January 28, 2010

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**REPORT AND DECISION**

SUBJECT: Department of Development and Environmental Services File No. **E05G0099**

**JEFFREY L. SPENCER AND RONALD A. SHEAR**
Code Enforcement Appeal

Location: 28225 West Valley Highway S

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EXAMINER PROCEEDINGS:

Hearing opened: June 23-26, 29-30, July 1-2, and November 12, 2009
Hearing closed: November 12, 2009

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

A. **Historical Context**

1. Jeffrey Spencer's 10-acre parcel lies within the Lower Green River Valley, a component of what is normally referred to as the Green/Duwamish River Watershed. If one were to make a compendium of the most completely and radically altered watersheds in the Puget Sound Basin, the Green River Watershed would be at or near the top of the list. The great forests that dominated the landscape within the lowland valley 150 years ago have been logged. First the newly cleared land was made into highly productive farmland, then later mostly converted to manufacturing and residential uses. Mr. Spencer's parcel is within one of the last agriculturally-zoned remnants within the Lower Green River Valley.

2. Beyond the progressive change in the land use patterns, the hydrology of the Green River system has been fundamentally altered as well. Three rivers that formerly flowed into the Green have been diverted into other channels, reducing historic flows by over 50 percent. The riverbanks have been diked and leveed and the valley floor channeled in an effort to reduce the effective extent of the floodplain. Much of the stormwater runoff from surrounding urban areas is either discharged to the Green River directly or indirectly through release to the feeder channels that crisscross the valley. The estuary that existed at the mouth of the Green/Duwamish system has been almost totally eliminated. Natural flows within the Green River main stem have been further altered by upriver dams installed both to control flooding and to divert water to the City of Tacoma for municipal use.

3. This regime of unfettered change began to moderate in the 1980s when King County decided that it might be a wise policy to preserve some of the last remaining fragments of valley agricultural land. This policy shift was implemented soon enough to substantially preserve the agricultural area in the Enumclaw area, but maintaining a viable agricultural district within the Lower Green River Valley has been an uphill battle. The 1985 King County Comprehensive Plan created three small islands of Agricultural Production District (APD) property within the Lower Green River Valley, two of them nestled between Kent and Auburn and the third on the western bank of the Green River between the cities of Kent and SeaTac. The county's first Comprehensive Plan

enacted pursuant to the Growth Management Act was the 1994 version, and by that time the northernmost APD island had disappeared as had the northwest extremity of the larger of the two segments lying between Kent and Auburn. Since 1994 these fragments have remained more or less intact, except along the Highway 167 corridor that bisects them. Mr. Spencer's parcel lies along what is now the eastern edge of the larger westerly APD fragment.

4. The discussions within the various King County Comprehensive Plans acknowledge summarily, in appropriately muted bureaucratic language, that the county's traditional agricultural lands have been under siege. The 1994 plan at page 103 provides the following synopsis:

> "Approximately 42,000 acres in King County remain in agriculture. In 1992, farmers in King County produced over $84 million dollars in agricultural sales that contributed to a diverse regional economy and provided fresh local foods. Commercial agricultural production, however, has declined by 30 percent in gross sales since 1978. The average farm and parcel size has also decreased, thus reducing the potential for many types of commercial operations. Fortunately, many of the smaller parcels still are undeveloped. If residences were built on all of the undeveloped parcels, King County's ability to sustain commercial agriculture would be significantly affected."

The 2004 Comprehensive Plan at page 3-24 also provides a broad summary describing the reasons for the decline in the county's resource lands:

> "Historically, Natural Resource Lands have been poorly protected. For example, only about one-third of the farmland existing in 1945 remains today. The natural resource base has diminished for many reasons, among them:
>
> - Demand for more land for industrial, commercial, and residential structures;
> - Lack of understanding of natural resource value;
> - Inconsistent coordination among agencies;
> - Poor operational practices in some cases; and
> - Lack of an adequate means to compensate natural resource owners for the many non-monetary values their lands provide."

5. Since 1985, then, King County has had policies supporting the preservation of agricultural lands and, with the adoption of the Growth Management Act, similar policies have existed statewide. While these documentary materials may not be directly applicable to resolving the issues within this set of appeals, the expectations created by preservationist policies has undoubtedly fueled the strong emotions that underlie the positions of many of the participants in this proceeding. The simple truth is that there is a disparity between what the policies seem to promise and what the regulations actually specify. Moreover, there is an ongoing conflict between policies that attempt to support maintenance of a traditional agricultural and rural economy and those which undertake to preserve to the maximum extent feasible critical areas amenities.

## B. **Procedural Background**

6. The Spencer and Shear code enforcement appeal proceeding has been going on now for more than three years, and one would like to be able to report that this time has been productively devoted to exploring some of the nuances of the important policy issues identified above. But that largely has not been the case. The original attorney for Appellant Ron Shear, who until a few months ago operated as the lead attorney for the Appellants collectively, early on adopted a

strategy of delay and aggressive obstructionism once he discerned that no compromise with Department of Development and Environmental Services (DDES) would be possible. DDES's non-negotiable bottom line appears to be simply to shut down the cited commercial operation on Mr. Spencer's property. Moreover, since Mr. Shear seems to have unwisely engaged in some bad behavior with both the neighboring property owner to the south and with some of the agency inspectors and investigators, DDES adopted the position that closing down operations on the Spencer property was a holy crusade where nothing short of total victory would be acceptable. The inevitable result of this rigidity was a process more preoccupied with posturing and tactical moves and countermoves than with identifying and addressing the underlying issues.

7. After more than a year of complaints and off-and on-investigations, the DDES Code Enforcement section on October 9, 2006, issued a notice and order in case number E05G0099 to Jeffrey Spencer and Ronald Shear concerning operations and activities at 28225 West Valley Highway S within the A-10 zone. The notice and order cited Spencer and Shear for "operation of a materials processing facility in an A-10 zone in a critical area (wetland, flood hazard area)" without required permits and for "clearing, grading, and/or filling within a critical area" without permits. The notice and order further stated that in order to bring the property into code compliance, the operation of the materials processing facility must cease, all equipment must be removed from the site and a clearing and grading permit must be applied for and obtained to abate and restore the property. The theory of legal responsibility underlying the notice and order was that Mr. Spencer was responsible as the property owner and Mr. Shear as the tenant operating the business.

8. Appeal notices and statements were filed by Jeffrey Spencer on October 20, 2006, and by attorney James Klauser "for Appellant Ron Shear and Mountain View Recycling" on October 24, 2006. The Spencer appeal statement denied the existence of wetland and flood hazard critical areas on the property and asserted that the property's use should properly be characterized as agricultural, with the materials generated on site not being fill but temporary stockpiles. These assertions were adopted and reiterated within the appeal statement for Mr. Shear.

9. The pre-hearing process undertook to clarify and modify the appeal issues. Hearing Examiner *pro tem* James O'Connor authorized DDES to file a statement to make more definite and certain, which was received on August 21, 2007. Further clarification occurred within the Examiner's February 23, 2009 pre-hearing order, which additionally identified as issues whether the activity on the Spencer property was a legal non-conforming use and whether the Appellants, or either of them, were persons responsible for code compliance under KCC Chapter 23.02. Modification of appeal issues pursuant to a pre-hearing conference is authorized by Hearing Examiner Rule VIII.A.

10. The two-and-a-half year period stretching from the filing of the notice and order in October 2006 to the opening of the appeal hearing on June 23, 2009 was characterized by much maneuvering and wrangling but produced little in the way of useful results. Large amounts of effort went into simply scheduling matters at mutually convenient times. Beyond that, considerable resources were spent in discovery and in briefing and arguing a DDES motion for partial summary judgment.

    The summary judgment motion seems to have been a particular aggravation in that nothing much got settled but the relationships among the participants degenerated into anger and mutual recrimination. DDES ended up withdrawing its summary judgment motion with respect to the wetlands and floodplain issues, but achieved some portion of its objectives in obtaining a ruling as to key elements necessary to characterize a materials processing facility on the Spencer parcel.

The main shortcoming of the summary judgment findings with respect to the materials processing facility is that they lack specificity with respect to critical time frames. There is not much doubt that what currently exists on the Spencer property qualifies under the zoning code as a materials processing facility. Rather the interesting questions are whether and to what extent it was established before relevant changes in permitting requirements were imposed by the zoning ordinance.

11. The summer and early fall of 2008 probably marked the low point in the overall pre-hearing process but also perhaps the high point of the Appellant strategy of delay and obfuscation. The summary judgment exercise mainly succeeded in annoying the original Hearing Examiner assigned to the case, Mr. O'Connor, to the point that he attempted to impose sanctions for misuse of the discovery process. Since the sanctions provisions of the Hearing Examiner's Rules are rather toothless, Mr. O'Connor ultimately felt compelled to withdraw the imposition of terms and recuse himself from further participation in the case.

12. In addition to the current parties to the appeal, who have been here since the beginning of time, other parties have come and departed from this proceeding. At an early stage Mr. Hang, the property owner to the south of the Spencer parcel, was granted limited intervention status in the proceeding and then later withdrew. In addition, in late 2008 the Seattle-King County Department of Public Health (Health Department) issued its own notice and order (file no. CO 0057548) for largely the same activities on the Spencer property, alleging violation of its solid waste handling rules. At the Appellants' request, and over strenuous objections from DDES, the Hearing Examiner ordered that the Health Department and DDES appeals be heard concurrently, a ruling that necessarily resulted in further delay. But, near the end of the consolidated hearing process, the Health Department proceeding was stayed and severed from the DDES appeals based on representations from the Health Department and the Appellants that some sort of stipulated resolution of the Health Department appeals was imminent. An order severing the DDES and Health Department appeal hearings and staying the Health Department proceeding was issued by the Hearing Examiner's Office on November 3, 2009.

13. Finally, in late summer 2009, Mr. Klauser and his partner Mr. Rowley withdrew as attorneys for Ronald Shear and Buckley Recycle Center, Inc., (BRC) respectively. They were replaced by Brian Lawler of the SOCIUS Law Group.

14. The concurrently scheduled DDES and Health Department code enforcement appeals were opened on June 23, 2009. Eight days of hearing testimony were received through July 2, 2009, at which time the hearing was continued to mid-September. The June and July hearings were focused on the DDES code enforcement appeal, which was mostly completed within the early summer time frame. The September hearings were then continued to mid-November at the request of the new attorney for Mr. Shear and BRC. At the end of October, Mr. Lawler further requested that the Health Department portion of the concurrent hearing proceeding be both severed and continued to allow the parties to negotiate a settlement agreement. The final day of hearing testimony on the DDES appeal took place on November 12, 2009, at which time the evidential record for the DDES proceeding was closed.

## C. Overview of Operations on the Spencer Site

15. There is no serious dispute that since mid-2005, at the latest, the Spencer parcel has been the site of a full-blown materials processing facility, as such is defined at KCC 21A.06.742. The subject business is not accessory to a mineral extraction or sawmill use, it involves grinding and screening large quantities of mostly land-clearing and landscaping organic debris, and the piles

of pulverized organic product are constantly being expanded as materials are ground and depleted as product is sold. The piles of stumps, branches and yard waste increase during the summer and are mostly processed during the winter. Much of the ultimate product is used in winter by dairy farms as animal bedding and some of the material is burned by mills for electric co-generation. As will be seen below, the bulk of the interesting use questions with respect to the Spencer property relate to exactly when the materials processing facility was established *vis a vis* the county's various recently adopted regulations governing such activity.

