

TRANSMITTED BY E-MAIL

October 21, 2022

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Snohomish County Planning & Development Services (PDS)  
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Ana Shafer, Assistant Director for Surface Mine Reclamation  
Department of Natural Resources, DNR  
[ANA.SHAFER@dnr.wa.gov](mailto:ANA.SHAFER@dnr.wa.gov)

Subject: Northpoint (NP) 228<sup>th</sup> Apartments  
Unpermitted Construction Work  
Reply to Mike McCrary Letter dated October 18, 2022  
1010 – 228<sup>th</sup> Street SW, Bothell, WA  
SNOCO Code Violation Investigation Request #126404  
Ecology ERTS Investigation #717970  
DNR Permit No. 70-010402  
Snohomish County PFN: 22-102098-SPA

This third letter is written in response to Mike McCrary's October 18, 2021 letter<sup>1</sup> and Ana Shafer's October 17, 2022 e-mail<sup>2</sup>, on behalf of the Save Bothell and the Sno-King Watershed Council to demand that Snohomish County issue a stop work order and require Applicant NP Snohomish County 228th Apartments, LLC (NP) to restore the site to its original condition prior to the unpermitted work that is or has occurred at the subject site; and to augment the Lider Engineering October 6 and October 10, 2022 letters.

Northpoint's engineer uses a fallacious argument that pumping was required and that someone had to be on site to operate the pumps and this was the reason for the excavation of 2,500+ cubic yard pond, along with construction of a Type 2 manhole and additional piping. First there are no pumps shown on the only sealed drawing accepted by the DNR for mine reclamation, nor is there any mention of these pumps or maintenance requirements for these alleged pumps in any DNR inspection report.

It is irrelevant that a portion of the pond was covered in concrete before, County Code is clear that stormwater facilities such as the illicitly constructed pond, are not allowed

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<sup>1</sup> Reference Attachment 1

<sup>2</sup> Reference Attachment 2

inside a stream buffer, regardless of preexisting land condition. [SCC 30.63A.210\(1\)\(a\)](#) states in part:

“new development and redevelopment activities must occur outside of all critical areas, together with the buffers”

There is no exception for the predeveloped land condition that allows construction of stormwater ponds inside a Type F, salmonid stream buffer. Drawings submitted as a part of the subject SPA permit application show that the constructed stormwater structure encroaches into the stream buffer.

Mr. McCray states that:

“Some minor clearing occurred at the southern end of the pond, and possibly along the western edge. It does not appear 5,000 or more board feet of merchantable timber was harvested.”

From our aerial photographs presented to Snohomish County, Ecology, and the DNR it is clear that this was not just some minor clearing that can be ignored. It was unpermitted clearing in the stream buffer and there are no agency approvals for this illicit construction work that has occurred.

Mr. McCrary opines that the timber had to be “merchantable”, in order to impose a 6-year development moratorium; but the County Code SCC [30.43F.040\(2\)](#) has no such requirement and states for that for the 6-year development moratorium exception to apply, less than 5,000 board feet of timber be removed:

The removal of less than 5,000 board feet of timber (including live, dead, and down material) for personal use in any 12-month period;

The county code does not specify what species of timber is removed, e.g., Douglas fir, Red Alder, or Cottonwood, only that removal of 5,000 board feet of timber has occurred. It does not matter if the trees were alive, dead, or down on the ground. The issue here is that Northpoint has destroyed the evidence by proceeding without a permit, and enforcement must now be based on aerial evidence of pre-existing trees in this area. Snohomish County must enforce the 6-year moratorium on development based on aerial photos. This moratorium is not discretionary or at the whim of the PDS Director, it is required under SCC 30.43F.220(1)(c) that states in part:

(1) Applicability. The department shall impose a six-year development moratorium on a site when any of the following occurs:

(c) The department becomes aware that a landowner converted his or her land to a nonforestry use without the proper permits or approvals that are required under this chapter. (Emphasis added)

Mr. McCrary is wrong in his conclusion and the County must impose a 6-year development moratorium on this project based on aerial photographic evidence.

