



## Kitsap County Department of Community Development

### Notice of Hearing Examiner Decision

05/18/2018

To: Interested Parties and Parties of Record

RE: Project Name: Kitsap Quarry Service Road – Administrative Appeal  
Applicant: Chico Creek Task Force  
2461 Northlake Way NW  
Bremerton, WA  
Application: Administrative Appeal  
Permit Number: 18-00903

Enclosed is the Decision issued by the Kitsap County Hearing Examiner for the above project.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

<https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf>

The Decision of the Hearing Examiner is final, unless appealed, as provided under Washington law.

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact [Help@Kitsap1.com](mailto:Help@Kitsap1.com) or (360) 337-5777.

CC: Applicant: Chico Creek Task Force – Jack Stanfill, [jackstanfill@hotmail.com](mailto:jackstanfill@hotmail.com)  
Representatives: Bricklin & Newman LLP: [miller@bnd-law.com](mailto:miller@bnd-law.com); Peggy Cahill, [cahill@bnd-law.com](mailto:cahill@bnd-law.com); Dave Bricklin, [bricklin@bnd-law.com](mailto:bricklin@bnd-law.com); Alex Sidles, [sidles@bnd-law.com](mailto:sidles@bnd-law.com); Dr. Sarah Cooke, [cookess@comcast.net](mailto:cookess@comcast.net); Craig Jones, [cjones@pinnacle-law.com](mailto:cjones@pinnacle-law.com);

Owner: Craig & Nicole Ueland, [craig@uelandfamily.com](mailto:craig@uelandfamily.com)

Authorized Agent: Ueland Tree Farm – Mark Mauren, [mauren.wa@gmail.com](mailto:mauren.wa@gmail.com)

Prosecutor

Assessor

DCD

Kitsap Sun

Interested Parties: None

**KITSAP COUNTY HEARING EXAMINER**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

**AND**

**REVISED ORDER ON MOTIONS TO DISMISS**

**Kitsap Quarry Service Road Expansion  
Site Development Activity Permit Appeal  
Appeal No. 18-00903; SDAP Permit No. 17-02228**

**May 16, 2018**

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**SECTION I. FINDINGS OF FACT**

**1. Overview**

1.1 The Kitsap County Department of Community Development ("DCD") issued Ueland Tree Farm, LLC ("Applicant") a Site Development Activity Permit ("SDAP") for a road. Chico Creek Task Force ("Appellant") appealed.

1.2 Kitsap County's Stormwater Management Ordinance<sup>1</sup> required the SDAP for a 650 foot road segment providing access to sand, gravel, and basalt mining operations. This road segment follows a pre-existing road alignment. However, because the existing roadway is being reconstructed and expanded, DCD required the SDAP.

1.3 The road segment provides access to the mining operations, which were permitted following State Environmental Policy Act, Ch. 43.21C RCW ("SEPA") review. Previous permit documents included a Conditional Use Permit, which was revised ("Revised CUP"),<sup>2</sup> a Development Agreement, and an Environmental Impact Statement, which was later supplemented ("SEIS").

1.3 Originally, the mining operation was accessed through the North Haul Route. To minimize truck traffic through residential neighborhoods, the Applicant designed a new route, called the South Haul Route. The SEIS addressed its environmental impacts. The Appellant appealed the SEIS. After the parties agreed to additional conditions, the Hearing Examiner dismissed the SEIS appeal and approved the Revised CUP for the new access route.

1.5 These earlier decisions are not before the Examiner. The only permit before the Examiner is the SDAP covering the first 650 feet of the South Haul Route.

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<sup>1</sup> DCD Exhibit 12 (2010 Stormwater Management Ordinance), KCC 12.04.010.

<sup>2</sup> Revised CUP 14-02844; CUP 07-44975.

## **2. Procedural History**

### **2.1 Pre-Hearing Issues**

2.1.1 The Examiner issued two pre-hearing orders. In response to a DCD request, the Examiner scheduled a pre-hearing conference and set a deadline for the Appellant to provide a narrative supporting its appeal points.<sup>3</sup> At the pre-hearing conference, the parties agreed on deadlines for filing motions to dismiss and proposed exhibits. The second pre-hearing order memorialized this agreement.<sup>4</sup>

2.1.2 DCD filed Motions to Dismiss and for Clarification per HE Rule 2.2.4; Applicant Ueland Tree Farm filed a Motion to Dismiss Appeal; the Appellant filed a Combined Response to DCD's and Ueland Tree Farm's Separate Motions to Dismiss and Motion for Clarification; and DCD filed a Reply on Motion to Dismiss. Attached exhibits were extensive, but included the SDAP appeal, the SDAP, SEIS, Revised CUP, and various permitting materials.<sup>5</sup>

2.1.3 DCD and the Applicant requested complete dismissal, with DCD requesting clarification on any issues not dismissed. In response, the Appellant stipulated to dismissing or partially dismissing three of the five issues.

