

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant(s): Malcolm and Patricia Douglas
951 Golf Course Road
Friday Harbor, WA 98250

File No.: PAPL00-10-0002

Request: Appeal of SEPA Determination of Nonsignificance

Parcel No: 352613002

Location: 806 Golf Course Road
San Juan Island, WA

Summary of Proposal: An appeal of a SEPA Determination of Nonsignificance

Comp Plan Designation: Rural Residential

Public Hearing: Held August 5, 2010

Application Policies and Regulations: SJCC 18.80.140 Appeals

Decision: The DNS is sustained in part by the addition of a condition requiring assessment and mitigation of storm water diversions created by the proposal.

[S.J.C.] COMMUNITY

AUG 19 2010

DEVELOPMENT & PLANNING

1 Mr. Huse noted that a section of the SEPA handbook addresses the withdrawal of
2 DNSs and provides that a DNS must be withdrawn if it is obtained by
3 misrepresentation or lack of material disclosure. There are some minimal
4 requirements for a SEPA checklist that are fundamental. The first is whether the
5 proposal description is complete. Second is whether all parts of the proposal been
6 identified and finally whether all required permits have been identified. Mr. Huse
7 also noted that the checklist for administrative review of an environmental checklist
8 first suggests inquiry into whether all required permits have been identified. Mr.
9 Huse looked to questions 9 and 10 of the environmental checklist. He noted that
10 there was no proposal description provided. The Permit Center inserted a one
11 sentence description that was completely wrong. The handwritten proposal
12 description was removal of an earth barrier separating the two ponds. The proposal
13 actually involves raising the dam that creates the ponds by seven to ten feet. It also
14 involves the construction of a new high flow spillway. No one reviewing the
15 checklist would be able to understand what the proposal is about.

16 The answer to Question 10 is very disingenuous. The reply is "not known." The
17 permits that are needed are known. The Notice of Correction identified a couple of
18 those permits and noted that state permits would be required. A state hydraulic
19 permit was an obvious state required permit. A reservoir permit was also required.
20 The hydraulic permit is identified as required in the JARPA permit. The clearing
21 permit was required because the proposal involved the removal of 500 cubic yards or
22 more of soil. The hydraulic permit was required because the proposal involved the
23 redirection or obstruction of a stream bed or flow. The reservoir permit was required
24 because the proposal involved the impounding of water more than ten feet deep (the
25 maximum depth of the ponds is 18 feet). The checklist should have identified all
these permits. The permit center should have added the required permits to the
permit checklist, since this is a fundamental requirement for a checklist.

Question E in the earth category of the checklist requires that the purpose be
identified for any proposed filling or grading. The applicant responded that there
was no filling, but the dam was raised 7 to 10 feet with fill. The checklist is also
misleading because it states that fill was moved from one part of the pond to the
other, but it fails to identify that this fill would be used to increase the height of the
dam. The checklist references the wetlands report to and answer the question about
displacement of water bodies. The wetlands report identifies some of the required
permits. Consequently, it is clear that the applicant did know some permits were
required when it replied "not known" in the checklist to the question on required
permits.

The checklist requires the disclosure of anticipated fill that was removed. There is no
pre-proposal information or topography because it is an after-the-fact permit. The
applicant wrote in the checklist that 450 to 500 cubic yards had been removed. Mr.
Huse converted the volume of the pond to cubic yards to try to estimate the amount of
fill removed. The pond is about 15,500 cubic yards in size. The 450-500 cubic yards

1 disclosed by the applicant is only about 3% of the total volume of the pond. Mr.
2 Huse then evaluated the change in dam height. The volume of the ponds before the
3 dam was increased in height was 4,500 cubic yards. Ex. G, a 1991 aerial of the pond,
4 shows that the pond is pretty empty. Mr. Huse believes from his analysis of the aerial
5 photo that the amount of excavation was closer to 800 to 1,000 cubic yards. Mr.
6 Huse also noted that even through the checklist only identifies the removal of earth
7 between the two ponds that there actually was a significant amount of fill removed
8 from the fairways as well.

9 The applicant also stated in the checklist that there would be no surface water
10 diversions or withdrawals involved. The pond will be used for irrigation. The use of
11 pond water for irrigation constitutes a diversion by definition.

