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BEFORE THE YAKIMA BOARD OF COUNTY COMMISSIONERS

Appellants MENSIONIDES DAIRY, LLC
and ART and TERESA MENSIONIDES:

File No. APL2017-00005

[CUP2016-00019]

Re.: Appeal of the Hearing Examiner's decision approving, subject to listed conditions, Fryslan Ranch Enterprise's Type 2 Conditional Use Permit Application for a Concentrated Animal Feeding Operation off of Glade Road near the City of Mabton.

FRYSLAN RANCHES'
MEMORANDUM OPPOSING
THE APPEAL (AND
SUPPORTING THE HEARING
EXAMINER'S DECISION TO
APPROVE THE COMBINED
USE PERMIT)

November 21, 2017, at 10:30 a.m.

Requested Action: Based on the record, Fryslan Ranch respectfully asks the Board of County Commissioners to approve CUP2016-00019, with the previously imposed conditions, because:

- The environmental considerations are addressed by the *final and binding* Mitigated Determination of Nonsignificance (MDNS) and therefore the Mensionides cannot challenge Yakima County's SEPA analysis contained in the MDNS; and
- The Mensionides fail to establish that the Hearing Examiner used improper procedures or based his decision on immaterial and insubstantial evidence when he decided not to consider past and future compliance as a CUP decision criteria.

Because the Mensionides fail to support their stated grounds for appeal, the Hearing Examiner's decision must be affirmed under YCC 16B.09.055.

1 **A. Background**

2 Fryslan Ranch, a Windmill Estates operation, seeks to consolidate four new-born
3 and elementary cattle-rearing operations. This proposed calf-rearing operation will be
4 located in a rural location southeast of Mabton. The Yakima County Planning Division,
5 and the Hearing Examiner, approved this project, with a number of conditions, including
6 requiring Fryslan Ranch to:

- 7 • restrict stock-watering usage from the existing permit-exempt wells on three
8 current calf-rearing parcels;
- 9 • operate under a Nutrient Management Plan approved by the Washington
10 State Department of Agriculture to address vector concerns, management of
11 liquid and solid manure, disposition of dead animals, and feed storage;
- 12 • develop a Dust Control Plan approved by the Yakima Regional Clean Air
13 Agency before construction begins and operate under the same;
- 14 • prepare a stormwater plan approved by the Yakima County Water
15 Resources Division;
- 16 • implement habitat mitigation with the Washington Department of Fish and
17 Wildlife's guidance; and
- 18 • implement a Complaint Management System.

19 The Hearing Examiner's August 1, 2017 CUP2016-00019 decision was timely
20 appealed by the Mensonides Dairy, LLC, and Art and Teresa Mensonides (collectively,
21 "the Mensonides"), and is now before the Board solely to review the three stated grounds
22 in the Mensonides' written appeal.

Not before the Board is a State Environmental Protection Act (SEPA) appeal. The
Mensonides failed to timely appeal Yakima County's June 16, 2017 SEPA decision—the

1 MDNS.¹ The Hearing Examiner permitted the parties to brief what impact the failure to
2 timely appeal Yakima County's SEPA decision had on the Hearing Examiner's authority.²
3 After considering the parties' briefs,³ the Hearing Examiner properly determined the
4 MDNS is final and therefore "deemed to conclusively comply with applicable rules and
5 ordinances."⁴ As a result, the MDNS (and its environmental analysis and findings) were
6 binding on the Hearing Examiner during his review of CUP2016-00019. Similar to the
7 Hearing Examiner, this Board's review is limited to the CUP and the three stated appeal
8 challenges, and does not extend to a SEPA review.

9 Yakima County Senior Project Planner Dinah Reed prepared a Staff Report for the
10 Board, recommending the Board uphold and affirm the Hearing Examiner's decision
11 because the Mensonides did not file a timely SEPA appeal and their three grounds for
12 appeal focus solely on environmental considerations.⁵

13 At the October 24, 2017 Board Agenda Meeting, two members of the Board
14 (Commissioners Mike Leita and Ron Anderson) voted to conduct a closed-record hearing
15 on the Mensonides' appeal; Rand Elliott voted not to consider the Mensonides' appeal,
16 acknowledging the finality of the unappealed MDNS. Commissioner Leita advised Ms.
17 Reed that he desired to review the proposed instrument(s) to be used to restrict stock-
18 watering usage from the existing wells on each of the three currently owned calf-rearing

19 ¹ Hrg. Exam'r Updated Ex. List No. 3.

20 ² Transcript of Proceedings Held on July 5, 2017 Hearing at 27 & 48-50.

21 ³ Fryslan Ranch post-hearing July 17, 2017 letter brief, and Mensonides' post-hearing July 12, 2017
22 letter brief.

⁴ Hrg. Exam'r Decision at 6.