2.1.4 As no EIS or threshold determination had been appealed, the Examiner determined she lacked SEPA jurisdiction, but that the SDAP appeal could proceed. Due to the SEPA dismissal, the only remaining issue was the non-SEPA aspect of Issue 1. On Issue 1, the Examiner required the Appellant to identify the code sections it was alleging the SDAP violates, identify affected water resources, and summarize the basis for its allegations.<sup>6</sup>

2.1.5 The Appellant filed its issue clarification and moved for reconsideration of the SEPA dismissal. DCD and the Applicant filed responses, with DCD also filing a supplemental response. The Examiner set oral argument for the hearing.<sup>7</sup>

### **2.2 Hearing**

2.2.1 An open record hearing was held on April 26, 2018. The Appellant was represented by Alex Sidles; DCD by Lisa Nickel; and the Applicant by Craig L. Jones.

2.2.2 SEPA jurisdiction was first addressed. Following oral argument, the Examiner confirmed her original decision dismissing the SEPA issues, stating a revised order of dismissal would issue with the appeal decision. The parties did not object.

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<sup>3</sup> First Pre-Hearing Order (March 15, 2018).

<sup>4</sup> Second Pre-Hearing Order (March 27, 2018).

<sup>5</sup> Most dismissal exhibits were later renumbered (originally, Applicant's Exhibits 1-9 and DCD's 1-6).

<sup>6</sup> Order on Motions to Dismiss and for Clarification (April 18, 2018).

<sup>7</sup> Order on Motion for Reconsideration of Order on Motions to Dismiss and for Clarification (April 23, 2018).

2.2.3 The Examiner next asked about the KCC sections at issue. The Appellant had identified three code sections in its issue clarification (KCC 12.10.070, .080, and .090). The parties agreed that the Applicant had vested to the three code sections as they stood in 2010, as presented through Exhibit DCD 12. The parties also stipulated that a reference in KCC 12.10.070 to .030 was a typographical error, and should instead be .040. The parties agreed that the appeal was based on only these three code sections.

2.2.4 Before the hearing, the parties identified the witnesses they intended to call, and proposed exhibits, numbered:

Appellant: A 1 – A 10  
DCD: DCD 1 - DCD 14  
Applicant: UTF 1- UTF 27

. At the hearing, the Appellant submitted an enlarged site plan (DCD Exhibit 11), which was numbered as Exhibit A 11. The Applicant submitted resumes for its witnesses, Mr. Biggerstaff, Mr. Allen, and Mr. Downs. The resumes became Exhibit UTF 28, along with a stipulation on witness qualifications. The Examiner admitted all exhibits, including those previously submitted,<sup>8</sup> by party stipulation.

2.2.5 The parties stipulated to the below expert witness qualifications:

- Dr. Sarah Cooke, Cooke Scientific: “[E]xpert regarding soils and wetlands, but without any Washington State licenses in these areas. And DNR expert in slope mass wasting, stability.”
- Brad Biggerstaff, GeoResources: “[E]xpert licensed Engineering Geologist and licensed Hydrologist in the State of Washington and qualified expert with DNR for slope stability.”
- Jeremy Downs, Soundview Consultants: “[E]xpert regarding wetlands, fish and wildlife biology, and environmental planner, but without any Washington State licenses in these areas.”
- Brett Allen, Contour Engineering: “[L]icensed Professional Engineer in the State of Washington.”<sup>9</sup>

2.2.6 Following opening arguments, the parties called these witnesses:

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<sup>8</sup> Most exhibits filed with the earlier motions were renumbered in the exhibit lists. The Applicant originally submitted exhibits numbered 1-9 and DCD numbered its original exhibits 1-6.

<sup>9</sup> Exhibit UTF 28.

Appellant: Dr. Sarah Cooke  
DCD: DCD Planners Jenifer Lawrence and Steve Heacock  
Applicant: Bradley P. Biggerstaff; Brent M. Allen, P.E.; Jeremy Downs

2.2.7 Rather than present closings orally, the parties all submitted written closing argument.

### 3. Motions to Dismiss: SEPA

3.1 The Examiner's SEPA jurisdiction is limited. "Administrative appeals are limited to review of a final threshold determination and final EIS for nonexempt project permit actions, as defined in Chapter 21.02."<sup>10</sup> This KCC provision follows state requirements. "Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS."<sup>11</sup>

3.2 As the Appellant stated, no threshold determination or EIS was appealed.

Appellant [W]e are not appealing the supplemental environmental impact statement of 2015. Instead, we are appealing the SEPA decision that was related to this SDAP permit. ...

