BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE SUBSTANTIAL DEVELOPMENT CONDITIONAL USE PERMIT GRANTED BY YAKIMA COUNTY TO VALLEY READY MIX CONCRETE CO., and DISAPPROVED BY THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, VALLEY READY MIX CONCRETE COMPANY and YAKIMA COUNTY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and MR. & MRS. E. S. CARLSON, et al., Respondents.	SHB Nos. 80-37, 81-1, and 81-2 MAJORITY FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of Department of Ecology's disapproval of a shoreline substantial development conditional use permit issued by Yakima County to Valley Ready Mix Concrete Company, came on for hearing before the Shorelines Hearings Board, Nat W. Washington, Chairman, and David Akana, Gayle Rothrock, David Jamison, Rodney M. Kerslake, and A. M. O'Meara, Members, convened at Lacey, Washington, on April 1 and 2, 1982. William A. Harrison,

Administrative Law Judge, presided.

Appellant Valley Ready Mix Concrete Company was represented by its attorneys Alan A. McDonald and Brian G. Evenson. Appellant Yakima County was represented by Terry Austin, Deputy Prosecuting Attorney. Respondents Mr. & Mrs. E. S. Carlson et al., were represented by their attorney John Rossmeissl. Respondent Department of Ecology did not appear. Court Reporters Lois Fairfield and Betty Koharski recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter concerns a proposal by Valley Ready Mix Concrete Company (VRM) to mine gravel alongside the Yakima River near Granger. Following review and remand of our earlier decision in this matter by the Superior Court of Thurston County (our SHB No. 223), we, in turn, remanded to Yakima County the question of whether this proposal can meet the stringent requirement of the Yakima County Shoreline Master Program relating to noise (see Finding of Fact III, below).

Yakima County re-evaluated VRM's proposal and answered the question affirmatively by approving a shoreline substantial development conditional use permit.

Twenty-one persons residing in the vicinity of the proposed development (appellants in our earlier SHB No. 223) made joint request to this Board for review of that permit. This request is our SHB No. 80-37, which was not certified by either the State Department of Ecology (DOE) or Attorney General.

Later, DOE reviewed and disapproved the conditional use permit approved by Yakima County for VRM.

Consequently, VRM and Yakima County requested review from this Board of DOE's disapproval. These requests for review are our SHB Nos. 81-1 and 81-2, which were certified by DOE. The twenty-one persons residing in the vicinity of the proposed development intervened as respondents in these requests for review. All requests for review, SHB Nos. 80-37, 81-1, and 81-2, were consolidated for hearing.

III

Yakima County has adopted these pertinent provisions in its Shoreline Master Program (YCSMP):

> 15.04.030 Rural Environment. The following Mining activities are permitted in the Rural environment:
> 15.04.031 By Conditional Use Permit: Surface mining activities. (YCSMP p. 5-14)
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> 18.00 Conditional Uses. Conditional uses are those uses which may be permitted to locate in shoreline areas, but are usually seen as uses which either do not need, or depending on the environment, considered not to be suitable for siting in shoreline locations. It is understood, however, that there may be special circumstances or a special type or style of conditional use that would make shoreline siting of special cases acceptable to the goals, policies and intentions of the Master Program...
>
> 18.02 The applicant must supply whatever evidence, information or agreements indicating (sic) that all of the following conditions will be met:....
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> 18.02.3 Water, air, noise, and other classes of pollution will not be more severe than the pollution that would result from the uses which are permitted in the particular environment. (YCSMP pp. 5-25 and 26.) (Emphasis added.)

IV

The mining proposal by VRM would involve the following equipment and operations:

> 1. A front loader or backhoe or dragline with which to remove gravel.
> 2. One or more trucks, or large off-road vehicle known as a Euclid hauler, to transport the gravel to the crushers on site.
> 3. Two gravel crushers for smaller material and one crusher for larger material together with conveyor systems, hoppers and screens.

The permit approved by Yakima County limits mining operations to the hours between official sunrise and sunset, provided that an eight-hour shift may be worked between 7:30 a.m. and 6:00 p.m. when darkness invades those hours. The permit does not contain any seasonal or

days-per-year limitation on mining operations.

V

Permitted uses appropriate for comparison to the proposed mining include orcharding, logging, and traffic upon a local access road.

