WHATCOM COUNTY HEARING EXAMINER

RE:	Administrative Appeal Application for	)	APL2010-0015 / SEPA2010-00031
		)	
		)	FINDINGS OF FACT,
	South Fork Heritage Association	)	CONCLUSIONS OF LAW,
		)	AND DECISION

SUMMARY OF APPEAL AND DECISION

Summary of Appeal: The South Fork Heritage Association [South Fork] has appealed a Determination of Non-significance issued by the Responsible Official for Whatcom County on May 19, 2010, under file SEPA2010-00031. The DNS was issued on a proposed establishment of a Whatcom County owned multi-use recreational facility or park, located on approximately 890-acres of County owned property, but with the potential addition of parcels owned by the Washington State Department of Natural Resources. The properties are located east of the town of Acme and are bordered by the Nooksack River on the west.

Summary of Decision: The Appellants have failed to establish the likelihood of substantial adverse environmental impacts from the project after the application of existing State and County regulations. The Appeal is denied and the issuance of a DNS on the project is upheld.

FINDINGS OF FACT

I.

Background Information

Appellant: South Fork Heritage Association

Legal Property Owners: Whatcom County

WC File # Being Appealed: SEP 2010-00031

Property Location/Address: Approximately 890 acres located east of the town of Acme, bordered by Mosquito Lake Road on the north, the Nooksack River on the West and Saxon Road to the south.

	Township 37N, Range 5E, Sections 8-9-15-16-21-22.
Zoning:	Agricultural, Rural Forestry, Commercial Forestry
Comprehensive Plan:	Agricultural, Rural Forestry, Commercial Forestry
Authorizing Ordinances:	WCC 20.92 Hearing Examiner WCC 20.84.240 Appeals

Applicable Whatcom County Codes: WCC 16.08 State Environmental Policy Act

Notice Requirements: Certificate of Posting, dated September 9, 2010
Certificate of Legal Notice of Open Record Hearing, dated September 9, 2010

Open Record Hearing: September 22, 2010

Exhibits:

1 SEPA Appeal Application with State to the Hearing Examiner and Customer Receipt attached

2 Letter dated April 27, 2010, from Lesa Starkenburg-Kroontje to Tyler Schroeder re: SEPA Review

3 Letter dated June 1, 2010, from Starkenburg-Kroontje to Schroeder re: South Fork Park/SEP2010-00031

4 DNS, dated May 19, 2010, with Checklist and Interfund Transfer receipt attached

5 SEPA Legal Notice, dated May 19, 2010

6 Legal Notice of Open Record Hearing, dated September 9, 2010

7 Draft Environmental Assessment for South Fork Park, March 2010

8 SEPA Comments (stapled as 8-1 and 8-2)

9 Staff Report, dated September 17, 2010

10 Certificate of Posting of Public Hearing, September 9, 2010

11 Hearing Brief Submitted by South Fork Heritage Association, Brief, prepared by Lesa Starkenburg-Kroontje, dated September 21, 2010 [notebook]

12 Letter dated December 4, 2009, from Dept of Fish and Wildlife re: Comment on S.F. Nooksack River Park Revised Master Plan

13 Materials submitted in support of Mr. Patz' testimony:
- 13-1 Email correspondence betw Mr. Patz and Washington State recreation and Conservation Office dated September 1-2, 2009, re: Public Disclosure Request/Nesset Farm Property, with highlighted page "Evaluation of the Property," and Bargain and Sale Deed, dated October 28, 1998 attached
- 13-2 Email correspondence betw Mr. Patz and Rodney Lamb, Sept 14, 2009; Mr. Patz and Barry Wenger, Nov 6, 2009 re: SEPA Process Conversation; letter dated January 25, 2010 from David Mann to Whatcom County Council re: South Fork Regional Park Concept Plan
- 13-3 South Fork Park SEPA Appeal, APL2010-0015, Whatcom County SEPA Official Response, Findings and Conclusions, p3, with highlighting; email betw Mr. Patz and Mr. Lamb dated September 1, 2009, re: Alternative 1 acreage breakdown; Email betw Mr. Patz and Mr. Wenger, dated November 6, 2009

14 Letters of concern from County Agencies:
- 14-1 Letter dated July 1, 2009, from Fire District #16 to Mr. Lamb, County Parks
- 14-2 Letter dated January 25, 2010 from Fire District #16 to Whatcom County Council
- 14-3 Email from County Council to Chris Hatch, dated January 26, 2010, re: Sheriff Bill Elfo's comments to Mike

Parties of Record

Lesa Starkenburg-Kroontje, Attorney at Law P.S.
P.O. Box 231
Lynden, WA 98264

Leroy Harkness
1611 Mosquito Lake Road
Deming, WA 98244

Harry Patz
4620 Turkington Road
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Jim Strachila
1385 Mosquito Lake Road
Deming, WA 98244

Chris Hatch
Acme, WA 98220

Rod Lamb
Whatcom County Parks and Recreation

Tyler Schroeder
Whatcom County Planning and Development Services

II.