Examiner What was the SEPA decision then?

Appellant ... Now the SEPA, to call it a determination I think is wrong. But, the SEPA decision in this case was well you know the SEIS already looked at this stuff. The SDAP is just one small part of what the SEIS contemplated so we'll just rely on the SEIS. And that's why I say we are not here to appeal the SEIS. That was in 2015. It's too late to appeal now. But we are appealing the SEPA decision that was made for this SDAP road, which decision was you know we can just rely on this SEIS everything's already been thought of, there is no need for a threshold determination and so forth. So, that's the heart of our appeal right there.

3.3 Without appealing an EIS or threshold determination, SEPA issues cannot be raised. Under the KCC, filing such an appeal and paying the filing fee are jurisdictional prerequisites.<sup>12</sup>

3.4 Only the SDAP was appealed. To identify the decision being appealed, the County's appeal form states:

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<sup>10</sup> KCC 21.04.290(E)(1); KCC 18.04.210 (Title 21 governs SEPA appeals).

<sup>11</sup> WAC 197-11-680(3)(a)(iii); RCW 43.21C.075(3)(a).

<sup>12</sup> KCC 21.04.290(B)(6) and (E)(1).

Appeal of (Choose one):       Project Permit Decision  
                                  Director's Interpretation  
                                  SEPA Determination<sup>13</sup>

The Appellant checked the "Project Permit Decision" box and identified the project appeal as "Kitsap Quarry Service Road Expansion, SDAP."

3.5 The approach invoked Examiner jurisdiction over the SDAP, but not over an EIS or threshold determination. The Appellant states that as it could not check two boxes, it was in an impossible situation. The solution is to obtain a second form for a second appeal, identify the SEPA decision the party wishes to appeal, and pay the second appeal fee. As DCD explained, "[i]t's long been the DCD practice there are two separate appeals, two separate tracks. They need to pay two appeal fees."

3.6 Even had the SEIS been appealed, SEPA prohibits multiple appeals over the same EIS.<sup>14</sup> The same parties already litigated the 2015 SEIS for the same road project now before the Examiner.<sup>15</sup> The parties eventually agreed to added SEPA conditions, as the 50-page SEPA Decision and Revised CUP explains:

Conclusions Based on Findings  
*SEPA Appeal*

**1. In response to the Hearing Examiner's Post-Hearing Order, the County, the Applicant, and the Appellant agreed that additional CUP revision Conditions Nos. 138 to 145 would mitigate for the construction and operation of the South Access Route and relocation of accessory uses.** Because the County, Applicant, and Appellant agreed to additional CUP revision conditions, the SEIS addresses and mitigates otherwise probable, significant adverse impacts of the proposed CUP revisions, as required by the State Environmental Policy Act (SEPA). *Findings 5-12.*<sup>16</sup>

3.7 The Examiner lacks jurisdiction over a second appeal of the same document over the same project.

3.8 These issues cannot be relitigated for another reason. The SEIS addressed the Southern Haul Route, which the project is a part of. The 2015 SEIS was subject to prior litigation, which was dismissed. Unless limited exceptions are met, SEPA requires this SEIS to be used unchanged.

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<sup>13</sup> Exhibit UTF 1 (SDAP Appeal).

<sup>14</sup> RCW 43.21C.075(3)(a).

<sup>15</sup> Exhibit DCD 2 (SEPA Decision and Revised CUP).

<sup>16</sup> Exhibit DCD 2 (SEPA Decision and Revised CUP), p. 17, ¶ 1, emphasis in text.

Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases: ... (b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are: ... (ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.<sup>17</sup>

3.9 The appeal did not identify new information on probable, significant adverse environmental impacts. As set forth in its brief, the Appellant's primary concern is wetland and stream impacts. These are not new issues. The SEIS addressed these water resources, including classification and mitigation, with the parties achieving agreement on SEPA mitigation.<sup>18</sup> The SEPA Checklist is a new document, but new issues regarding information in it are not raised, and SEPA does not allow for administrative appeals of a SEPA Checklist. And, the identified recreational impacts are not new.<sup>19</sup> However, new information or not, without an appeal of an EIS or threshold determination, the Examiner lacks SEPA jurisdiction.

3.10 The reconsideration motion only addressed SEPA, so it is unnecessary to address the other matters the dismissal order resolved. The original order is incorporated, with this decision's additional findings and conclusions amending it.

#### 4. SDAP Appeal

##### 4.1 Overview: Title 12 Stormwater

4.1.1 Kitsap County's Stormwater Management Ordinance requires SDAP issuance before "site development activity, including land clearing, grading or other construction activity," may commence.<sup>20</sup> To issue the permit, DCD must find that the SDAP complies with "applicable regulations, including Title 12," and the County stormwater manual.<sup>21</sup> The SDAP decision may be appealed to the Hearing Examiner.<sup>22</sup> An appellant has the burden to demonstrate that DCD erred in issuing the SDAP.