⁵ Oct. 24, 2017 Memorandum from Ms. Reed to the Board.

1 operations and inquired as to what aquifer water would be drawn from; Commissioner
2 Anderson concurred in these informational requests. Following the Agenda Meeting,
3 Fryslan Ranch and the Yakima County Planning Division conferred and developed the
4 attached Declaration of Well Monitoring Covenant.⁶

5 **B. Standard**

6 YCC 16B.09.055(1) sets forth the procedures that "shall apply" to closed record
7 appeals before the Board:

8 *Appeal Statement.* The appellant's written appeal statement shall specify the
9 claimed error(s) or issue(s) which are being appealed and shall specifically
10 *state all the grounds for such appeal*, limited to stating why the record does
or does not support the decision of the Hearing Examiner because the
decision:

- 11 (a) Was based on improper procedures that prejudiced the
appellant;
- 12 (b) Was not based on substantial evidence; or
- 13 (c) Constitutes clearly erroneous application of the development
14 regulations to the proposed project.

15 *Issues or grounds of appeal which are not so identified shall not be
considered by the Board.⁷*

16 Therefore, it is the Mensonides' burden to establish one of their stated grounds for appeal
17 of the CUP2016-00019:

18 Following the Board's review of a closed record appeal of a Hearing
19 Examiner's Type 2 or 3 decision, the Board may grant the appeal or grant
the appeal with modifications *if the appellant (Mensonides) has carried the*
20 *burden of proof* and the Board finds that the recommendation or

21 ⁶ Attach. A.

22 ⁷ YCC 16B.09.055(1) (emphasis added).

1 determination is not supported by material and substantial evidence. *In all*
2 *other cases, the appeal shall be denied.*⁹
3 When reviewing the appeal for one of the above errors, the Board "accord[s] substantial
4 weight" to the Hearing Examiner's decision.⁸ *If* the Mensonides satisfy their substantial
5 burden, then the Board may modify the Hearing Examiner's decision; otherwise, the
6 Board must affirm the Hearing Examiner's decision approving CUP2016-00019, with the
7 previously imposed conditions.

8 **C. Water Usage**

9 Before addressing the Mensonides' raised grounds for appeal, Fryslan Ranch
10 addresses Commissioners Leita's and Anderson's inquiries at the October 24 Agenda
11 Meeting as to which aquifer will be used to supply water to Fryslan Ranch and the status of
12 the legal instrument to be used to implement the stock-watering restriction. Fryslan Ranch
13 respectfully highlights that these matters were *not* raised as grounds for appeal by the
14 Mensonides in their written statement and therefore per YCC 16B.09.055(1) these issues
15 cannot be considered by the Board when ruling on the Mensonides' appeal. Nonetheless,
16 so that the Commissioners have background against which to consider the Mensonides
17 three stated grounds for appeal, Fryslan Ranch provides the Commissioners with the
18 requested information.

19 As to the aquifer that will be used to supply water to Fryslan Ranch, Fryslan Ranch
20 obtained the input from the Department of Ecology and a hydrologist consultant to
21 determine which of the four wells on the property to draw water. It was decided that well

22 ⁹ YCC 16B.09.050(3)(b) (emphasis added).

⁸ YCC 16B.09.070(1).

1 BIF-430, which draws from the Saddle Mountain Basalt aquifer will have the least impact.
2 The hydro-geologic study conservatively concluded well BIF-430 will produce drawdown of
3 2.19 feet on average at a distance of 1½ miles from the well, which was concluded to
4 unlikely interfere with wells into aquifers stratigraphically above and below the Saddle
5 Mountain Basalt aquifer.¹⁷ The Hearing Examiner considered this evidence and concluded,
6 "if the Saddle Mountain Basalt well is used to provide water for the calf yard, and the
7 stockwater use is discontinued at the other Fryslan properties in accordance with the Deed
8 Restriction, the water quantity-related potential for adverse community impact does not
9 appear substantial."¹⁸

10 As to the stock-watering restriction, it "is intended to eliminate permit-exempt stock
11 watering use from the existing wells serving those properties."¹⁹ Following the Agenda
12 Meeting, Fryslan Ranch and the Yakima County Planning Division conferred and agreed
13 upon the attached Declaration of Well Monitoring Covenant to implement the stock-
14 watering restriction.²⁰ To ensure a supply of water to the calves until they are relocated to
15 Fryslan Ranch, the Declaration of Well Monitoring Covenant will be recorded after the
16 calves are relocated to Fryslan Ranch.

17 Again, while Fryslan Ranch provides the Commissioners with this requested
18 background information, this information does not bear on the three stated grounds for
19 appeal, to which the Board's review of CUP2016-00019 is limited per YCC 16B.09.055(1).

20 ¹⁷ Hrg. Exam'r Updated Ex. List No. 23.

