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**THE HEARING EXAMINER OF
THE CITY OF SEDRO-WOOLLEY, WASHINGTON**

<p>APPEAL OF MDNS IN RE: Deluxe Recycling and Disposal LLC</p>	<p>NO. BP-111-07 DELUXE RECYCLING AND DISPOSAL LLC'S MOTION TO DISMISS / AND RESPONSE</p>
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**I.
REQUEST FOR RELIEF**

Deluxe Recycling and Disposal LLC ("Deluxe") respectfully move that the Hearing Examiner dismiss the Janicki appeal as untimely. In the alternative, we request that the Hearing Examiner affirm the validity MDNS issued by the City of Sedro-Woolley and dismiss the Janicki appeal.

**II.
STATEMENT OF FACTS**

Deluxe submitted a building permit application to construct a recycling facility on an existing 12.84-acre portion of the former "Sedro-Woolley lumber sawmill site" zoned Industrial. The proposal would include the processing, recycling and disposal of municipal solid waste and would process construction debris. The site would be open to the public. It also includes the construction of

1 a 30,000 square foot processing facility and below grade compactor. In addition,
2 the existing buildings would be used for office and shop space, scales and a
3 scale house would be constructed and other activities on the site would include
4 an area for self-service recycling and storage of inert materials, such as wood,
5 concrete and metals. The proposal is permitted use within the Industrial zone
6 classification and only subject to the issuance of a building permit.
7

8 Deluxe filed a SEPA checklist to the City on December 17, 2007. The
9 checklist was accompanied with the following additional information which was
10 provided to the City of Sedro-Woolley to give sufficient information to issue a
11 threshold determination. The additional information included the following:
12

- 13 1. Department of Ecology – no action determination letter dated April 5,
14 2007. This no action letter incorporated a number of studies that were
15 done for the old Sedro-Woolley lumber site. After independent
16 remedial action of the site, Department of Ecology concluded that the
17 “independent remedial action” conducted at the site was sufficient to
18 meet the substantive requirements of the Model Toxic Control Act.
19 (see No Action Letter).
20
- 21 2. Wetland reconnaissance dated September 14, 2007 by Wetlands, Inc.
22 The consultants performed a critical area site reconnaissance of the
23 subject site for the presence of wetland streams or protective wildlife
24 habitats. The report concluded that there were no endangered,
25 threatened, sensitive wildlife habitats near the property, no streams on
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the property or within 200 feet, and scattered, invasive wetland plants but no regulated wetlands.

3. Stormwater Pond Design – This report is dated September 6, 2007, and was filed by Skagit Surveyors & Engineers with the state environmental policy checklist which provided the stormwater detention and treatment approach for the Deluxe project site. The report concluded that the proposed project would comply with the city standards. Incorporated within the report were aerial photos and calculations for the subject site, in accordance with the Western Washington hydrology model hydraulic tables.
4. Geo Engineer Test Services, Inc. report dated July 9, 2007. This report summarized the environmental conditions encountered recent and geotechnical site investigation related to the proposed site development. The report concluded that they had not identified any environmental contaminate concerns during the test period investigations.
5. Gibson Traffic Impact Assessment dated October 10, 2007. This report provided the traffic impact analysis for the proposed industrial development in the City of Sedro-Woolley with the necessary traffic generation/distribution and impact information. The report calculated the peak hour trips, mitigation fee required by the City, evaluation that the proposed development would not impact any identified WSDOT

1 improvement projects with 10 or more p.m. peak hour trips with
2 attached traffic impact study maps.

3
4 6. Deluxe Recycling and Disposal LLC SEPA site plan.

5 7. Processing facility detail exhibit drawings of the facility.
6

7 The application was determined to be complete on December 18, 2007.

8 After evaluating the various information provided with the checklist and studies,
9 the City of Sedro-Woolley issued on March 7, 2008 Mitigated Determination of
10 Non-Significance. The City concluded the environmental impact statement was
11 not necessary based on compliance with 27 mitigative conditions. Before issuing
12 the threshold determination, the City of Sedro-Woolley obtained comment letters
13 from various agencies and members of the public. The Appellant Ms. Janicki
14 submitted a comment dated February 4, 2008 that stated the following: "Please
15 accept this letter as official notice that I have concerns about the waste site
16 project. I do not believe a reasonable decision can be reached without a full
17 environmental impact study." The Appellant expressed no specific
18 environmental concerns or details that required either from the Applicant or
19 Sedro-Woolley further study or review.
20
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22 SWMC Section 2.88.170(b) states that: "An appeal must be filed in
23 writing with the responsible official within fourteen calendar days of the
24 decision..." Here, the Mitigated Determination of Non-Significance was issued
25 March 7, 2008 and the Appellant Janicki did not appeal the decision until March
26 26, 2008 – 19 days after the decision.
27