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<sup>17</sup> WAC 197-11-600(3)(b)(ii).

<sup>18</sup> DCD Exhibit 2 (Revised CUP and SEPA Decision), p. 8. The SEPA decision summarizes SEIS appeal testimony, including Dr. Cooke's testimony on road impacts on wetlands and streams and their buffers, erosion, and vegetation removal concerns. Mr. Stanfill's testimony on impacts to streams and wetlands is also summarized. Conditions 138-145 are at pgs. 38-45, and the Examiner's description of the parties' agreement on same is at p. 17, ¶ 1; UTF 5 (SEIS), Figure 4-1 (mapping wetlands/streams, including buffer areas) and Appellant's SEIS comments.

<sup>19</sup> See e.g., UTF 1 (Appeal, Cooke Scientific 2015 Memo, revised 2018), attaching correspondence on trail concerns, dated October 15, 2013; UTF 1 (Appeal, Mr. Stanfill's August 14, 2017 letter, Exhibit 13), noting 2013 establishment of Green Zone. The SEIS was issued in 2015. UTF 5 (SEIS).

<sup>20</sup> DCD Exhibit 12 (2010 Stormwater Management Ordinance), KCC 12.10.030.

<sup>21</sup> DCD Exhibit 12 (2010 Stormwater Management Ordinance), KCC 12.10.050.

<sup>22</sup> KCC 21.04.290(C).

4.1.2 Kitsap County's 2010 Stormwater Management Ordinance consists of 45 pages of code, with 13 sections: General Provisions; Definitions; Permits; Covenants, Sureties and Liability Insurance; Erosion and Sediment Control; Grading; Stormwater Management; Operation and Maintenance; Critical Drainage Areas; Water Quality; Enforcement; Surface and Stormwater Management Program; and, Surface and Stormwater Management Program Rate Structure. The section at issue is § 12.10 Permits, specifically §§ .070, .080, and .090.

4.1.3 The parties do not dispute that technical analysis addressing these three sections was submitted and that qualified professionals prepared the analysis. The dispute is over whether what was submitted complies with KCC 12.10.070, .080, and 090, as these sections existed in 2010 (DCD Exhibit 12).

4.1.4 The Examiner has not assumed that because the earlier SEPA analysis was determined to meet SEPA requirements, that decides the issues raised. The question is SDAP KCC compliance. All analysis, SEPA based or not, is reviewed not against SEPA, but the KCC.

## 4.2 KCC 12.10.070: Off-Site Drainage Analysis

4.2.1 The SDAP application must include "an off-site drainage analysis as described in Section 12.18.030 [.040],<sup>23</sup> prepared by a qualified professional engineer and based on a field investigation of the development's off-site contributing and receiving drainage areas."<sup>24</sup> The ".040" analysis requires:

Natural drainage patterns shall be maintained, and discharges from the project site shall occur at the natural location, to the maximum extent practicable. The manner by which runoff is discharged from the project site must not cause a significant adverse impact to downstream receiving waters and down-gradient properties. All outfalls require energy dissipation. ....

[S]hall conduct an analysis of downstream water quality impacts resulting from the project and shall provide for mitigation of these impacts ....

The analysis shall extend a minimum of one-fourth of a mile downstream from the project. The existing or potential impacts to be evaluated and mitigated shall include excessive sedimentation, erosion, discharges to ground water contributing or recharge zones, violations of water quality standards, and spills and discharges of priority pollutants.<sup>25</sup>

4.2.2 In summary, the KCC requires preservation of natural drainage patterns by ensuring project discharges occur at natural locations and runoff does not cause significant

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<sup>23</sup> The parties agreed this is a typographical error. The correct reference is to .040.

<sup>24</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), KCC 12.10.070.

<sup>25</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), KCC 12.18.040(A) and (B); DCD 13 (Stormwater Manual), at pg. 245, § 4.6.1 and pg. 611, Table 4.11.

downstream impacts from excessive sedimentation, erosion, groundwater discharge to recharge areas, water quality standard violations, and priority pollutant spills or discharges. The area to be analyzed is 1/4 mile downstream.