21 ¹⁸ Hrg. Exam'r Decision at 8.

22 ¹⁹ Hrg. Exam'r Decision at 8.

²⁰ Attach. A.

1 Each of the Mensonides' unmeritorious appellate arguments is now addressed.

2 **D. The Hearing Examiner's decision must be affirmed because the Mensonides cannot**
3 **satisfy their burden on appeal.**

4 The Mensonides' stated grounds for appeal are:

- 5 1. The Hearing Examiner's decision is based on improper procedures
6 because it put the burden of proof of environmental noncompliance
7 on the opponents and not Fryslan Ranch.
- 8 2. The Hearing Examiner's decision is not based on substantial evidence
9 in that the entire decision is based on a determination unsupported by
10 any substantial evidence that Fryslan Ranch can be trusted to comply
11 with SEPA conditions and environmental rules and regulations; and
- 12 3. The Hearing Examiner's decision is based on improper procedures
13 that prejudiced Mensonides as the Hearing Examiner failed to
14 exercise his full authority as a Reviewing Official to ensure
15 accountability to the public regarding environmental standards."

16 Each of these stated grounds for appeal boils down to an assertion that the Veldhuises
17 cannot be trusted to comply with environmental regulations given their (claimed) past
18 noncompliance and that the agencies are too busy to investigate and enforce environmental
19 violations. These assertions are unsupported, cannot be pursued because no timely SEPA
20 appeal was filed, misconstrue the Yakima County Code (YCC), and fail to afford the
21 substantial weight that must be given to the Hearing Examiner's reasoned decision.

- 22 1. The MDNS (SEP2016-00007) is not before the Board because the MDNS
was not timely appealed.

The Mensonides' appeal focuses on environmental factors. But the procedure to
address environmental factors is through Yakima County's SEPA (State Environmental

22 " Mensonides' Appeal of Hearing Examiner Decision at 2.

1 Protection Act) analysis, which is governed by Yakima County Code Chapter 16B.06. The
2 hurdle that Mensorides cannot now clear is that they did *not* timely appeal the MDNS.

3 The deadline to appeal the June 16, 2017 MDNS was June 30, 2017. No SEPA
4 appeal of the MDNS was filed by that date. As a result, Yakima County's SEPA analysis
5 controls the environmental considerations for CUP2016-00019. The MDNS is final.

6 Fyrslan Ranch's July 17, 2017 letter brief to the Hearing Examiner explains in
7 greater detail the distinction between Fyrslan Ranch's CUP2016-00019, which was before
8 the Hearing Examiner and now before the Board, and Fyrslan Ranch's SEP2016-00007,
9 which was not timely appealed and therefore not before the Hearing Examiner or the
10 Board for review. Simply stated, the Mensorides cannot base their appeal on
11 environmental factors.

12 The Mensorides appear to recognize this limitation by stating "[t]his is not an attack
13 on the MDNS."¹⁴ But they cite to both CUP2016-00019 (the appealed Hearing Examiner's
14 decision) and SEP2016-00007 (the unappealed Yakima County MDNS decision) on their
15 Appeal caption, thereby potentially misleading the Board as to what matter is before it.
16 Moreover, the Mensorides' three grounds for appeal are based on environmental concerns
17 and thus reflect that, as Commissioner Elliott recognized, the Mensorides are in fact trying
18 to bypass the MDNS's finality. Only the Hearing Examiner's CUP2016-00019 decision is
19 before the Board. The Board (like the Hearing Examiner) lacks the authority to review the
20 final, non-appealed MDNS.

21
22 ¹⁴ Mensorides' Appeal of Hearing Examiner Decision at 8.

1 2. The Mensonides' appeal fails because, contrary to their unsupported
2 assertion, the Hearing Examiner properly placed the burden of proof on
3 Fryslan Ranch.

3 In support of their argument that the Hearing Examiner improperly placed the
4 burden of proof on them, the Mensonides claim: 1) the Hearing Examiner required the
5 Mensonides to prove that Fryslan Ranch violated environmental regulations, rather than
6 requiring Fryslan Ranch to justify other Windmill Estates entities' carcass-disposal and
7 manure-application practices; and 2) that by relying on County process and penalties to
8 address permit-condition violations, the Hearing Examiner failed to properly put the
9 burden of proof on Fryslan Ranch. The Mensonides correctly cite YCC 16B.08.050(1) as
10 the section setting forth the Hearing Examiner's review responsibilities but then the
11 Mensonides make an unsupported leap from the YCC and the evidence presented to the
12 Hearing Examiner.

13 The cited code, YCC 16B.08.050(1), imposes a duty on the Hearing Examiner to:

14 approve a project or approve with modifications if the applicant has
15 demonstrated that the proposal complies with the *applicable decision criteria*
16 *of the Yakima County Code*. The applicant carries the burden of proof and
17 must demonstrate that a preponderance of the evidence supports the
18 conclusion that the application merits approval or approval with
19 modifications.