Mr. McCrary goes on to state the excavated soils were placed “benched” areas that have been used for mining and reclamation activities. These “benched” areas are future building sites as shown on the subject SPA permit currently under review by PDS. In any event, sidecast soil on the steep slope with TESC measures or SWPPP, leaves this freshly excavated soil in a highly erodible state as shown in photos dated October 16, 2022. The excavated soils were placed in areas that had been previously reclaimed, as shown in the June 1, 2021 DNR inspection report prepared by John Bromley, shown in Figure 1 below:

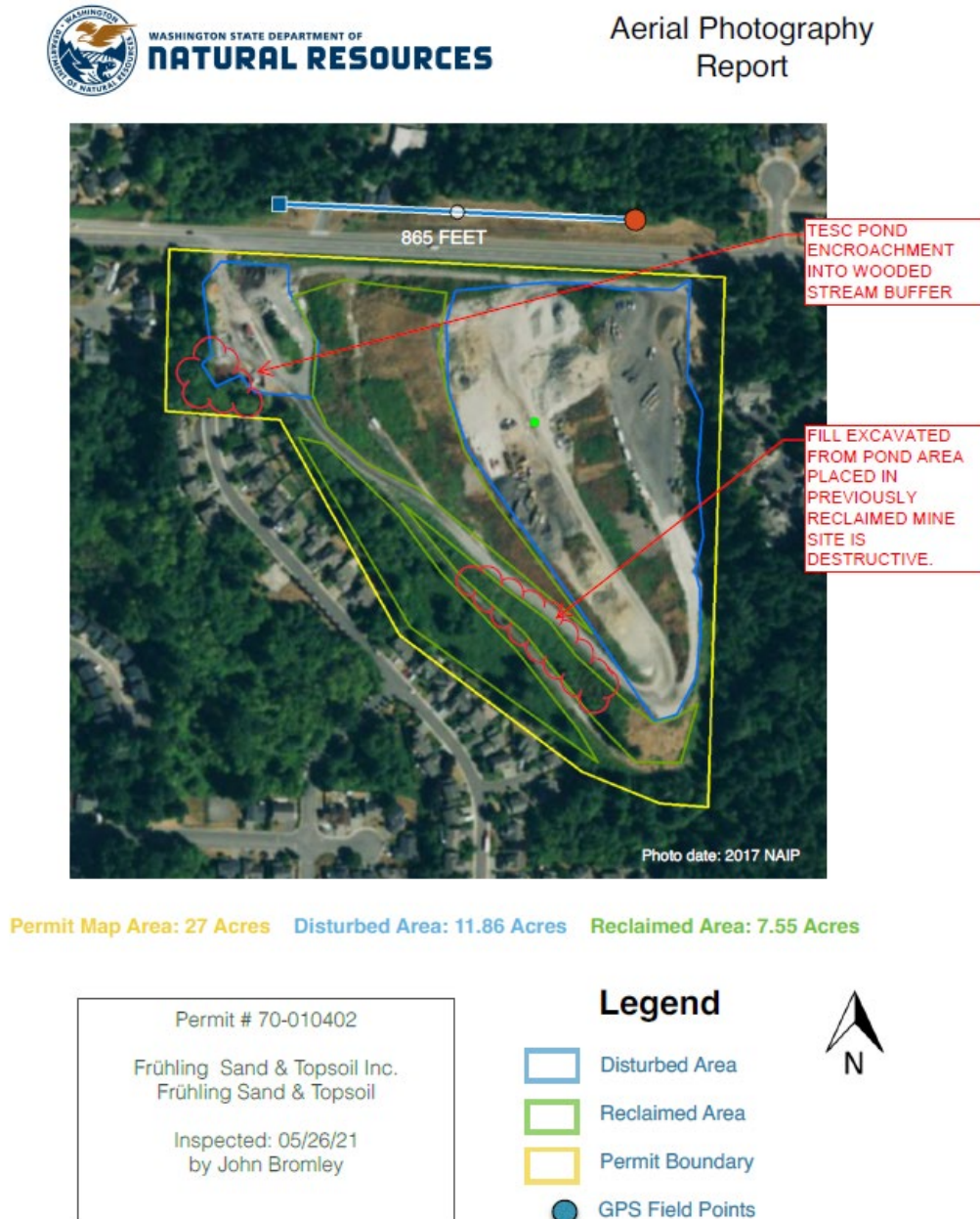


Figure 1: Annotated clip from DNR Inspector John Bromley inspection report dated June 1, 2021 report's aerial photo of the site where the illicit pond was constructed and fill placed over previously reclaimed area, noted in the clouded areas.