4.2.3 To address these requirements, the Applicant submitted a Drainage Report and Construction Stormwater Pollution Prevention Plan, or SWPPP.<sup>26</sup> Brett Allen, P.E., provided testimony on these reports, which he approved. Mr. Allen has a B.S. in geotechnical engineering, is licensed with the State, and founded Contour Engineering, LLC, a civil engineering firm, in 2006. The parties did not dispute he is a qualified professional engineer:

[A] person, who, by reason of his or her special knowledge of the mathematical and physical sciences and the principles and methods of engineering analysis and design, acquired by professional education and practical experience, is qualified to practice engineering as attested by his or her legal registration as a professional engineer in the state of Washington.<sup>27</sup>

4.2.4 The technical analysis summarized the stormwater approach:

The proposed gravel roadway is 15-ft wide. According to the BMP, A vegetated buffer width of 10-ft must be provided for up to 20-ft of width of paved or impervious surface. Since none of the paved or impervious surfaces exceed 20-ft. A 10-ft vegetated flowpath area is sufficient for all areas associated with the project. The entire 10-ft vegetated buffer is currently proposed to be disturbed and therefore will require soil amendment and revegetation. Specifications for soil amendment and re-vegetation are provided on the construction plans.

The hydrologic modeling program, Western Washington Hydrology Model 2012 (WWHM), was utilized in order to calculate the total groundwater recharge of the pre-developed and developed site conditions. In order to meet the standards of minimum requirement #5, the project must maintain the average annual volume of water that infiltrates onsite at or above pre-developed levels as predicted by an approved model. ... The project will maintain the average annual volume of water that infiltrates onsite at or above pre-developed levels and therefore satisfies minimum requirement #5.<sup>28</sup>

4.2.5 The study area extended 1/4 mile downstream.<sup>29</sup> The analysis concluded, "No ... erosional or flooding problems are known to be associated with the delineated study area and no other problems are expected to occur as a result of the proposed development."<sup>30</sup> The

<sup>26</sup> Exhibits DCD 8 and DCD 9.

<sup>27</sup> DCD Exhibit 12 (2010 Stormwater Management Ordinance), KCC 12.08.010(56), *see* project engineer definition at (57), and KCC 12.10.060 (requiring qualified professional engineer to prepare SDAP technical submittals).

<sup>28</sup> Exhibit DCD 8 (Drainage Report), § 4.

<sup>29</sup> Exhibit DCD 8 (Drainage Report), § 3.

<sup>30</sup> Exhibit DCD 8 (Drainage Report), § 3.

hydrogeologic report "did not identify any potential threats to groundwater...."<sup>31</sup> The report concluded, "[t]he project will maintain the average annual volume of water that infiltrates onsite at or above pre-developed levels..."<sup>32</sup>

4.2.6 The Appellant did not challenge the flow calculations or modeling figures, alleging other factors should have been addressed. Dr. Cooke raised concerns about soil erosion, having larger wetland buffers, and the quantity of stormwater to plan for (resulting from high-volume storm events, back-to-back storms, and climate change).

4.2.7 The KCC requires 100-year storm event modeling.<sup>33</sup> "According to the SDM [Stormwater Design Manual], the project conveyance system must have adequate capacity to convey the 100-year design storm event."<sup>34</sup> The technical analysis includes calculations showing the design approach as adequate to manage these peak flows.<sup>35</sup> Based on the analysis and Mr. Allen's testimony, the road's conveyance system was designed consistent with 100-year storm event modeling.

4.2.8 The KCC does not require the road engineering design to meet a metric other than the 100-year storm event. Regarding storm events which exceed the 100-year storm, or multiple storm events, whether due to climate change or other factors, the KCC does not require the road segment to be designed to a higher inflow level. As the KCC does not require a different standard, the Examiner lacks authority to impose one.

4.2.9 Even if the Examiner could craft a different metric, the data presented was not sufficient for the task. Dr. Cooke testified on there being an increasing number of 100-year storm events. However, other than testifying in general terms on the increasing intensity and frequency of storm events, the evidence was insufficient to support a finding that DCD erred in not imposing an alternative standard for this road segment.

4.2.10 In questioning on whether the culverts would be sufficient to handle stormwater, Dr. Cooke stated, it was "very hard for me to say," as she had not been out to the site. She could not tell from reviewing the reports how much water comes through and the timing. She stated she had "called the Department of Fish and Wildlife that issued the HPA and they were not concerned because when they were out there, there was very little evidence of much flow at all in that area." Dr. Cooke concluded that if the Department had been out in high volume or back to back events, there "would be more water but I have no way of knowing if it's a concern or not because it wasn't evaluated." So, the primary issue raised was not that the figures and analysis the Applicant provided were wrong, but that the inflow of a higher volume of water should have been evaluated. However, even assuming the Examiner is not constrained

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<sup>31</sup> Exhibit DCD 8 (Drainage Report), § 2, last page of.

<sup>32</sup> Exhibit DCD 8 (Drainage Report), § 4.

<sup>33</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), KCC 12.20.090; Exhibit DCD 13 (Stormwater Manual), p. 222, § 4.1(A)(1).

