BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CITIZENS TO PRESERVE NOOKACHAMPS VALLEY; WILLIAM KUTZ; EDWARD G. MALONEY, JR.; JOHN M. SMITH,	)	**SHB NO. 93-14**
Appellants,	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON REMAND**
v.	)	
SKAGIT COUNTY; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; TEWALT, INC.; CHARLES TEWALT; and FRED C. TEWALT,	)	
Respondents.	)	

This matter came on before the Honorable William A. Harrison, Administrative Appeals Judge, presiding,and Board Members, Robert V. Jensen, Chairman, Richard C. Kelley, Bobbi Krebs-McMullen, Mike Morton, and O'Dean Williamson.

The matter is the request for review of a shoreline substantial development permit granted by Skagit County to respondents, Tewalt, for rock quarrying.

Appearances were as follows:

1 Edward G. Maloney, Jr , Attorney at Law, for appellants, Citizens, et. al.,

2. Andrew H. Salter. Attorney at Law, for appellant Edward G. Maloney, Jr ;

3. John Moffat, Skagit County Deputy Prosecuting Attorney, for respondent Skagit County;

4. Charles W. Lean, Attorney at Law, for respondent Tewalt, Inc.; and

5. Rebeca E. Todd, Assistant Attorney General, for respodent Department of Ecology.

The Upper Skagit Indian Tribe was granted participation as amicus curiae and appeared by Jeffrey S. Schuster and Debora Juarez. Attorneys at Law.

The hearing was conducted at Mt. Vernon and Lacey on December 1, 2, 3, 10, 13, 16, 17 and February 8, 1994. Closing arguments were heard on February 14, 1994. In all, 9 days were devoted to the hearing on the merits.

Gene Barker and Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. The Board viewed the site of the proposal in the company of Judge Harrison and the parties. From testimony heard and exhibits examined, the Shorlines Hearings Board makes these

FINDINGS OF FACT

I

The essential issues in this matter concern impacts from the proposed mining development in these areas: 1) cultural, historical and archeological resources, 2) water quality and wetlands, 3) noise, 4) traffic and pedestrian safety, and 5) aesthetics. These are now taken up in turn.

II

Cultural, historical and archeological resources. Skagit County has considered the likelihood that the site contains cultural, historical and archeological resources (hereafter referred to as cultural resources). It did so by accessing the state computer system known as

TRAX. That system is devised to match known cultural resources with specific sites. The TRAX system yielded a response of no known cultural resources at the Tewalt site.

Following the filing of this appeal. motions were granted under the rules of discovery for two weekend entries to the site by appellants to inspect for cultural resources. The chief result of these entries to the site was the identification of a marked rock urged by appellants to be an ancient petroglyph. At the same time, respondents urge that the markings were made during their land clearing operations when struck by the tool mounted on a bulldozer. Although the testimony has been lengthy and passionate on both sides, substantially all of the testimony is grounded upon observation, alone. What is needed, to conclude this issue, is examination of the rock by a trained and neutral expert using a carbon dating or similar process to objectively date the markings on the rock.

III

Water quality and wetlands. We find no probable adverse environmental effect from the runoff of the project upon either water quality or wetlands under the conditions imposed by Skagit county and Ecology. In particular we cite conditions providing for construction of a sedimentation and erosion facility (No. 3 of permit), enhancement of Turner Creek (No 4 of permit), prevention of fuel and oil storage (No. 5 of permit), revegation (No. 7 of permit), and flood damage prevention (No. 8 of permit). These conditions, in tandem with requirements for standard compliance with the County drainage ordinance (No. 6 of permit) and Ecology wetlands mitigation (No. 3 of conditional use approval) assure adequate protection of water quality and wetlands.

IV

Noise. We find no probable adverse environmental effect from the proposal's noise, except blasting. Noise from the proposal is likely to be within established levels developed for

noise control, including the Washington State Noise Regulations. Noise control is governed by levels, not impact, with regard to the human environment. In particular, we cite these conditions as protective against excess noise: limitation on the days and hours of general operations (No.3 of MDNS), one week's notice to neighboring owners of blasting (No. 4 of MDNS), radar sensitive backup alarms (No. 10 of permit), prohibition of jake brakes (No. 12 of permit), requirement of best available technology to reduce noise (No. 13 of permit) and permit review each five years (No. 2 of MDNS) and limitation of the current permit to five years (No. 1 of conditional use approval). The project is described as follows, with regard to blasting, crushing and screening at paragraph 6 of the environmental checklist:

> Project to start immediately after all agency approvals. Phase I, 0 to 5 years, is to blast and sort rock for rip rap, this phase will open up access routes and further develop the operation's facilities. Phase II is not anticipated to begin for several years. This phase would initiate crushing and screening operations. Phase III, reclamation, is 30 to 100 years away.