The orcharding use would probably involve the following equipment and operations:

1. Tractors and straddle carriers

2. Pruners and chain saws

3. Wind machine for frost protection

4. Speed sprayer for pesticide application

The logging use would probably involve the following equipment and operations:

1. Chain saws

2. Tractor, loader, motor grader, and trucks

The traffic use would probably involve ordinary cars, trucks, and other motor vehicles.

VI

Not all equipment of either the proposed mining use nor the permitted uses will be operated to a given level on every day. To the contrary, specific pieces of equipment within each use may be operated frequently, others only infrequently. There will be significant periods of time when no equipment within a given use will be operated. Noise will accordingly vary not just with the equipment enlisted to each use but with the frequency over time that the equipment will be used.

VII

One-Day Method of Noise Comparison. In approving this permit, Yakima County relied upon a comparison of noise from the proposed and permitted uses which assumed that all equipment for each use would be operated during a one-day (24-hour) period. The noise from each use was averaged and the rank order of comparison placed orcharding and logging ahead of traffic and mining which tied. That comparison failed to consider the frequency with which equipment would be operated within each use over weeks, months, seasons or years. The

one-day noise levels compared were not representative of a typical day as the equipment would be operated but were, rather, typical of a chosen day when all equipment is operating.

VIII

Thirty-Year Cycle Method. The site in question will take some 30 years or more to mine to exhaustion. This method of noise comparison, therefore, considers the probable frequency with which noise from the proposed and permitted uses will occur within a 30-year period. An average noise level is then reached for each use. These are as follows in order:

Mining	56	dB(A)[1]
Orcharding	52	dB(A)
Traffic	48	dB(A)
Logging	42	dB(A)

These are the receiving noise levels at 1,350 feet, the approximate distance from the site to the nearest two residences. The above noise level for mining assumes continuous operation throughout the year as the permit presently allows. The testimony of William Douglas, principal of VRM, establishes that the actual operation would average 66 days per year with a maximum of 93 days per year. All the above noise levels include a penalty factor for noise, if any, occurring after 10:00 p.m. and before 7:00 a.m. the next day. This penalty factor was imposed because noises that occur during the nighttime hours, when people are sleeping or would like to be sleeping, cause a greater degree of annoyance than do noises that occur during the daylight hours. A greater degree of annoyance also pertains to noise in the evening hours when people have retreated from the work place to the shelter of their homes. The above noise level for mining also does not take into consideration any step method for placing gravel into the crusher hoppers nor rubber padding of the hoppers. Limiting the days per year and hours per day of operation while adding noise suppression devices can reduce gravel mining noise pollution so that it is not more severe than that resulting from permitted uses.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

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1. This noise level for mining assumes an eight-hour day.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

We have no jurisdiction over the uncertified request (SHB No. 80-37) for review of Yakima County's approval of the permits in question. RCW 90.58.180(1).

II

We have jurisdiction over the certified requests by VRM and Yakima County (SHB No. 81-1 and 81-2) for review of DOE's disapproval of this shoreline conditional use permit. The persons requesting review, VRM and Yakima County, have the burden of proof. RCW 90.58.140(7).

III

We must review the proposed development for consistency with the Shoreline Management Act, chapter 90.58 RCW, and the applicable master program. RCW 90.58.140(2)(b).

IV

In this case, the applicable master program is that adopted by Yakima County, in particular, the proposed mining (a conditional use) must meet the stringent requirement that it not produce noise pollution which is more severe than that resulting from permitted uses. (YCSMP Section 18.02.3, p. 5-26, see Finding of Fact III, above.) In interpreting this requirement, we have previously held:

> Nowhere in the SMP is "more severe" or "noise" defined. The term "severe" is defined in Webster's Third International Dictionary as "inflicting physical discomfort or hardship...inflicting pain or distress...of a great degree or to an undesirable or harmful extent." "Noise" is defined as "any sound that is undesired or that interferes with something to which one is listening...." Thus, "noise" would seem to include any type of noise, peak noise, or noise over a period of time, so long as the noise is a sound which is undesired. If noise from a first source is more undesirable or harmful than noise from a second source, than the noise from the first source can be said to be "more severe" than the second source. (Emphasis added.)

In that case, E. S. Carlson, et al v. Yakima County and Valley Ready Mix Concrete Co., SHB No. 223, the Shorelines Hearings Board, following instructions from the Thurston County Superior Court, held that the words "no more severe" as applied to noise required consideration not only of peak noise levels, but also of duration. In so holding, we recognized the difficulty involved in attempting to give proper consideration to the element of duration, and suggested that the dilemma might be solved if the county would amend its master program. The County did amend its master program and did eliminate the "no more severe" requirement. Appellant, however, chose to attempt to comply with the old "no more severe" requirement rather than to start all over again under the new requirements.