Figure 2 below shows an October 18, 2022 photo taken of illicit fill placed in previously vegetated mine reclamation area:



*Figure 2: October 18, 2022 photo of illicitly placed fill. Clouded areas show where fill placed in previously reclaimed, vegetated mine area above the failed bioretention swale. PDS required a land disturbing (LDA) permit for the swale construction, yet PDS did not require an LDA permit for excavating over 2,500 cubic yards of soil on a site with just a pending administrative site plan application (SPA) permit.*

As of this letter, we are unaware that the DNR has had an inspector view the site as of as noted in the e-mail dated October 17, 2022 from Ana Shafer. Ms. Shafer stated that:

“On October 5, our Chief Reclamation Geologist made observations of the Fruhling Sand & Topsoil site from 228<sup>th</sup> Street SW, along the northern surface mine reclamation permit boundary. The visit occurred after-hours, and no representatives from the mine were available to grant access to the site.”

Apparently the DNR geologist just “peeked” over the gate off 228<sup>th</sup> Street SW on October 5, 2022. The DNR geologist opined that:

“...grade work, including the stormwater pond and the terraced upland area, appears to be generally consistent with the approved DNR surface mine reclamation permit and plan (70-010402), as well as with the County-determined residential subsequent site use.”

There is no County-determined residential site use or SPA or LDA permit for this work



Figure 3 below shows a photograph of what is visible from this gate:



*Figure 3: October 19, 2022 photo looking over the gate from 228th Street SW. None of this work is in accordance with any design drawing submitted to the DNR, per recent public records requests. Excavated soils placed in the previously reclaimed mine area is not visible from this location.*

Mr. McCrary is wrong to conclude that Snohomish County does not have a regulatory obligation to inspect this site for non-conformance with the code. [Chapter 10.40, Surface-Mined Land Reclamation](#) of the County code gives Snohomish County regulatory authority over mine reclamation projects. Specifically, [SCC 10.40.040](#) gives the County regulatory authority over repeated continuing use. Snohomish County required Northpoint to obtain a land disturbing activity permit under project file number: 21-109327-LDA for a bioretention swale; yet Snohomish County required no permits for a much larger excavation, with a higher probability of sediment erosion. PDS is currently reviewing a Site Plan Application permit number, 22-102098-SPA, yet feels that it has no obligation to permit this ongoing land disturbing active work. Why did PDS choose to ignore the obvious code violation with no SEPA determination?

The DNR has abdicated its regulatory status by not enforcing state law under [WAC 332-18 Surface Mine Reclamation](#) and [RCW 78.44 Surface Mining](#). Specifically, DNR has failed under the law to:

- To provide SEPA review sufficient to determine that the impacts of the proposed stormwater pond can be adequately mitigated<sup>3</sup>;
- To obtain required approval from Snohomish County that the pond excavation is approved under local zoning and land use regulations. The site is currently zoned for Multiple Residential (MR) or high density apartments is not zoned for any mining activity or mine reclamation work <sup>4</sup>;
- Fruhling no longer owns the mine, Northpoint purchased the property on July 27, 2021 and is the current owner and operator of the mine. Yet there is no public record that the DNR ever approved the permit transfer to Northpoint or obtained the required documentation for any permit transfer required under law<sup>5</sup>;
- To require Northpoint to provide a written narrative describing the proposed mining and reclamation scheme with a statement of the proposed subsequent use of the land after reclamation, that is consistent with the local land use designation. The reclamation plan does not vest the proposed subsequent use of the land<sup>6</sup>;
- To provide at least two cross sections of the mine including all applicable data required in the narrative and map portions of the reclamation plan<sup>7</sup>;
- To provide evidence that the proposed surface mine has been approved under local zoning and land use regulations<sup>8</sup>;
- To obtain written approval of the reclamation plan by the landowner for mines permitted after June 30, 1993<sup>9</sup>.

Under RCW 78.44.091(6):

“Only insignificant deviations may occur from the approved reclamation plan without prior written approval by the department for the proposed change.”