Although we find no significant adverse impact from the proposal on wildlife, generally, we find that blasting from the proposal is likely to have a significant adverse effect upon migrating Trumpeter swans which feed in the vicinity of the site during the winter. Blasting from the proposal would flush the swans, leading to the potential for abandoning the area. The Skagit Valley is the most important wintering area in the United States for this recovering wildfowl species. The winter months of greatest concern are December through March.

V

Traffic and pedestrian safety. The proposal, including truck traffic, does not pose any significant adverse effect upon traffic or pedestrian safety. The increased traffic from the

proposal will not be great nor will adjacent roadways be significantly reduced in level of service. Pedestrian safety is not likely to be impaired. We cite in support of this finding, the permit condition for improvements to mitigate traffic impacts (No. 5 of permit) and the existing use of adjacent roads for hauling from an existing gravel pit in the area.

VI

Aesthetics. The quarrying of Tewalt rock will lead to its eventual disappearance and probable replacement with a small farm pond. This would not be a significant, adverse change in the aesthetics of the area.

VII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

We review the proposed development for consistency with 1) the Shoreline Management Act and 2) the Skagit County Shoreline Master Program. RCW 90.58.140(2)(b). We also review for consistency with the State Environmental Policy Act, WAC 461-09-175-(1)(a).

II

Appellants, having requested review, have the burden of proof. RCW 90.58.140(7).

III

Shoreline Management Act. The proposed development has not been shown by appellants to be inconsistent with the shoreline Management Act (SMA) except in one respect. This concerns the effect of winter blasting upon Trumpeter swans. Such winter blasting is inconsistent with RCW 90.58.020 which sets forth a policy:

"... protecting against adverse effects to the public health, the land and its vegetation and wildlife ..." (Emphasis added.)

IV

The review conducted by the Board is de novo. The Board may approve or condition the approval of a shoreline permit. San Juan County v. Natural Resources, 28 Wn app. 796, 799-800, 626 P 2d 995 (1981). A condition is necessary regarding winter blasting to conform the proposed development with the SMA From the evidence, we conclude that the permit should be conditioned, for the protection of Trumpeter swans to prohibit blasting during the months of December through March

V

Skagit County Shoreline Master Program Mining, such as the quarrying of Tewalt rock, is "quarry rock extraction" and water related. SCSMP 3.03.I.2.2b. If the quarried rock must be reduced for hauling (unlike mined gravel) the crushing and screening operations would be necessary and incidental to the removal of the quarried rock and share its character as water related. A use which is necessary and incidental to a water dependent or related use shares the character of that use. Dept. of Ecology v City of Tacoma and Barden, SHB Nos. 83-42, 84-27 and 84-33 (1985), at C/L VI. However, the evidence indicates that blasting operations are proposed to reduce rock to rip rap size. Rock of rip rap size can be removed from the site by truck. Under these circumstances, crushing and screening operations are not necessary and incidental to removal of the quarried rock, are not water related, are not consistent with SCSMP 7.08.2.B(10) and 7.11.2.B (1) and should not be allowed on the site.

VI

Skagit County's related issuance of a special use permit indicates consistency with its comprehensive plan, and that permit is not before us for review.

VII

The applicant carried its burden of proof before Skagit County as indicated by the permit issuance.

VIII

The proposed development has no significant adverse aesthetic effect, and is consistent with SCSMP 7 08.1.J.

IX

The proposed development has not been shown to pose a hazard during flooding and is consistent with SCSMP 7.08.1.F.(1) and (2) and 7.08.2.B.(4).

X

There are no significant adverse erosion or water impacts likely to result from the proposal. The proposal is consistent with SCSMP 7.08.1.E.(2).

XI

The proposal will result in removal of Tewalt rock which is not prime agricultural land. The proposal is consistent with SCSMP 7.08.1.A(2).

