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**CITY OF SEDRO-WOOLLEY
OFFICE OF THE HEARING EXAMINER**

ANNIE JANICKI,

Appellant,

No. BP-111-07

vs.

CITY OF SEDRO-WOOLLEY and DELUXE
RECYCLING AND DISPOSAL LLC

Respondents.

THE CITY OF SEDRO-WOOLLEY'S
RESPONSE TO APPELLANT'S
RESPONSE TO STAFF REPORT

I. INTRODUCTION

Appellant appealed the "SEPA Notice of Threshold Determination Mitigated Determination of Non Significance". See Appellant's Notice of Appeal. From the City of Sedro-Woolley Planning Department's ("Planning Department") perspective there are two principal substantive issues involved with this appeal. (1) Whether there was sufficient information before the Planning Department for it to issue the MDNS, and (2) Whether the Planning Department's decision to issue an MDNS for this project was made consistent with SEPA requirements. It is hereby requested that the Hearing Examiner find the Planning

1 Department correctly issued the MNDS for the Deluxe Recycling and Disposal LLC project
2 and dismiss this appeal.

3 II. FACTS

4 The Deluxe Recycling and Disposal LLC project ("Project") is to construct and
5 operate a recycling and solid waste handling facility. The facility would also process
6 construction debris and provide self service drop off for recyclables. See Notice of
7 Application. The Planning Department issued the SEPA Notice of Threshold Determination
8 for the Project on or about March 7, 2008. This Notice was published March 12, 2008. See
9 SEPA Notice of Threshold Determination. The threshold determination for the Project is a
10 Mitigated Determination of Non-Significance ("MDNS"). *Id.* The lead agency for this
11 environmental review is the City of Sedro-Woolley ("City") and the responsible official is
12 the Planning Director ("Responsible Official").

13 The breadth and detail of environmental review conducted by the Planning
14 Department is extensive and thorough. This analysis includes a critical areas site
15 reconnaissance by Wetlands Inc. This wetlands analysis reviewed vegetation, soils and
16 wetland hydrology and the results indicate that the Project did not impact critical areas. See
17 Attachment to SEPA Checklist, Letter from Whitefield to McCarter re site reconnaissance,
18 dated September 14, 2007. The technical memorandum on stormwater design was
19 conducted according to state and local standards. See Attachment to SEPA Checklist,
20 Memo from Abenroth to Moore re DRD-stormwater pond design, dated September 6, 2007.
21 The geotechnical report demonstrated that the Project site does not contain signs of
22 contamination. See Attachment to SEPA Checklist, Letter from Sorenson to Wilton re
23 geotechnical site investigation, dated July 9, 2007. The Gibson Traffic report was also

1 reviewed and will be discussed in more detail below. See Attachment to SEPA Checklist,
2 Traffic Report - Traffic Impact Statement, dated October 10, 2007.

3 During the public comment period, the Planning Department received comments
4 from the Department of Ecology. See Comment letter, dated January 18, 2008. The
5 Planning Department also received comments from other local public agencies such as the
6 Skagit County Public Works Department, the Skagit County Health Department and the
7 Sedro-Woolley School District. See Comment letters. Finally, the Planning Department
8 received comments from several members of the public including the Appellant.

9 From these comments, the Planning Department learned more about environmental
10 issues such as the number of sides on the structure necessary to reduce dust, odor, and noise
11 (4 sides required by MDNS; 3 were originally proposed), whether portions of the Project are
12 in the floodplain, impacts on the school district's property, and traffic concerns. Also, the
13 Planning Department was notified of the additional regulatory requirements of the
14 Department of Ecology (NPDES General Permit for Stormwater Discharges associated with
15 Construction Activity and a Stormwater Pollution Prevention Plan), Skagit County Public
16 Works (System Operator Agreement with Skagit County), Skagit Health Department
17 (Permits solid waste facilities in Skagit County), Public Utility District No. 1 (will impose
18 water system improvements and/or backflow prevention requirements).

19 After reviewing all of the information submitted, the Planning Department issued the
20 MDNS with twenty-seven (27) conditions. *See* MDNS.