16. As is frequently the case in such disputes, the most reliable information relating to the history of property use on the Spencer parcel is provided by aerial photographs. Exhibit 67 is a chain of six aerial photographs of the Spencer and adjacent parcels beginning in 1936 and extending through 2005. The 1936 photograph (exhibit 67a) shows the Spencer property entirely under cultivation except for the residential structures in the southeast corner near the West Valley Highway. The cultivated area extends easterly to include the northeast corner of the parcel north of the access driveway. Further, it is evident from the planting patterns that the 10-acre parcel now owned by Mr. Spencer in 1936 was being farmed as part of a larger agricultural operation that included the parcels adjacent both to the north and the south.

17. By the time of the 1998 aerial photo, the Spencer property had become a discrete 10-acre parcel used separately from the adjacent parcels lying to the north and south. Moreover, the approximately two acres at the east end of the parcel adjacent to the West Valley Highway now displayed a different and more complex level of use than the eight acres to the west. In the 1998 photo the western eight acres were uniformly under cultivation while to the east the non-cultivated area adjacent to the house and barn had begun to expand. Within the easterly two acres about half the area was under cultivation while the other half contained a house and a barn, with about half an acre of uncultivated area lying west and north of the barn.

18. Within the 2000 and 2002 aerial photos the cleared, non-cultivated area west of the barn continued to expand. The area directly north of the house and barn in the eastern two acres was overgrown and no longer under cultivation, and the area under cultivation within the western eight acres became less clearly defined. Within the western one-third of the property obvious signs of tilling and furrowing can be made out, but the status of the remainder of the western portion is less clear. It may have been left fallow or passively planted in a cover crop.

19. The 2004 aerial photo (exhibit 67f) shows that more significant changes had begun to occur on the Spencer parcel. While most of the western two-thirds of the property were again under active cultivation, major changes began to occur elsewhere. The access driveway from West Valley Highway, which historically protruded about 250 feet into the property, was further extended westward another 50 feet, taken at a right angle north to the northern property line, then extended along that property line approximately another 600 feet. Moreover, beyond the end of the expanded driveway system in the property's northwest quadrant one can now make out a series of large mounds. The picture also shows perhaps an acre of fresh clearing of overgrowth in the area immediately north of the house and original driveway, plus storage of vehicles or equipment immediately west of the new northerly driveway spur. An older barn lying north of the original driveway also seems to have been mostly removed.

20. The new non-agricultural activity first depicted within the 2004 aerial photo is shown within the 2005 photo (exhibit 67e) to have been further increased. The originally somewhat jagged, freshly graded area immediately north of the original driveway has been expanded and its northeast edge smoothed and straightened. The 2005 photo shows that a large quantity of vehicles and equipment have been moved into the newly graded area. In addition, there is an

extension of new grading north from the original driveway next to and parallel with West Valley Highway. Finally, while farming continued to occur on most of the westerly two-thirds of the parcel, the width of the driveway along the northern property boundary has been substantially enlarged.

21. The aerial photographs are consistent with both the witness testimony and later ground-level photographs. Mr. Spencer and Mr. Shear testified that their business relationship dated back to October 2003 and began as an oral agreement to allow Mr. Shear to bring equipment and materials from his nearby one-acre processing site east of West Valley Highway onto the Spencer parcel for storage. The quantity and areal expanse of storage increased throughout 2004 and at some point in late 2004 or 2005 the grinding and screening of raw organic materials into the ultimate hog fuel product commenced.

It seems clear that with the grinding of the product the quantity of vehicle traffic and dust generation on the Spencer site significantly increased and began to impact Mr. Hang's commercial flower growing operation adjacent to the south. Robert Mann's May 2005 photographs show a newly graveled entrance driveway, a variety of trucks and trailers, a depleted pile of ground organic product and an expanse of grass and buttercups adjacent to West Valley Highway, with an intrusion area newly denuded of vegetation. Mr. Tijerina's photographs taken approximately a year later in May 2006 show larger piles of both pulverized product and raw organic materials as well as the presence of an excavator and a grinder. In addition, the later photos show scattered small piles of rock and concrete rubble apparently culled out of the organic materials.

22. Later testimony and photographs also document the expansion of the materials piles and processing operations onto the southern half of the property's middle section, and Mr. Shear testified that at full operation the business involves trucks, trailers, excavators, loaders, screening and grinding equipment and employs two full-time workers. In addition to contractor-generated materials, the site now accepts suitable yard waste from members of the public who haul in small quantities and are allowed to deposit such materials for a fee. Thus, at full operation Mr. Shear's business has steadily expanded westward and has gone from an initial stage consisting of overflow storage of materials and equipment from a nearby site to a full processing operation that receives materials from BRC's own contract land clearing business, materials from other contractors and small yard waste loads from the general public. This organic material is ground into a hog fuel product and then trucked off-site to agricultural and industrial customers.

## D. Wetlands

23. There is no dispute that the Lower Green River Valley where the Spencer parcel is located is historically a soggy part of the world. Within his third letter dated July 6, 2008 Appellant Shear's wetland consultant A. J. Bredberg provides a somewhat hyperbolic but generally accurate summary of Lower Green River Valley development history:

> "Before the numerous manmade land use changes, nature provided significant precipitation intercept from large trees (forests) across the Green Valley floor. Stormwater was naturally or originally limited except during seasonal flood events produced in the North Cascade Mountains. Historic Green Valley water management included dams, dikes, and levees, and large organized drainage districts, deep open ditches and subsurface wood, clay tile, or plastic drains with USDA government assistance. During the mid-20th century the USDA–SCS designed a valley-wide drainage plan to control the ever-increasing stormwater

> runoff discharges. Crops and pastures prospered throughout the Green Valley for generations...
>
> Presently, large volumes of uncontrolled stormwater discharges are produced by new subdivisions across the plateaus (uplands) surrounding the Green Valley."

24. So the question raised within this appeal proceeding is not whether the Green River Valley is in some respects a damp place but whether unlawfully altered jurisdictional wetlands exist on the Spencer property as alleged within the notice and order. This matter is complicated by the fact that any former wetlands that have been continuously farmed since before 1990 are grandfathered in as permitted uses in existence before the adoption of King County wetland regulations. Moreover, the current critical areas alteration tables provided at KCC 21A.24.045.C define horticultural activity as a permitted wetland alteration if established prior to January 1, 2005 and even allow such activities to be expanded on sites predominantly involved in agricultural practices.

25. A further regulatory complication arises from the fact that there are some discrepancies between the wetlands provisions of the King County Code and the definitions and practices governing wetland delineation specified in the 1997 Washington State Wetlands Identification and Delineation Manual (the state manual). For example, the code definition of a wetland stated at KCC 21A.06.139.1 appears to provide unconditionally within subsection A for employment of an atypical situations wetland determination methodology "where the vegetation has been removed or substantially altered," while section F of the state manual limits use of this method to circumstances involving unauthorized wetland activities, unusual natural events or wetlands created by human activities. Another difference is that the code definition of a wetland speaks to an area that is inundated or saturated by water at a frequency and duration sufficient to support the prevalence of wetland vegetation, while the manual references saturation during the growing season specifically. Since RCW 36.70A.175 within the Growth Management Act requires that "wetlands regulated under the development regulations adopted pursuant to this chapter shall be delineated in accordance with the manual adopted by the department pursuant to RCW 90.58.380," it is clear that any conflict between the county code and the state manual regarding delineation standards and procedures must be resolved in favor of the manual.

26. The requirement within the state manual limiting the use of the atypical situations methodology to unauthorized wetland alterations implies that to the extent portions of the Spencer site have been altered solely by permitted farming activities, they are not subject to the atypical situations analysis. Thus, if wetlands testing has been performed on the Spencer property directly within the traditionally farmed areas, the resultant data must meet all three wetland tests—vegetation, hydrology and soils—in order to support a positive wetland determination. Employment of the atypical situations methodology is appropriate for the areas newly occupied by the fill piles but not for the adjacent historically tilled areas that have remained in agricultural use. Further, assertion by the DDES wetland technician that the atypical situations methodology warrants totally ignoring the altered wetland parameter is incorrect. Under the manual procedure, the altered parameter is not altogether disregarded but the investigator is directed to examine secondary sources and need not rely primarily on a contemporaneous field test.

27. A final preliminary matter arises from DDES's suggestion in argument that if the evidence for a positive wetland determination on the Spencer site is conflicting or otherwise uncertain, a positive conclusion can be premised on a finding that DDES's wetland technician, Mr. Sloan, was a more credible witness than the Appellant's consultant, A. J. Bredberg. At the outset it must be acknowledged that both Mr. Bredberg's hearing demeanor and his written work product

demonstrated rather clear indications of personal bias. In his hearing testimony Mr. Bredberg was combative and partisan, and his answers to DDES questions on cross-examination tended to be evasive.

An aggressive egotism also characterizes Mr. Bredberg's written work. His résumé modestly suggests that "Mr. Bredberg has seen more soils, test pits, and completed more studies of the entire Puget Sound area than anyone." And, his July 6, 2008 critique of Mr. Sloan's delineation documentation (exhibit 90, third letter) describes it as not merely incomplete, but "incomprehensible."

28. But, referring again to his January 6, 2008 critique, the most disturbing aspect of Mr. Bredberg's written work is his insertion of elements of a political screed into what is offered as a technical document:

> "Local governments do not support or condone proper management of drainage (cleaning ditches) which is a landowner's legal right. Mill Creek drainage maintenance has been opposed by the government entities. They want to take the landowners' property by default."

More critically, it is apparent that his political agenda has infected Mr. Bredberg's technical conclusions as well:

> "Even if the site did contained [*sic*] hydric soils, there is sufficient evidence that the presence of deep ditches and underground drain tile, had they been historically maintained, would effectively drained the site. The 1997 DOE Manual discusses normal circumstances. Normal circumstances would include a drainage system that is property [*sic*] maintained."

29. In short, if the resolution of wetlands issues within this proceeding were to come down to a credibility call between the Appellant and DDES witnesses, Mr. Bredberg's performance provides a fact finder with abundant ammunition to support a finding of bias. But here a credibility evaluation is only a necessity if the DDES case, standing alone, supports a positive wetland finding on the Spencer property sufficient to uphold the notice and order. If the DDES case falls short of the mark in some essential respect, it simply fails on its own merits, and no credibility finding is required.

30. Generally speaking, the state manual requires for a positive wetland determination three elements: the prevalence of hydrophytic vegetation at the test location; the existence of wetland hydrology consisting of the periodic inundation or saturation of soils during the growing season for a sufficient duration to create anaerobic and reduced soils conditions; and the presence of an upper layer of hydric soils formed under conditions of saturation during the growing season.