XII

The master program, at SCSMP 7.08.1.A(1) states a policy that "... mining activities .. should be encouraged primarily in other than shoreline areas." The master program use regulations, however, prohibit mining only in areas designated "natural". In areas such as this one, designated "rural", mining is allowed as a conditional use. SCSMP 7.08.2.A. Reading these provisions together we conclude that mining is allowed in the rural environment as a conditional use. The proposed development meets conditional use criteria, with the conditions added for blasting and crushing as set out above, with the only possible exception being cultural resources which is contingent on the remand, below. The proposal's effect on archeological and cultural resources cannot be determined conclusively before submission of the addendum called for by this Order. A determination will thereafter be made with regard to SCSMP 7.08.1.F(3) and 7.14.

XIII

State Environmental Policy Act The discovery of the rock markings, since issuance of the permit, is sufficient new information to require a limited process of further examination under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. This is contemplated under the provision of SEPA rules allowing for an "addendum" to an environmental document. WAC 197-11-625. Such an addendum of objective examination should be prepared, under County supervision, then returned within a stated period of time here. We retain jurisdiction to determine, upon submission of the addendum, whether the

alleged petroglyph is authentic and therefore, whether the proposed development would adversely affect an authentic petroglyph.

Because of the maul and lithic scatter found near the site, we also conclude that a cultural resource survey of the Tewalt site should be undertaken as part of the addendum and the results presented in the same manner for the same purpose as prescribed above.

Finally, when presented with the addendum on cultural resources, and depending on its contents, we will at that future date affirm or reverse the permit for the proposed development.

XIV

We have carefully considered the other contentions of appellants and find them to be without merit.

XV

Summary In summary, the shoreline substantial development permit issued by Skagit County is consistent with the SMA, SMP and SEPA in all respects but three. First a permit condition should be added to mitigate the effect of blasting upon Trumpeter swans by prohibiting blasting during winter months. Second, a permit condition should be added which prohibits on-site screening and crushing activity. Third, further study of the marked rock, and a cultural resource survey of the site, should be performed and returned here. We retain jurisdiction to review the prescribed studies and then to determine the lawfulness of the permit with regard to cultural resources.

XVI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

This matter is remanded to Skagit County with instructions to:

1) add to the permit a condition preventing blasting during the months of December through March;

2) add to the permit a condition which prohibits on-site screening and crushing activity.

3) collect information under WAC 197-11-625 as an addendum to its MDNS and return that addendum here by June 15, 1994. The addendum shall consist of:

a. An objective examination of the marked rock using a carbon dating or similar process and a report of the result, and

b. A cultural resources survey of the Tewalt site of not more than two weeks duration and report of the result.

4) The person carrying out a., above, shall be Dr. James C. Bard who was chosen by inquiry to the Smithsonian Institution, Washington, D.C.

5) The person carrying out b., above, shall be qualified by professional training in the identification of cultural resources, and shall be selected by Skagit County.

6) The persons carrying out a. or b , above.

a) Shall not be, and shall not confer with, any attorney, party, amicus or other person listed or consulted as a witness in this proceeding except upon permission of the Board,

b) Shall be paid by the County which shall be reimbursed by the applicant, but otherwise shall have had no significant income from any party or amicus or person listed as a witness or consulted in this proceeding.

4. Shall abide by the Protective Order herein.

We retain jurisdiction for the purpose of rendering a final decision.

SO ORDERED.

DONE at Lacey, WA, this 5TH day of April, 1994.

William A. Harrison
HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

SHORELINES HEARINGS BOARD

Robert V. Jensen
ROBERT V. JENSEN, Chairman

Richard C. Kelley
RICHARD C. KELLEY, Member

Bobbi Krebs-McMullen
BOBBI KREBS-McMULLEN, Member

O'Dean Williamson
O'DEAN WILLIAMSON, Member

Mike Morton
MIKE MORTON, Member

S93-14O

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CITIZENS TO PRESERVE NOOKACHAMPS VALLEY; WILLIAM KUTZ; EDWARD G. MALONEY, JR.; JOHN M. SMITH,	)	SHB NO. 93-14
Appellants,	)	ORDER GRANTING AND DENYING MOTIONS TO STRIKE
v.	)	
SKAGIT COUNTY; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; TEWALT, INC.; CHARLES TEWALT; and FRED C. TEWALT,	)	
Respondents.	)	

On February, 8, 1994, respondents, Tewalts, filed a Motion to Strike Attachments. On February 3, 1994, appellants filed a Motion to Strike Portions of the testimony.