The permit as issued by the County might or might not have met the new requirements, but does not meet the requirements of the old "no more severe" provisions.

V

Although informative, the one-day method of noise comparison relied upon by VRM and Yakima County impermissibly limits the broader noise control rule which Yakima County has adopted. The frequency with which noise will occur over a period of weeks, months, seasons or years cannot be disregarded to focus the inquiry upon one day when all equipment is operating.

VI

The "more severe" noise control rule of YCSMP Section 18.02.3 defies exact numerical analysis. Because the 30-year cycle method addresses the frequency with which noises will occur over an extended period of time, it is generally the correct approach under the given "more severe" rule. Thus, we begin with the order of noise pollution shown by this method (Finding of Fact VIII, above) in which mining ranks first. This order appears to be correct in light of the terms of the subject permit as it now exists. However, the preponderance of the evidence establishes that the subject permit, with the three conditions following, would allow a conditional use (surface mining) that will probably not produce noise pollution more severe than that resulting from permitted uses. The three conditions are:

> 1. (In lieu of the present condition No. 1 which shall be deleted.) Operation of the gravel plant and its associated equipment shall occur only during the period of 7:30 a.m. to 6:00 p.m. Such limitation shall be strictly observed by the permittee.

2. Operation of the gravel plant and its associated equipment shall occur on no more than 93 days per calendar year.

3. Rubber padding shall be installed and maintained in the crusher hoppers together with a step method for placing rock into such hoppers.

The above three conditions are required to establish compliance of the proposed development with YCSMP Section 18.02.3. As so conditioned, the subject permit would be consistent with the Shoreline Management Act and YCSMP and should be issued to VRM.

VII

We have carefully reviewed the other contentions of VRM and Yakima County and find them to be without merit.

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

This matter is remanded to Yakima County with instructions to issue a shoreline substantial development conditional use permit in the same form as it now exists with the addition of the three conditions as set forth in Conclusion of Law VI above.

DATED: 30th day of June, 1982.

SHORELINES HEARINGS BOARD

NAT W. WASHINGTON, Chairman

GAYLE ROTHROCK, Vice Chairman

(See Concurring and Dissenting Opinion)
DAVID AKANA, Lawyer Member

DAVID JAMISON, Member

(See Dissenting Opinion)
RODNEY M. KERSLAKE, Member

A. M. O'MEARA, Member

WILLIAM A. HARRISON
Administrative Law Judge

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE SUBSTANTIAL DEVELOPMENT CONDITIONAL USE PERMIT GRANTED BY YAKIMA COUNTY TO VALLEY READY MIX CONCRETE CO., and DISAPPROVED BY THE STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, VALLEY READY MIX CONCRETE COMPANY and YAKIMA COUNTY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and MR. & MRS. E. S. CARLSON, et al., Respondents.	SHB Nos. 80-37, 81-1 and 81-2 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Concurring and Dissenting)

This matter, the request for review of Department of Ecology's disapproval of a shoreline substantial development conditional use permit issued by Yakima County to Valley Ready Mix Concrete Company, came on for hearing before the Shorelines Hearings Board, Nat W. Washington, Chairman, and David Akana, Gayle Rothrock, David Jamison, Rodney M. Kerslake, and A. M. O'Meara, Members, convened at Lacey, Washington, on April 1 and 2, 1982. William A. Harrison,

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Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

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This matter concerns a proposal by Valley Ready Mix Concrete Company (VRM) to mine gravel alongside the Yakima River near Granger. Following review and remand of our earlier decision in this matter by the Superior Court of Thurston County (our SHB No. 223), we, in turn, remanded to Yakima County the question of whether this proposal can meet the stringent requirement of the Yakima County Shoreline Master Program relating to noise (see Finding of Fact III, below).

Yakima County re-evaluated VRM's proposal and answered the question affirmatively by approving a shoreline substantial development conditional use permit.

Twenty-one persons residing in the vicinity of the proposed development (appellants in our earlier SHB No. 223) made joint request to this Board for review of that permit. This request is our SHB No. 80-37, which was not certified by either the State Department of Ecology (DOE) or Attorney General.

Later, DOE reviewed and disapproved the conditional use permit approved by Yakima County for VRM.

