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ER 408 PROTECTED COMMUNICATION

August 21, 2008

Eron Berg
City Administrator & City Attorney
325 Metcalf Street
Sedro-Woolley, WA 98284

RE: *Janicki v. Sedro-Woolley et al*, Skagit Cty Cause No. 08-2-01130-8

Dear Mr. Berg:

Since learning of the City's rejection of our settlement offer via your August 14, 2008 press release, we have taken time to analyze the City's SEPA rules, in an effort to understand how it is you managed to advise the City Council they could have liability for accepting our settlement offer.

The County made a settlement offer to the City as an entity, which you then publicly deferred to the City Council. Having done so, you then publicly advised the City Council that they (and their wives) would have personal liability should they act to accept our offer. You then publicly advertised this in radio interviews, press releases, and the like – which, among other things, is a curious manner of advising one's client.

The conclusion reached inevitably depends on the question posed, and it would seem that the legal question you posed was something along the lines of the following: "Would the City Council have potential liability if it were to withdraw the Deluxe MDNS, arbitrarily and without cause, over the top of the Mayor, and against advice from the City Attorney?" I would agree with both Mike Tierney and you: that would create liability for the City Council. And part-time city council pay hardly warrants exposing oneself and one's family to that sort of personal risk, regardless of public ire.

The answer you provided was perhaps correct, but the question you posed was obviously not. The relevant question is whether the City as an entity has authority under the facts and the law to withdraw the MDNS, should it choose to do so. While it seems highly unlikely that anyone did so in advising the Sedro-Woolley City Council, our own review of the City's SEPA rules makes abundantly clear that the City is not only *entitled* to withdraw the Deluxe MDNS, but, under the City's own rules, is likely *obligated* to do so.

Sedro-Woolley Municipal Code (SMC) 2.88.065 adopts the Department of Ecology's model SEPA rules by reference, making them a part of the City's laws. We attach a copy of SMC 2.88.065 as Exhibit A. This includes WAC 197-11-340(3)(a), which provides in relevant part as follows:

The [City] **shall**¹ withdraw a DNS² if... [t]here is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or...[t]he DNS was procured by misrepresentation or lack of material disclosure...

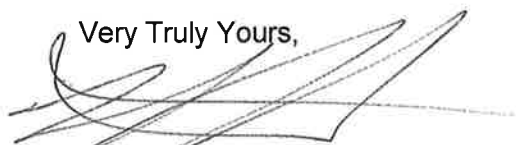
A copy of WAC 197-11-340 is attached as Exhibit B. Throughout this matter, the City has apparently failed to consider that the Deluxe proposal is prohibited by the 1994 solid waste plan still in effect with the City of Sedro-Woolley, not to mention the City's GMA Comprehensive Plan. (These issues were raised by Mrs. Janicki before the Hearing Examiner, so this isn't news.) As discussed below, there are more than sufficient grounds to withdraw the MDNS, assuming you want to. Specifically:

1. Deluxe's permit and engineering consultant, Skagit Surveyors and Engineers, submitted a SEPA checklist on November 29, 2007 that extensively discussed solid waste policy and planning issues (indicating that *someone* considered such things), yet utterly failed to disclose that the solid waste plan in effect within Sedro-Woolley prohibits the Deluxe proposal.³ Thus, Deluxe clearly "procured [the MDNS] by misrepresentation or lack of material disclosure."

2. The Deluxe MDNS was finalized and released to Deluxe on March 7, 2008. On March 11, 2008, the Skagit County Public Works Director wrote to Deluxe, copying the letter to the City of Sedro-Woolley, putting Deluxe and the City on notice that private transfer stations are not allowed within the City of Sedro-Woolley. This clearly constitutes "significant new information indicating, or on, a proposal's probably significant adverse environmental impacts," something the City of Sedro-Woolley cannot reasonably dispute given the City's comment letter during the Cimarron proposal process to the effect that a private transfer station's impact on the solid waste system demands a full environmental impact statement. See, Exhibit C.

No building permit has issued, and Deluxe has not turned a single shovel of dirt on the project. The City has every right in the world to withdraw the Deluxe MDNS if it chooses to do so, and, in fact, is *obligated* to do so under the City's own SEPA rules, without any liability whatsoever to Deluxe. From our perspective, the sum and substance of this matter is that *you don't want to withdraw the Deluxe MDNS*, and the advice furnished to the City Council was carefully structured to ensure that outcome.

In reality, the Mayor and you as the City Supervisor / City Attorney have every right and power to make this decision yourself if you feel it is in the interests of the City, without another public circus that seeks to improperly deflect public ire onto the City Council's shoulders. Our August 4, 2008 settlement offer remains open until 4:00 p.m. Tuesday, August 26, 2008, to the extent the City wishes to reconsider its prior rejection.