<sup>34</sup> Exhibit DCD 8 (Drainage Report), § 4.

<sup>35</sup> See e.g., Exhibit DCD 8 (Drainage Report), § 4.

by the Title 12 100-year engineering standard, the Appellant did not present sufficient evidence to support a different standard, or that the road was inadequately designed to meet KCC requirements.

4.2.11 The Appellant's witness expressed a desire for a better project, and additional analysis, but the question before the Examiner is not whether the project could be improved on, or more analysis could be done, but whether the KCC was complied with.

#### 4.2.12 Wetlands

4.2.12.1 Wetland buffer adequacy to protect fish and wildlife under the state's Growth Management Act, Ch. 36.70A RCW was reviewed through other code sections (Title 19). Those code sections are not at issue in this appeal. The Appellant's witness took the view that a different buffer size would change the analysis for Title 12 purposes, but did not explain how. The Revised CUP authorized use of an existing roadway. The segment the SDAP covers is already located inside the wetland buffer. DCD's stormwater reviewer, Ms. Lawrence, testified that as a result, a different buffer size would not alter the stormwater analysis.

4.2.12.2 Title 12 Stormwater review looks to wetland issues through a different lens than a critical areas code (Title 19) assessment does. As DCD's stormwater reviewer testified, the Title 12 critical areas review is through KCC 12.18.130, and Stormwater Manual Chapters 8 and 10.<sup>36</sup> The Appellant did not allege violations of these sections, so they are not before the Examiner. However, the basic Title 12 approach is that stormwater discharges to wetlands are allowed where wetland characteristics (hydrology, soils, and plants) are maintained. To achieve these objectives, qualified specialists provide mitigation recommendations to address stormwater management design.<sup>37</sup> The Appellant raised concerns over wetland classification and increased stormwater going into wetlands, tying those concerns to downstream analysis requirements. However, the Appellant did not quantify how much additional water would enter the wetlands.

4.2.12.3 Mr. Downs of Soundview Consultants, a qualified wetlands expert, provided recommendations and strategies to maintain wetland characteristics.<sup>38</sup> This included analysis of the previous wetlands ratings and buffers, and multiple site visits in multiple seasons. Dr. Cooke testified that just one point separated Wetland E from a different classification with a larger buffer. However, unlike Mr. Downs, she had not visited the site. While she may have rated the wetland differently, even if the Examiner had jurisdiction to revisit the earlier wetland ratings classified through Title 19, the Appellant has not met its burden to demonstrate the rating was in error.

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<sup>36</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), at 23-24; Exhibit DCD 13 (stormwater manual), pgs. 400, and 481-485.

<sup>37</sup> Exhibit DCD 13 (Stormwater Manual), pg. 483.

<sup>38</sup> Exhibits DCD 5 and DCD 6.

4.2.12.4 The Applicant focused on Wetland E, as that is where buffer impacts occur. Dr. Cooke testified that it would be worth examining whether the wetlands are conjoined, at least during higher volume storm events. But, having not been to the site, she also indicated that she could not comment.

4.2.12.5 Dr. Cooke also raised a buffer sizing issue, although Title 19 governs this issue. Based on reproduced site plans, Dr. Cooke asserted the buffer appeared to be 22.5 feet. DCD and the Applicant confirmed the buffer is 56 feet from the road's edge.<sup>39</sup>

4.2.12.6 As Mr. Downs explained, Wetlands M and N are roughly 900-1,500 feet from SDAP's road segment, and located upslope. The project does not impact them. The Appellant did not question the longitude/latitude data in the technical analysis. Also, Dr. Cooke did not object to ratings for wetlands G, H and F, which are in another drainage, and not affected by the project.

4.2.12.7 The project is a road threading through an existing road. There is some vegetation clearing, and where that happens, replanting is required. Dr. Cooke preferred a specific number of plants in the mitigation plan, but the Appellant did not identify a KCC provision requiring this level of specificity. Mr. Downs explained that with the planting bond and estimate, the mitigation is adequate to meet KCC requirements, and is the preferred approach, to protect against over-planting.

4.2.12.8 The Appellant has not met its burden of proof to demonstrate that the analysis, including on wetland impacts, does not meet KCC 12.10.070 requirements. While the Appellant desired additional analysis and a different approach, the technical analysis is consistent with Title 12.

#### 4.2.13 Groundwater

4.2.13.1 The project is within a Category II aquifer recharge area, but is only required to have a hydro-geological report if roadways are listed in Table 19.600.620. As DCD's Mr. Heacock testified, they are not.

4.2.13.2 The soils at this location do not readily allow for groundwater recharge.<sup>40</sup> Mr. Biggerstaff evaluated geologic conditions as they relate to hydrogeology. Impermeable soils were encountered one to four feet below the surface, which means there is minimal recharge to the deeper aquifer located 60 to 80 feet from the surface. He concluded that the roadway will not impede groundwater recharge.