Consequently, VRM and Yakima County requested review from this Board of DOE's disapproval. These requests for review are our SHB Nos. 81-1 and 81-2, which were certified by DOE. Twenty-one persons residing in the vicinity of the proposed development intervened as respondents in these requests for review. All requests for review, SHB Nos. 80-37, 81-1, and 81-2, were consolidated for hearing.

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Permitted uses appropriate for comparison to the proposed mining include orcharding, logging, and traffic upon a local access road.

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Not all equipment of either the proposed mining use nor the permitted uses will be operated to a given level on every day. To the contrary, specific pieces of equipment within each use may be operated frequently, others only infrequently. There will be significant periods of time when no equipment within a given use will be operated. Noise will accordingly vary not just with the equipment enlisted to each use but with the frequency over time that the equipment will be used.

VII

One-Day Method of Noise Comparison. In approving this permit, Yakima County relied upon a comparison of noise from the proposed and permitted uses which assumed that all equipment for each use would be operated during a one-day (24-hour) period. The noise from each use was averaged and the order of comparison placed orcharding and logging ahead of traffic and mining which tied. That comparison failed to consider the frequency with which equipment would be operated within each use over weeks, months, seasons or years. The one-day noise levels compared were not representative of a typical day as the equipment would be operated but were, rather, of a chosen day when all

equipment is operating.

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Thirty-Year Method. The site in question will take some 30 years or more to mine to exhaustion. This method of noise comparison, therefore, considers the probable frequency with which noise from the proposed and permitted uses will occur within a 30-year period. An average noise level is then reached for each use. These are as follows:

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These values are the receiving noise levels at 1,350 feet, the approximate distance from the site to the nearest two residences. The above noise level for mining assumes continuous operation throughout the year as the permit presently allows. The testimony of William Douglas, principal of VRM, establishes that the actual operation would average 66 days per year with a maximum of 93 days per year. All the above noise levels include a penalty factor for noise, if any, occurring after 10:00 p.m. and before 7:00 a.m. the next day. This penalty factor was imposed because noises that occur during the nighttime hours, when people are sleeping or would like to be sleeping, cause a greater degree of annoyance than do noises that occur during the daylight hours. A greater degree of annoyance also pertains to noise in the evening hours when people have retreated from the work place to the shelter of their homes. The above noise level for mining also does not take into consideration any step method for placing gravel into the crusher hoppers nor rubber padding of the hoppers.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

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1. This noise level for mining assumes an eight-hour day which is the minimum day that the permit presently allows.

CONCLUSIONS OF LAW

I

We have no jurisdiction over the uncertified request (SHB No. 80-37) for review of Yakima County's approval of the permits in question. RCW 90.58.180(1).

II

We have jurisdiction over the certified requests by VRM and Yakima County (SHB No. 81-1 and 81-2) for review of DOE's disapproval of this shoreline conditional use permit. The persons requesting review, VRM and Yakima County, have the burden of proof. RCW 90.58.140(7).

III

We must review the proposed development for consistency with the Shoreline Management Act, chapter 90.58 RCW, and the applicable master program. RCW 90.58.140(2)(b).

IV

In this case, the applicable master program is that adopted by Yakima County. In particular, the proposed mining (a conditional use) development must meet the stringent requirement that it not produce noise pollution which is more severe than that resulting from permitted uses. (YCSMP Section 18.02.3, p. 5-26, see Finding of Fact III, above.) In interpreting this requirement, we have previously held:

> Nowhere in the SMP is "more severe" or "noise" defined. The term "severe" is defined in Webster's Third International Dictionary as "inflicting physical discomfort or hardship...inflicting pain or distress...of a great degree or to an undesirable or harmful extent." "Noise" is defined as "any sound that is undesired or that interferes with something to which one is listening...." Thus, "noise" would seem to include any type of noise, peak noise, or noise over a period of time, so long as the noise is a sound which is undesired. If noise from a first source is more undesirable or harmful than noise from a second source, than the noise from the first source can be said to be "more severe" than the second source. (Emphasis added.)

SHB No. 223 (Final Findings of Fact, Conclusions of Law and Order, dated December 6, 1979). This interpretation results from the

inescapable conclusion of the Court when it reversed this Board's first decision which had then affirmed the County's prior action: In addition to peak noise levels, duration of noise was to be considered.

V

Although informative, the one-day method of noise comparison relied upon by VRM and Yakima County is an unduly limiting interpretation of the broader noise control rule which Yakima County has adopted. The frequency over which noise will occur over a period of weeks, months, seasons or years cannot be disregarded to focus the inquiry upon one day when all equipment is operating.