21 Appellant appealed the "SEPA Notice of Threshold Determination Mitigated
22 Determination of Non Significance". *See* Appellant's Notice of Appeal. The Planning
23 Department has submitted its Staff Report ("Staff Report") responding to the appeal of the
24 SEPA MDNS. Appellant's Response to the Staff Report makes several arguments which
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1 are outside the scope of its appeal and extraneous to review of the SEPA threshold
2 determination before the Hearing Examiner.

3 At the first telephonic pre-hearing conference, the Hearing Examiner instructed the
4 parties that whether the Project is permitted is not within the scope of this appeal. Instead,
5 the issues properly before the Hearing Examiner are (1) whether the MDNS was supported
6 by sufficient information before the Department; and (2) whether the MDNS decision
7 conforms with SEPA. Extraneous arguments made by Appellant include whether the
8 actions of the City Council or statements by the Mayor influenced the lead agency's
9 decision to issue an MDNS; and whether City Res. 706-04 demonstrates that the City did
10 not follow the Skagit County Solid Waste Management Plan ("CSWMP"). This memo will
11 briefly respond to these extraneous arguments. The focus of the Planning Department's
12 response is on the questions of whether the decision to issue an MDNS for the Project was
13 based on sufficient environmental information and made in accordance with SEPA
14 requirements.

15 III. LEGAL ARGUMENT

16 A. This Project was not Pre-Judged by the Planning Department

17 Under the SEPA rules and the Sedro-Woolley Environmental Policy (SWMC 2.88),
18 the lead agency and responsible official have specific duties. The responsible official must
19 comply with SEPA's procedural requirements for issuing the threshold determination.
20 WAC 197-11-050(2); SWMC 2.88.040. Appellant argues that since the City Council
21 adopted Resolution No. 743-07 and the Mayor expressed support for the project, the
22 Planning Department pre-judged the applicant's project.

23 By its express terms, Resolution 743-07 is simply a statement of conceptual support
24 for the Project. The City Council is not the lead agency. Further, this Resolution
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1 specifically states that “Nothing herein is to be construed as any sort of regulatory or
2 permitting approval of any project that may be developed consistent with this concept.”
3 Resolution 743-07. Appellant objects to that portion of the Resolution offering conceptual
4 support, but ignores that portion of the Resolution which states it shall not be “construed as
5 any sort of regulatory or permitting approval.” The Resolution does not in any way direct
6 the responsible SEPA official to a particular threshold decision.

7 Appellant also presents statements made by the Mayor at a Skagit County Board of
8 Commissioners meeting in support of the project as proof that the SEPA threshold
9 determination was pre-judged. Supporting a project, however, is not the same as having an
10 opinion on the appropriate SEPA threshold determination. It is quite consistent for a project
11 supporter to believe an EIS should be prepared. Appellant offers no link between general
12 support for the Project and an opinion on the threshold determination.

13 Moreover, the Mayor never said anything about the approval process and never so
14 much as implied what the SEPA threshold decision ought to be. Appellant speculates,
15 without any evidence whatsoever, that the Responsible SEPA Official was pressured to
16 abrogate his duties as a public official. Appellant further assumes that the Responsible
17 Official knuckled under to this imagined pressure by issuing an MDNS when he should have
18 issued a DNS. Appellant’s speculations and assumptions are unfounded and collapse under
19 their own weight. Appellant has not demonstrated that there was any pre-judgment of the
20 threshold determination by the Responsible SEPA Official.

21 Finally, contrary to Appellant’s argument, the appearance of fairness doctrine is
22 inapplicable as it applies only to quasi-judicial decision making, not an administrative SEPA
23 threshold determination. RCW 42.36.010. Even if the doctrine was applicable, which it is
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1 not, the Appellant fails to present any evidence of actual bias to support the contention that
2 the Planning Department pre-judged the environmental review.¹ Appellant instead implies
3 that bias should be presumed because the Responsible Official is a subordinate of alleged
4 project supporters like the Mayor and City Council. That Appellant cites no authority in law
5 for presuming such bias is not surprising. The Appellant's presumption of bias and
6 suggestion that the Planning Department was required to hire an outside consultant to make
7 the threshold determination is simply incorrect.

