for a Comprehensive Plan Amendment to the MRO (PL01-0609). However, further processing of this amendment (and other amendment requests) is at present on hold.

27. An interim ordinance originally adopted on January 28, 2002, and later re-adopted commits the County to cease processing Comprehensive Plan amendments, such as the proposed Day Creek MRO amendment, during the period that the ordinance is in effect. The ordinance was passed pursuant to Court orders to stop the County from approving optional Comprehensive Plan amendments until certain pending litigation is resolved. The instant Administrative Interpretation request appears to be an effort to deal separately with the Day Creek MRO designation question without waiting for the stalled Comprehensive Plan amendment process to be completed.

28. There is simply no way of knowing how all of the designation factors now applicable would be weighed by the legislative authority in deciding on the proposal to amend the Comprehensive Plan regarding the Day Creek MRO. The result might be boundaries quite different from those proposed by the subject mapping error correction request.

29. Public review and public hearings were held prior to each of the past legislative actions adopting Natural Resource Lands maps, including all of the MRO. No one from the Day Creek area spoke during that process regarding the placement of the MRO area in question.

30. The Administrative Interpretation under appeal was not the subject of a public hearing. A Notice of Decision was issued which advised of the opportunity to appeal.

31. The County approved seven administrative mapping interpretations between February 2001 and February 2002, using the same procedures that were used here. None of these earlier actions were appealed.

32. The DNS Addendum entered here was not adopted with respect to any previously issued DNS.

33. A Determination of Significance (DS) under the State Environmental Policy Act (SEPA) was issued for the entire package of pending Comprehensive Plan amendments. The appellants herein provided comments on the DS specifically directed toward the proposed Day Creek MRO expansion that is the subject of this proceeding.



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34. The Notice of Decision herein provided notice of the DNS Addendum and of appeal rights.

35. There was insufficient evidence to support a finding that a more than moderate adverse impact on environmental quality is a reasonable likelihood of approving the Administrative Interpretation.

36. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this appeal. SCC 14.06.040(3)(d). 14.06.110(7).

2. The environmental document issued in this case was erroneously labeled an Addendum. It should have been issued simply as a DNS. It's principal conclusion is that the proposed mapping error determination and correction will not have a probable significant adverse impact on the environment. This conclusion was reached after evaluation of an Environmental Checklist. The rationale for the conclusion is that the action involved is purely programmatic in nature and is very limited in coverage. The requested map change, if made, will not, in itself, cause anything to happen to the environment. The area of affected is small.

3. Questions were raised about possible impacts to the neighborhood of future mining on the proposed new MRO lands, but these questions point to an information deficit on the environmental effects of development proposals that have not yet been made. Such impacts are at this juncture speculative. As to the present programmatic step, the Examiner concludes that issuance of the DNS was not shown to be based on insufficient information. Further, the opportunity for detailed environmental analysis is not lost by default. Likely physical impacts can be knowledgeably analyzed when a site-specific development permit is sought.

4. Regardless of what the appealed environmental document was called, the Examiner holds that it fulfilled the function of a negative threshold determination under SEPA, and that such a determination was appropriate in this case. See WAC 197-11-340(1).

5. There was no showing that there is another agency with jurisdiction over this Administrative Interpretation action and therefore the comment and notice requirements of WAC 197-11-340(2) did not apply. Nevertheless, notice was provided by the Notice of Decision which supplied information on appeal rights which were, in fact, exercised. The appellants in this case have shown no prejudice from the procedure followed.



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6. It is true that this same proposal is also included in a package of proposals for amending the Comprehensive Plan. That package has been the subject of a DS. However, there is nothing here to indicate that the subject mapping change is an interdependent part of the larger proposal, making it inappropriate to consider it separately. See WAC 197-11-060(3).

7. The Administrative Interpretation provided in this case is based on the provisions of SCC 14.06.040(3)(a). In pertinent part that subsection reads:

Administrative interpretations are decisions by the Administrative Official as to the meaning, application, or intent of any of the provisions of SCC Title 14. Administrative interpretations are also available for questions regarding a map boundary or an alleged mapping error that does not involve reconsideration or rebalancing of designation criteria. . . .

8. By virtue of the Growth Management Act, the Comprehensive Plan and the implementing code are part of a single interrelated legislatively enacted legal scheme. The Comprehensive Plan and implementing zoning must be consistent with one another. The Examiner concludes that the Administrative Interpretation authority of the code extends to Comprehensive Plan mapping.

9. Beyond their SEPA appeal, the appellants put forward three arguments for why they think approval of the proposed mapping change was in error. The arguments are:

(1) The decision improperly uses the Administrative Interpretation process to amend the Comprehensive Plan and zoning map designations.

(2) Making the decision necessarily involves the reconsideration or rebalancing of designation criteria.