17 (Emphasis added). To assess whether the applicant demonstrates that the application
18 merits approval, the Hearing Examiner considers the following Type 2/3 permit decision
19 criteria:

- 20 a) the present and future needs of the community will be adequately served
21 by the proposed development and that the community as whole will be
22 benefited rather than injured;

- 1 b) the proposed use is compatible with neighborhood land uses, the goals,
2 objectives and policies of the Comprehensive Plan, and the legislative
3 intent of the zoning district;
- 4 c) the site of the proposed use is adequate in size and shape to
5 accommodate the proposed use;
- 6 d) all setbacks, spaces, walls and fences, parking, loading, site screening,
7 landscaping, and other features required by Title 19 YCC;
- 8 e) the proposed use complies with other development and performance
9 standards of the zoning district and Title 19 YCC;
- 10 f) the site for the proposed use relates to streets and highways adequate in
11 width and pavement type to carry the quantity and kind of traffic
12 generated by the proposed use;
- 13 g) the proposed use will have no substantial adverse effect on abutting
14 property or the permitted use thereof; and
15
- 16 i) the development complies with all criteria in Chapter 19.18 applicable to
17 the proposed use, unless otherwise administratively adjusted.¹⁸

18 The Mensonides submit that the Hearing Examiner should have also considered
19 enforcement effectiveness. In regard to the purported enforcement-effectiveness
20 consideration, the Hearing Examiner properly concluded “[p]ast compliance with permit
21 or environmental regulatory requirements is generally not expressed in Title 19 YCC as a
22 consideration” for Type 2/3 decision criteria.¹⁹ The Hearing Examiner’s conclusion was
correct because no such enforcement-effectiveness language or requirement is set forth in
the decision criteria for a Type 2/3 permit application.

¹⁸ YCC 19.30.080(7).

¹⁹ Mensonides’ Appeal of Hearing Examiner Decision at 10.

1 In comparison, "accountability to the public," which could possibly include an
 2 assessment of past compliance, is a *SEPA* consideration under the "accountability to the
 3 public factor" in YCC's *SEPA* Chapter 16B.06. But Yakima County's *SEPA* analysis is
 4 final because the MDNS was not timely appealed. Therefore, the Hearing Examiner did
 5 not consider the *SEPA* "accountability to the public" factor in his review, instead properly
 6 focusing on the decision criteria set forth in YCC 19.30.080(7) for Type 2/3 permit
 7 reviews. The Mensonides fail to identify how or why enforcement effectiveness is a Type
 8 2/3 decision criteria. Plus, the Hearing Examiner properly concluded the Yakima County
 9 Code establishes many means to address code violations, including: 1) limiting the project's
 10 scope and use to that consistent with the approved plan; 2) revoking a project permit; and
 11 3) imposing penalties under YCC 16B.11 and YCC Title 19—hefty sanctions."

12 Even if the irrelevant, unsubstantiated assertions of improper practices are
 13 considered, Fryslan Ranch presented the Hearing Examiner with evidence contesting these
 14 assertions:

| Claimed Activity | Evidence Presented to Hearing Examiner | Hrg. Exam'r Updated Ex. List |
|----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|
| Mortality disposal | The Yakima Health District investigated Stuart Turner's complaint and found no violation of the requirement that mortalities be buried and covered with 3 feet of soil within 72 hours of death. | No. 1, Exs. C & F |
| Nutrient-water application | Emergency application of nutrient water from storage lagoons is permitted. Ruard Veldhuis proactively communicated with Daniel McCarty with the WSDA regarding emergency application of nutrient water onto nearby fields to relieve | No. 1, Exs. D & E |

22 * YCC 19.30.120.

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| | pressure on the storage lagoon because of extreme winter conditions. | |
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The record clearly supports the Hearing Examiner's decision to approve Fryslan Ranch's application with modifications. The Mensorides fail to establish the Hearing Examiner improperly shifted the burden of proof. The Mensorides' appeal must be denied in this regard.

3. The Mensorides' appeal fails because, contrary to their second unsupported assertion, the Hearing Examiner's decision is based on substantial evidence.

The Mensorides contend the Hearing Examiner's decision is not based on substantial evidence because Fryslan Ranch cannot be trusted to comply with SEPA conditions and environmental rules and regulations. This argument fails from the fatal "the MDNS is final" flaw.

The Mensorides cannot seek another bite at SEPA. No timely SEPA appeal was filed to challenge the MDNS. Therefore Yakima County's MDNS is SEPA compliant and constitutes the final decision on environmental considerations relating to CUP 2016-00019.