Very Truly Yours,

William Honea

¹ Bolding added. According to the Merriam-Webster Online Dictionary, the word "shall" is "used in laws, regulations, or directives to express what is mandatory." <http://www.merriam-webster.com/dictionary>, last visited August 21, 2008.

² An MDNS is a subspecies of DNS that uses mitigating conditions to reach the status of DNS. See, WAC 197-11-350. For the purposes of WAC 197-11-340, a DNS and an MDNS are the same.

³ The SEPA checklist is the basic disclosure document from the applicant on which SEPA determination are made. See, WAC 197-11-315. This WAC has also been adopted by Sedro-Woolley Municipal Code.

Sedro-Woolley Municipal Code - Chapter 2.88

ENVIRONMENTAL POLICY

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Article III. Categorical Exemptions and Threshold Determinations

2.88.065 Purpose of this part and adoption by reference.

This part contains the rules for deciding whether a proposal has a “probable significant, adverse environmental impact” requiring an environmental impact statement (EIS) to be prepared. This part also contains rules for evaluating the impacts of proposals not requiring an EIS. The city adopts the following sections by reference, as supplemented in this part:

WAC

197-11-300	Purpose of this part.
197-11-305	Categorical exemptions.
197-11-310	Threshold determination required.
197-11-315	Environmental checklist.
197-11-330	Threshold determination process.
197-11-335	Additional information.
197-11-340	Determination of nonsignificance (DNS).
197-11-350	Mitigated DNS.
197-11-355	Optional DNS process.
197-11-360	Determination of significance (DS)/initial scoping.
197-11-390	Effect of threshold determination.
197-11-800	Categorical exemptions.
197-11-880	Emergencies.
197-11-890	Petitioning DOE to change exemptions.

(Ord. 1448-03 § 2 (part), 2003)

197-11-335 << 197-11-340 >> 197-11-350

WAC 197-11-340

No Washington State Register filings since 2003

Determination of nonsignificance (DNS).

(1) If the responsible official determines there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a determination of nonsignificance (DNS) substantially in the form provided in WAC 197-11-970. If an agency adopts another environmental document in support of a threshold determination (Part Six), the notice of adoption (WAC 197-11-965) and the DNS shall be combined or attached to each other.

(2) When a DNS is issued for any of the proposals listed in (2)(a), the requirements in this subsection shall be met. The requirements of this subsection do not apply to a DNS issued when the optional DNS process in WAC 197-11-355 is used.

(a) An agency shall not act upon a proposal for fourteen days after the date of issuance of a DNS if the proposal involves:

- (i) Another agency with jurisdiction;
- (ii) Demolition of any structure or facility not exempted by WAC 197-11-800 (2)(f) or 197-11-880;
- (iii) Issuance of clearing or grading permits not exempted in Part Nine of these rules;
- (iv) A DNS under WAC 197-11-350 (2), (3) or 197-11-360(4); or
- (v) A GMA action.

(b) The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under WAC 197-11-510.

(c) Any person, affected tribe, or agency may submit comments to the lead agency within fourteen days of the date of issuance of the DNS.

(d) The date of issue for the DNS is the date the DNS is sent to the department of ecology and agencies with jurisdiction and is made publicly available.

(e) An agency with jurisdiction may assume lead agency status only within this fourteen-day period (WAC 197-11-948).

(f) The responsible official shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS or supporting documents. When a DNS is modified, the lead agency shall send the modified DNS to agencies with jurisdiction.

(3)(a) The lead agency shall withdraw a DNS if:

(i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;

(ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or

(iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

(b) Subsection (3)(a)(ii) shall not apply when a nonexempt license has been issued on a private project.

(c) If the lead agency withdraws a DNS, the agency shall make a new threshold determination and notify other agencies with jurisdiction of the withdrawal and new threshold determination. If a DS is issued, each agency with jurisdiction shall commence action to suspend, modify, or revoke any approvals until the necessary environmental review has occurred (see also WAC 197-11-070).

[Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110, 97-21-030 (Order 95-16), § 197-11-340, filed 10/10/97, effective 11/10/97.]

EXHIBIT **B**



CITY OF SEDRO-WOOLLEY

Office of the Mayor
720 Murdock Street
Sedro-Woolley, WA 98284
(360) 855-0771

October 15, 2004

Gary Christensen
Skagit County Planning & Permit Center
200 W. Washington
Mount Vernon, WA 98273

SKAGIT COUNTY
PERMIT CNTR.

OCT 15 2004

RECEIVED

RE: Mitigated Determination of Nonsignificance for Special Use Permit #PL04-0716

Dear Mr. Christensen;

The City of Sedro-Woolley would like to submit comments on the Mitigated Determination of Nonsignificance (MDNS) dated September 30, 2004 issued to construct a second solid waste transfer station (recycling and composting) in Skagit County at the Bayview Ridge Industrial park.