12 Mr. Huse explained Exhibit I. He noted that it is a plan view of the ponds. The
13 existing pond has a water surface elevation that is 15 feet below the new pond. The
14 original dam was somewhere between 7 and 10 feet below the elevation of the rim of
15 the rest of the pond. When the dam was filled, the crest elevation of the dam was
16 equal to the rim elevation, thereby creating a bowl with no place for water to go. The
17 applicants failed to identify that they created a side channel spillway, identified in red
18 in Exhibit I. The channel spillway essentially serves to divert water from its natural
19 course down Bison Creek and redirect it into an open channel and then through a
20 culvert into the eastern pond. The culvert is the problem. The culvert is not large
21 enough to handle spillway overflow. Consequently, when the culvert is hit with more
22 water than it can handle, the water spills across the fairway and floods the applicant's
23 property. The culvert was not changed as a result of the subject proposal and was
24 only sized to additional amounts of water dumped into it from the newly configured
25 pond. When the dam was raised, it changed the volume of water entering the culvert
and this change in volume was never assessed by an engineer or permitted. The trees
in Exhibit I, depicted in green, demonstrate the change in size of the pond. The
original pond ended about halfway into this clump of trees, as shown in a 2004 aerial
photo, which was taken about two years before the pond was modified. A 2008 aerial
photo, included in the wetlands report, shows the pond completely covering all of the
trees. A comparison of the aerial photos in 2004 and 2008 reveals a significant
amount of excavation into Fairway 2, as the boundaries of the pond are clearly man
made.

21 The applicant appended a couple letters to its application. One thing that is said is
22 that there are no new storm water controls. This is incorrect since the raising of the
23 dam constitutes a new storm water control along with the new spillway. The second
24 letter contends that there is no stream titled Bison Creek flowing through the golf
25 course. Ex. J describes the creek in some detail and identifies that Bison Creek flows
into a pond which in turn flows across the golf course. None of the stormwater
facilities on the golf course are designed to handle the flows of Bison Creek. The
applicant did not acquire any permits for these storm water controls. Had the golf

1 course acquired the required permits, the stormwater control facilities would have
2 been reviewed by engineers and the design flaws would have been corrected.

3 One of the defenses of the applicant on the flooding of the appellants' property is that
4 the flooding was caused by an unusually large storm event. It was not. There were
5 two instances of flooding of the appellants' property. One was caused by a rain event
6 of seven tenths of an inch over 24 hours and the other was caused by a rain event of
7 1.1 one inches of rain in 24 hours. The design standard for the applicant's facility is
8 3.5 inches in 24 hours. The permits would have required the storm water facilities to
9 handle the storm events that flooded the appellants' property. The permits are
10 necessary to protect the appellants from further flooding. The appellants' property
11 will flood again in another significant rain event. The DNS does not take into
12 account these problems.

13 In the second letter the applicant finally admits that they engaged in excavation of
14 Fairway 2.

15 The applicants also submitted a DOE letter concluding that the proposal is exempt
16 from a dam permit. However, DOE does state that the dam could still constitute a
17 serious hazard to down stream properties should there be a breach.

18 The appeal should have included a pre-appeal conference, which could have avoided
19 the adversarial nature of the SEPA appeal.

20 The appellants recently reconstructed their home. They had to file a storm water plan
21 and a grading plan. The County looked carefully over every aspect of the proposed
22 construction. The applicant should have been held to the same standard of care. The
23 Permit Center has ignored the opinions of two licensed professional engineers that the
24 subject pond modifications are hazardous. A DNS should not be issued for a facility
25 that imperils a home.

Mr. Huse went over the staff report point by point. On Finding No. 1 he reiterated all
the information that had been missing from the proposal description. He emphasized
that the relocation of the spillway created a new drainage course. As to the staff's
comparison of aerial photos to show no excavation activity beyond removal of the
land bridge, Mr. Huse noted that the applicant had admitted in the second letter
appended to the application that they excavated into Fairway 2. The staff report also
fails to note that the hydraulic features of the proposal are not identified.

On Finding No. 2 of the staff report, Mr. Huse noted that the checklist underreported
the amount of excavation and failed to identify the excavation into Fairway 2. On
Finding No. 3, no information on irrigation withdrawal is provided by the applicant.
A reservoir permit is also required because the depth of the ponds is more than ten
feet deep. The reservoir permit is separate from the dam permit that DOE concludes
does not apply to the proposal in Ex. 8. The Permit Center fails to acknowledge that

1 withdrawal for purposes of irrigation is a diversion and that this needs to be
2 quantified and analyzed. The Permit Center does not respond to the appellant's
statement that the proposal has damaged their property.