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<sup>39</sup> Exhibit UTF 3 at Exhibit 6, p. 3; DCD 11. Dr. Cooke's testimony may have been based on previously established 22.5' clearing limits. Buffer restoration work is required for 56'.

<sup>40</sup> Exhibit DCD 7 (Geotechnical Engineering Report), pg. 4.

4.2.13.3 Due to these soil conditions, stormwater dispersion was allowed rather than infiltration, an unchallenged design feature.<sup>41</sup> With the approach, infiltration will closely match preexisting conditions, meaning the roadway will not impact the amount of water which infiltrates.<sup>42</sup> The approach is consistent with KCC 12.10.070 requirements.

4.2.14 The analysis the Applicant submitted was prepared by a qualified professional engineer, and follows KCC 12.10.070 and 12.18.040.

4.2.15 §§ 4.3 and 4.4 are incorporated.

### **4.3 KCC 12.10.080: Geotechnical Analysis**

4.3.1 All SDAP applications shall include, when required:

[A] geotechnical analysis, prepared by a professional geotechnical engineer or licensed engineering geologist. The geotechnical analysis shall address the effects of ground water interception and infiltration, seepage, potential slip planes and changes in soil bearing strength.<sup>43</sup>

To address this provision, the Applicant retained Mr. Brad Biggerstaff, who prepared two geotechnical reports.<sup>44</sup> Mr. Biggerstaff is a Principal Engineering and Hydrogeologist with GeoResources, LLC, who has specialized in geotechnical, hydrogeologic and mineral resource projects for over 40 years, and is a state licensed geologist. He has a B.S in Geology and a M.S. in Economic Geology. He is a qualified geotechnical engineer, and licensed engineering geologist.

4.3.2 Mr. Biggerstaff testified that he had been to the site probably 20 times or more. Site reconnaissance in the road area (a little under an acre) and the surrounding area (8-10 acres) was completed. This included digging exploration test pits within the road bed and outside the road alignment. The geotechnical analysis found that based on multiple test pits within the area and road segment itself, only the Neilton and Norma soils existed and that the measured slopes were of such a degree as to only present slight erosion hazards.<sup>45</sup> The Ragnar soils Dr. Cooke raised concerns over occur further west, but are not within the project site. Mr. Biggerstaff worked with civil engineers to plan and prepare documents to adequately mitigate erosion potential. During project construction there will be continual monitoring regularly and after significant storm events through Certified Erosion Control Specialists.

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<sup>41</sup> Exhibit DCD 7 (Geotechnical Engineering Report), pg. 4.

<sup>42</sup> Exhibit DCD 8 (Drainage Report), § 4.

<sup>43</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), KCC 12.10.080.

<sup>44</sup> Exhibit DCD 7 (Geotechnical Engineering Report); Exhibit DCD 8, Appendix B (Geotechnical Engineering Report, 2016).

<sup>45</sup> Exhibit DCD 7 (Geotechnical Engineering Report), pg. 2; Exhibit DCD 8, Appendix B (Geotechnical Engineering Report); Testimony, Mr. Biggerstaff.

4.3.3 The Appellant's witness raised "severe concerns" about erosion and disputed the soil type present on the site. However, Dr. Cooke did not visit the site and evaluate soils, and is not a licensed engineer.<sup>46</sup> As addressed above, the soils actually at the site were verified by on site visits, including testing, by a qualified professional meeting KCC requirements. Mr. Biggerstaff explained that one road has already been built in the area and he is not aware of any reports or issues on stormwater management or erosion. As a geotechnical analysis meeting KCC requirements was submitted, DCD did not err in determining the SDAP complies with KCC 12.10.080.

4.3.4 §§ 4.2 and 4.4 are incorporated.

#### **4.4 KCC 12.10.090: Soils Analysis**

4.4.1 All SDAP applications shall include, when required, "a soils investigation report."<sup>47</sup> Such a report is "a study of soils on a subject property with the primary purpose of characterizing and describing the engineering properties of soils. The soils investigation report shall be prepared by a qualified soils engineer or geologist...."<sup>48</sup> Such a person is "a practicing engineer licensed as a professional engineer in the state of Washington who has at least four years of professional employment as an engineer dealing with soil descriptions and characterizations."<sup>49</sup> The parties did not dispute that Mr. Biggerstaff, whose credentials are described above, qualifies. Mr. Biggerstaff prepared two reports to address this requirement.<sup>50</sup>

4.4.2 As addressed above, GeoResources completed numerous test pits within and around the roadway and found the soils did not present a high erosion risk. Dr. Cooke disputed the soil type, but has not been on site, and is not a licensed geotechnical engineer.