8 Elimination of environmental impact is not the purpose of an MDNS. Instead, the
9 MDNS is only issued when a project no longer creates significant environmental impacts
10 once mitigated.² The Planning Department has an obligation under SEPA to meet this goal.
11

12
13 ¹ In *Trepanier v. Everett*, the Court of Appeals addressed an applicant's "contention that a conflict of interest
14 exists when the proponent of the project undergoing SEPA review is also the lead agency charged with making
15 the threshold determination of whether an EIS is required. The applicant believed that the decision-making
16 process was flawed because the Everett planning department was charged with the responsibility for both
17 drafting the proposed code and evaluating its environmental significance. He contends that the problem is
18 compounded by the Council's review of the DNS, which allowed the Council to act upon its *own* proposed
19 zoning code revision." *Trepanier v. Everett*, 64 Wn. App. 380, 384, 824 P.2d 524 (1992). Although
20 Trepanier claims the Council was also biased, he asserts no factual basis to support his contention. Nor is there
21 any evidence that the Council had any knowledge of the substantive provisions or environmental impacts of
22 the new zoning code prior to the hearing. Similarly, there is no showing that the workings of the planning
23 department and the Council are so incestuous as to affect appellant's opportunity for a fair hearing. Absent a
24 showing of bias or circumstances from which it may be presumed, the Council's consideration of its own
25 proposed code does not violate the appearance of fairness doctrine. See *Christensen v. Terrell*, 51 Wn. App.
621, 632-33, 754 P.2d 1009 (1988).

² The purpose of an MDNS is,

[t]o encourage agencies and applicants to work together to reduce the impacts of a project
below the threshold level of significance. *WAC 197-11-350*. With an MDNS, promulgation
of an EIS and intense public participation are rendered unnecessary because the mitigated
project will no longer cause significant adverse environmental impacts. Use of mitigation to
bring projects into compliance with SEPA, without promulgation of an EIS, has been viewed
favorably by the Washington courts. The Washington State Supreme Court deems the
MDNS process to be "eminently sensible." *Hayden v. City of Port Townsend*, 93 Wn.2d 870,
880, 613 P.2d 1164 (1980), overruled on other grounds, *SANE v. Seattle*, 101 Wn.2d 280,
676 P.2d 1006 (1984). The Court of Appeals, Division One, has held that

1 Despite Appellant's accusations, the Mayor of the City of Sedro-Woolley does not have the
2 power to require that the Planning Department thwart state law. The Appellant has not
3 demonstrated that the Planning Department pre-judged the environmental review of the
4 project or that any alleged pre-judgment resulted in inadequate mitigating conditions.

5 **B. The lead agency followed the terms of the 2004 Interlocal Agreement and the**
6 **County's 2004 Solid Waste Management Plan (CSWMP).**

7 Appellant argues that the Planning Department failed to follow the CSWMP when it
8 conducted environmental review. The CSWMP provides direction regarding the permitting
9 and siting of a solid waste handling facility. This appeal, however, pertains to whether the
10 decision to issue an MDNS was correct. Appellant's argument about failing to follow the
11 CSWMP in permitting and siting a solid waste transfer facility is entirely outside the scope
12 of this SEPA threshold determination appeal and beyond the jurisdiction of the Hearing
13 Examiner. Appellant entitles its Notice of Appeal as "Appeal of SEPA Determination."
14 The opening statement in the Notice of Appeal frames it thusly:

16 SEPA encourages compromise and accommodation by requiring that the decisionmaker
17 consider mitigation and state why it is inadequate to relieve the adverse impact. When the
18 decisionmaker imposes some mitigation measures, this does not necessarily mean that
19 unmitigated impacts no longer exist or will be totally eradicated by mitigation, but merely
20 that as mitigated, the project as a whole is acceptable. *Victoria Tower Partnership v. City of
Seattle, 59 Wn. App. 592, 603, 800 P.2d 380 (1990)* (footnote omitted). Similarly, the
Washington Department of Ecology (DOE) has favorably characterized the MDNS process
as conducive to efficient, cooperative reduction or avoidance of adverse environmental
impacts:

21 The mitigated DNS provision in *WAC 197-11-350* is intended to encourage applicants and
22 agencies to work together early in the SEPA process to modify the project and eliminate
23 significant adverse impacts. The mitigated DNS process is not intended to reduce the amount
of environmental review done on a project, but to reduce the paperwork needed to document
the process.