1 Although the City Code states that an appeal must be filed within 14
2 calendar days of the decision, the City Public Notice on the MDNS advised that a
3 party would have 14 days from the date of publication to appeal the statement.
4 This statement is inconsistent and contrary to the Sedro-Woolley Code, Section
5 2.88.170(b).
6

7 **III.**
8 **Appellant Janicki appeal of the Mitigated Determination of Non-**
9 **Significance should be dismissed as it is untimely.**

10 The general rule that a right of action created by statute or ordinance is
11 subject to such valid restrictions, conditions, or limitations as a legislative body
12 may place on it. Seattle Shorelines Coalition v. Justin, 93 Wn.2d 395, 398, 609
13 P.2d 1371 (1980). The city has imposed a requirement that any appeal of the
14 threshold determination must be “filed in writing with the responsible official
15 within fourteen calendar days of the decision.” The ordinance is clear and
16 unambiguous that once a decision is filed, the decision must be ... an appeal
17 must be filed within 14 calendar days. Here, Ms. Janicki filed the appeal 19 days
18 after the Mitigated Determination was issued on March 7, 2008, with the appeal
19 filed on March 26, 2008. Thus, the Janicki appeal was untimely.
20

21 The Hearing Examiner has no jurisdiction to hear the appeal and should
22 be required to dismiss the appeal.

23 For example, in Birch Bay Sales v. Whatcom County, 65 Wn. App. 739,
24 829 P.2d 1109 (1992), the Court dismissed an appeal which was untimely filed
25 after the 10 day appeal period established by Whatcom County Code.
26

1 That Court stated that "There is nothing suspect in creating an ordinance
2 that requires an appeal to be filed within 14 calendar days of the decision.
3 These deadlines cannot be ignored."
4

5 For example, in King County, an ordinance which provided a 10-day
6 appeal period of a Land Use decision was upheld in Woodward v. Spokane. The
7 Court stated: "Specific provisions limiting the time within an agreed litigated
8 must perfect an appeal are included in the enabling acts of 2/3 of the state. In
9 general, these provisions are included for the assumption that the public interest
10 will be best served by finalizing the decision and firming up the rights to develop
11 land at the earliest moment which is consistent with fair process." See also citing
12 for R. Anderson American Law Zoning No. 27.24 at Page 532.
13

14 The City of Sedro-Woolley cannot extend the statutory appeal periods by
15 misquoting the ordinance or publishing within its notice of the Mitigated
16 Determination another appeal deadline.
17

18 Appeal periods are hard and fast and are adopted to protect a property
19 owner and cannot be deviated or changed to Deluxe's detriment by City of
20 Sedro-Woolley.

21 Thus, based on the above reasons, Deluxe would request that the appeal
22 of the MDNS be dismissed.

23 **IV.**
24 **In the Alternative, the Appeal should be**
25 **Dismissed as it is Premature.**

26 Ms. Janicki's appeal of the issuance of a Mitigated Determination of Non-
27 Significance without appealing the underlying building permit. Ironically, the

1 building permit has not even been issued which is the permit that is subject to
2 the environmental review.

3
4 **Sedro-Woolley Code 2.88.170, Appeals, states:**

5 C. Because a major purpose of this chapter is to combine
6 environmental considerations with public decisions, any appeal
7 brought under this chapter shall be linked to a specific governmental
8 action.

9 D. Unless otherwise provided by this section:

10 1. Appeals under this chapter shall be of the
11 governmental action together with its accompanying environmental
12 determinations.

13 2. Appeals of environmental determination made (or
14 lacking) under this chapter shall be commenced within the time
15 required to appeal the governmental action which is subject to
16 environmental review.

17 Accordingly, the appeal is premature as it only requests consideration of
18 the decision to issue a Mitigated Determination of Non-Significance. The
19 building permit has not even been issued yet. The building permit should have
20 been appealed together with the environmental determination, not simply the
21 Mitigated Determination of Non-Significance. The City of Sedro-Woolley does
22 not authorize an appeal of the threshold determination without an appeal of the
23 permit that was subject to the threshold determination.