31. Although Mr. Sloan's documentation is a bit thin, the dominance of hydrophytic vegetation at the six sample points identified within his July 19, 2007 wetland report is not seriously in doubt viewing the evidence as a whole. At his sample points one and two the dominance of hydrophytic vegetation is affirmatively stated in the report. For sample points three through six the information within the report is more equivocal but is adequately supplemented by other information in the record. For points three and four Mr. Sloan indicates that hydrophytic vegetation was "generally lacking due to recent tilling" with remnant culms of *juncus effusus* present. While this characterization is somewhat less than positive, one of the Appellant's consultants, Mr. Herriman, logged 100 percent dominance of hydrophytic vegetation at his test

pit numbers six and eight adjacent to sample points three and four respectively. In like manner for sample points five and six, Mr. Sloan's inclusion of a non-indicator willow species in his vegetation list might call into question whether the 50 percent dominance criterion had been met, but Mr. Herriman's notes fill the gap as to point five by showing 80 percent dominance at nearby test pit one. This leaves in question only sample point six, which contains both an OBL species and is located adjacent to the north boundary near an identified offsite open-water wetland location. This context allows one to reasonably infer that the 50 percent dominant vegetation standard would be met at sample point six as well, even if the willow entry were excluded.

32. The hydrology parameter presents a more complicated assessment because a single onsite observation may or may not be representative of a substantial period of the growing season. Mr. Sloan's report shows soils saturation at 10 inches depth for points four, five and six, which is a strong positive indicator due to the July observation time. But his report of "soils moist at 10 inches" does not really indicate a positive finding of saturation and at sample point one he found an inconclusive hydrology presence. By comparison, on May 2, 2008, Mr. Herriman doing deeper test pits recorded standing water at 36 inches within the holes excavated adjacent to Mr. Sloan's sample points one and two, at 32 inches adjacent to Mr. Sloan's sample points three and five, and at 30 inches adjacent to sample point four. None of Mr. Herriman's measurements indicate wetland hydrology. It should be noted, however, that both data sets could be correct, with the differences attributable to the presence or absence of recent storm activity. But in the broader picture, one would have to conclude that the two inconsistent data sets are insufficient to establish a clear growing season pattern.

33. A stronger case for the presence of wetland hydrology can be derived from Mr. Sloan's testimony and report observations indicating the presence of oxidized rhizospheres along live root channels at his sample points two through six, although the lack of data as to depth and concentrations is problematic. A less controversial source of support for Mr. Sloan's positive hydrology findings can be found in his citation of the FAC neutral test which allows the observer to infer the presence of wetland hydrology based on the relative dominance of OBL and FACW vegetation. Although the state manual seems to view the FAC neutral test more as a source of corroboration than a primary determinant, the fact that most of the vegetation cited by Mr. Sloan is either FACW or OBL could support its applicability here.

34. The issue over which the battle between Mr. Sloan and Mr. Bredberg and his associates is clearly joined concerns the presence or absence of hydric soils on the Spencer site. All of Mr. Herriman's test results for the ten test pits excavated on May 2, 2008, report a Munsell reading of 10YR3/2 for the upper 9 to 10 inches of AP horizon. For all the pits except one the chroma reading increases from two to three below the AP layer. Mr. Bredberg's testimony was that the brown upper horizon soils did not demonstrate a gray wetland chroma and that the organic reddish stains he observed were not redoximorphic in origin.

35. Mr. Sloan's report identifies hydric soils on the Spencer property based on soils mapping and notes chroma one soils in four test holes and chroma two soils in the remaining two, all with prominent mottles. Mr. Sloan's report also cites the presence of rhizospheres in four of the six holes as supporting a finding of hydric soils, but Mr. Bredberg and his associates were clearly correct in pointing out that oxidized rhizospheres are called out by the state manual as a hydrology indicator but not as a soils indicator. Such fact explains why the manual emphasizes that rhizosphere reports need to be documented as occurring during the growing season.

36. Mr. Bredberg and his associates are also correct in pointing out that Munsell color readings are not useful unless they are identified to a soil depth. The state manual at page 25 specifies the

location of interest for identifying hydric soils by their color features as being "the horizon immediately below the A horizon or 10 inches (whichever is shallower)". Based on Mr. Herriman's soil logs for the Spencer site, that horizon would be a soil band within the test pits at a depth between 9 and 12 inches, more or less. The fact that Mr. Sloan failed to provide test pit depth data for his color feature identifications renders them incapable of supporting firm conclusions as to the existence of hydric soils.

37. Based on the foregoing discussion, our conclusion would be that Mr. Sloan's wetland report provides a solid basis for the finding of hydrophytic vegetation on the Spencer site, modest support for a finding of wetland hydrology in sample points four, five and six and inadequate data to warrant a finding of hydric soils at any location. Under the state manual, soils mapping alone cannot establish hydric soils at a specific location without field verification. Since all three parameters need to be present in order to make a positive wetland determination, the overall outcome is that the Sloan report fails to establish the presence of jurisdictional wetlands on the Spencer site. In view of this conclusion it is unnecessary to review the results of Mr. Sloan's later tests to the south on the Hang property because their primary value was to suggest a wetland boundary in conjunction with the sample points on the Spencer site itself.

38. The lack of critical documentation within the Sloan wetland determination report also allows us to avoid having to attempt an *ad hoc* resolution of the long simmering policy conflicts within the Lower Green River Valley between the goals of preserving traditional agricultural practices and of providing critical areas protection in an area that seems to be growing wetter as a consequence of surface water runoff from the surrounding upland areas. Upland development has increased both stormwater discharges and sediment loads to the valley floor as erosional urban flows cut through the channels incised into the valley walls.

39. The exhibit 67 aerial photographs show that the central one-third of the Spencer property where major piles of both unprocessed and processed organic materials have recently been deposited was continuously farmed up until its conversion to a materials storage and processing use by Mr. Shear. Thus, at the moment of its conversion to a processing use this area was exempt from being regulated as a jurisdictional wetland due to its ongoing agricultural use. Looking to the historical basis alone, then, there is no support for a conclusion that Mr. Shear's processing use necessarily occurred within an existing jurisdictional wetland. The argument for regarding the central third of the Spencer property as a jurisdictional wetland therefore can only be that despite its historic agricultural use, it retained wetland characteristics similar to those of the tilled land immediately to its west. Whatever the ultimate theoretical feasibility of making such a showing, Mr. Sloan's report failed to conclusively document the current presence of wetlands immediately west of the organic piles sites. Accordingly, it provided an inadequate basis for inferring the presence of jurisdictional wetlands in the disturbed former farmland area adjacent to the east where the stockpiles are situated.

## E. **Flood Hazards**

40. The Federal Emergency Management Agency (FEMA) offers a nationwide flood insurance program to cover losses from river flooding. The FEMA program operates in cooperation with local jurisdictions, which are enticed to conform with and exceed FEMA standards by the promise of lower insurance rates. King County within Title 21A has adopted the FEMA regulatory framework, including standards that exceed minimum FEMA requirements.

41. FEMA conventionally regulates river floodplains based on a calculated one-foot rise in flood elevations, but it offers incentives to local jurisdictions to undertake a more ambitious level of

discipline. King County has risen to the challenge by adopting a floodplain regulatory system based on one-one hundredth of a foot in flood elevation rise. While this offers the illusion of great scientific precision, the actual legitimacy of such a refined standard of course depends on the completeness and accuracy of the underlying data.

42. King County's floodplain regulations, based as they are on a non-measurable rise in flood waters from a storm that has only a one percent chance of occurring in any given year, are purely mathematical constructs. Unlike a wetland determination, for example, where one can walk onto a piece of property, dig a bunch of holes and perform soils-testing and vegetation identification, there is no way to assess whether a parcel lies within or without the floodplain based on a site visit. Rather it all comes down to questions of regional mapping and modeling, and the data assumptions that underlie the exercise.

43. In a general way, the essential information that goes into the computation of the areal extent of a 100-year floodplain is historic rainfall data, river flow volumes and durations, topographical data (including major human interventions such as dams and levees), and the capacity of the computer program to model hydraulic movements on a three-dimensional scale. With perfect data and a perfect model one could theoretically calculate the extent of a floodplain to a very fine degree, maybe even to an accuracy level of less than one foot of elevation rise as presupposed by the county system.

44. The county regulatory system admirably recognizes that the existence and quality of data for defining any specific floodplain system are shifting and dynamic phenomena. Thus it does not arbitrarily call out any one piece of information as automatically controlling, but rather lists the functional elements to be considered and identifies potential sources of reliable information. KCC 21A.24.230A identifies the five components of a flood hazard area and subsection B provides a general menu of potential data sources to be analyzed. While Don Gauthier testified that as a practical matter DDES views the sources listed at KCC 21A.24.230B as enumerated in order of priority, the fact is that the ordinance itself imposes no such regime. Rather the ordinance states that, "When there are multiple sources of flood hazard data for floodplain boundaries, regulatory floodway boundaries, base flood elevations, or flood cross sections, the department may determine which data most accurately classifies and delineates the flood hazard area."

The only instance where the ordinance mandates the use of projections from a specific source is where a basin plan or hydrologic study approved by the county includes relevant flows under future developed conditions. No basin plan or other hydrologic study meeting the specifications of KCC 21A.24.230B has been adopted for the Lower Green River Valley.

45. The most recent and comprehensive document produced by King County regarding river and floodplain management is the 2006 King County Flood Hazard Management Plan adopted by the King County Council under ordinance no. 15673 on January 16, 2007. This plan at page 40 states that although some flood studies have been completed, "further effort is needed to update the remaining major river studies in King County." As its first example of a needed update it offers the following information on the status of the Green River:

> "Green River–On portions of the Green River, survey data is over 30 years old, cross-sections are spaced over a mile apart and the contour interval of the topographic maps is up to 5 feet. In some reaches of the river, the channel has laterally migrated since the data for the existing flood study was collected. Major commercial, industrial and residential developments, situated behind

> levee systems in the lower reach, have occurred throughout the basin since the floodplain maps were produced. A new flood study for the Green River from River Mile 5 to River Mile 45 was initiated in early 2006 and is partially funded with a grant from the Washington State Department of Ecology."

As noted, the Spencer property lies within the Lower Green River Valley, which is roughly defined as beginning at Auburn at River Mile 31and ending at Tukwila at River Mile 11. The plan tells us that as of the end of 2006 the baseline data for this area, while poor and generally outdated, was beginning to be upgraded by the county, subject to funding availability.

46. Many and perhaps most of the major floodplain mapping resources for this portion of the Lower Green River Valley have been entered into the hearing record. These include the FEMA Flood Insurance Rate Maps (FIRMs) generated in 1978, 1989 and 1995. These maps all show the Spencer parcel lying close to the western and southern edges of the 100-year floodplain but entirely within it. Each successive FEMA map is considered to be at least a slight improvement over its predecessor, owing to somewhat better topographical information and more advanced modeling techniques. The 1989 and 1995 FEMA maps are virtually identical. Andy Levesque of the county's Water and Land Resources Division within the Department of Natural Resources and Parks patiently offered invaluable information regarding the history and context of the county's floodplain regulatory system and its relationship to FEMA. The transcript of his March 13, 2008, oral deposition (exhibit 51) provided the following thumbnail summary of the current state of information:

> "So really there are five maps. There is '75, one which I tend to ignore because that's outdated. There's the '89 and '95 map set, which you can count as two if you want, but they're basically the same. There's a new draft D-FIRM, and then there's the new preliminary flood study produced by the county."

47. The D-FIRM, which is basically a digitalized version of FEMA's 1995 FIRM, has set off a controversy between the federal agency and the county. In the aftermath of Hurricane Katrina, a somewhat chastened FEMA decided that river levees should not be mapped as effectively containing river flows unless they have been certified as constructed to Army Corps of Engineers standards. Of the approximately 25 miles of levees that line the Green River channel, only a small segment near Tukwila has been federally certified. The remaining levees are older facilities, built over many years by various agencies and individuals, some public and some private, that function with a degree of reliability but have not been, and mostly cannot be, federally certified. If they are removed from the mapping analysis as constraints to flooding, the theoretical Green River floodplain expands to cover the entire valley from wall to wall.