Inadequate information. The environmental checklist submitted by the applicant is not adequate to support the MDNS issued by Skagit County. The application purports to rely on environmental review of the 1994 Skagit County Solid Waste Plan (SCSWP) and the current (2004) update which has not yet been adopted. The environmental review of these plans does not include review of the proposed recycling and composting facility in the application, but only covers such programs in general terms. This review is not an adequate substitute for specific EIS review.

The 2004 draft of the SCSWP update cited by the applicant does not presume to substitute for environmental review of the proposed facilities. The 2004 SCSWP update draft states in Section 7.2.3 (E):

“Private and public solid waste facilities... shall be required to obtain necessary land use permits and undergo appropriate review under the State Environmental Policy Act as required.”

Need for an Environmental Impact Statement (EIS). The City of Sedro-Woolley submits that a MDNS should not be issued for Special Use Permit #PL04-0176, and that an EIS should be required for this application; and that the information submitted by the applicant is not adequate for a comprehensive review of the potential impacts of the entire program, but *implicitly* calls for impermissible “phased review” of the project.

The issues that need to be reviewed in the EIS include, but are not limited to:

1. The effects of the composting operation on the natural and built environment.

HEARING EXAMINER

EXHIBIT

23
EXHIBIT

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2. The effects of the proposed composting and recycling program on existing County programs, including recycling, in-county transfer, and waste export.
3. The proposal contemplates *waste import* into Skagit County, which has not been reviewed in the 2004 draft update, and is not adequately discussed in the environmental checklist except for a brief comment on page 18 relating to traffic issues. The potential impacts of unrestricted waste-import are very significant and should be addressed in an EIS.
4. The applicant states that its project will impact the Skagit County transfer station by reducing its revenue, and contemplates upgrades necessary for the Skagit County transfer station to remain solvent. However, no analysis is presented to show that the County transfer station will be economically viable with a reduced waste stream and resulting reduction in revenue. The proposal does not contemplate export of all waste, and the viability of the County transfer station, or the effects of its closure, should be addressed in an EIS. If the County transfer station were to close as a result of the impact of this proposal, the environmental effects would be significant.
5. The project is subject to conditions to be imposed in the contemplated "Special Use Permit". These conditions can only be determined by in-depth environmental review. It is inconsistent with SEPA to conduct this review only as part of the special use permit process, and not to require it as either part of the initial checklist nor in an EIS.
6. The SEPA Checklist (p. 14) only addresses compatibility of the project with the Bayview Ridge Industrial Park. It does not address compatibility with other surrounding zoning designations and land uses: Natural Resource – Agriculture, Natural Resource – Rural Resource, and Rural Reserve. The proposed 40 foot buffer on Farm to Market Road may not be adequate protection of surrounding land uses for a project with these impacts. This buffer is significantly less than the buffer for the Paccar site to the north.
7. The impacts of this project on the Paccar site have not been addressed.
8. It appears that additional phases of the project are contemplated for future development and expansion of the facility. If phased review is planned for this project, it should be specified and at this time. Without more information, the *implied* proposal for phased review should be denied, and an EIS should be required for all aspects of the project.

The City of Sedro-Woolley submits that the mitigation proposed in the MDNS is inadequate to address potential impacts as a result of this proposal. The City therefore requests that an Environmental Impact Statement be prepared that addresses the full range of impacts associated with this proposal.

Thank you for the opportunity to comment on this proposal.

Sincerely,



Mayor Sharon Dillon



City Planner Lacy Lahr



October 14, 2004

In reply to: (MDNS)

Attention: NORM WEETING

Subject: SPECIAL USE PERMIT # PL04-0176

SKAGIT COUNTY
PERMIT CENTER

OCT 15 2004

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My biggest concerns are with number nine and ten in the MDNS. Also we would require monthly reports of materials of received and processed and residues independently certified.

- A.) Monitoring and reporting of inbound materials: The City of Sedro-Woolley would require that only county personnel be present in this position during operating times.
- B.) Procedures and compensation methodology for disposal of all residual and non process able materials: The City of Sedro-Woolley would require that this facility be required to pay the same system fee that the county does with no subsidies of any kind. The rates shall be the same as the counties transfer station. And any residues are taken to the county transfer station for disposal and paid for at the county rate, currently \$82.00 per ton.
- C.) The proposed project shall conform to the current Solid Waste Management Plan: Since this facility will be accepting municipal Solid Waste. This facility does not conform to the current Solid Waste Management Plan, which states that only one transfer station, is allowed in Skagit County.

Also as recommended by the Skagit County Solid Waste Advisory Board, All of the Mayors in Skagit County, and all of the Signatories to the Interlocal agreement there should be only one Transfer station at this time. This project does not comply and should be denied.

Thank you,
Leo Jacobs
360-855-1884
Solid Waste Foreman
City of Sedro-Woolley

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22