24 Richard L. Settle, *DOE Interpretations of Determination of Non-Significant Provisions*, in
1988 SEPA HANDBOOK, G-1 to G-6, app. at 466. *Anderson v. Pierce County, 86 Wn.*
25 *App. 290, 303, 936 P.2d 432 (1997).*

1 COMES NOW appellant, Annie Janicki, by and through her attorney, C.
2 Thomas Moser, and does now appeal the "SEPA Notice of Threshold Determination
3 Mitigated Determination of Non-Significance (MDNS) dated March 7, 2008 issued
4 by Planning Director Jack Moore and attached hereto as **Exhibit A** to this appeal.

5 Appellant's Notice of Appeal To Hearing Examiner, p. 1. The authority in city code for
6 appealing a SEPA threshold determination is found at SWMC 2.88.170 and SWMC
7 2.90.010.C.2 (as amended by Section 3 of Ord. 1607-08).

8 The present appeal is by its own terms an appeal of the SEPA threshold
9 determination. Arguments about project compliance with the CSWMP are beyond the scope
10 of this appeal and should therefore be rejected.

11 Nonetheless, rather than let significantly incorrect assertions stand without reply, a
12 brief response is in order. The Planning Department maintains that this project is a
13 permitted use and that it followed the 2004 Interlocal Agreement and the CSWMP.³

14 The City first adopted the 1994 CSWMP after entering into a 1986 Interlocal
15 Agreement per Resolution 57. See Resolution 57. Pursuant to RCW 70.95.080, Skagit
16 County ("County") and the City entered into a new Interlocal Agreement for management of
17 solid waste in 2004. See 2004 Interlocal Agreement. This Interlocal Agreement imposed
18 specific obligations on the municipalities and is presently in effect. For instance, Term 4 of
19 the Agreement states:

20 Comprehensive Solid Waste Management Plan. For the duration of this
21 Interlocal Agreement, each Municipality shall participate in the
22 Comprehensive Solid Waste Management Plan prepared and periodically
23 reviewed and revised pursuant to Chapter 70.95 RCW. For the duration of
24 this Interlocal Agreement, each Municipality authorizes the County to

25 ³ Deluxe's project is a permitted use within the City's Industrial Zone. See SWMC 17.28. Project review is dictated by the Washington Legislature under RCW 36.70B.030 and provides discretion to the local government in making the decision of whether an application is permitted.

1 include in the Comprehensive Solid Waste Management Plan provisions for
2 the management of solid waste generated in each Municipality.

3 Term 9 of the Interlocal Agreement states:

4 Revision, Amendment, Supplementation or Termination. This Interlocal
5 Agreement shall be reviewed by the parties in conjunction with any review of
6 the Comprehensive Solid Waste Management Plan. The terms of the
7 Interlocal Agreement may be revised, amended, or supplemented, or the
8 Interlocal Agreement as a whole may be terminated only upon the written
9 agreement of both the County and all Municipalities executed with the same
10 formalities as the original. No revision, amendment, supplementation or
11 termination shall be adopted or put into effect if it impairs any contractual
12 obligation of the County.

13 These terms and state law require the City to follow the CSWMP. Despite the City's
14 adoption of Resolution 706-04, it adopted the County's 2004 Amendments to its CSWMP in
15 Resolution 767-08. See Resolution 767-08. Resolution 706-04 is a non-enforceable
16 declaration of opposition to the 2004 CSWMP. See Resolution 706-04. The recitals of
17 Resolution 706-04 state the City's obligation pursuant to the 2004 Interlocal Agreement is to
18 follow the County's CSWMP. See Resolution 706-04. The Planning Department followed
19 the dictate of the 2004 Interlocal Agreement despite the existence of Resolution 706-04.
20 The 2004 CSWMP allows for another transfer station facility within Skagit County. See
21 2004 CSWMP section 7.3.5.⁴ While the City initially declined to adopt the County's
22 update to its CSWMP in 2004, the City remained bound by the terms of the Interlocal
23 Agreement. Finally, state law requires adherence to the Interlocal Agreement. RCW
24 70.95.080.