24 **V.**
25 **There is no Basis for the Hearing Examiner to Reverse the Mitigated**
26 **Determination of Non-Significance to Deluxe.**

27 Challenges of MDNS's rarely have been successfully challenged in Court.
28 MDNS' have effectively been upheld when it is established that the City

1 considered environmental factors in a manner sufficient to amount to prima facie
2 compliance with the procedural requirements of SEPA. See West 514 v.
3 Spokane County, 53 Wn. App. 838, 770 P.2d 1065 (1989). In the West 514
4 case, the Court decided that the MDNS for a shopping mall was sufficient and
5 that the County adequately considered environmental factors.
6

7 In regards to SEPA, Courts have stated that "it is unrealistic to expect no
8 effect from development. The law does not require that all adverse impacts be
9 eliminated; if it did, no change in land use would ever be possible." See Pease
10 Hill v. Spokane, 62 Wn. App. 802, 808, 816 P.2d 37 (1999). In the Pease Hill
11 case, an MDNS was upheld for a wood waste landfill. The Court recognized that
12 the Court should defer to "the expertise of the administrative agency." Pease Hill
13 v. Spokane, 62 Wn. App. p.804. Here, the Hearing Examiner should also defer
14 to the expertise of the administering agency, the City of Sedro-Woolley, in
15 evaluating whether the environmental factors are considered in a manner
16 sufficient to amount to prima facie compliance with the procedural requirements
17 of SEPA.
18

19
20 A determination of compliance must be based on the information
21 reasonably sufficient to determine the environmental impacts of a proposal. The
22 record must establish that there was a complete and thorough review. Pease
23 Hill v. Spokane, 62 Wn. App. p.804. The Court has acknowledged that the
24 selection of the environmental review process and protection is left to the sound
25 discretion of the appropriate governing agency not the Court. Thus, the decision
26
27

1 to issue an MDNS is reviewed under the “clearly erroneous standard.” Anderson
2 v. Pierce County, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). A decision is
3 clearly erroneous when after reviewing all evidence to support it, the reviewing
4 Court is left with a definite firm conviction that a mistake has been committed.
5

6 Nevertheless, “An agency decision to issue an MDNS and not to require
7 an EIS must be accorded substantial weight.” RCW 43.21C.090. The
8 legislature created the MDNS process to encourage agencies and applicants to
9 work together to reduce the impacts of a project below the threshold level of
10 significance. WAC 197-11-350. With an MDNS, promulgation of an EIS and
11 intense public participation are rendered unnecessary because the mitigated
12 project will no longer cause significant adverse environmental impacts.
13

14 The use of mitigation to bring projects into compliance with SEPA without
15 promulgation of an EIS has been reviewed favorably by the Washington courts.
16 The Washington State Supreme Court deems the MDNS process to be
17 “imminently sensible.” Hayden v. City of Port Townsend, 93 Wn.2d 870, 880,
18 613 P.2d 1164 (1980). Similarly, the Washington Department of Ecology has
19 favorable characterized the MDNS process as conducive to efficient,
20 cooperative, reduction or avoidance of adverse environmental impacts. The
21 mitigated DNS provision in WAC 197-11-350 is intended to encourage
22 Applicants and agencies to work together early in the SEPA process to modify
23 the project and eliminate significant adverse impacts. The mitigated DNS
24 process is not intended to reduce the amount of environmental review done on a
25 project, but to reduce the paperwork needed to document the process. Richard
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1 L. Settle, DOE Interpretations of Determination of Non-Significant Provisions in
2 1988 SEPA Handbook, G-12G-6, App. at 466.

3
4 Here, the record clearly establishes that Sedro-Woolley has thoroughly
5 considered appropriate environmental factors in analyzing Deluxe's building
6 permit application and environmental checklist. After receiving all comments and
7 reviewing the studies that were provided by Deluxe, mitigative measures were
8 attached to reduce significant adverse environmental impacts below threshold
9 levels of significance, so that an EIS is no longer required.

10
11 **VI.**
Appellant Provides No Relevant Reason to Reverse
the Decision to Issue an MDNS.

12
13 **A. The Mitigative Conditions Are Adequate.**

14 In turning to the specific issues raised by the Appellant, Appellant makes
15 a broad assertion that the conditions of the MDNS are illusory. Appellant makes
16 no case of what specifics of the environment need to be studied in an
17 environmental impact statement and does not point to any deficiencies in the
18 reports delivered with the environmental checklist that would warrant the
19 preparation of an EIS. The City of Sedro-Woolley has adequately responded to
20 this specific objection. The record establishes that the City adequately
21 considered environmental impacts and crafted MDNS conditions to provide some
22 specificity and flexibility to deal with unforeseen problems. It is a common
23 approach to consider in issuing a threshold determination and conditioning of a
24 particular project. For example, in West 514 v. Spokane County, an MDNS for a
25 suburban regional shopping center was upheld even though the conditions
26