Whatcom County owns approximately 890-acres, consisting of three parcels, located east of the town of Acme, and bordered by Mosquito Lake Road on the north, the Nooksack River on the west, and Saxon Road on the south. A County park or recreational facility has been envisioned for these properties since the late 1960s.

III.

In January 2010, Whatcom County Parks and Recreation ["Parks"] submitted a Resolution to the Whatcom County Council seeking approval of a Conceptual Plan for the South Fork Regional Park. The Resolution clearly stated the purpose of the Resolution and set forth a Conceptual Design for a proposed Regional Park or Educational/Recreational Facility.

The Resolution was submitted to the Whatcom County Council prior to a SEPA Review of the proposal. For this reason, the Resolution was withdrawn and on March 15, 2010, Parks submitted a SEPA Environmental Checklist and a Draft Environmental Assessment for South Fork Park. The Environmental Assessment includes a description of the proposed action [Alternative No. 1, page 4 of the Draft Environmental Assessment], which reads as follows:

> "Alternative No. 1 - Proposed Action
> Alternative 1 provides recreational access to the Galbraith, Overby, and Nesset Farms, and to the proposed DNR reconveyance properties. This alternative includes a 30 vehicle (20 single unit spaces and 10 truck and trailer spaces) parking area, improved access off of Mosquito Lake Road, a restroom building, picnic shelter, and hiking and equestrian trailheads. Trails from the two trailheads are separated for the initial one-quarter mile of their length and then merge into a multi-use trail that will accommodate hikers, bicyclists and equestrians. The multi-use trail continues eastward crossing an existing Park road serving adjacent properties, and continues into the northern reconveyance property. As the trail nears the eastern boundary of the reconveyance property, it crosses Hutchinson Creek by way of a proposed bridge. The trail continues south through the reconveyance property along the alignment of an existing logging road where it enters Overby Farm. The trail continues westward

following a historic rail corridor, and then south crossing Pond Creek at an existing culvert crossing. There, the multi-use trail continues south to Nesset Farm. At Nesset Farm, the trail is limited to walk-in or wheelchair access only. Hitching posts and bicycle racks will provide a means to properly secure horses and bicycles for riders wishing to access the historic core area of Nesset Farm. Nesset Farm consists of a complex of farm buildings and a caretaker residence. The farm buildings will be restored and periodically opened for guided historic tours. Hiking trails in and around the buildings will provide visitors access to fields, orchards, Nesset Creek, and the Nooksack River. Additional spur trails limited to foot traffic are located at other points along the main multi-use trail beginning at Galbraith Farm property and are depicted on the figure provided. These include a river access trail located near the multi-use and hiking/bicycle trail junction on Galbraith Farm, a scenic overlook trail in the northern reconveyance property, and a trail that provides access to the historic Overby Farm site."

The Assessment also included four alternatives, including a 'no action' alternative, and described and briefly discussed these alternatives. In addition, the Assessment listed three alternatives, Alternative 5, Alternative 5A, and Alternative 6, which the Assessment indicated were considered but rejected.

The Draft Environmental Assessment described the proposed action and possible alternatives in sufficient detail to provide the Responsible Official adequate information on which to base a Threshold Determination.

The Responsible Official indicated that his SEPA Determination took into account the potential impacts from all of the various alternatives and that he concluded that there were no likely significant adverse environmental impacts from any of the proposals.

IV.

The Appellants indicate that the information before the Responsible Official was confusing and that it was unclear as to what project was reviewed. The Appellants ask, "Is this a trail or is this a regional park?" The Appellants point out that a Zoning Conditional Use Permit may be required under the Whatcom County Code in order to approve a regional park within the properties zoned Agriculture that are a part of this proposal.

The Appellants set forth the definition of park from WCC 20.97.285, the definition of trailhead from WCC 20.97.435.2, and the definition of trails from WCC 20.97.435.3, and argue that the proposal meets the definition of "Park." The Appellants indicate some kind of concern whether this is a proposal for a trail system which would end up allowing an "... entire regional facility under the guise of a trail system." The Appellants point out some perceived inadequacies in the description of the proposal and in the Environmental Checklist. The Appellants point out that the SEPA Checklist and DNS issued failed to include, in answer to what permits are required, a Zoning

Conditional Use Permit, which is probably required for any public uses on the portion of the property zoned Agriculture. The Appellants suggest that the proposal is being improperly "compartmentalize-ed," that the proposed use of the site as a "regional park" has not properly been reviewed and that the County is failing to fully analyze under SEPA the proposed creation of a "regional park" at this location.

The Appellants' brief concludes with a list of five impacts that the Appellants feel were not considered by the Responsible Official.

V.

Witnesses testifying on behalf of the Appellants indicated concern about adverse impacts to protected salmon at this location of the Nooksack River, resulting from public access; impacts on the Elk herd in the area; as well as, concerns about traffic and noise.

At no point do the Appellants provide any factual basis to establish that these kinds of impacts will not be adequately mitigated through the application of existing regulations, including the Shoreline Management Act and Whatcom County's Critical Areas Act. The Appellants did not produce any expert testimony which would support a conclusion that the proposed facility would have significant environmental impacts.