The Mensorides submit the "Hearing Examiner appears to feel constrained by the provisions of YCC 16B.06.060(5) regarding SEPA review and the absence of an express authority in the YCC to deny an application based on prior violations."¹⁰ The Hearing Examiner was *constrained* by YCC 16B.06.060(5), which states, "A SEPA determination shall be deemed to be conclusively in compliance with SEPA, the SEPA rules, and the provisions of YCC Chapter 16.04, unless a SEPA appeal is filed in accordance with this Chapter or Chapter 36.70C RCW."

¹⁰ Mensorides' Appeal of Hearing Examiner Decision at 4-5.

1 Yakima County issued the MDNS, finding the imposed mitigation measures were
2 sufficient to comply with SEPA. Fryslan Ranch must abide by these MDNS mitigation
3 measures. Failure to abide by these conditions will subject Fryslan Ranch to sanctions and
4 penalties. Fryslan Ranch will be subject to inspections by the Yakima Regional Clear Air
5 Authority, Yakima County, Washington Department of Ecology, Washington State
6 Department of Agriculture, and Washington Department of Fish and Wildlife. It is
7 reasonably anticipated that the Mensorides and Stuart Turner will observe Fryslan Ranch's
8 activities and be ready to report any suspected violations.

9 The Mensorides' second ground for appeal—that the Hearing Examiner's decision
10 is not based on substantial evidence because Fryslan Ranch cannot be trusted to comply
11 with SEPA conditions and environmental rules and regulations—fails from the fatal "the
12 MDNS is final" flaw. Further, substantial weight must be given to the Hearing Examiner's
13 decision that Fryslan Ranch submitted substantial evidence to support its permit
14 application, including the project plan, a hydraulic impact assessment report, and letters
15 and records from relevant governmental agencies.

- 16 **4. The Mensorides' appeal fails because, contrary to their unsupported**
17 **assertion, the Hearing Examiner exercised his full authority as a Reviewing**
18 **Official of CUP2016-00019.**

19 Lastly, the Mensorides contend the Hearing Examiner failed to exercise his full
20 authority as a Reviewing Official in order to ensure accountability to the public regarding
21 environmental factors. This argument is neither supported by the Yakima County Code
22 nor the evidence, and yet again seeks to challenge the final MDNS.

1 The Mensorides rely on YCC Chapter 16B.06, which is the "Consistency Analysis
2 and SEPA Integration" chapter. And the SEPA factor the Mensorides ask the Board to
3 consider, "[e]nsure accountability by local government to applicants and the public for
4 requiring and implementing mitigation measures," YCC 16B.06.010(3)(c), is not relevant
5 because no timely SEPA appeal was filed. The SEPA Reviewing Official—the Yakima
6 County Planning Division—considered this factor, along with each of the SEPA project-
7 review factors listed in YCC 16B.06.010(3), when developing and issuing the MDNS.
8 Because the MDNS was not appealed, the MDNS—and the YCC Chapter 16B.06 analysis
9 contained therein—is binding and serves as the CUP's environmental analysis.

10 The Mensorides are simply wrong when they state, "the Hearing Examiner clearly
11 has the authority, as a 'Reviewing Official', by the terms of the YCC, to deny the
12 application for insufficient environmental review (as in the failure to require an EIS) and
13 also if the mitigation proposed is insufficient to mitigate probable adverse environmental
14 impacts."¹⁰ The Hearing Examiner was not the Reviewing Official of the MDNS. Instead,
15 the Hearing Examiner was the Reviewing Official of the permit application, CUP2016-
16 00019. The Hearing Examiner exercised his full authority by considering the decision
17 criteria listed in YCC 19.30.080(7) for Type 2/3 combined use permits and by
18 incorporating the binding MDNS conditions into the CUP conditions.

19 Not only is the MDNS binding on the Board, but it is binding on Fryslan Ranch.
20 Fryslan Ranch must comply with the mitigation measures contained in the MDNS—
21 mitigation measures that are many and demanding. For instance, before Fryslan Ranch can

22 ¹⁰ Mensorides' Appeal of Hearing Examiner Decision at 8.

1 begin calf-rearing operations at this proposed site, it must submit an approved stormwater
2 retention plan, deliver to the Yakima County Planning Division a legal instrument limiting
3 future permit-exempt stock watering from the existing wells on the current calf-rearing
4 parcels, prepare an approved Nutrient Management Plan overseen by the Washington
5 State Department of Agriculture; submit an approved Dust Control Plan to the Yakima
6 Regional Clean Air Agency; and enter into a habitat protection plan with the Washington
7 Department of Fish and Wildlife. In addition, Fryslan Ranch must comply with the litany
8 of other design and operational-related conditions imposed by the Hearing Examiner.