Having considered the motions, responses, replies, and supporting affidavits and memoranda, and being fully advised,

NOW THEREFORE IT IS ORDERED THAT:

1) The motion to strike the Bradford E. Furlong letter of April 10, 1991, is granted on the grounds that 1) the issue of whether to lift the Protective Order for which the letter was offered has been previously resolved, and 2) the evidence is irrelevant (ER 401, 402) ,and 3) prejudicial (ER 403) with regard to the issues on the merits.

2) The motion to strike the Margaret Nelson letter of January 6, 1994, is granted on the grounds that 1) the issue of whether to lift the Protective Order for which the letter was offered has been previously resolved, and 2) the evidence was not relied upon by Mr. Mierendorf who reached his opinion before examining the letter, and 3) the evidence is hearsay (ER 802), and 4) access exists to similar evidence which has already been admitted.

3) The motion to strike portions of the testimony of Merle Ash is denied on the grounds that 1) Mr. Ash was qualified as an expert witness by prior ruling, and 2) there has been no willful abuse of discovery rules, and 3) any omission in discovery with regard to Mr. Ash's consultation with Mr. Parr was substantially ameliorated by the subsequent discovery and examination of Mr. Parr testifying as a witness.

4) The letters of Mr. Furlong and Ms. Nelson are returned herewith to appellants.

DONE at Lacey, WA, this 5th day of April, 1994.

William A. Harrison

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge, Presiding

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DOCKETED
MAY 10 1993

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CITIZENS COMMITTEE TO PRESERVE NOOKACHAMPS VALLEY, et al., Appellant.	SHB NO. 93-14
v.	ORDER DENYING MOTION TO DISMISS
SKAGIT COUNTY, et al., Respondent.	

On April 7, 1992, the permittee Tewalt, Inc., although not a party, appeared specially to move dismissal of this matter on grounds that the permittee was not named as a party within the 30 day period for appeal here. By notice dated April 13, 1993, respondent Skagit County joined in this motion.

On April 15, 1993, appellants filed their response.

On April 20, 1993, Tewalt, Inc., filed its reply.

Having considered the foregoing together with the records and files herein, and being fully advised, the following is found as uncontroverted fact:

1. On January 19, 1993, Skagit County granted a shoreline conditional use permit to Tewalt, Inc. to develop and operate a rock quarry on a shoreline of the state.

2. On February 24, 1993, Department of Ecology approved that permit with conditions.

3. On March 19, 1993, appellant filed with this Board, the Department of Ecology and the Attorney General, a Request for Review of that permit.

4. The Request for Review did not name Tewalt, Inc. as a party.

5. The Request for Review did name Skagit County.

6. The text of the Request for Review, at page one, recited that review is sought of

> " *Skagit County's decision granting a permit, SHB 91-033, to Tewalt, Inc for the development of a rock quarry and associated rock crushing and screening operations within the shoreline areas of Skagit County.* "

7 Appellants sent a copy of the Request for Review to Mr. Charles Tewalt.

8 Appellants sent a copy of the Request for Review to the Board of County Commissioners of Skagit County

9. The 30 day period for appeal has now expired.

From which the Board concludes as follows:

1. Pursuant to RCW 90 58.175 the Shorelines Hearings Board may adopt rules and regulations governing the administrative practice and procedure before the Board.

2. The Board's rules of procedure are published at chapter 461-08 WAC.

3. These rules adopt the statutes and court rules regarding pretrial procedures in civil cases in superior courts of the State of Washington "insofar as applicable, and not in conflict with these rules". WAC 461-08-010

4. There is no requirement to name the permittee or landowner in the rule governing the content of a request for review. WAC 461-08-055. Neither is there any prohibition in that rule against such naming.

5. Another rule specifically allows joinder of the permittee. WAC 461-08-085

6. Neither WAC 461-08-055, nor -085, previously cited, require the joinder of a permittee or landowner within the 30 day period for appeal.

7. WAC 461-08-065(1) requires that a copy of the request for review be filed concurrently with the Shorelines Hearings Board, the Department of Ecology and the Attorney General. WAC 461-08-065(2) requires that the appellant mail a copy to the permittee, where the permittee is other than the party requesting review; however there is no deadline set in the regulation for such mailing.