25 **C. The MDNS was based on sufficient information and is consistent with
requirements under SEPA.**

26 ⁴ The following recommendation is being made for the transfer system in Skagit County:
27 T1) More than one transfer station should be allowed to operate in Skagit County, subject to
28 normal permitting requirements and compatibility with the System Policy shown in Section
29 7.2.3.

1 **1. Standard of Review Governing Appeal.** Under the Sedro-Woolley
2 Municipal Code, deference must be accorded threshold determinations by the Responsible
3 SEPA Official. City code provides:

4 The procedural determinations by the city's responsible official shall carry
5 substantial weight in any appeal proceeding.

6 SWMC 2.88.170.I. This city code provision is consistent with Washington law on the
7 subject. Several Washington appellate court cases also provide that the lead agency's
8 decision to issue an MDNS is accorded substantial weight. *Anderson v. Pierce Cy*, 86 Wn.
9 App. 290, 302, 936 P.2d 432 (1997) citing RCW 43.21C.090; *Indian Trail Property*
10 *Owner's Assoc. v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994). The
11 standard of review applicable to an appeal of the issuance of an MDNS is under the "clearly
12 erroneous" standard of review. *Id.* citing to RCW 43.21C.090; *Indian Trail Property*
13 *Owner's Assoc. v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994). *Pease Hill*
14 *Community Group v. County of Spokane*, 62 Wn. App. 800, 809, 816 P.2d 37 (1991).

15 **2. The MDNS decision was made based upon sufficient information.**

16 The Planning Department is required to review the environmental effects of the
17 project in order issue the threshold determination. WAC 197-11-050. For this project, the
18 Planning Department received and reviewed the building permit application, conceptual site
19 plan and construction drawings, SEPA environmental checklist, several reports from
20 consultants evaluating environmental impacts, and numerous comments from other agencies
21 and the public. See p. 2 of this Memorandum. All material was considered.

22 The record should demonstrate that "environmental factors were considered in a
23 manner sufficient to amount to prima facie compliance with the procedural requirements of
24 SEPA," and that the decision to issue an MDNS was based on information sufficient to
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1 evaluate the proposal's environmental impact. *Id.* citing to *Pease Hill*, 62 Wn. App. at 810
2 (citing *Sisley*, 89 Wn.2d at 85; *Brown v. City of Tacoma*, 30 Wn. App. 762, 766, 637 P.2d
3 1005 (1981)).

4 The documents considered by the Responsible Official and in the record before the
5 Hearing Examiner include without limitation the numerous documents identified in the
6 below note.⁵ Appellant has not expressly argued that these documents were insufficient to
7 evaluate the proposal's environmental impact. While Appellant makes a general claim that
8 an EIS should be prepared (responded to below), Appellant has not specifically articulated
9 why the documents reviewed by the Responsible Official were insufficient to evaluate
10 environmental impacts. Appellant bears the burden of proof and has failed to provide reason
11 or evidence for overturning the responsible official's decision on these grounds.

12 **3. The MDNS decision was made consistent with the requirements of**
13 **SEPA.** Appellant makes two main arguments in support of overturning the MDNS issued
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16 ⁵ 1. Memo from Debbie Allen to Coleman re toxic flow into wastewater treatment facility, dated 2/5/08

17 2. Memo from Mark Freiberger to Building & Planning Dept. re review of BP-111-07, 2/20/08

18 3. Building Permit Application No. BP-111-07, 12/17/07

19 4. Conceptual site plan and construction drawing submitted w/application, 10/2007

20 5. SEPA Checklist, 11/29/07

21 6. Attachment to SEPA Checklist, No Further Action Determination Ltr from DOE, 4/5/07

22 7. Attachment to SEPA Checklist, Letter from Whitefield to McCarter re site reconnaissance, 9/14/07