9 The Mensonides vaguely state that “[r]egulators are busy” and it is “pure
10 speculation” that “if code violations occur, they can be addressed by penalties as described
11 in the YCC.”⁴⁰ Even if this is a CUP decision criteria, the Mensonides offer pure
12 speculation, not the evidence needed to overturn or modify the Hearing Examiner’s
13 deliberate decision, which is afforded substantial weight. In comparison, the record reflects,
14 not only has Fryslan Ranch responded to public concerns, but the agencies also timely
15 investigated public complaints. There is no evidence the agencies are unable to fulfill their
16 investigatory and oversight responsibilities. Lastly, in the words of Virginia Prest, the
17 Washington State Department of Agriculture Dairy Nutrient Management Program
18 Manager, “Much improvement has been observed and documented at your farms and you
19 have been very good to work with.”⁴¹

21 ⁴⁰ Mensonides’ Appeal of Hearing Examiner Decision at 8.

22 ⁴¹ Hrg. Exam’r Updated Ex. List No. 1, Ex. B at 13.

1 E. Conclusion: The Hearing Examiner's decision must be affirmed.

2 No timely SEPA appeal was filed. The Hearing Examiner (and the Board) cannot
3 reconsider the final MDNS and the environmental factors under YCC's SEPA Chapter
4 16B.06. The Hearing Examiner fully considered the relevant YCC 19.30.080(7) decision
5 criteria and evidence before him and concluded Fryslan Ranch satisfied its burden. Fryslan
6 Ranch respectfully requests this Board affirm the Hearing Examiner's decision approving
7 CUP2016-00019 with the conditions imposed therein and begin the three-year time to
8 complete the imposed conditions from the date of the Board's decision.

9 DATED this 7th day of November, 2017.

10 STOKES LAWRENCE
11 VELIKANJE MOORE & SHORE

12 By: 

13 Erika Hartlieb (WSBA #33277)
14 Brendan Monahan (WSBA #22315)
15 Attorneys for Fryslan Ranch
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17 120 N. Naches Avenue
18 Yakima, WA 98901-2757
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RETURN TO:

**STOKES LAWRENCE
VELIKANJE, MOORE & SHORE**
Attention: Erika N. Harfiep
120 N. Naches Avenue
Yakima, Washington 98901-2737

DECLARATION OF WELL MONITORING COVENANT

| | |
|----------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Declarant(s): | (1) FRYSLAN RANCHES ENTERPRISES, LLC (2) FRIESLAND ENTERPRISES, LLC (3) DEN BOER ENTERPRISES, LLC |
| Abbreviated Legal Description: | SE¼ SW¼ S18, T9N, R23EWM; NE¼ NW¼ S17, T9N, R23EWM; S¼ SW¼ SW¼ S9, T9N R23EWM; SW¼ SW¼ S8, T8N, R23EWM; SE¼ SW¼ S8, T8N, R23EWM; NW¼ S17, T8N, R23EWM. Complete legal descriptions are on pages 8-11 |
| Assessor's Tax Parcel ID No(s): | 230909-33001; 230917-21001; 230918-34001; 230808-33001; 230808-34001; 230817-21001 |

This Declaration of Well-Monitoring Covenant ("*Declaration*") is made this ___ day of _____, 2017 (the "*Effective Date*") by FRYSLAN RANCHES ENTERPRISES, LLC, a Washington limited liability company ("*Fryslan*"), FRIESLAND ENTERPRISES, LLC, a Washington limited liability company ("*Friesland*") and DEN BOER ENTERPRISES, LLC, a Washington limited liability company ("*Den Boer*") (collectively the "*Declarants*").

RECITALS

A. Fryslan is the owner of the Fryslan Property, Friesland is the owner of the Friesland Property, and Den Boer is the owner of the Den Boer Property, as such terms are defined in Section 1 below.

B. On February 25, 2016, Fryslan submitted a Conditional Use Permit Application referred to as CUP 2016-00919 (the "*Permit Application*"), in which Fryslan sought approval from Yakima County (the "*County*") to operate a calf yard on the Feedlot Property, as such term is defined in Section 1 below. Upon approval of the Permit Application, Declarants intend to relocate all calves currently located on the Restricted Parcels to the Feedlot Property.

C. As a condition of approving the Permit Application, the County requires that the Declarants execute and record a Declaration of Well Monitoring Covenant, in which the affiliated Declarants agree to prohibit permit-exempt stock watering uses of the existing wells located on the Fryslan Property, the Friesland Property, and the Den Boer Property, and to limit the use of such

existing wells on the Restricted Parcels to domestic uses for the present and future residences and shops located on such properties after the calves are relocated from the Restricted Parcels to Fryslan Ranch (the "Permit Contingency").

D. In recognition that the calves have been relocated from the Restricted Parcels to Fryslan Ranch, the Declarants now desire to execute and record this Declaration in satisfaction of the Permit Contingency.