3 Mr. Huse explained that his client wants a site development plan that accurately
4 depicts the proposal, including excavation. Mr. Huse noted that applications for
5 clearing and grading permits require a demonstration that in-stream water flow will
6 remain unobstructed (i.e., won't be redirected onto the appellants' property) and a
demonstration that the pond runoff will be controlled to prevent damage to adjacent
properties.

7 As to Tom Sage's analysis of the need for additional storm water analysis (Ex. 9), Mr.
8 Sage incorrectly premises his comments on the understanding that the only
9 modification to the pond is the removal of the land bridge. This is incorrect. Mr.
Sage fails to consider the raising of the dam level and the impact that this will have
on storm water flows.

10 The environmental checklist misrepresents and fails to disclose the hydrological
11 impacts of the proposal, the raising of the dam and failing to disclose required
12 permits. The appellants should not have to wonder every time it rains whether their
home will be flooded.

13 Mr. Huse testified that the proposal is poorly engineered and is not properly sized. In
14 particular the culvert identified on Ex. 11 cannot handle the new volumes of water
15 directed to it by the new spillway created by the proposal. The inlet elevation of the
16 culvert is also about the same elevation as the spillway elevation. In order to get water
17 into the culvert you need appropriate headwater depth. The lack of this necessary
depth guaranties that water will not flow into the culvert. Mr. Huse is a licensed
professional engineer. It is his opinion that the pond is a hazardous facility.

18 In rebuttal Mr. Huse noted that the first permit listed on the JARPA application is a
19 hydraulic permit. Mr. Huse noted that the JARPA application states that a hydraulic
20 permit is required if you use, divert, alter, obstruct or change the natural flow of
21 water. Mr. Huse acknowledged that checklist responses are usually generally in
nature is correct, but this is after the fact and the applicants know exactly what they
did.

22 Julie Thompson

23 Julie Thompson, senior planner, addressed the staff position. Ms. Thompson stated
24 she visited the proposal site, consulted with public works and concluded that the
25 environmental checklist was complete. In questioning from Mr. Huse, Mr.
Thompson stated that she was not aware a hydraulic permit would be required when
she reviewed the checklist and that she didn't believe a clearing and grading permit

1 was necessary based upon the excavation information provided by the applicant. Ms.
2 Thompson currently doesn't know if a hydraulic permit is required for the project.

3 Robert Query

4 Mr. Query testified on behalf of the applicant. Mr. Query noted that the only review
5 required for proposals with less than 500-cubic-yard excavation is a SEPA checklist.
6 Mr. Query did not think that the flooding that happened after the event should be
7 considered in the SEPA appeal. Mr. Query pointed out that the checklist requires
8 "basic" information about the proposal "to the best of your knowledge" and that the
9 information should usually be accessible without the use of expert analysis. Mr.
10 Query noted that most persons who fill out environmental checklists do not have
11 much experience in doing so and the checklist requirements take this into account.
12 He noted that staff will request additional info when necessary. Mr. Query noted
13 that there is a lawsuit on the flooding and that is the proper venue for finding the
14 cause of the flooding on the appellants' property. Mr. Query noted that Question 10
15 provides that a full project description is not necessary if the information was
16 provided elsewhere. Mr. Query noted that information about the project description
17 had been provided elsewhere in the checklist. Mr. Query noted that when most
18 people see the question on amount of filling, they believe they are not doing any
19 filling if they are using on-site soils. The applicant does admit that he failed to
20 disclose the excavating done in Fairway 2 and that for this reason there may have
21 been more than 500 cubic yards of fill excavated that would trigger a clearing and
22 grading permit. Mr. Query noted that the need for permits is not relevant to the
23 SEPA appeal and that issue can be handled elsewhere. Mr. Query also noted that
24 flooding has occurred in the area in the past and that neighbors complained of
25 flooding caused from other sources. Mr. Query noted that it is unclear whether the
on-line SEPA handbooks were available to the applicant and whether they reasonably
could have known about them or should have used them. On the issue of flood
potential, Mr. Query noted that increasing the capacity of the ponds and raising the
height of the dam would not in any common sense analysis result in more flooding
but rather less.

EXHIBITS

21 The exhibits identified in the exhibit list of the staff report were admitted at the
22 hearing. In addition, the following documents were also admitted during the hearing:

- 23 12. DOE SEPA Online Handbook, Chapter 2.
- 24 13. SEPA Guide for Project Applicants
- 25 14. WA Governor's Office of Regulatory Assistance Environmental Permit Handbook
15. 12/28/09 Notice of Correction (Case No. 09CI055).
16. SJC Storm Drainage Standards brochure.