23 8. Attachment to SEPA Checklist, Memo from Abenroth to Moore re DRD-stormwater pond design, 9/6/07

24 9. Attachment to SEPA Checklist, Ltr from Sorenson to Wilton re geotechnical site investigation, 7/9/07

25 10. Attachment to SEPA Checklist, Traffic Report - Traffic Impact Statement, 10/10/07

11. Comment letter from DOE to Coleman, 1/18/08

12. Comment letter from Jeffrey Miller, SC Pub Wks, 1/30/08

13. Comment letter from SC Health Dept, 1/30/08

14. Comment letter from SW School Dist. 101, 1/28/08

15. Comment letter from Appellant Janicki, 2/4/08

16. SEPA Determination comment letter from SC Health Dept, 3/28/08

17. Letter from Voetberg, SC PW, to Snell and McCarter re issues of concern, 3/18/08

18. Interlocal Cooperative Agrmt between SC and cities and towns in SC for solid waste mngmt, 5/17/04

1 by the responsible SEPA official: (i) the mitigation requirements were inadequate; and (ii)
2 and EIS should have been prepared.

3 (i) **Adequacy of Mitigation in MDNS.** The standard for determining
4 the adequacy of mitigating conditions is that the mitigation measures imposed must be
5 reasonable and capable of being accomplished. RCW 43.21C.060; WAC 197-11-660(1)(c);
6 *Kiewit Constr. Group, Inc. v. Clark County*, 83 Wn. App. 133, 143, 920 P.2d 1207 (1996).
7 The law does not even require that all adverse impacts be eliminated. *See Pease Hill*
8 *Community Group v. Spokane* (cited below), 62 Wn.App. 802, 808, 816 P.2d 37 (1999).

9 Washington courts have generally upheld MDNS decisions when challenged, finding
10 that the above standard is met. Examples abound. In *Pease Hill Community Group v.*
11 *Spokane*, 62 Wn. App. 800, 816 P.2d 37 (1999), the court found that,

12 The record does not support the contention that the project, as mitigated, will
13 have significant detrimental effect on the surrounding property. The county
14 engineer's office concluded the expected truck traffic will not interfere with
15 the public road; the reduced speed limit and the requirement that exhaust
16 brakes not be used on private haul roads will minimize noise. There is no
17 evidence in the record to support the claimed reduction in property values.
The Board also concluded the design of the leachate system, as well as the
rules and regulations of the Spokane County Health District and the
Department of Ecology, are sufficient to protect the wells and groundwater in
the area." *Id.* at 808.

18 Although the project, even as mitigated, will alter the surrounding area, it is
19 unrealistic to expect no effect from development. "The law does not require
20 that all adverse impacts be eliminated; if it did, no change in land use would
21 ever be possible." *Maranatha Mining, Inc. v. Pierce Cy.*, 59 Wn. App. 795,
22 804, 801 P.2d 985 (1990). *Id.* at 808-809.

23 In *Indian Trail Property Owners' Assc. v. Spokane*, 76 Wn. App. 430, 886 P.2d 209
24 (1994), an MDNS was issued by the Spokane Director of Building Services. *Id.* at 433.
25 When the Hearing Examiner reviewed the Director's threshold determination, they found
that the determination was not clearly erroneous as the agency reviewed the environmental

1 checklist evaluated comments and considered relevant environmental factors. *Id.* at 444.
2 Further, the Hearing Examiner found that with the exception of two mitigating measures, the
3 mitigation measures were adequate. *Id.* at 444. The Hearing Examiner remanded for
4 additional information and a determination of whether additional mitigation measures were
5 necessary and the MDNS were corrected. The court found after such a remand the criteria
6 and procedure under SEPA were satisfied. *Id.* at 444.

7 The Appellant in this case must prove the presence of significant adverse
8 environmental impacts despite the mitigating conditions. Without such a demonstration, the
9 Appellant fails to meet her burden of proof. Despite Appellant's assertions, the mitigating
10 conditions are "capable of being accomplished" (enforceable) under SWMC 2.88.100(G):

11 Mitigation measures incorporated in the mitigated DNS shall be deemed
12 conditions of approval of the permit decision and may be enforced in the
13 same manner as any term or condition of the permit, or enforced in any
14 manner specifically prescribed by the city. Failure to comply with the
designated mitigating measures shall be grounds for suspension and or
revocation of any issued license or permit.