48. In response to the proposed D-FIRM, the county has accelerated its efforts to produce its own floodplain mapping for the Lower Green River Valley and on March 18, 2008, issued a Lower Green River flood boundary work map produced on contract by Northwest Hydraulic Consultants. This map has been submitted by King County and the cities of Auburn and Kent to FEMA as a challenge to the proposed D-FIRM mapping. This challenge map gives effect to the existing levee system, and the local technical consensus appears to be that its overall level of topographical data is superior to the FEMA effort and the modeling program employed is a more sophisticated one. The county's 2008 work map (exhibit 44a) shows most of the western two-thirds of the Spencer parcel inside the 100-year floodplain. The eastern one-third plus a strip along the northern boundary where an access road has been recently constructed are shown to lie above the floodplain elevation.

49. The county's 2008 challenge to the FEMA D-FIRM brought to a crisis level a discontent with FEMA mapping that had been brewing for some time. A representative criticism is found at page 15 of the 2006 County Flood Hazard Management Plan:

> "Historically, King County's flood hazard regulations have been applied within the 100-year floodplain as mapped by FEMA. FEMA maps are based on current or historical land use in the watershed. As watersheds develop, the rate and volume of runoff reaching rivers and streams can increase. The boundaries of the 100-year floodplain may change over time, creating inconsistencies between actual floodplain conditions and those portrayed on FEMA maps."

50. In addition to FEMA's adopted rate maps and the county's 2008 map challenging the FEMA D-FIRM proposal, another document that received considerable attention within the hearing was exhibit 54a, entitled "Tributary 053 Existing Conditions Proposed Developments North Area" and dated October 13, 2005. This was a county Water and Land Resources Division product that was generated to depict the channelized tributaries that originate within the upland plateaus to the west and south and drain across the flatlands of the Lower Green River Valley north to the Green River. This map outlines the 100-year floodplain in the vicinity of the Spencer parcel in a way that generally mimics the later 2008 challenge map, but with one important difference. The 2005 tributary map shows only approximately the western one-third of the Spencer parcel lying within the floodplain. If that boundary were deemed accurate, then most of the materials processing operations occurring on the Spencer parcel would lie outside the floodplain and those that were inside could be shifted further east.

51. Mr. Levesque characterized the 2005 map as an improvement over the existing FEMA documents but an interim step on the road towards developing the 2008 challenge map. His view was that to the extent that differences exist between the two documents, the 2008 map was based on more complete information and therefore was more accurate. But since DDES's 2006 notice and order is predicated on the contention that the materials processing activities instituted on the Spencer parcel largely in 2005 should have been at that time subjected to floodplains regulatory review, exhibit 54a may be regarded in such context as having some vitality. It is probably not too farfetched to speculate that had Mr. Spencer and Mr. Shear walked into the DDES offices in November 2005 in search of an official floodplain determination, they likely would have been told that the exhibit 54a map was the best and most current information then available.

52. The actual dynamics of floodplain creation in the vicinity of the Spencer parcel are also a matter of some contention. There are two primary channel systems that drain across the valley floor from the upland plateau. The westerly complex is denominated the Mullen Slough system, and its mainstem tributary 045 travels due north within an excavated channel located about 400 feet west of the Spencer property. The Mullen Slough sub-basin to the Green River is estimated to cover approximately six square miles.

53. The Mill Creek sub-basin lies generally east of West Valley Highway and east of the Spencer parcel as well. The Mill Creek sub-basin is larger than Mullen Slough at about 22 square miles, and the Mill Creek channel generally lies at a higher elevation than the properties located to its west. The consequence is that when the Mill Creek channel overflows it generally floods west into the Mullen sub-basin and toward the Spencer and other farmland parcels located on the other side of West Valley Highway.

54. While there is an abundance of discussion about the effects of upland development on the valley floor stream systems in terms of both increased volumes and sediment transport from

downcutting the upland valley walls, it seems clear that for purposes of defining the 100-year floodplain these lesser tributary contributions are overwhelmed by the backwater flooding from the main Green River channel to the north. The metered release of the Green River from Hanson Dam is engineered not to exceed 12,000 cfs, but backwater flooding at the mouths of Mill Creek and Mullen Slough begins to occur at 3,000 cfs. Assuming that the county's most recent floodplain mapping is fundamentally accurate as to its hydraulic assumptions, it is apparent that the larger Mill Creek floodplain merges with the floodplain for Mullen Slough at some point north of S 277th Street.

In this framework the major question is: at what point does S 277th Street cease to function as an effective dike holding back floodwaters from the Green River to the north? The county's mapping model suggests that the 100-year flood event overtops S 277th Street while the anecdotal evidence of historical flooding offered by the Appellants and their consultant argue that S 277th Street in reality operates as an effective barrier to such major flood events. As noted, there are many factors that affect the floodplain analysis, including projections as to the integrity of the older levees and the Hanson Dam itself and the ability of the computer models to accurately replicate the hydraulics of the two merging backwater floodplains.

55. Flooding problems on the Mill Creek and Mullen Slough systems have been the subject of a number of studies dating back to the early 1990s. These studies have generated proposals for dredging the existing channels that have bumped up against a variety of environmental issues. But as the 2006 Flood Hazard Management Plan makes clear on page 230, there is also available a relatively simple but apparently expensive fix for the problem:

> "As recently as the 1990s, several studies were completed to investigate the feasibility of constructing another major pump station to serve Mullen Slough and Mill Creek, which flow into the Green River at River Mile 21.58 and 23.84, respectively. These tributaries share a large agricultural floodplain with the Green River. Although this pump station proposal was a key element in the 1970s-era Natural Resource Conservation Service flood control plan for the Green River valley, more contemporary studies indicate that any economic benefits that might result from construction of another large pump station at this location would be far exceeded by the project costs. Therefore, the shared floodplain of these tributaries near their confluence with Green River remains designated as part of the Green River's FEMA-mapped floodway."

For those not fluent in bureaucratese, what this paragraph tells us is that, notwithstanding the many fine Comprehensive Plan policies supporting agricultural preservation in the Lower Green River Valley, the cost of installing a pump station to protect these remaining agricultural lands is not offset by the meager tax revenues that such marginal agricultural properties are capable of generating. This means that the problem of agricultural flooding in the Lower Green River Valley can be expected to continue indefinitely, particularly in the context of current county funding constraints.

CONCLUSIONS:

**A. <u>Critical Areas</u>**

1. The King County Critical Areas Ordinance (CAO), as embodied in KCC Chapter 21A.24 and supported by the definitions contained in KCC Chapter 21A.06, provides a regulatory framework for determining the presence or absence of a flood hazard area on a potential floodplain property.

This framework is a thorough and adequate mechanism for purposes of floodplain planning and permit review. In the permit context it directs the department to assemble the available data, determine which data is most reliable and on that basis make a flood hazard area delineation.

2. For purposes of code enforcement, however, the CAO flood hazard provisions are incomplete. For enforcement purposes one needs also a clear and intelligible standard. KCC 21A.24.230 tells us how DDES should go about formulating such a standard, but until that process is actually undergone, no standard exists. As the ordinance itself suggests, the normal procedure by which the county establishes a flood hazard area is through the adoption of a basin plan or some other functional plan as defined by KCC 20.08.132. While the 2006 King County Flood Hazard Management Plan is precisely the type of functional plan that could be employed to define and enact flood hazard area standards for specific locations, this document defers such regulatory matters to a later date. Section 1 of ordinance 15673 adopting the 2006 Flood Hazard Management Plan is explicit in this regard: "However, while the plan sets forth what the county currently believes are best practices, nothing in this plan creates or precludes the creation of new land use requirements, laws or regulations."

3. The fact that the county has been slow to adopt specific regulations defining flood hazard areas for different floodplain locations should not come as a great surprise. The county's decision to implement floodplain regulations based on a calculated rise of one-one hundredth of a foot in flood elevation is a double-edged sword. While such a standard may provide insurance rate benefits under the FEMA system, the baseline data required to make such an exacting standard rationally defensible at any location is daunting to contemplate and costly to generate. One expedient that could have been adopted would have been simply to define by ordinance the current FEMA map as presumptively valid and shift upon affected property owners the burden of demonstrating that the FEMA mapping is incorrect in its specific application. To the county's credit it did not choose that route, which would have placed a huge financial burden on potentially affected property owners.

4. DDES has attempted to counter the critique that the CAO fails to specify a flood hazard area standard for the Green River Valley by focusing attention on the term "components" as it appears within KCC 21A.24.230.A. The relevant code provision states that "a flood hazard area consists of the following components" and then lists five elements, including the floodplain, the floodway, the flood fringe and channel migration zones.

   The DDES argument assigns to the word "components" a regulatory importance that it cannot sustain. The word standing alone simply means "parts" and is purely descriptive in scope. It does not contain or imply a prescriptive element. More critically, subsection KCC 21A.24.230B immediately following tells us how those components are to be used within the flood hazard area delineation analysis. DDES is required to sift through and compare the multiple sources of flood hazard data and evaluate their accuracy in formulating a relevant standard. When KCC 21A.24.230 sections A and B are read together, it is plain that the term "components" has been used in subsection A in its customary, merely descriptive manner.

5. While KCC 21A.24.230 provides a full menu of component floodplain factors and a roster of potential floodplain data resources, including at the top of the list the FEMA FIRM maps, it does not create a presumption that any one of these resources is to be deemed accurate and controlling for regulatory purposes. Without such a formal regulatory designation, there is no easily ascertainable adopted county flood hazard area standard applicable to the Spencer property, and the portion of the county's notice and order that cites the Appellants for conducting materials processing operations and clearing, grading and filling within a flood hazard area becomes a

gesture without legal effect. Therefore, the portion of the appeals that challenges the notice and order citations for activities within a flood hazard area must be granted.

6. With respect to the wetland citations, the problems encountered by DDES in support of its notice and order are not the result of gaps in the regulatory structure. Wetlands are clearly defined under the county code and a site inspection provides an adequate mechanism for making a wetland determination. The problem here, rather, is that the county's wetland determination itself did not adequately document the presence of wetland conditions for one of the three essential regulatory parameters. The Spencer property is a difficult site to evaluate because the soils have been historically disturbed, but the disturbance itself was the result of legal agricultural activity. This meant that the atypical situations methodology outlined within the state manual could not be applied directly to the legally tilled areas, but only to adjacent areas where the new fill piles were later deposited. More critically, the hydric soils analysis is quite specific as to the depths required for critical observations, and Mr. Sloan's failure to record test data depths undercut his ability to adequately document a positive finding.

7. Another tactical error by DDES was its failure to distinguish between a preliminary wetland report and a more complete study that is sufficiently detailed to withstand critical attack from an adverse wetland technician. Jon Sloan's initial site investigation of the Spencer property was surely good enough to warrant requesting further wetland information. But when the Appellants came forward with a conflicting wetland report that rejected Mr. Sloan's initial conclusions, the evidential bar was raised. It then became incumbent on DDES to either provide a compelling explanation why Messrs. Bredberg and Herriman's conclusions were simply wrong, or to bring in new and further information filling the data gaps that they identified in the Sloan study.