COVENANT. THE UNDERSIGNED, FOR GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND ADEQUACY ACKNOWLEDGED, HEREBY DECLARE AND AGREE AS FOLLOWS:

1. **Definitions.** For purposes of this Declaration, the following terms shall have the following meanings:

- 1.1. "Den Boer Property" means that certain Yakima County, Washington, real property, commonly referred to as Yakima County Assessor's Parcel Nos. 230918-34001 and more particularly described on Exhibit A.
- 1.2. "Feedlot Property" means that certain Yakima County, Washington, real property owned by Fryslan and Fryslan's affiliate, FRH Enterprises, LLC, a Washington limited liability company. The proposed Feedlot Property is commonly referred to as Yakima County Assessor's Parcel Nos. 230808-33001, 230808-34001 and 230817-21001, and is more particularly described on attached Exhibit D (the "Feedlot Property").
- 1.3. "Friesland Property" means that certain Yakima County, Washington, real property, commonly referred to as Yakima County Assessor's Parcel Nos. 230917-21001 and more particularly described on Exhibit B.
- 1.4. "Fryslan Property" means that certain Yakima County, Washington, real property, commonly referred to as Yakima County Assessor's Parcel Nos. 230909-33001, and more particularly described on attached Exhibit C.
- 1.5. "Restricted Parcels" means the Fryslan Property, the Friesland Property, and the Den Boer Property, collectively.
- 1.6. "Subject Wells" means the permit-exempt wells currently located on the Restricted Parcels.

2. **Stock-Watering Restriction.** As of the Effective Date of this Declaration and so long as the Feedlot Property is used as a feedlot for livestock, the present and future owners of the Restricted Properties shall be prohibited from using the Subject Wells for stock-watering purposes, as otherwise permitted under RCW 90.44.050. Notwithstanding the foregoing, nothing contained in this Declaration shall prohibit the use of the Subject Wells for any permit-exempt uses allowed under RCW 90.44.050 other than stock-watering purposes for business and commercial purposes.

3. Monitoring and Verification of Compliance.

- 3.1. **Well Water-Usage Meter.** Within *thirty (30) days* of calves being removed from a Restricted Parcel and placed on the Feedlot Parcel, Declarants shall install, at Declarants' sole expense, a water meter on that Restricted Parcel's Subject Well(s) to measure and record the water usage from such Subject Well(s).
- 3.2. **Annual Reporting.** Commencing on *January 15, 2019*, and again annually on *January 15th of each following year*, the present and future owners of the Restricted Parcels shall provide the County with a summary of the water usage from each Subject Well for the previous *twelve (12) month period*.
- 3.3. **Inspection.** Upon *forty-eight (48) hours* prior written notice to the owners of the Restricted Parcels, County and State Officials are permitted to enter the Property during normal business hours to inspect the Subject Wells' water meters to determine compliance with this Covenant.
4. **Rights to Use Property.** The present and future owners of the Restricted Parcels may use the Restricted Parcels for any purpose that is not inconsistent with this Declaration.
5. **Binding Effect; Running with the Land.** This Declaration is binding on the undersigned parties and their respective heirs, successors, and assigns and constitutes perpetual restrictions, conditions, and covenants appurtenant to and running with the Restricted Parcels.
6. **No water right created.** A water right is authorization from the State to make use of water. This Covenant does not create or establish a water right.
7. **Amendment.** This Declaration may be amended only by a signed and notarized writing, which references this Declaration, that is recorded with the Yakima County Auditor and signed by both the Grantor and the County.
8. **Termination.** This Declaration shall terminate upon and no longer be of any force or effect upon the sooner of (a) the date on which the Feedlot Property ceases to be used as a feedlot for livestock; or (2) upon the recording of a notice of termination of such covenants executed by the owner(s) of the Restricted Parcel(s) and the County, recorded with the Yakima County auditor.
9. **Governing Law and Venue.** This Declaration was made under the laws of the state of Washington, and if it becomes necessary to interpret or enforce any of this Declaration's terms, the laws of the state of Washington will apply. The proper and exclusive venue for any proceeding to interpret or enforce this Declaration will be Yakima County, Washington.
10. **Headings.** The captions and paragraph headings used in this Declaration are inserted for convenience of reference only and are not intended to define, limit, or affect the interpretation or construction of any term or provision of this Declaration.

11. **Attorney Fees.** If any party to or that benefits from this Declaration brings a legal action to interpret or enforce this Declaration, the substantially prevailing party in the action will be entitled to an award of the reasonable attorney fees and costs the party incurs in the action, whether in mediation, arbitration, at trial, on appeal, or in a bankruptcy proceeding.

EXECUTED effective as of the Effective Date first stated above.