15 Planning Staff was well aware of its authority that noncompliance with mitigating
16 conditions could result in revocation or suspension of the occupancy permit. See Staff
17 Report.

18 One of the tools available to the Responsible Official in crafting mitigating
19 conditions is to require compliance with other federal, state and local regulations. WAC
20 197-11-158 expressly authorizes the use of existing plans, regulations, and laws for analysis
21 and mitigation of "some or all" impacts. *Moss v. City of Bellingham*, 109 Wn. App. 6, 22,
22 31 P.3d 703 (2001).⁶ This is precisely what the Responsible SEPA Official did in crafting

24 ⁶ The *Moss* court also stated that, "WAC 197-11-158(2)(d) requires that the statement cited above be placed in
25 the DNS only when "no conditions will be required under SEPA." There is no corresponding statement to be

1 the subject mitigating conditions. For example, the MDNS specifically requires compliance
2 with the Northwest Clean Air Agency Regulations (regulates odor and dust) in Condition
3 no. 2. Condition No. 3 requires the applicant to comply with all state, federal and local
4 regulations. State regulations include RCW 70.95, WAC 173-350 (Solid Waste Handling
5 Standards). These regulations impose stringent standards for obtaining a solid waste permit
6 from the local health department.⁷

7 The Staff Report addresses the Appellant's specific arguments pertaining to the
8 adequacy of MDNS Condition Nos. 21, 24, 26, 9, 10, 11, 12, 22 and 23 and this memo
9 incorporates the Planning Department's conclusions. Additional support that these
10 conditions accomplish the goal of reducing significant environmental impact is set forth
11 below.

12 **a. Storage and Air Pollution.**

13 The Staff Report addresses Conditions No. 21 and 24 on page five (5). Appellant's
14 response to the Staff Report does not refute the Planning Department's explanation.
15 Materials stored on site are not permitted to wash away in a flood event. The Planning
16 Department will have oversight to enforce this condition should the solid waste facility
17 operation result in storage in the flood plain or in such a manner that risks security of the
18 material. Further, the solid waste handling permit will address storage of solid waste.
19 Finally, nuisances are enforceable under the City's code. Under the City code, nuisance is
20 defined under SWMC 17.040.030 (31). These nuisances may be abated under state law.
21 See RCW 7.48. Finally, as the Staff Report succinctly states, odor and dust control is

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23 placed in the DNS where the agency chooses to impose additional mitigation measures under SEPA, nor even
24 a requirement that the agency expressly refer to *WAC 197-11-158* in the DNS." *Id.* at 23.

25 ⁷ Each permit which the Project requires will also be enforceable by the permitting agency such as
the Northwest Clean Air Agency, Skagit County Public Health Dept. and the Washington Department of
Ecology.

1 regulated by the Northwest Clean Air Agency and compliance with its regulations is a
2 condition of the MDNS.

3 **b. Traffic.**

4 The Planning Department specifically considered transportation and traffic. Part of
5 project review under RCW 36.70B.030 requires the Planning Department to review its
6 planning documents and local regulations for application to the Project. The City's
7 Comprehensive Plan specifically provides for the reopening of the Jameson Street Right of
8 Way:

9 **Rhodes Road/Jameson Street/Railroad Avenue** – Improvements are
10 identified for Rhodes Road, Jameson Street, and Railroad Avenue to provide
11 a secondary arterial serving east-west traffic in the south part of the City.
12 These improvements would include upgrading the roadways to standards
13 including turn lanes and improved non-motorized facilities. The Plan calls for
14 extending Jameson Street between Batey Road and SR 9 when (and if) the
15 existing lumber business site is redeveloped. These improvements would
16 provide a continuous secondary arterial route between Fruitdale Road and SR
17 20.