   DDES did neither, and that was a fatal mistake. One appreciates that DDES was in a difficult position because Mr. Sloan had departed county employment and was not readily available to fortify his initial results. But sympathy is not evidence, and the shortcomings of Mr. Sloan's initial report were never addressed by DDES. The bottom line is that DDES did not make a competent demonstration of the existence of hydric soils on the Spencer parcel; therefore the appeals must be granted with respect to the notice and order citations for wetlands on the property.

**B. <u>Nonconforming Use</u>**

8. The most important questions raised in this proceeding relate to the notice and order's citation of the Spencer property for operation of a materials processing facility in an A-10 zone without required permits and approvals. The definition of a materials processing facility was added to the county zoning code in September 2004, pursuant to section 6 of ordinance 15032. This same ordinance amended KCC Chapter 21A.22 to require materials processing operations to obtain a grading permit prior to commencement and to combine the materials processing review procedures with those already existing within the chapter for mineral extraction. KCC 21A.06.742 supplies the new definition at issue:

> "Materials processing facility: a site or establishment, not accessory to a mineral extraction or sawmill use, that is primarily engaged in crushing, grinding, pulverizing or otherwise preparing earth materials, vegetation, organic waste, construction and demolition materials or source-separated organic materials and that is not the final disposal site."

9. Since the code provisions governing materials processing facilities did not exist in 2003 and early 2004 when Mr. Shear first began his occupancy of the Spencer site, the question arises as to whether Mr. Shear's business activities qualify as a legal non-conforming use (NCU) established prior to the adoption of ordinance 15032. Analytically, there are two parts to this question. First, when did Mr. Shear's operation on the Spencer parcel become a materials processing facility as specified by the current code definition, and, second, were Mr. Shear's activities on the property prior to September 2004 some other form of legal use under then-existing zoning provisions?

10. The core element of the materials processing facilities definition focuses on the transformation of raw materials through a crushing, grinding or pulverizing operation. While preparatory activities certainly occurred before September 2004, there is no conclusive evidence that actual crushing operations and grinding began before the winter or spring of 2005. That is when the first complaints came into the DDES office and when Mr. Hang, the neighbor to the south, testified to first being concerned about offsite dust impacts. So the question becomes whether one can conclude under the code as applied to these facts that establishment of the materials processing facility predated commencement of screening and crushing operations.

11. It appears that establishment of Mr. Shear's materials processing facility use of the Spencer parcel involved three stages. The first stage was site preparation, where the property was secured, configuration of the property for the use was begun, and equipment and raw materials stockpiles were brought in. At the second stage the raw material was being ground into the ultimate product. And, in the third stage the finished product was transported offsite to ultimate consumers. The record demonstrates that prior to September 2004 all of the essential first-stage site preparation activities were underway. The site had been rented from Mr. Spencer, equipment was being assembled, some grading had occurred and a few stockpiles were in evidence. The April 25, 2004 aerial photograph of the site (exhibit 67f) shows the access driveway having been extended to and along the northern site boundary, new grading in the eastern one-third of the property and a cluster of some seven or eight mounds near the property's northwest corner.

12. KCC 21A.08.010 provides the county zoning code requirement for establishing land uses. It states that the "use of a property is defined by the activity for which the building or lot is intended, designed, arranged, occupied or maintained." It further provides that the use is considered "permanently established when the use will or has been in continuous operation for a period exceeding 60 days."

13. The first three of the five defining characteristics listed within KCC 21A.08.10—intent, design and arrangement—are all focused on purpose. They are therefore prospective in effect. The record demonstrates that Mr. Shear, soon after initially approaching Mr. Spencer concerning use of the property for overflow storage, became committed to his larger purpose of establishing a materials processing operation on the Spencer parcel. He already had such a business nearby on the east side of West Valley Highway at a site that was becoming too small for his purposes and under pressure from the county to undergo a permitting process. By early 2004 Mr. Shear seems to have figured out that it would not make much sense for him to undertake an elaborate and costly permitting process with DDES on a site that was already too small for his ultimate needs.

14. Mr. Shear's activity toward establishing a materials processing facility on the Spencer property seems to have been without major interruption. The record, spotty though it may be in places, shows a steady increase in the variety and intensity of site use starting in late 2003 and proceeding through 2006. Further, there is no evidence that at any point in this progression of an

interim use established on the Spencer parcel by Mr. Shear that would have been independently viable as a business activity.

Based on the testimony describing the early conversations between Shear and Spencer, DDES argues that one should view the storage of organic piles on the property as a separate, independent use. But the April 2004 aerial photograph shows that this storage had already been directed to the northwest corner of the property at the furthest possible distance from the site's access to West Valley Highway. Storage in a remote corner implies an expectation for use on the site itself after its ultimate configuration and development, not for temporary storage and use elsewhere. If Mr. Shear's purpose had been merely temporary storage, the stockpiles surely would have been placed much closer to West Valley Highway. These facts evince an intent, design and purpose to establish a larger materials processing operation, not merely a temporary storage for use at another location. The prospective purpose required by KCC 21A.08.010 was established at the time of the April 25, 2004 aerial photograph, which was more than 60 days before the adoption of Ordinance 15032.

15. So the record shows that a materials processing facility, as such was eventually defined by KCC 21A.06.742, was in existence on the Spencer site in April 2004, thus making it a legal NCU within the framework of the ordinance 15032 standard. But for it to actually become a legal NCU in April 2004, Mr. Shear's operation would have needed to be a permitted use under one of the relevant zoning standards in effect at that time. This requires us to ponder the conundrum of the "interim recycling facility" and its relationship to "yard waste processing facilities" and "source-separated, organic waste processing facilities."

16. The zoning code history for the terms identified above dates back to at least 1993, and the parties have very helpfully laid out much of this history in their various briefs. To do full justice to the saga would probably require a fair number of pages, but the gist of the matter can be encapsulated.

In the twilight days of the old Title 21 zoning code, ordinance 10408 introduced a definition for "interim recycling facility," which was deemed to mean:

> "A site or establishment, which is not located at the final disposal site, engaged in the collection or treatment of recyclable materials and including drop-boxes, yard waste processing facilities and collection, separation, and shipment of glass, metal, paper, or other recyclables to others who will reuse them or use them to manufacture new products."

17. Shortly thereafter, Title 21 was repealed and replaced by Title 21A, at which time the definition for an interim recycling facility was reformatted and slightly amended. Specifically, the term "yard waste processing facilities" was replaced with the term "source-separated, organic waste processing facilities." Under this scheme, which remained largely unchanged `until September 2004, the General Services Land Use table at KCC 21A.08.050 displayed that an interim recycling facility was a permitted use within the Agricultural Zone subject to the provisions of development condition 21. Condition 21 specified that the interim recycling facility permitted use within the Agricultural Zone was "limited to source-separated yard or organic waste processing facilities."

18. Under the new scheme adopted in September 2004 within ordinance 15032, an interim recycling facility is retained within the KCC 21A.08.050 General Services table as a permitted use in the various residential and commercial zones, but is dropped from the Agricultural Zone. Moreover,

the reference to source-separated processing has been purged from note 21, which now limits the use in the designated zones to drop-box facilities accessory to some other public or community use. Meanwhile, a materials processing facility entry has been added to KCC 21A.08.080, Manufacturing Land Uses, as a permitted activity in the Agriculture Zone subject to a development condition 13, which limits such use to "source-separated organize waste processing facilities at a scale appropriate to process the organic waste generated in the agricultural zone." Under the new scheme materials processing facilities are also permitted in the Forest, Mineral and Rural Zones subject to different conditions, and permitted unconditionally in the Industrial zone.

19. The critical issue for our purposes is whether Mr. Shear's operation on the Spencer parcel, which meets the materials processing facility definition under the current code, also qualified as an interim recycling facility under the earlier code. And the resolution of this question seems to depend on whether the change in the definition example described above in Conclusion no. 17 from "yard waste processing facilities" to "source-separated, organic waste processing facilities" constituted an expansion or a limitation.

DDES argues that it is a limitation because the term, "source-separated," implies an exclusion, whereas the prior yard waste processing example was unrestricted.

20. Our view is that the DDES argument is not correct. While "source-separated" is indeed a limiting qualifier, the scope of the definitional term overall has been greatly enlarged. Organic waste processing facilities is a vastly broader use category than yard waste processing facilities. The "source-separated" modifier was superfluous with respect to the yard waste example because yard waste itself intrinsically presupposes an adequate level of source-separation. As pointed out by the attorney for Appellant Shear, the zoning code definition of "source-separated organic material" is directed toward removing chemically-treated and other toxic materials from the organic waste stream. In addition, the core definitional term, the "collection or treatment of recyclable materials," clearly applies to a process of assembling and refining landscaping and yard waste, which is exactly what Mr. Shear does on the Spencer property. Since the source-separated qualifier is directed toward removing toxic materials, a concern which is not a factor in dealing with landscaping and yard waste, its application as an independent requirement is not warranted in this instance. Mr. Shear is not required at the materials source to separate the branches from the twigs, and the twigs from the leaves.

In summary, the type of materials processing performed on the Spencer site by Mr. Shear meets the definition for an interim recycling facility as such was implemented within the applicable use tables of the Title 21A zoning code in effect in 2004 immediately prior to the adoption of ordinance 15032. Mr. Shear's operations therefore qualified at that time as a legal NCU.

21. Having determined that the materials processing use of the Spencer property was legally established prior to September 2004, the main questions left to be resolved are whether the use has been expanded since 2004 in a manner that requires a conditional use permit (CUP) and whether and to what degree the operations on the Spencer site are subject to ongoing regulation under KCC Chapter 21A.22. In addressing these questions it is first important to note that the legal progression described above is not from a permitted use to one that is prohibited by code, but rather from a permitted use with few regulatory controls to a permitted use subject to a detailed regulatory regime. As a category of use Appellant Shear's operation was permitted prior to September 2004 as an interim recycling facility and after September 2004 as a materials processing facility. Thus the use has not become one that the county as a matter of policy is

seeking to terminate, but simply a use that is now subject to a more ambitious level of regulatory review.

22. The non-conformance provisions of KCC Chapter 21A.32 do not forbid the expansion of a NCU. Rather, KCC 21A.32.065 requires that any expansion in key use parameters greater than 10 percent undergo CUP review. KCC 21A.06.427 defines the term expansion to mean the "act or process of increasing the size, quantity or scope."

23. While the purpose-based provisions of KCC 21A.08.010 support a conclusion that Mr. Shear's processing use was legally established prior to September 2004, it is also clear that the full implementation of that use, including the materials grinding and trucking operations and their attendant impacts, was only completely manifested in 2005 and thereafter. Therefore, in terms of the 2004 activity NCU baseline, the processing use on the Spencer property has been greatly expanded since the adoption of ordinance 15032 and, accordingly, requires a CUP.

24. This outcome is consistent with applicable case law, which is mostly framed in terms of NCUs that are prohibited outright rather than more actively regulated. *Keller v. Bellingham*, 92 Wn2d 726 (1979), distinguishes between an intensification and an enlargement, stating that the former occurs when the nature and character of the use is unchanged and substantially the same facilities are used. *Meridian Minerals v. King County*, 61 WnApp 195 (1991), further elaborates on this distinction, suggesting that the intensification of a NCU can become so extreme that a jurisdiction may be justified in treating it as a different use activity: "When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a non-conforming use, courts may find a change to be proscribed by the ordinance." (61 WnApp at 209.) In other words, while the legal nature of the processing use on the Spencer parcel did not change after 2005, its volume and intensity were greatly enlarged, and the provisions of KCC 21A.32.065 requiring such a NCU expansion to obtain a CUP are consistent with applicable Washington case law.