VI.

The Responsible Official under SEPA, on page 3 and 4 of the Staff Report, Exhibit No. 9 in the Hearing Examiner file, indicates the "affected environment" considered, the environmental consequences of the alternatives as set forth in the Draft Environmental Assessment, and a list of Agencies and Parties consulted prior to the issuance of the DNS. These agencies included the Washington State Department of Fish and Wildlife, the Washington State Department of Natural Resources, Washington State Recreation and Conservation Office, Washington State Department of Archaeology and Historic Preservation, Washington State Department of Ecology, and Washington State Department of Transportation. It also included Whatcom County Planning and Development Services, Whatcom County Public Works, and the Whatcom County Sheriff. Additionally, numerous, public nonprofit organizations and citizens were consulted.

Specifically, in relationship to potential adverse impacts on protected salmon and Trout populations in this portion of the Nooksack River, the SEPA Official contacted the Lummi Indian Nation and Nooksack Indian Tribe, as well as, the Washington State Department of Fish and Wildlife.

VII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

WCC 16.08.170 allows appeals of a Final Determination of Non-significance. This section also states that the SEPA Determination made by the Responsible Official "... shall carry substantial weight in any appeal proceeding."

The Hearing Examiner is given the right to reverse a Threshold Determination "... when, although there is evidence to support it, the Hearing Examiner, on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

The Appellants have the burden of establishing with clear, cogent, and convincing evidence that there is a likelihood of significant adverse environmental impacts from the project.

A significant adverse environmental impact is defined as an impact which would have more than a moderate adverse impact on environmental quality.

The Appellants have failed to establish the likelihood of a significant adverse environmental impact resulting from the proposed action. The Hearing Examiner is convinced that the DNS issued by the Responsible Official is appropriate and was issued after an adequate review of the proposal and of its potential impacts. Merely naming possible environmental impacts is not adequate to meet the Appellants' burden of establishing with clear and convincing evidence that a significant adverse environmental impact is likely.

II.

WAC 197-11-680 allows Administrative Appeals on SEPA procedures only "... to review a Final Threshold Determination and Final EIS." Concerns stated about the adequacy of the SEPA Checklist submitted raise procedural issues beyond the correctness of this DNS. Flaws in an Environmental Checklist, in and of themselves, are not a sufficient basis for overturning the Threshold Determination of the Responsible Official under SEPA. The Appellants need to establish a likely significant adverse environmental impact and not just a poorly or inaccurately completed Environmental Checklist.

III.

The Draft Environmental Assessment includes an accurate and detailed description of the proposed use, including potential alternatives. The Hearing Examiner concludes that the SEPA review for this project was a review of the entire project, plus a review of the impacts which might result from alternative actions. The Responsible Official did not improperly compartmentalize this proposal.

IV.

WAC 197-11-158 allows the Responsible Official to consider existing plans, laws, and regulations in making a Threshold Determination. A Threshold Determination of Non-significance is appropriate for a proposal when it is determined that the application of Whatcom County's development regulations and Comprehensive Plan, combined with any applicable State and Federal regulations, will result in adequate analysis and mitigation of any significant adverse environmental impacts of the project. In this case, the Washington State Shoreline Management Act and the Whatcom County Shoreline Master Program give the County broad authority to condition projects within the 200-foot shoreline jurisdiction bordering the Nooksack River. The Whatcom County Critical Areas Ordinance will carefully regulate any proposed activity within a critical area or its legally protected buffer. In addition, the United States Army Corps of Engineers has regulatory authority over wetlands.

The fact that Whatcom County may require a Zoning Conditional Use Permit for portions of the project which may take place within the Agriculture zone is just one more example of mitigating potential significant adverse impacts from this project through application of existing regulations.

Potential impacts from construction of the parking lot, trailhead, and proposed trails will be subject to the requirement for a Clearing and Grading Permit, may require additional environmental review, and are therefore unlikely to result in significant adverse impacts. Whatcom County Public Works has authority over potential adverse impacts resulting from traffic, as well as, those resulting from stormwater runoff.

V.

The Appellants have failed to meet their burden of producing clear, cogent, and convincing evidence of a substantial adverse environmental impact that will not be mitigated through the application of existing regulation.

The Appellants have not produced adequate evidence to support the Hearing Examiner reaching a conclusion that the Responsible Official under SEPA made a mistake when issuing a DNS on this proposal.

VI.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

The Appellants have failed to establish the likelihood of substantial adverse environmental impacts from the project after the application of existing State and County regulations. The Appeal is denied and the issuance of a DNS on the project is upheld.

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final. The following review procedure is available from this Decision and may be taken by the Applicant, any Party of Record, or any County Department.

Appeal to County Council. Within ten business days of the date of the Decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

1) The specific error of law which is alleged, or

2) How the Decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830. A copy of this document is available for review at the County Council Office.

After an appeal has been filed and the Council Office has received the hearing record and transcript of the public hearing, the Parties will be notified of the time and date to file written arguments.

DATED this 8th day of October 2010.

Michael Bobbink

Michael Bobbink, Hearing Examiner