1 attached to the MDNS were “general commitments to study various areas of
2 environmental concerns and to modify the project site plan as appropriate on the
3 basis of the findings of further studies,” although these conditions were not
4 specific as to mitigating specific concerns, but required future studies, the MDNS
5 was upheld. Here, the conditions attached to the Deluxe project are even more
6 specific, defensible, and must be upheld.
7

8 The Appellant’s concerns with the Conditions Nos. 21, 24, 26, 9, 10, 11,
9 12, 22, 23 have been answered in Sedro-Woolley’s written response. We
10 incorporate and adopt by reference the response of Sedro-Woolley to these
11 specific concerns.
12

13 In addition, there is no requirement to impose mitigative condition if
14 violations are enforced through other relevant ordinances or statutes. For
15 example, this use will require a Solid Waste Handling Facility Permit (RCW
16 70.95) from the Skagit County Health Department. This statute regulates length
17 of stay of garbage, and maintenance of the site through the issuance of their
18 permit. Accordingly, the issue need not be mitigated in this process if further
19 regulated by statute.
20

21 In regard to Condition No. 24, the City has the authority to enforce this
22 condition. The evidence in the record establishes that the use will not create
23 nuisance like smells. Nevertheless, this condition was imposed to establish the
24 authority to police the site in the event that there was an unforeseen nuisance.
25 In addition, the Northwest Air Pollution Board further enforces odor pollution.
26
27

1 The City adequately considered the traffic impacts from the site. The
2 record indicates that the Applicant submitted a detailed traffic study. The record
3 further reveals that the City considered traffic impacts from the use and as a
4 result, adopted mitigative Conditions No. 9, 10, 11, and 12.
5

6 Lastly, the City's MDNS mitigates objective manifestations/impacts from
7 operating the use regardless as to the volume of refuse or recyclable materials
8 brought to and from the site. In that case, it does not make any sense to attempt
9 to restrict volume, but to evaluate the impact from a "worst case scenario." The
10 record indicates that this is what the City did in adopting the various mitigative
11 measures on to this particular proposal.
12

13 **B. Appearance of Fairness Doctrine does not Apply to the Issuance**
14 **of a Building Permit.**

15 Appellant contends that the City Planning Staff "pre-judged" or "is biased"
16 in favorable to the application and that this is a violation of appearance of
17 fairness doctrine.
18

19 This application is for a building permit which is subject to environmental
20 review. The property is zoned Industrial. This is not a quasi-judicial proceeding.
21 The appearance of fairness doctrine only applies to a quasi-judicial proceeds
22 that require a public hearing not ministerial acts, such as the issuance of a
23 building permit [RCW 42.36.010]. The Supreme Court further ruled that the
24 "appearance of fairness requirement which have been developed for hearing as
25 are inappropriate in the building permit process which necessarily involves
26 frequent formal contacts between the Applicant and employees of the building
27

1 department. Polygon Corp. v. Seattle, 90 Wn.2d 59, 68, 578 P.2d 1309 (1978).
2
3 In any event, the adoption of Resolution No. 743-07 has absolutely nothing to do
4 with the issuing of an MDNS. This decision to issue an MDNS is made by the
5 staff not the Council. Furthermore, the appearance of fairness doctrine does not
6 apply to staff members who neither conduct hearings nor have the authority to
7 decide quasi-judicial matters. Polygon Corp. v. Seattle, supra. In any event, the
8 Appellants have provided no evidence of Mr. Moore's bias in his review and
9 ultimate decision to issue the MDNS in this case. His employment with the City
10 of Sedro-Woolley is not a basis to overturn the City decision to issue an MDNS.
11

12 **C. Compliance with the Solid Waste Management Plan is not**
13 **Relevant Basis to Overturn the MDNS.**

14 Whether or not Deluxe' site is part of the County's Comprehensive Solid
15 Waste Management Plan is not relevant on whether or not the City should have
16 issued an MDNS or required an EIS. The Appellant is attempting to inject
17 political and not relevant issues into this appeal. Any reference to this argument
18 should be stricken with the hearing limited to only issues related to the threshold
19 determination.
20

21 **VII.**
22 **CONCLUSION.**


23 In conclusion, Deluxe would respectfully requests that the Janicki appeal
24 be dismissed.
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DATED this 1 day May, 2008.

Respectfully submitted,

ADELSTEIN, SHARPE & SERKA LLP

BY: 

PHILIP A. SERKA, WSBA #6814
Attorney for Deluxe Recycling and Disposal
LLC

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