FRYSLAN RANCHES ENTERPRISES, LLC

By: Windmill Estates, LLC, Member

By: _____
Jacob Veldhuis, Manager

By: _____
Anna F. Veldhuis, Manager

FRIESLAND ENTERPRISES, LLC

By: Windmill Estates, LLC, Member

By: _____
Jacob Veldhuis, Manager

By: _____
Anna F. Veldhuis, Manager

DEN BOER ENTERPRISES, LLC

By: Windmill Estates, LLC, Member

By: _____
Jacob Veldhuis, Manager

By: _____
Anna F. Veldhuis, Manager

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

On _____, 2017, JACOB VELDHUIS ("Signer"), who is personally known to me or proved by satisfactory evidence to be the Signer, personally appeared before me and acknowledged that Signer executed the above-stated Declaration of Well Monitoring Covenant ("Instrument") as Signer's free and voluntary act and deed for the uses and purposes stated in the Instrument and that Signer is authorized to execute the Instrument in the following capacity:

- As Manager for WINDMILL ESTATES, LLC, a Washington limited liability company, Member of FRYSLAN RANCHES ENTERPRISES, LLC, a Washington limited liability company

(print name)
NOTARY PUBLIC in and for the state of Washington
My appointment expires _____

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

On _____, 2017, ANNA F. VELDHUIS ("Signer"), who is personally known to me or proved by satisfactory evidence to be the Signer, personally appeared before me and acknowledged that Signer executed the above-stated Declaration of Well Monitoring Covenant ("Instrument") as Signer's free and voluntary act and deed for the uses and purposes stated in the Instrument and that Signer is authorized to execute the Instrument in the following capacity:

- As Manager for WINDMILL ESTATES, LLC, a Washington limited liability company, Member of FRYSLAN RANCHES ENTERPRISES, LLC, a Washington limited liability company

(print name)
NOTARY PUBLIC in and for the state of Washington
My appointment expires _____

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

On _____, 2017, JACOB VELDHUIS ("Signer"), who is personally known to me or proved by satisfactory evidence to be the Signer, personally appeared before me and acknowledged that Signer executed the above-stated Declaration of Well Monitoring Covenant ("Instrument") as Signer's free and voluntary act and deed for the uses and purposes stated in the Instrument and that Signer is authorized to execute the Instrument in the following capacity:

- As Manager for WINDMILL ESTATES, LLC, a Washington limited liability company, Member of FRIESLAND ENTERPRISES, LLC, a Washington limited liability company

(print name)
NOTARY PUBLIC in and for the state of Washington
My appointment expires _____

EXHIBIT A

Legal Description of Den Boer Property

Assessor's Parcel No. 230918-34001:

The Southeast 1/4 of the Southwest 1/4 of Section 18, Township 9 North, Range 23, E.W.M., records of Yakima County, Washington;

EXCEPT the South 25 feet for road;

AND EXCEPT beginning at the Southwest corner of the Southeast 1/4 of the Southwest 1/4 of said Section;

thence East 190.0 feet;

thence North at right angles to the South line of said Section 25 feet to the true point of beginning;

thence North at right angles to the South line of said Section, 213.00 feet;

thence East parallel with the South line of said Section, 190.0 feet;

thence South at right angles to the South line of said Section, 213.00 feet;

thence West parallel with the South line of said Section, 190.0 feet to the point of beginning.

Situated in Yakima County, Washington.

EXHIBIT B

Legal Description of Friesland Property

Assessor's Parcel No. 210917-21091:

The Northeast 1/4 of the Northwest 1/4 of Section 17, Township 9 North, Range 23 E.W.M., records of Yakima County, Washington;

EXCEPT a right-of-way 80 feet wide as conveyed to the North Coast Railroad Company, now Oregon-Washington Railroad Company, by deed recorded in Volume 92 of Deeds, page 465;

AND EXCEPT the North 30 feet for county road;

AND EXCEPT the East 15 feet for county road.

Situated in Yakima County, Washington.

EXHIBIT C

Legal Description of Eryslan Property

Assessor's Parcel No. 280909-33001:

The South 1/2 of the Southwest 1/4 of the Southwest 1/4 of Section 9, Township 9 North, Range 23, E.W.M., records of Yakima County, Washington;
EXCEPT those portions lying within county roads on the South and West.

Situated in Yakima County, Washington.

EXHIBIT D

Feedlot Property

Assessor's Parcel No. 230808-33001:

That portion of the Southwest 1/4 of the Southwest 1/4 of Section 8, Township 8 North, Range 23 E.W.M., records of Yakima County, Washington, lying South of the Mabton Lateral.

Assessor's Parcel No. 230808-34001:

The West 1/2 of the Southeast 1/4 of the Southwest 1/4 of Section 8, Township 8 North, Range 23, E.W.M., records of Yakima County, Washington, lying South of the Mabton Lateral.

Assessor's Parcel No. 230817-21001:

The Northwest 1/4 of Section 17, Township 8 North, Range 23 E.W.M., records of Yakima County, Washington.

Situated in Yakima County, Washington.