Excavating a 2,500+ cubic yard hole in the ground, then placing the excavated fill in previously reclaimed areas is not an “insignificant deviation”. As previously stated in my other two letters referenced above regarding the illicit, unpermitted work, Northpoint must remove the unpermitted work and restore the site, prior to commencement of the 6-year development moratorium.

RCW 78.44.250 provides for fines and civil penalties and damage recovery of damages; and RCW 78.44.260 provides penalties for operating without a permit, as is the case here.

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<sup>3</sup> WAC 332-18-01003(b)

<sup>4</sup> WAC 332-18-01003(c)(i)

<sup>5</sup> WAC 332-18-150

<sup>6</sup> RCW 78.44.091(1)

<sup>7</sup> RCW 78.44.091(3)

<sup>8</sup> RCW 78.44.091(4)

<sup>9</sup> RCW 78.44.091(5)

Lastly, RCW 78.44.270 allows aggrieved parties such as Save Bothell and/or the Sno-King Watershed Council who have standing in this matter under RCW 34.05.530 and whose members will suffer harm by the lack of required environmental review under SEPA, to appeal DNR's and Snohomish County's decision to construct this stormwater pond with no approvals to the Pollution Control Hearings Board (PCHB).

We trust that an appeal before the PCHB will not be required to force Snohomish County and the DNR to perform their regulatory duties under the law.

Respectfully submitted,  
LIDER ENGINEERING, PLLC



October 21, 2022

William Lider, PE, CESCL  
Principal Engineer

Attachment 1: Mike McCrary October 18, 2022 228th Multifamily Development  
Project Update  
Attachment 2: Ana Shafer, DNR October 17, 2022 e-mail to William Lider, PE

cc: Dave Somers, Joshua Machen, Bill Leif, Snohomish County  
Rachel McCrea, Mak Kaufman, Jay Fennel Ecology  
Environmental Report Tracking System (ERTS), Ecology  
Richard Sawyer, City of Kenmore  
Save Bothell, SKWC Board Members



October 18, 2022

## 228<sup>th</sup> Multifamily Development Project Update

Snohomish County has received concerns related to potentially unpermitted construction activities at the former Fruhling Pit site, located at 1010 228<sup>th</sup> St. SW, Bothell, WA. The site is also subject to a proposed multi-family development, applications for which are currently under review by Snohomish County (project file number 22-102098 SPA).

The concerns are summarized as follows:

- The developer commenced work moving thousand of cubic yards of soil to construct a pond in the Crystal Creek stream buffer without proper review or permits;
- Soil excavated for the bond was used to construct building pads for the proposed apartment buildings without proper review or permits;
- Clearing without permits can result in a six-year development moratorium under county code.

County staff conducted a site visit on October 11, 2022, joined by staff from the Department of Ecology (DOE), Depart of Fish and Wildlife (DFW), Snohomish Health District (SD), and representatives of the current owner and applicant for the proposed multi-family development. Representatives from the Department of Natural Resources (DNR) were not in attendance.

As described by the owner, the pond was constructed to provide sediment and erosion control. The system previously in place was a system of smaller ponds, requiring pumping between each pond to be performed on a regular basis by someone on site. According to the current owner's engineer, after the property was sold no one would be on site to perform this function. The construction of the new pond eliminates the need to have someone on site to pump from pond to pond. Prior to excavation, the pond area was covered predominately with concrete. Some minor clearing occurred at the southern end of the pond, and possibly along the western edge. It does not appear 5,000 or more board feet of merchantable timber was harvested.

There was no indication that soil from the pond was used to prepare building pads. The areas of concern appear to be "benched" areas that have been used for mining and reclamation activities for many years. These areas include a combination of gravel and concrete materials, and the concrete appears to have been in place for many years. The site owner and applicant for the proposed multi-family development confirmed that buildings are proposed in these areas, and that if and when permitted, these areas would be excavated to accommodate foundation and building construction.

Observations from the joint site visit on October 11th and information received from a site visit performed by DNR's Chief Reclamation Geologist on October 5th indicate that the grade work, including the stormwater pond and the terraced upland area, was performed under and appears to be generally



consistent with the approved DNR surface mine reclamation permit and plan (70-010402). DNR is planning to conduct another inspection on site in the very near future. In doing so, DNR will be able to make more site-specific observations and discuss site conditions and compliance issues, if any, with the permit holder or their representative.