25. We also agree with DDES that the Washington Supreme Court decision in *Rhod-A-Zalea v. Snohomish County*, 136 Wn2d 1 (1998), stands for the proposition that the ongoing materials processing operations on the Spencer parcel are subject to the county's police power regulations enacted to promote the health, safety and welfare of the community. We further accept that KCC Chapter 21A.22 is precisely the type of police power regulation that the *Rhod-A-Zalea* case envisions. The interesting question here is not so much whether the county has police power authority to regulate on an ongoing basis materials processing operations, but rather how exactly this chapter relates to existing non-conforming activities.

26. KCC Chapter 21A.22, as presently configured, is a somewhat infelicitous melding of mineral extraction and materials processing regulations into a single system. KCC Chapter 21A.22 originally was enacted to provide for the siting and regulation of mineral extraction operations. In September 2004, at the time of adoption of ordinance 10532, regulation of the newly-created category of materials processing operations was inserted into the existing mining review procedures along with some minimal amendments and adaptations. The cut-and-paste nature of this regulatory fusion has raised some problems of interpretation.

27. At the heart of the debate is the effect of KCC 21A.22.040. KCC 21A.22.030 requires both mineral extraction and materials processing operations to "commence only after issuance of a grading permit". Then KCC 21A.22.040 goes on to provide that "to the maximum extent practicable, non-conforming mineral extraction operations shall be brought into conformance with the operating conditions and performance standards of this chapter during permit renewal."

The Appellants argue that the failure of section 21A.22.040 to mention non-conforming materials processing operations means that such operations are afforded a regulatory free pass under KCC 21A.22. In other words, according to the Appellants' interpretation, based on the subsection .040 language KCC Chapter 21A.22 only applies to materials processing operations that are being newly proposed and provides a complete exemption to existing non-conforming operations.

28. Beyond the elementary fact that the Appellants' interpretation defies common sense, one can also find an adequate explanation for the apparently anomalous language in KCC 21A.22.040 by looking at the parallel terms within KCC Chapter 21A.32 governing NCUs generally. The key provision here is KCC 21A.32.020.A, which reads as follows: "With the exception of non-conforming extractive operations identified in KCC 21A.22, all non-conformances shall be subject to the provisions of this chapter." So, to make a long story short, the purpose of KCC 21A.22.040 is not to give non-conforming materials processing operations a regulatory free-ride, but rather to assure that non-conforming mineral extraction operations are not exempted from oversight. The message of KCC 21A.22.040 is that while non-conforming mineral extraction operations still do not need to get a CUP, relevant operating and performance standards will be applied through the standard grading permit renewal procedure. No mention is made of materials processing operations in this context because they were never exempted from the provisions of KCC Chapter 21A.32.

Admittedly this is poor draftsmanship, but the intent seems clear enough. Non-conforming minerals processing operations are subject to the requirements of KCC Chapter 21A.32 when they seek to expand, and to the ongoing operational review specified by KCC 21A.22. As will be spelled out below, the application of KCC Chapter 21A.22 to processing operations on the Spencer property needs to be subject to a the limitation that such procedures should not be used as a back-door pretext to force the legally established non-conforming activity out of business.

## C. Grading

29. Our earlier discussion of wetland and flood hazard critical areas implicitly dealt with the clearing, grading and filling citation within the notice and order to the extent that it was dependent upon the presence or absence of the critical areas in question. And, a tight reading of the notice and order allegation of "clearing, grading and/or filling with a critical area" might exclude consideration of grading issues except within the critical area context. However, our ongoing pre-hearing effort to reshape the appeal issues so that all legitimate major questions were addressed in this marathon proceeding was broad enough to include the issue of whether grading has occurred on the Spencer site without specific reference to the critical areas question, i.e., whether grading requiring a permit may have occurred on the property just on the grounds that the standard exemption levels were exceeded. Although the grading permit exceptions menu has recently grown so complex that it now occupies a matrix table covering two-and-a-quarter pages (along with another page of explanatory notes), the traditional basic volumetric exception (now codified at note 1 of KCC 16.82.051.C) remains largely unchanged. "Excavation less than five feet in vertical depth, or fill less than three feet in vertical depth that, cumulatively over time, does not involve more than 100 cubic yards on a single site" are deemed activities exempt from grading permit requirements.

30. In addition to the permit exceptions categories, the grading code definitions have also evolved over time. At the earliest point when Mr. Shear began his operations on the Spencer site, the term "fill" would have simply referred to a deposit of earth material. This definition would have arguably excluded piles of vegetative matter, at least prior to their decomposition. But the operative definition has now expanded. Within the grading ordinance the term "fill" presently

refers to "a deposit of earth material or recycled or reprocessed waste material consisting primarily of organic or earthen materials, or any combination thereof, placed by mechanical means."

So this definition is now broad enough to at least include the processed organic waste materials on the Spencer site. And since the *Rhod-A-Zalea* case tells us that ongoing regulation of a materials processing operation pursuant to current grading permit standards is a legitimate exercise of the county's police power, there is no serious argument for applying the grading regulations except through the prism of the present code scheme.

31. This shifts our analytical emphasis away from the nature of the materials to the character of their placement. In other words, does the term "deposit" include the creation and removal of temporary storage piles? In his December 4, 2009 post-hearing brief the attorney for Appellant Shear argues that the creation of temporary stockpiles is not equivalent to the deposit of fill under the grading ordinance. He suggests that Mr. Shear's employer, BRC:

> "...merely mechanically manipulates a stockpile of raw material brought from elsewhere, grinds it to various sizes depending on the desired product and then stores the product until it is sold to third parties. The surface of the property is not altered....The height of the stockpiles increases and decreases depending on the time of year and the demand for product. If BRC were to clear away the stockpiles, there would be no change in the topography of the property from its original state. The property would revert to its condition as farmland. To say that BRC's activities are grading, clearing or filling requires an extreme distortion of the definitions both in the code and in the common understanding of those terms. Do all businesses which have stockpiles of materials onsite require grading permits?"

32. We agree with Appellant Shear that the creation of temporary stockpiles and their removal does not involve the deposit of fill within the meaning of the grading ordinance. Further, beyond Mr. Lawler's alliterative rhetorical volley, there are numerous instances where the framework and context of the grading code itself support the inference that the legislative intent was not to regulate temporary stockpiles as an instance of grading. Beginning with the definitions themselves, KCC 16.82.020.N identifies "grade" as "the elevation of the ground surface." By implication, therefore, grading would result in changing the elevation of the ground surface, which connotes an element of permanence.

This implication is supported at numerous other places within the grading standards listed at KCC 16.82.100. These standards require the ground's surface to be prepared to receive fill by removing unsuitable material, an action that only makes sense in the context of permanent placement. Further, recycled materials cannot be used as fill unless intermixed with earthen materials in sufficient quantity to enable satisfactory compaction. The compaction requirement itself suggests permanent placement, as do additional requirements for soil moisture-holding capacity and topsoil layering.

33. Finally, the reclamation standards contained within KCC 21A.22.081, while they relate to restoring mineral extraction sites specifically, provide a usage of terms that is instructive. Subsection C.7 reads as follows:

> "Waste or soil piles shall be used for grading, backfilling or surfacing if permissible under this section, then covered with topsoil and planted in accordance with...this section. Waste or soil piles not acceptable to be used for fill in accordance with this chapter or as topsoil in accordance with... this section shall be removed from the site."

What is important about this subsection is that waste and soil piles are being described as something other than fill, *per se*: such piles only become fill after they are properly and permanently placed.

34. In short, the creation and removal of temporary storage piles of processed yard and landscaping waste are not the deposit of fill within the regulatory ambit of the grading code. But this does not lead inexorably to the conclusion that no unauthorized grading has occurred anywhere on the Spencer property. If within exhibit 67 the 2002 aerial photograph is compared with those for 2004 and 2005, one has no trouble in seeing that on the eastern one-third of the property adjacent to West Valley Highway about an acre of vegetation has been freshly cleared and graded. The 100-cubic yard grading exemption threshold is exceeded by excavating an acre to an average depth of less than one inch, so a reasonable inference derived from the record is that the grading depicted in the 2004 and 2005 aerial photos on the eastern one-third of the Spencer site surpassed the 100-cubic yard exemption limit and required the issuance of a grading permit.

35. Thus, notwithstanding the exotic and temporary nature of the storage piles of organic materials generated by Mr. Shear's processing operation and the absence of demonstrable grading in critical areas, ordinary clearing and excavation occurred on the eastern third of the Spencer property in volumes sufficient to sustain a grading violation citation under the notice and order. Moreover, our earlier conclusion that the materials processing operation on the Spencer property is subject to ongoing regulation pursuant to KCC Chapter 21A.22 makes the nuances of the grading violation analysis somewhat beside the point. Chapter 21A.22 designates the grading permit as the chosen regulatory mechanism for ongoing site management and review, without requiring any factual predicate as to specific instances of grading activity.

## D. <u>Enforcement</u>

36. Before moving into a discussion of remedies and future procedures, there is one loose end that needs to be secured. From the outset one of the pillars of the Appellants' legal strategy has been to claim that neither Mr. Spencer nor Mr. Shear are parties responsible for any code violations that may be found present on the Spencer property. Mr. Spencer's argument is simply that as the property owner he had no control over the behavior of his tenant, Mr. Shear. Mr. Shear, on the other hand, initially adopted a somewhat more elaborate, hide-the-ball strategy of pretending that the business operator on the Spencer site was an entity called Mountain View Recycling, whereas in reality it was BRC, a corporation apparently controlled by Mr. Shear's long-time girlfriend and the mother of his children.

37. Within the county's provisions relating to code enforcement, KCC 23.02.010.K supplies a very broad and inclusive definition of "person responsible for code compliance." The term is defined as meaning "either the person who caused the violation, if that can be determined, or the owner, lessor, tenant or other person entitled to control, use or occupy, or any combination of control, use or occupy, property where a code violation occurs, or both." While a rather inelegant specimen of legal draftsmanship, the "or both" at the end of the definition conveys an intent to hold all the listed entities responsible, not just one or another. Thus, whether Mr. Shear should be regarded as the tenant or merely the tenant's agent is not a decisive distinction. In either

instance, as the individual in charge of the business operations on the site he was "the person who caused the violation" as well as the "person entitled to control, use or occupy" the premises. And Mr. Spencer is the property owner as well as the lessor, both listed categories under the definition.

A tenancy based on an oral lease agreement with Mr. Shear or BRC works against Mr. Spencer's argument, not for it. In the absence of a written lease, Mr. Spencer is entitled to retake control of the property at any time based on 30 days' notice. In short, regardless of whether Mr. Shear is the tenant or simply BRC's agent, both he and Mr. Spencer are persons responsible for code compliance within the meaning of KCC Title 23.

38. Regarding the ultimate issues under the notice and order, in brief summary DDES has failed to establish the existence of critical areas violations on the Spencer property or that the manipulation of temporary stockpiles qualifies as grading under the grading code. DDES did not demonstrate that Mr. Shear's processing operation was a prohibited use at the time of its establishment, but the record does document that the operation has been significantly expanded on the ground since the adoption of new regulations governing materials processing facilities. The record also demonstrates the existence of conventional grading violations on the eastern one-third of the site. What this all adds up to is a requirement for Messrs. Spencer and Shear to get a CUP for the enlargement of the NCU and to submit to ongoing regulation and review under KCC Chapter 21A.22 pursuant to a grading permit process.