(3) The decision violates the ordinance which puts the processing of Comprehensive Plan amendments on hold pending resolution of litigation.

10. The County takes the position that the Administrative Interpretation authority of SCC 14.06.040(3)(a) provides an alternative method to a Comprehensive Plan amendment for effecting the change requested.

11. The Comprehensive Plan and the implementing zoning regulations are adopted by legislative action. The Administrator has no legislative powers. An Administrative Interpretation, therefore, involves something other than amending the Comprehensive Plan or the zoning code. "Interpretation" is not amendment. It is clarification of what the legislatively adopted plan or code means.



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12. The mapping error provision is therefore limited to interpretation. Action taken under it cannot affirmatively amend. The most that such an action can do is to conform the Plan or the code to what the legislative authority intended in the first place.

13. The appellants argue that mapping corrections are limited to errors that occur through some sort of scrivener's (or mapper's) error between the time of adoption and the time that the adopted map is physically reproduced. This is because the Administrative Interpretation process bypasses the entire public notice and public comment process that attends legislative amendments. If more than post-adoption errors are encompassed, interpretations can effect substantive changes in the maps without public scrutiny.

14. A corollary to this argument is that persons who seek mapping changes did have a chance to be heard on the subject during the legislative process. Clearly the applicants in this case slept on their rights during the several map adoption and re-adoption proceedings that took place and now seek to correct what they could easily have pointed out before.

15. However, the Examiner does not believe that the mapping error power is as limited as the appellants contend. In his view, a map may be corrected to reflect the intent at adoption if the map before the legislative authority at the time of adoption inaccurately reflected that intent. In short, the Administrative Interpretation mechanism provides a second chance for those like the applicants here who later ask for clarification of what the lawmaker's meant. This appears to have been the operating assumption of the County in approving other mapping corrections.

16. That the Administrative Interpretation process provides no notice and comment opportunity for members of the public generally is an issue of policy. There is no clear legal requirement for such public involvement. In any event, the Examiner is obliged to assume the legality of the code provisions that County has adopted.

17. SCC 14.06.040(3)(b) requires that in making an interpretation the Administrative Official "shall research the original intent of the language or provision." The Administrator attempted to do that here and concluded that the initially adopted MRO maps were based on the reference maps available to the CAC.

18. This is true as far as it goes, but does not provide the complete explanation of the boundaries that were drawn. Because the MRO adopted is not simply a reproduction mineral locations shown on the resource maps, other factors must have come into play. To put the acres requested in the MRO would thus be consistent with one basis for designation of the initial MRO, but not necessarily with all the bases used. A rebalancing of designation criteria would appear to be necessary in order to determine what the CAC intended.



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19. In other words, to know that the subject acres have sand and gravel deposits is not to know the exact geographic coverage that was intended for the MRO in the Day Creek area. The only thing that can be said with confidence is that some portion of the sand and gravel deposits shown on the resource maps was meant to be included. While an error was evidently made here, there is no way to tell on the instant record what precise boundaries were intended for the MRO in this area, or whether those boundaries included the additional acres in question.

20. The inclusion of any new acres not within the original intent would be a matter of amendment, not interpretation. The Comprehensive Plan is explicit about the means to be used for the inclusion of lands within the MRO. At CP 4A-6.6, the Plan states:

Designation or removal of the Mineral Resource Overlay shall be processed as a Comprehensive Plan amendment pursuant to all of the procedures required for the same, including petition, notice, and public hearing.

21. The Hearing Examiner concludes that the subject Administrative Interpretation strayed across the line from interpretation into amendment and that, under the facts, the mapping error concerned could only be corrected by a rebalancing of the initial designation criteria.

22. The delay caused by the difficulties attendant on adopting Comprehensive Plan amendments is regrettable and, doubtless, frustrating. But, this problem does not justify bending the Administrative Interpretation mechanism to cover a situation that it does not quite fit. Such a bending is what the Examiner concludes has happened here.

23. The outcome should make no practical difference for those acres already covered by non-conforming uses rights. However, inclusion in the MRO of the undeveloped acres in question should be dealt with through the Comprehensive Amendment process and provided with the full public review that will entail.

24. Any finding herein which may be deemed a conclusion is hereby adopted as such.



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DECISION

(1) The SEPA appeal herein is denied and the environmental review conducted is affirmed.

(2) The Administrative Interpretation under appeal (PL02-720) is reversed.

Wick Dufford

Wick Dufford, Hearing Examiner

Date of Action: March 11, 2003.

Copies Transmitted to Parties: March 11, 2003.

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with the Planning and Permit Center within 10 dates after the date of this decision. As provided in SCC 14.06.110(13), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the Clerk of the Board within 14 days after the date of the decision, or decision on reconsideration, if applicable.