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17. SJCC 18.60.060.
18. WDFW FAQ on Hydraulic Project Approval
19. DOE webpage "Dam Safety"
20. Aerial of Golf Course, purple hues
21. Aerial of Golf Course, green hues
22. MDE Engineers calculation sheet, dated 3/19/08.
23. Pencil pond schematic
24. Cattle Point Road Storm Drainage TIR, dated 7/04.

FINDINGS OF FACT

Procedural:

1. Applicant/Appellant. The applicant is the San Juan Golf and Country Club. The SEPA appellants are Malcolm and Patricia Douglas.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on August 5, 2010, at 11:00 a.m. in the San Juan County Council meeting chambers in Friday Harbor.

Substantive:

3. Project/Site Description. The applicant submitted an after-the-fact application for SEPA review of the removal of an earthen barrier separating two ponds at the San Juan Golf and Country Club. The purpose of the removal was to integrate two golf course ponds into one. The ponds and work are depicted in Ex. 4, Pond Volume Survey, dated April 22, 2010. The fill composing the land bridge was moved to the eastern edge of the eastern pond, as depicted in the Pond Volume Survey. Tom Huse testified that this displaced fill was used to raise the level of a dam on the eastern edge seven to ten feet. The applicants did not dispute this assertion and the testimony of Mr. Huse was credible, based upon his expertise as a professional engineer and thorough review of topographical documents (including the Pond Volume Survey) and aerial photographs. The Examiner finds that the dam on the eastern edge of the eastern pond was raised by seven to ten feet. For the same reasons the Examiner also finds that these modifications created a new spillway on the eastern edge as testified by Mr. Huse. As admitted by the applicants, there was also some excavation done on the west side of the western pond, into Fairway 2. See Ex. 4, 6/1/10 Bird letter.

4. SEPA Appeal. County staff issued a DNS for the proposal on May 12, 2010. Ex. 3. The appellants filed an appeal of the DNS on June 3, 2010. Ex. 2.

5. Adverse Impacts of Proposed Use. The only adverse impact presented by the appellants was potential flooding created by the pond modifications. Mr. Huse presented compelling testimony that the spillway created by the modifications alters

1 storm water drainage flows. Mr. Huse believes that these altered flows are the cause
2 of two flooding events that occurred upon the single family residential property of his
3 clients¹, who apparently reside adjacent to or close to the golf course. Mr. Huse
4 believes that the ponds are a hazard because the modifications have not been subject
5 to engineering analysis or subject to the review involved in a hydraulic, reservoir or
6 clearing and grading permit. Mr. Huse explained that the spillway created by the
7 proposal redirects storm water into a channel that feeds into a culvert. The culvert
8 has not been sized for the added storm water flow and as a consequence may not have
9 the capacity to handle significant storm events. This may be the cause of the flooding
10 of his clients' property. Mr. Hughes believes that an engineering analysis should be
11 done on the storm water impacts of the proposal to ensure that no flooding is created.

12
13 The County and the applicant respond that the modifications will not increase
14 downstream flooding. They note that the removal of the land bridge increases the
15 storage capacity of the ponds, which obviously would not exacerbate flooding
16 problems by itself. The County's analysis is limited to an email from Tom Sage,
17 Ex. 9. Mr. Sage is a storm water engineer. Mr. Sage was not present for questioning
18 and the applicant did not present any expert testimony on storm water impacts. In his
19 email, Mr. Sage was very clear that in his opinion the proposal would not add to
20 flooding problems.

21 Under the substantial weight that the Examiner must afford to the determinations of
22 the SEPA responsible official, the opinion of the City's expert would normally
23 outweigh those of another expert, all other factors being equal. However, in this case
24 it is unclear whether the County's expert considered or even knew of the spillway
25 impacts identified by Mr. Huse. There was no evidence presented by the County or
the applicant that addressed the spillway analysis provided by Mr. Huse. Given the
credibility of Mr. Huse's analysis and the absence of any conflicting evidence, the
Examiner finds that there is a reasonable likelihood of flooding impacts to occur.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. SJCC 18.80.140, Table 8.3, provides that
the Examiner shall hold an open record appeal hearing and issue a final decision on
an appeal of a SEPA threshold determination.

¹ The fact that flooding occurred after the proposal was completed is not
determinative in the Examiner's findings. The Examiner finds that the flood potential
is a probably significant environmental impact in the absence of this information.
The issue of whether events occurring after proposal completion can be considered in
an after-the-fact SEPA review does not need to be addressed in this case.