4.4.3 §§ 4.2 and 4.3 are incorporated.

### **SECTION II. CONCLUSIONS OF LAW**

#### **1. SEPA: Motions to Dismiss**

1.1 The KCC allows for only SEPA appeals of a threshold determination or EIS.<sup>51</sup> This is consistent with SEPA.<sup>52</sup> As the Appellant acknowledged, it did not appeal an EIS or

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<sup>46</sup> During cross examination, Dr. Cooke confirmed she herself had not requested a site visit. According to testimony from the Applicant's witnesses, she had been invited in 2015, but did not appear for the scheduled visit. Dr. Cooke did not recall these circumstances.

<sup>47</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), KCC 12.10.090.

<sup>48</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), KCC 12.08.010(66).

<sup>49</sup> Exhibit DCD 12 (2010 Stormwater Management Ordinance), KCC 12.08.010(67).

<sup>50</sup> Exhibit DCD 7 (Geotechnical Engineering Report, 2017); Exhibit DCD 8, Appendix B (Geotechnical Engineering Report, 2016).

<sup>51</sup> KCC 21.04.290(E)(1); KCC 18.04.210 (Title 21 governs SEPA appeals).

threshold determination. Under the KCC, appealing one of these two types of documents and paying the filing fee are jurisdictional prerequisites.<sup>53</sup>

1.2 The Appellant stated the appeal period had passed for the 2015 EIS. The Appellant's statement on the reason for not appealing the SEIS is consistent with SEPA requirements, which prohibit more than one appeal on the same environmental review document.

If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

Shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement);<sup>54</sup>

1.3 The Appellant has litigated the SEIS, which reviewed the South Haul Route. The permit involves a segment of this route. The KCC does not allow the Appellant the opportunity to relitigate its concerns. However, even if jurisdiction could be obtained, the Appellant has not raised new issues, as SEPA requires.<sup>55</sup>

## 2. SDAP

2.1 The KCC provides for the Hearing Examiner to hear appeals of certain administrative decisions "in a de novo open-record hearing in accordance with the hearing examiner rules of procedure."<sup>56</sup> Such decisions include SDAP appeals.

2.2 The SDAP was issued consistent with KCC 12.10.070, .080, and .090. The required analysis was prepared by qualified professionals consistent with the KCC. The testimony supporting the analysis from these professionals was credible and the methodology used in the analysis followed KCC requirements. The Appellant did not meet its burden of proof to show otherwise, and that DCD erred in issuing the SDAP.

2.3 The KCC requires use of the 100-year storm as the standard for engineering design. The technical analysis presented was sufficient to verify that KCC stormwater management requirements are met. More analysis could always be done, and applicants can always elect to overdesign for stormwater. However, the Examiner has jurisdiction only over

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<sup>52</sup> WAC 197-11-680(3)(a)(iii); RCW 43.21C.075(3)(a); Washington State Environmental Policy Act, A Legal and Policy Analysis, Richard L. Settle, § 19.01(2), Limitations on SEPA Determinations Which May Be Administratively Reviewed.

<sup>53</sup> *Lewis County v. GMHB*, 113 Wn. App. 142, 53 P.3d 44 (2002); *King v. City of Vancouver*, 2000 Wash. App. Lexis 2824 (January 28, 2000, Div. II).

<sup>54</sup> RCW 43.21C.075(3)(a).

<sup>55</sup> WAC 197-11-600(3)(b)(ii).

<sup>56</sup> KCC 21.04.290(C).

KCC compliance, and the Appellant did not present evidence sufficient to support a conclusion that a DCD erred in not imposing a different standard.

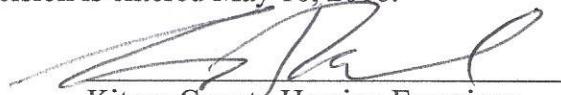
2.4 As the SDAP is consistent with 2010 Title 12 requirements, and as the Appellant has not met its burden to show otherwise, the SDAP should be upheld.

### **SECTION III DECISION**

The Examiner lacks SEPA jurisdiction, so the SEPA issues were properly dismissed. As set forth in the original order, per Applicant stipulation, Issues 2, 4, and 5 (except for recreational use) were dismissed. And, Issues 1, 3, and 5, as they relate to SEPA, were properly dismissed. The reconsideration motion is denied.

The Appellant has not met its burden of proof to demonstrate DCD's SDAP decision was issued in violation of or inconsistent with KCC 12.10.070, .080, or .090. The Examiner upholds DCD's SDAP decision.

This Decision is entered May 16, 2018.



Kitsap County Hearing Examiner  
Susan Elizabeth Drummond