39. Before describing the future regulatory process in more detail, it is perhaps useful to address the relationship generally between this appeal proceeding and such future regulatory activities. Based on its comprehensive application review process, DDES subscribes to what might be characterized as the "innumerable bites at the apple doctrine." In DDES's view if it brings a notice and order action against a property owner citing 10 instances of alleged violations, and after an appeal hearing the property owner prevails on 9 of those 10 items, DDES believes that its success on the one item still entitles it to submit the property owner to the full gamut of review requirements, including all those upon which the property owner prevailed on appeal. This is how DDES explained its position in its closing brief:

> "The Examiner should not award Appellants' illegal behavior by allowing them to avoid any part of the permit process. The Examiner should explicitly require Appellants to submit to regular permit procedures for any future proposed use of the subject parcel."

40. In addition to tacit assumption of moral superiority, the DDES position is premised squarely on the Division II Appellate decision in *Young v. Pierce County*, 120 WnApp 175 (2004). Pierce County has assembled and adopted a wetland atlas, which presumptively designates properties as wetlands based on available data. If a property is designated within the atlas, or lies within 150 feet of another designated property, the county requires the property owner to perform a wetland determination before commencing any regulated development activity. In the reported case, the property owner engaged in clearing trees and other vegetation without first performing a wetland determination on a property listed in the county's atlas as an unverified wetland. The county issued a cease and desist order requiring wetland review to ascertain the presence of wetlands and buffers in the area, and the property owner challenged the legal sufficiency of the cease and desist order in Superior Court. The Court of Appeals ruled that Pierce County could require the property owner to submit an application and perform a wetland determination based on its atlas designation without first proving that the data underlying the designation was reliable or conclusive as to wetland status.

41. Our view is that the holding in *Young* does not determine the scope of remedies in the instant situation because the regulatory posture of Pierce County in the *Young* case was fundamentally different from that of DDES within this appeal. Pierce County did not take the position categorically that there was a wetland on the Youngs' property. Its position, rather, was that the admittedly incomplete wetland atlas identified the Young property as an area of concern, and on that basis the county could require a wetland delineation to either confirm or disprove the atlas designation.

42. DDES's position, on the other hand, as expressed in its notice and order, is that wetlands and flood hazard areas exist unequivocally on the Spencer property and that Mr. Shear's materials processing facility use must be terminated because it impinges on such critical areas. Thus, while Pierce County's position was that more wetland information was needed, and its cease and desist order was directed toward obtaining that information, the DDES notice and order asserts unconditionally that wetland and flood hazard critical areas exist on the Spencer parcel and business operations must be shut down. DDES, having adopted a more ambitious and conclusive regulatory stance, must be prepared to accept the burdens of its failure as well as the benefits of its success. Accordingly, the conditions attached to this appeal decision will place appropriate limitations on further review designed to preserve to the Appellants the successful elements of their appeal and will retain Hearing Examiner jurisdiction to the extent necessary to assure that these limitations are observed.

DECISION:

The appeals of Jeffrey Spencer and Ronald Shear are GRANTED, in part, and DENIED, in part. They are GRANTED with respect to citations within the notice and order alleging unlawful or unpermitted activities within critical areas and that the materials processing facility was not a legally permitted use at the time of its establishment. The appeals are DENIED with respect to assertions that the Appellants are not parties responsible for code compliance, that the expansion of materials processing operations on the site subsequent to September 2004 is exempt from the requirement to obtain a CUP, and claims that a materials processing operation is not subject to ongoing regulation pursuant to KCC Chapter 21A.22.

ORDER:

**Condition no 1**

No penalties shall be assessed against the Appellants or their property if the deadline imposed and requirements stated herein are met. Failure to meet such stated deadline shall entitle DDES to assess penalties as of such deadline date on the grounds that the permitting requirements of KCC Chapter 21A.22 have been violated, and to abate those materials processing facility operations established on the Spencer site after September 28, 2004.

No later than June 30, 2010, the Appellants shall submit the following materials to DDES:

A. A complete CUP application for expansion on the site of a materials processing facility as a NCU.

B. Pursuant to the requirements stated at KCC Chapter 21A.22A , a complete grading permit application for expansion of a materials processing site and for the ongoing conduct of materials processing operations.

C. A written lease between the site owner and the site tenant for use of the entire parcel as a materials processing facility, with tenant renewal options over at least a five-year period.

Existing materials processing operations may continue on the site at current levels during the pendency of the permit review process.

**Condition no. 2**

The DDES permit applications review shall be conducted subject to the following limitations, which are deemed necessary to preserve to the Appellants the fruits of their appeal efforts:

A. The scope of the CUP review shall be limited to consideration of a proposal to expand the materials processing facility use to include onsite screening and grinding of organic raw materials, the impacts of increased levels of delivery and storage of raw materials on the site and the transport of finished product offsite, and the scope and management of onsite retail operations. The baseline legal NCU not subject to CUP review shall be defined by the uses in existence on the site on September 28, 2004. The Appellants shall not be required to demonstrate during CUP review that the proposed facilities are at a scale appropriate to process the organic waste generated in the agricultural zone.

B. The conditional use and grading permit review procedures shall not be used to prohibit, directly or indirectly, continued operation of a viable materials processing facility use at the site.

C. DDES shall not require further studies or review of whether the Spencer property is within a flood hazard area or contains a jurisdictional wetland, except that:

   i. a code-mandated buffer may be required to protect the offsite open-water wetland feature on the parcel adjacent to the north; and

   ii. requirements for the location and configuration of storage piles may take into account potential floodwater patterns.

D. Compatibility with adjacent uses shall be achieved through the buffer and screening requirements provided by KCC 21A.22.070.

E. DDES conditions shall conform to any Health Department requirements imposed for mitigation and management of a solid waste handling facility on the site and to Puget Sound Clean Air Agency conditions for mitigating air quality impacts.

**Condition no. 3**

Hearing Examiner jurisdiction is hereby retained to consider requests to modify the conditions of this order, to resolve questions and conflicts regarding DDES's adherence to the requirements of condition no. 2 above, and to review challenges to any DDES determination that a conditional use or grading permit application submitted pursuant to condition no. 1 above should be cancelled. DDES, or either of the Appellants, may request in writing Hearing Examiner review and determination of the matters specified within this condition. A request to modify the conditions of this order will not be deemed a request for reconsideration resulting in extension of judicial appeal deadlines.

**Condition no. 4**

A. Hearing Examiner jurisdiction hereunder shall terminate upon the later of the following two dates:

The issuance by DDES of a CUP decision on an application to expand the materials processing facility on the Spencer property, or 30 days after the issuance of an initial grading permit decision for materials processing operations on the Spencer property. Challenges to a DDES CUP decision shall follow normal administrative appeal channels.

B. Hearing Examiner jurisdiction will also be deemed terminated 30 days after the expiration of the deadline stated in condition no. 1 if the application materials specified therein have not been submitted, or 30 days after written notice to the Appellants of the expiration or cancellation of any permit application specified in condition no. 1, if such expiration or cancellation has not been challenged by a timely request under condition no. 3 of this order.

ORDERED this 28th day of January, 2010.

Stafford L. Smith
King County Hearing Examiner *pro tem*

**NOTICE OF RIGHT TO APPEAL**

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the county regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in superior court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JUNE 23-26, 29-30, AND JULY 1-2, 2009, PUBLIC HEARINGS ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E05G0099 AND SEATTLE-KING COUNTY PUBLIC HEALTH DEPARTMENT FILE NO. CO 0057548

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Cristy Craig representing the Department of Development and Environmental Service; Roman Welyczko representing the Seattle-King County Public Health Department; Robert West representing Appellant Jeffrey Spencer; James Klauser representing Appellant Ron Shear; Bob Rowley representing Buckley Recycle Center; Bill Turner; Yee Hang; Andrew Levesque; James Hartley; Robert Manns; Al Tijerina; Randy Sandin; Ronald Shear; Mara Heiman; Jon Sloan; Doug Dobkins; Jeffrey Spencer and Anthony Jay Bredberg.

The following Exhibits were offered and entered into the record:

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| Exhibit No. 1 | Department of Development and Environmental Services (DDES) Stop Work order posted at 28225 West Valley Highway S on May 13, 2005 by DDES Site Development Specialist Robert Manns |
| Exhibit No. 2 | Two photographs of subject property taken by Al Tijerina during site visit in December 2005 (oversize) |
| Exhibit No. 3 | Two photographs of subject property taken by Al Tijerina during site visit of May 26, 2006 |
| Exhibit No. 4 | Two photographs of subject property taken by Al Tijerina during site visit of May 26, 2006 |
| Exhibit No. 5 | Two photographs of subject property taken by Al Tijerina during site visit of May 26, 2006 |
| Exhibit No. 6 | Two photographs of subject property taken by Al Tijerina during site visit of May 26, 2006 |
| Exhibit No. 7 | Copy of the DDES Notice & Order for case no. E05G0099 issued on October 9, 2006 |
| Exhibit No. 8 | Photograph of subject property taken by Al Tijerina during site visit of November 17, 2006 |
| Exhibit No. 9 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 |
| Exhibit No. 10 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 *with portions of description below photograph redacted* |
| Exhibit No. 11 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 |
| Exhibit No. 12 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 |
| Exhibit No. 13 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 *with portions of description below photograph redacted* |
| Exhibit No. 14 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 *with portions of description below photograph redacted* |
| Exhibit No. 15 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 |
| Exhibit No. 16 | Photograph of subject property taken by Al Tijerina during site visit of December 1, 2006 |
| Exhibit No. 17 | Photograph of subject property (oversize) |
| Exhibit No. 18 | Photograph of subject property (oversize) |
| Exhibit No. 19 | Photograph of subject property (oversize) |
| Exhibit No. 20 | Photograph of Hang and Spencer properties (oversize) |
| Exhibit No. 21 | Photograph of Hang and Spencer properties (oversize) |
| Exhibit No. 22 | Photograph of Hang and Spencer properties (oversize) |
| Exhibit No. 23 | Photograph of Hang and Spencer properties (oversize) |
| Exhibit No. 24 | Collage of photographs of subject property taken on July 18, 2007 during DDES site inspection |
| Exhibit No. 25 | Collage of photographs on subject property taken on July 18, 2007 during DDES site inspection |
| Exhibit No. 26 | Collage of photographs on subject property taken on July 18, 2007 during DDES site inspection |
| Exhibit No. 27 | Collage of photographs of subject property taken on July 18, 2007 during DDES site inspection |