VI

Because the 30-year method addresses the frequency over which noises will occur over the life period of the mining question, it is the preferable of the two approaches presented under the constraints imposed by the law of the case. This method specifically addresses the duration of noises which can be generated from the uses investigated, and thereby the reason this case was remanded.

While the approach seems correct, it requires further development before it can be applied to this case. It is clear that with appropriate conditions, including, for example, limitations on operating hours per day, days per year, and maximum noise levels, a permit could be issued. Such limitations should control the cumulative, relative, and peak noises over the expected period of the mining operation to insure that noise pollution from it would not be more severe than the noise pollution that would result from permitted uses. Given the evidence available in this record, such conditions could best be formulated by the County after reconsideration. The matter should therefore be remanded.

VII

We have carefully reviewed the other contentions of VRM and Yakima County and find them to be without merit.

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

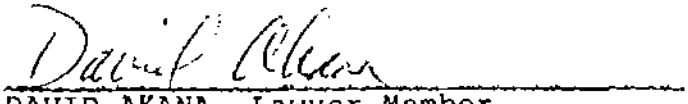
From these Conclusions the Board enters this

ORDER

This matter is remanded to Yakima County for further consideration.

DATED this 30th day of June, 1982.

SHORELINES HEARINGS BOARD



DAVID AKANA, Lawyer Member

BEFORE THE
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Mining	56	dB(A)[1]
Orchading	52	dB(A)
Traffic	48	dB(A)
Logging	42	dB(A)

These are the receiving noise levels at 1350 feet, the approximate distance from the site to the nearest two residences. The order of each noise source may be expected to remain the same, though noise levels closer to the site would be greater and farther from the site would be less.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

We have no jurisdiction over the uncertified request (SHB No. 80-37) for review of Yakima County's approval of the permit in question. RCW 90.58.180(1).

II

We have jurisdiction over the certified requests by VRM and Yakima County (SHB No. 81-1 and 81-2) for review of DOE's disapproval of this shoreline conditional use permit. The persons requesting review, VRM and Yakima County, have the burden of proof. RCW 90.58.140(7).

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1. This noise level for mining assumes an eight hour day.

III

We must review the proposed development for consistency with the Shorelines Management Act, chapter 90.58 RCW, and the applicable master program. RCW 90.58.140(2)(b).

IV

In this case, the applicable master program is that adopted by Yakima County, in particular, the proposed mining (a conditional use) must meet the stringent requirement that it not produce noise pollution which is more severe than that resulting from permitted uses. (YCSMP Section 18.02.3, p 5-26, see Finding of Fact III, above.) In interpreting this requirement we have previously held:

> Nowhere in the SMP is 'more severe' or 'noise' defined. The term 'severe' is defined in Webster's Third International Dictionary as 'inflicting physical discomfort or hardship...inflicting pain or distress...of a great degree or to an undesirable or harmful extent.' 'Noise' is defined as 'any sound that is undesired or that interferes with something to which one is listening....' Thus, 'noise' would seem to include any type of noise, peak noise, or noise over a period of time, so long as the noise is a sound which is undesired. If noise from a first source is more undesirable or harmful than noise from a second source, than the noise from the first source can be said to be 'more severe' than the second source. (Emphasis added.)

V

Although informative, the one day method of noise comparison relied upon by VRM and Yakima County impermissibly limits the broader noise control rule which Yakima County has adopted. The frequency with which noise will occur over a period of weeks, months, seasons or years cannot be disregarded to focus the inquiry upon one day when all equipment is operating. Those requesting review, VRM and Yakima County, have not carried their burden of proving that the proposed conditional use will produce noise pollution which will not be more severe than that resulting from permitted uses. We conclude that the proposed development is inconsistent with YCSMP Section 18.02.3. The disapproval of this conditional use permit by DOE should be affirmed.

VI

We have carefully reviewed the other contentions of VRM and Yakima County and find them to be without merit.

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The disapproval of this shoreline conditional use permit by Department of Ecology is affirmed.

DONE this 30th day of June, 1982.

SHORELINES HEARINGS BOARD

NAT W. WASHINGTON, Chairman

GAYLE ROTHROCK, Vice Chairman

DAVID AKANA, Lawyer Member

DAVID JAMISON, Member

RODNEY M. KERSLAKE, Member

A. M. O'MEARA, Member

WILLIAM A. HARRISON
Administrative Law Judge