**From:** [SHAHER, ANA \(DNR\)](#)  
**To:** [bill.liderengineering.com](mailto:bill.liderengineering.com)  
**Cc:** [Fennell, Jay D. \(ECY\)](#); [Kaufman, Mak \(ECY\)](#); [ECY RE NWRO ERTS](#); [Crossman, Kenneth](#); [McCrea, Rachel \(ECY\)](#); [Machen, Joshua](#)  
**Subject:** RE: 228th Street SW Illicit, Unpermitted Clearing and Grading  
**Date:** Monday, October 17, 2022 4:46:03 PM

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Mr. Lider,

On October 5, our Chief Reclamation Geologist made observations of the Fruhling Sand & Topsoil site from 228<sup>th</sup> Street SW, along the northern surface mine reclamation permit boundary. The visit occurred after-hours, and no representatives from the mine were available to grant access to the site. What he could observe of site conditions from the road on the northern side of the permit area indicated that the grade work, including the stormwater pond and the terraced upland area, appears to be generally consistent with the approved DNR surface mine reclamation permit and plan (70-010402), as well as with the County-determined residential subsequent site use. As I informed you on October 6, DNR is planning to conduct an inspection on site in the very near future. In doing so, DNR will be able to make more site-specific observations and discuss site conditions and compliance issues, if any, with the permit holder or their representative. In the meantime, DNR has been in contact with representatives from Ecology and Snohomish County, as well as the permit holder's representative.

Thank you,

Ana

**Ana Shafer, LG, LEG** (she/her)  
*Assistant State Geologist*  
*Assistant Director for Surface Mine Reclamation*  
*Washington Geological Survey*  
Washington Department of Natural Resources  
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**From:** bill.liderengineering.com <bill@liderengineering.com>  
**Sent:** Monday, October 17, 2022 8:24 AM  
**To:** Machen, Joshua <Joshua.Machen@co.snohomish.wa.us>; McCrea, Rachel (ECY) <rmcc461@ECY.WA.GOV>; SHAHER, ANA (DNR) <ANA.SHAHER@dnr.wa.gov>  
**Cc:** Fennell, Jay D. (ECY) <JFEN461@ECY.WA.GOV>; Kaufman, Mak (ECY) <makk461@ECY.WA.GOV>; ECY RE NWRO ERTS <nwroerts@ECY.WA.GOV>; Crossman, Kenneth <Ken.Crossman@co.snohomish.wa.us>; bruce thomas <brucejthomas@hotmail.com>; dennis hill <dennishill229@gmail.com>; Eric Adman <snokingwatershedcouncil@gmail.com>  
**Subject:** 228th Street SW Illicit, Unpermitted Clearing and Grading

Please reference:

Ecology ERTS Investigation #717970  
DNR Permit No. 70-010402  
Snohomish County PFN: 22-102098-SPA  
SNOCO Code Violation Investigation Request #126404

Two (2) weeks has passed since complaints were filed on the subject project and no agency can state who approved the illicitly constructed clearing and grading work.

Please reference the attached photos taken over the last several days. Incipient rilling is already visible on some the soil sidecast onto steep slopes. Significant rain is forecast for the end of the week and site is disturbed with highly erodible soils with either no or minimal TESC measures in place.

The SNOCO *Notice of Pending Land Use Action* sign placed at the dead end on is blank and covered with plastic bag to make it unreadable to the public from the street.

Outstanding questions still remain unanswered:

1. Who was the person that Mr. Villwock was "in communication" with at the DNR that he referenced in his Oct. 4, 2022 e-mail?
2. Were these "communications" in written or electronic form, or were these communications just verbal?
3. Did anyone at DNR authorize the construction of the large stormwater TESC Pond A in the Crystal Creek stream buffer in violation of County code?
4. Were there ever any DNR, Ecology, or Snohomish County approved reclamation drawings or stormwater design calculations ever prepared for the recent clearing and grading work performed by Northpoint?

Your prompt response is expected and appreciated.

William (Bill) Lider, PE, CESCL  
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