18 See Arterial Improvements, Transportation Plan, at 44. See also, Table 13, Arterial
19 Improvements at 38. [http://www.ci.sedrowoolley.wa.us/ComprehensivePlans/documents/
20 Comp Plans/transportation/transp_plan/FINAL%20Report.pdf](http://www.ci.sedrowoolley.wa.us/ComprehensivePlans/documents/Comp%20Plans/transportation/transp_plan/FINAL%20Report.pdf). The balance of the Staff
21 Report on traffic impacts is incorporated herein.

22 Review of case law pertaining to the issuance of an MDNS makes clear that the
23 Planning Department followed the SEPA rules when it reviewed the environmental effects
24 of this Project. Following a thorough environmental review, mitigation measures were
25 required. The legal precedent and authority cited herein indicates that the subject mitigating
conditions are reasonable and capable of enforcement under the law. Appellant has not
provided any legal authority supporting the argument that the MDNS conditions here are
inadequate. Any argument of inadequate MDNS conditions must fail.

1 (ii) Appellant’s legal precedent fails to demonstrate that an EIS is
2 **required.** An EIS is not required in this case. A close examination of the Appellant’s legal
3 support does not demonstrate that the facts warrant an EIS.

4 The Appellant cites *Cook v. Clallam County* for the proposition that even if the
5 Project is permitted under the City’s zoning code, the City cannot ignore environmental
6 impacts. Of this there is not a dispute – the Planning Department did not ignore such
7 impacts. It should also be noted that the *Cook* case is factually distinct from this case as it
8 involves the adequacy of an EIS. The Board’s decision to deny the applicant’s building
9 permit after an EIS in the *Cook* case was not overturned. The court stated that the “[t]he
10 question is not whether the Board properly enforced local zoning, but whether the EIS
11 identifies specific adverse environmental impacts sufficient to support the Board’s
12 determination under state law.” *Cook v. Clallam County*, 27 Wn. App. 410, 415 (1980).
13 This question is completely different from the question before this Hearing Examiner; to
14 wit: whether the threshold determination with its 27 mitigating conditions was proper.

15 The Appellant also cites *Sisley v. San Juan County* for the proposition that an EIS is
16 required. This case, however, was decided before the SEPA rules were in effect. *Sisley v.*
17 *San Juan County*, 89 Wn. 2d 78, 87 (1977). The record in *Sisley* was replete with
18 information pertaining to the many environmental effects of the proposed marina that were
19 not analyzed or considered by the lead agency. *Id.* at 86-87. By contrast, the environmental
20 review in present case took place under the present SEPA rules. More important, unlike in
21 *Sisley*, Appellant does not allege environmental impacts were not considered, only that the
22 mitigation for some of those impacts was inadequate. In the present case, every comment
23 and probable adverse environmental impact was considered and analyzed by the Planning
24
25

1 Department. The most compelling evidence of this consideration is the 27 mitigating
2 conditions imposed on the project on all adversely impacted elements of the environment.

3 Finally, Appellant cites to *Norway Hill v. King County Council*, 87 Wn.2d 78 (1977)
4 for the idea that on its face this Project requires an EIS. *Norway Hill*, however, is another
5 case decided before SEPA rules on issuance of an MDNS were instituted. See WAC 197-
6 11-350. It is therefore inapposite. Indeed, the underlying decision in *Norway Hill* is no
7 longer recognized as good legal precedent. The Court of Appeals Division One stated that
8 “[] to the extent that *Norway Hill* can be read to mandate an EIS for every large subdivision,
9 regardless of attempts to mitigate the impacts prior to permitting, it is no longer good law.”
10 *Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001).


11 Appellant has not demonstrated that the Planning Department’s MDNS is clearly
12 erroneous or that a full EIS is required.

13 IV. CONCLUSION

14 For the reasons stated above, the Hearing Examiner should find that there was
15 sufficient information before the Planning Department to issue the MDNS and that the
16 Planning Department complied with SEPA when making its decision to issue an MDNS for
17 this project. The Responsible Official and the Planning Department respectfully request that
18 this appeal be denied.

19 DATED this 2nd day of May 2008.

20 **ZENDER THURSTON, P.S.**

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22 **ROBERT A. CARMICHAEL, WSBA #14008**
23 Attorneys for Respondent City of Sedro-Woolley