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| Exhibit No. 28 | Collage of photographs of subject property taken on July 18, 2007 during DDES site inspection |
| Exhibit No. 29 | Collage of photographs of subject property taken on July 18, 2007 during DDES site inspection |
| Exhibit No. 30 | Collage of photographs of Hang and Spencer properties (oversize) |
| Exhibit No. 31 | Collage of photographs of Hang property (oversize) |
| Exhibit No. 32 | Photograph of Hang and Spencer properties taken during DDES site inspection of March 20, 2008 |
| Exhibit No. 33 | Photograph of Hang and Spencer properties property taken during DDES site inspection of March 20, 2008 |
| Exhibit No. 34 | Photograph of Hang and Spencer properties taken during DDES site inspection of March 20, 2008 |
| Exhibit No. 35 | Photograph of Hang and Spencer properties taken during DDES site inspection of March 20, 2008 |
| Exhibit No. 36 | GIS map of subject area depicting Pre-CAO Hydrologic Sensitive Areas; FEMA; Wildlife Networks with parcel 3522049051 outlined |
| Exhibit No. 37 | Yee Hang's hand drawn sketch of Hang and Spencer properties depicting current conditions |
| Exhibit No. 38 | Yee Hang's hand drawn sketch of Hang and Spencer properties as of November 1997 |
| Exhibit No. 39 | *not admitted* |
| Exhibit No. 40 | April 3, 2008 revised memorandum to Cristy Craig and Al Tijerina from Jon Sloan reporting on site inspection (Hang parcel) of March 20, 2008 |
| Exhibit No. 41 | Photocopy of pages from Munsell Soil Color Chart |
| Exhibit No. 42 | Printout of Natural Resources Conservation Service Hydric Rating by Map Unit-King County Area, Washington (E05G0099), dated June 5, 2008 |
| Exhibit No. 43 | Data Form I (*Revised*) (datasheets) filled out during Bredberg & Associates site inspection of May 2, 2008 *not admitted* |
| Exhibit No. 44 | Black and white copy of map prepared in 2008 by Northwest Hydraulics Consultants submitted in support of King County's response to FEMA's preliminary Digital Floodway Insurance Rate Map (D-FIRM), annotated by Andrew Levesque to delineate location of subject property (oversize) |
| Exhibit No. 44a | Color copy of map prepared in 2008 by Northwest Hydraulics Consultants submitted in support of King County's response to FEMA's preliminary D-FIRM, annotated by Andrew Levesque to delineate location of subject property (oversize) annotated |
| Exhibit No. 45 | Collage of photographs of subject property taken by Robert Manns during site visit on May 13, 2005 (oversize) |
| Exhibit No. 46 | Collage of photographs of subject property taken by Robert Manns during site visit on May 13, 2005 (oversize) |
| Exhibit No. 47 | Flood Insurance Rate Map (FIRM) for King County, Washington (Unincorporated Areas) effective September 29, 1978, annotated by Andrew Levesque to delineate location of subject property (oversize) |
| Exhibit No. 48 | FIRM for King County, Washington (Unincorporated Areas) revised May 16, 1995, annotated by Andrew Levesque to delineate location of subject property (oversize) |
| Exhibit No. 49 | FIRM for King County, Washington (Unincorporated Areas) effective September 29, 1989, annotated by Andrew Levesque to delineate location of subject property, annotated by Mara Heiman (oversize) |
| Exhibit No. 50 | DDES Report to the Hearing Examiner (staff report) dated December 20, 2006 |

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| Exhibit No. 51 | Transcript of deposition of Andrew Levesque taken March 13, 2008 with exhibits D-J attached |
| Exhibit No. 52 | Copy of email sent February 28, 2007 from Barbara Heavey to Peter Donahue, James Klauser, M. Nelson, Brent Carson, Ginger Ohrmundt, Marka Steadman and Trishah Bull in relation Serrano appeal (DDES file no. L05P0010) regarding Trib. 053 Existing Conditions Proposed Developments North Area map dated October 13, 2005 |
| Exhibit No. 53 | Envelope used to post Trib. 053 Existing Conditions Proposed Developments North Area map dated October 13, 2005 from Barbara Heavey to James Klauser |
| Exhibit No. 54a-b | High-quality, large-scale version of Trib. 053 Existing Conditions Proposed Developments North Area map dated October 13, 2005, annotated by Mara Heiman, AJ Bredberg and Jeff Spencer (oversize) |
| Exhibit No. 55 | July 19, 2007 memorandum to Cristy Craig and Al Tijerina from Jon Sloan regarding site inspection of July 18, 2007 |
| Exhibit No. 56 | Declaration of Yee Hang in Support of Petition to Intervene, dated June 19, 2007 |
| Exhibit No. 57 | Puget Sound Clean Air Agency Formal Statement filled out by Yee Hang, dated May 24, 2007 |
| Exhibit No. 58 | Hand written notes of Yee Hang *not admitted* |
| Exhibit No. 59 | Ordinance 12196 |
| Exhibit No. 60 | Excerpts from ordinance 10870 |
| Exhibit No. 61a | Grading/Clearing Permit no. L06CG012 Serac, LLC with maps (annotated by Mara Heiman) attached |
| Exhibit No. 61b | Printout of DDES online permit search for parcel 3522049013 as executed on May 26, 2009 |
| Exhibit No. 61c | Printout of DDES online detail for permit L09GI151 as accessed on May 26, 2009 |
| Exhibit No. 62 | Appellant Shear's Answers and Responses to King County's First Interrogatories and Requests for Production to Appellant Ron Shear, dated August 13, 2007 *not admitted* |
| Exhibit No. 63 | Magnification of exhibit 44 to show detail in area surrounding subject property (oversize) |
| Exhibit No. 64 | Email and attachments sent June 11, 2009 from Mara Heiman to Bob West, Jim Klauser, Robert Crowley, ajb@wa.net and Jeffrey Spencer with subject line reading "Jeff Jones/Serac Wetland Bank Grading Permit" |
| Exhibit No. 65a-r | Photographs of Spencer property taken on June 20, 2009 |
| Exhibit No. 66 | Photograph of Schuler property taken by Mara Heiman in Spring 2009 |
| Exhibit No. 67a | Printout of 1936 aerial photograph of area surrounding subject property downloaded from King County iMAP as accessed on September 8, 2008 |
| Exhibit No. 67b | Printout of 1998 aerial photograph of area surrounding subject property downloaded from King County iMAP as accessed on September 8, 2008 |
| Exhibit No. 67c | Printout of 2000 aerial photograph of area surrounding subject property downloaded from King County iMAP as accessed on September 8, 2008 |
| Exhibit No. 67d | Printout of 2002 aerial photograph of area surrounding subject property downloaded from King County iMAP as accessed on September 8, 2008 |
| Exhibit No. 67e | Printout of 2005 aerial photograph of area surrounding subject property downloaded from King County iMAP as accessed on September 8, 2008 |
| Exhibit No. 67f | 2004 aerial photograph of area surrounding subject property |
| Exhibit No. 68 | King County Department of Natural Resources, Water and Land Resource Division Drainage Investigation Report: Field Investigation dated November 25, 2008 for file name/no. Heiman/2008-0671 |
| Exhibit No. 69 | Mill Creek (Auburn) Hydraulic Modeling report prepared in December 1993 by Northwest Hydraulic Consultants Inc. |

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| Exhibit No. 70 | Map of area surrounding subject property depicting FEMA 100-Year Floodplain, NHC 2-Year Floodplain, NHC 10-Year Floodplain and NHC 100-Year Floodplain |
| Exhibit No. 71 | Critical Areas and Wetland Identification and Delineation Report for NorthCreek Corporate Campus, Auburn, Washington 98001-2438, prepared by SNR Company, dated November 7, 2008 |
| Exhibit No. 72 | Mullen Slough Capital Improvement Project Study and Action Plan Preliminary Review Draft prepared in April 2001 by King County Wastewater Treatment Division, Surface Water Engineering and Environmental Services, Northwest Hydraulics, Inc. and Adolfson Associates |
| Exhibit No. 73 | Attachment A of ordinance 15028 of King County Comprehensive Plan as adopted September 27, 2004 and effective October 11, 2004 |
| Exhibit No. 74 | Section VI: Resource Lands of Chapter Three of 2008 Comprehensive Plan |
| Exhibit No. 75 | Appendix H: Farmlands and Agriculture in King County of 1994 Comprehensive Plan |
| Exhibit No. 76 | 2006 King County Flood Hazard Management Plan: King County River and Floodplain Management Program, Final Plan, January 2007 |
| Exhibit No. 77 | DDES Public Rule Chapter 21A-24 Sensitive Areas: Flood Hazard Areas effective date November 6, 2002 |
| *Exhibit No. 78* | *exhibit number assigned to previously entered exhibit 36* |
| Exhibit No. 79 | Copies of Jon Sloan's field notes for site inspection of July 18, 2007 |
| Exhibit No. 80 | Washington State Wetlands Identification and Delineation Manual, March 1997 |
| Exhibit No. 81 | Wetland Delineation Report Criteria as downloaded from DDES public website on November 28, 2007 |
| Exhibit No. 82 | DDES Report to the Hearing Examiner: Supplemental Staff Report, dated June 23, 2009 |
| Exhibit No. 83 | Letter from James Klauser to Al Tijerina regarding code enforcement case no. E0401144, dated November 17, 2005 |
| Exhibit No. 84 | String of emails, sent between February 2 through May 30, 2006 from James Klauser to Al Tijerina, Paul Prochaska and Ron Shear regarding code enforcement case no. E0401144 |
| Exhibit No. 85 | Email sent December 11, 2006 from James Klauser to Marka Steadman, Hearing Examiner, Al Tijerina, Paul Prochaska, Ron Shear, Bob West, Lamar Reed and Bob Rowley regarding code enforcement case no. E05G0099 |
| Exhibit No. 86 | String of emails, dated between January 24 through 30, 2007, between Gary Criscione, Al Tijerina, Charles Wu, Roman Welyczko, Teri Barlcay, Gordon Clemans, Claude Williams and Rick Pogers regarding subject property |
| Exhibit No. 87 | String of emails, dated between January 24 through 30, 2007, between Gary Criscione, Al Tijerina, Charles Wu, Roman Welyczko, Teri Barlcay, Gordon Clemans, Claude Williams and Rick Pogers regarding subject property |
| Exhibit No. 88 | Email sent April 7, 2005 from Patricia Malone to charlottemj@nventure.com and William Turner regarding online citizen complaint |
| Exhibit No. 89 | Declaration of Jon Sloan in Support of King County's Motion for Summary Judgment dated April 8, 2008 |
| Exhibit No. 90 | Declaration of AJ Bredberg, MS, PWS, CPSS, CPSC in Support of Appellants' Summary Judgment Response dated July 11, 2008 |
| Exhibit No. 91 | iMAP downloaded on November 14, 2008 |
| Exhibit No. 92 | US Army Corps of Engineers Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region, April 2008 |
| Exhibit No. 93 | Map of Mill Creek General Land Office survey 1869 over USGS 2000 *not admitted* |

MINUTES OF THE NOVEMBER 12, 2009, PUBLIC HEARINGS ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E05G0099.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Cristy Craig representing the Department of Development and Environmental Service; Robert West representing Appellant Jeffrey Spencer; Brian Lawler representing Appellant Ron Shear; Steven Neugebauer; Donald Gauthier and Andrew Levesque.

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| Exhibit No. 94 | Declaration of Richard C. Herriman |
| Exhibit No. 95 | Declaration of Dr. Steven Holzhey |
| Exhibit No. 96 | USDA Farm Service Agency Fact Sheet for Biomass Crop Assistance Program, downloaded and printed on November 11, 2009 from the USDA website |
| Exhibit No. 97 | Curriculum Vitae of Steven F. Neugebauer |
| Exhibit No. 98 | Summary of Findings and Conclusions—Mullen Slough Drainage Basin Parcel no. 3522049051, Steven F. Neugebauer |

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