8. The amendment of a request for review, which would include an amendment to name a permittee or landowner, is addressed at WAC 461-08-090. That rule provides:

> *Prior to the scheduling of the first conference, the party appealing may amend the request for review at any time; thereafter, such amendment may be made on such terms as the board or presiding officer may prescribe . . .*
> WAC 461-08-090(2).

9 The pending motion cites cases governing the commencement of a writ action under RCW 58.17.180 in superior court for review of land use decisions by cities and counties. These cases are cited in Baker Investments v Snohomish Cy., 59 Wn. App. 29, 34-35, (1990). In construing the court rules relating to commencement of these superior court actions, the Washington State Supreme Court has held that 1) naming a necessary party, e.g. landowners, is untimely after the 30 day period for appeal 2) the provision of CR 15(c) which provide for "relating back" do not apply and 3) the actual knowledge of the necessary party of the suit within the 30 days is not alone sufficient to change matters. See, North Street Ass'n v Olympia, 96 Wn.2d 359 (1981) Under CR 19 these cases are then subject to dismissal for failure to join a necessary party. Id

10. In the case law construction of CR 15(c) set forth above, the relation-back feature is held inapplicable because the appealing parties were aware of the necessary parties yet did

not originally name them. This is deemed inexcusable neglect warranting dismissal. North Street, supra.

11. We agree that the case law construction of court rules concerning commencement of a writ action is as set forth in Tewalt Inc.'s motion. The final question, however, is whether the Shoreline Management Act, chapter 90.58 RCW and this Board's procedural rules are the same or different from court rules in a writ action? We hold that they are not the same, that the applicable shoreline rules are in conflict with the court rules, that the shoreline rules apply and that the shoreline rules do not warrant dismissal of this appeal.

12. Unlike the courts in construing rules for commencement of writ reviews, this Board is bound in the matters which it reviews by the Shoreline Management Act. That act provides that:

> *Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may seek review from the shorelines hearings board by filing a request for the same within thirty days of the date of filing as defined in RCW 90.58.140(6).*
>
> *Concurrently with the filing of any request for review with the board as provided in this section pertaining to a final order of a local government, the requestor shall file a copy of his request with the department [of ecology] and the attorney general . . .*
> RCW 90.58 180

13. There is nothing in RCW 90.58.180 which mandates the naming of the permittee or property owner in the request for review when originally filed within 30 days

14. The Act goes on to provide that.

> *This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.*

15. Our rules of procedure fulfill the mandate of liberal construction found in the Act by allowing the joinder of necessary parties, even after the 30 day period for appeal, absent actual prejudice. WAC 461-08-055, -085, and -090(2), supra.

16. In this matter the permittee, Tewalt, Inc., has not shown actual prejudice nor would actual prejudice result from naming Tewalt, Inc. or related parties at this stage of the proceeding prior to the pre-trial conference.

17. The rules of the Board, WAC 461-08-055, -085 and -090(2) are the applicable rules under WAC 461-08-010 for naming parties in requests for review here. With regard to the naming of parties, the court rules conflict with these applicable rules, and do not apply. Our rules do not deem the failure to name a party within the 30 day period for appeal as inexcusable neglect warranting dismissal. Naming a party after the 30 day period for appeal is permissible in the absence of actual prejudice. The failure originally to name the permittee and related parties has not been shown to cause actual prejudice. These persons should now named as parties.

WHEREFORE IT IS ORDERED THAT

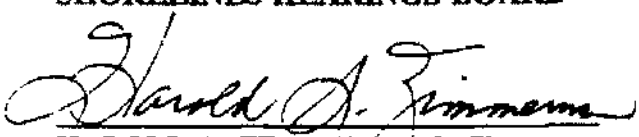
1. The motion to dismiss is denied.

2. The appellants shall forthwith name Tewalt, Inc., Charles Tewalt and Fred Tewalt as parties respondent by the amendment of its Request for Review. The same shall be promptly filed and served.

DONE at Lacey, WA, this 6th day of May, 1993.

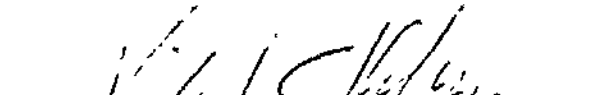
HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

SHORELINES HEARINGS BOARD



HAROLD S. ZIMMERMAN, Chairman

ROBERT V JENSEN, Member



RICHARD C. KELLEY, Member

ROBERT PATRICK, Member

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