1 **Substantive:**

2 2. Appeal Criteria. SJCC 18.80.050(A)(1) adopts the SEPA rules (Chapter
3 197-11 WAC) by reference. Under the SEPA rules, the relevant inquiry for purposes
4 of assessing whether County staff correctly issued a DNS is whether the project as
5 proposed has a probable significant environmental impact. See WAC 197-11-
6 330(1)(b). If such impacts are created, conditions will have to be added to the DNS
7 to reduce impacts so there are no probable significant adverse environmental impacts.
8 In the alternative, an environmental impact statement would be required for the
9 project. In assessing the validity of a DNS, the determination made by the County's
SEPA responsible official shall be entitled to substantial weight. WAC 197-11-
680(3)(a)(viii). "Probable" is defined by the SEPA rules as "likely or reasonably
likely to occur" as in "a reasonable probability of more than a moderate effect on the
environment".

10 As discussed in Finding of Fact No. 5, there is a reasonable likelihood that the
11 proposal will create adverse flooding impacts. Additional analysis and mitigation is
12 necessary to address those impacts.

13 3. Relevancy of Incomplete Checklist. The appellants' case has largely been
14 based upon alleged deficiencies in the environmental checklist. The appellants
15 apparently base their position upon WAC 197-11-340(3)(a)(iii), which requires a lead
16 agency to withdraw a DNS if the DNS was procured by misrepresentation or lack of
17 material disclosure. However, WAC 197-11-680(3)(a)(iii) provides that agency
18 appeals shall be limited to review of a final threshold determination and the adequacy
19 of a final environmental impact statement. A threshold determination is defined as
the decision by the SEPA responsible official on whether or not an environmental
20 impact statement is required for a proposal. As noted in Conclusion of Law No. 2,
21 the criteria for a threshold determination is whether a proposal will have probable
22 significant environmental impacts. The adequacy of an environmental checklist has
23 no direct relevancy to this inquiry.

24 The checklist issues raised by the appellants has been directly addressed in *Citizens*
25 *for Natural Habitat v. City of Lynnwood*, 107 Wn. App. 1054 (2001). This is an
unpublished opinion, but nonetheless casts some light on the issue. In that case
project opponents also relied upon WAC 197-11-340(3)(a)(iii) in an appeal of a
threshold determination, arguing that the applicant had failed to disclose some
allegedly material information. The court concluded as follows:

*Although Echelbarger failed to disclose in his application that we was
also applying to the Alderwood Water and Sewer District, that
information has no bearing on the ERC's threshold determination of
whether a DS, NDS, or MDNS should be issued. That determination is
based upon whether the ERC finds that the proposed land use action*

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would have 'probable significant adverse environmental impacts.' WAC 197-11-340(1); WAC 197-11-360.

For a private project, the SEPA responsible official may withdraw a DNS at any time until a permit is issued for the proposal. See WAC 197-11-340(3)(b). The decision to withdraw or not withdraw is not a threshold determination or the issuance of a final environmental impact statement. Consequently, it is not a decision subject to administrative appeal to the hearing examiner.

DECISION

The appeal of the DNS is sustained in part. A condition shall be added to the DNS providing as follows:

1. The applicant shall prepare a hydrologic and hydraulic analysis of stormwater impacts created by modifications to the overflow spillway and dam height of the ponds of the proposal. The analysis shall specify any mitigation reasonably necessary to prevent any significant adverse storm water impacts created by the modifications. The proposal shall comply with the recommended mitigation. County storm water engineer(s) shall dictate the scope of the hydrologic and hydraulic analysis. The County storm water engineer(s) may conclude that no further analysis is necessary after specifically considering the potential impacts of changes to the pond spillways and dam height created by the proposal. The County storm water engineer(s) shall consult with the applicant and Mr. Huse in making the determinations required by this condition.

Dated this 18th day of August, 2010.



Phil A. Olbrechts
San Juan County Hearing Examiner

Effective Date, Appeal Right, and Valuation Notices

Hearing examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130, and SJCC 18.80.110.

This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter. Such decisions are not subject to administrative appeal to the San Juan County Council. See also, SJCC 2.22.100.

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1 Depending on the subject matter, this decision may be appealable to the San Juan
2 County Superior Court or to the Washington State shorelines hearings board. State
3 law provides short deadlines and strict procedures for appeals, and failure to timely
4 comply with filing and service requirement may result in dismissal of the appeal. See
5 RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to
6 promptly review appeal deadlines and procedural requirements and consult with a
7 private attorney.

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Affected property owners may request a change in valuation for property tax purposes
notwithstanding any program of revaluation.