



CITY OF SEDRO-WOOLLEY
PLANNING DEPARTMENT
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TRANSMITTAL & REPORT MEMORANDUM

HEARING DATE: May 5, 2008

TO: Donald B. Largen – Sedro-Woolley Hearing Examiner

REGARDING Appeal of SEPA Mitigated Determination of Non-Significance for file #BP-111-07, Deluxe Recycling and Disposal

FROM: _____
Jack R. Moore, Planning Director and Building Official
Sedro-Woolley Planning Department

BACKGROUND / PROPOSAL

On December 17, 2007, Deluxe Recycling and Disposal, LLC submitted an application to develop a site within the City of Sedro-Woolley as a solid waste handling and recycling facility. The proposed project is located at 109 Jameson Street. It lies south of Jameson Street and west of Third Street and extends south from Jameson Street to the City limits. It is comprised of tax parcels P75932, P75933, P75935, P75936 and P37648 and is a portion of the NE ¼ of the NW ¼ of Section 25, Township 35 N., Range 04 E., W.M.

The lead agency (City of Sedro-Woolley) followed the regulations for the optional DNS process in WAC 197-11-355, which allow for an integrated comment period to obtain comments on the notice of application and likely threshold determination for a project. The lead agency published the “Notice of Application and SEPA Comment Period” (notice) on January 16, 2008. The comment period was to remain open until 4:30 PM, January 30, 2008. The notice was posted at two locations on the project site and mailed to all properties and property owners within 500 feet of the site as well as all those who had requested copies of notices relating to the project. The notice was to be published in the January 16, 2008 Courier-Times, but due to a publisher error, the notice did not appear in said newspaper on that date. The City re-issued the notice which was published in the Courier-Times on January 23, 2008. The public comment period was held open until February 6, 2008 to assure adequate time for public comment.

On March 7, 2008 the lead agency issued a mitigated determination of non-significance (MDNS). The MDNS (Exhibit A) was posted at two locations on the project site and mailed to all properties and property owners within 500 feet of the site as well as all those who had requested copies of notices relating to the project. The MDNS was published in the March 12, 2008 Courier-Times and the fourteen day appeal period closed on March 26, 2008 at 4:30 PM. On March 26, 2008, Annie Janicki, by and through her attorney, C. Thomas Moser, filed a timely appeal of the SEPA Threshold Decision (MDNS).

PARTIES TO THE APPEAL

Project Applicant: Deluxe Recycling and Disposal, LLC
4916 LaBounty Place
Ferndale, WA 98248

Appellant: C. Thomas Moser, Attorney for Annie Janicki
411 Main Street
Mount Vernon, WA 98273

APPELLANT'S ARGUMENTS

C. Thomas Moser, attorney for Annie Janicki (Appellant) makes several assertions and arguments concerning the MDNS in the Notice of Appeal to Hearing Examiner. The following is a brief description of those assertions under the heading for each as found in the Notice of Appeal to Hearing Examiner (see Notice of Appeal to Hearing Examiner for full text):

- *Resolution No. 743-07- "City pre-judged application"*
- *Applicant and City Not Allowed or Permitted- "the City rejected and failed to adopt the 2004 CSWMP"*
- *Inadequacy of Mitigation-*
 1. *MDNS condition 21- "what about garbage that floats out of a container or recyclable materials?"*
 2. *MDNS condition 24- concerning timing for removing Municipal Solid Waste from on site*
 3. *MDNS condition 26- concerning odor and dust control*
 4. *MDNS conditions 9, 10, 11 and 12- concerning traffic issues*
 5. *MDNS condition 22- concerning traffic mitigation fees*
 6. *MDNS condition 23- concerning "voluntary police impact fee"*
 7. *SEPA Checklist item referring to Site Designation and Systems Operator's Agreement with Skagit County*
- *Conclusion and Request for Relief- Appellant requests that the Hearing Examiner determine that the MDNS is insufficient and that the only method for determining the impact if this project is to require a full EIS."*

LEAD AGENCY COMMENT ON APPEAL

- *Appellant comment titled “Resolution No. 743-07”-*

The Appellant asserts that “there is scant evidence in the record that the City’s MDNS flows from an adequate assessment of the likely environmental impacts the Deluxe project will create.” This is not accurate. A complete Environmental Checklist for the Deluxe project was submitted and reviewed by City staff. In addition, twenty-six (26) written comments were received and reviewed during the open public comment period between January 16 and February 6, 2008 (Exhibit B). Moreover, prior to and subsequent to the comment period, the City received several other comments. Staff considered every comment and addressed in the MDNS each comment that may have an environmental impact.. Two interdepartmental meetings were also held so as to determine the potential impacts on City street, sanitary, police and fire services.

The Appellant also asserts that by passing Resolution No. 743-07 (Exhibit C), “the City pre-judged this application.” This statement is also incorrect. The resolution clearly states that the City supports the concept of the facility within the City limits. The proposed location is zoned Industrial and the proposed use is outright allowed in that zone. The Planning Department is obligated by the Sedro-Woolley Municipal Code (SWMC) to consider an application for a use that is in accordance with the zoning for the location. Furthermore, the resolution includes a statement: “Nothing herein is to be construed as any sort of regulatory or permitting approval of any project that may be developed consistent with this concept. This resolution is intended to be an expression of support for the concept of this business and facility within the City and nothing more.” The fact that City Council supports the use of industrial land for industrial purposes in no way has affected staff’s ability to process the application in full accordance with the SWMC and, more relevant to this appeal, the State SEPA rules. Staff is bound by the rules and processes in state and local code. The Appellant’s argument fails to draw a logical nexus between City Council support for a concept and staff’s ability to process an application objectively and in accordance with the law.

- *Appellant comment titled “Applicant and City Not Allowed or Permitted”-*

The City is part of the County’s Comprehensive Solid Waste Management Plan (CSWMP). In 2004, the City of Sedro-Woolley signed an Interlocal Agreement (Exhibit D) between all cities and Skagit County that dictates how the CSWMP is amended and implemented. Number 4 of the agreement states: “[f]or the duration of this Interlocal Agreement, each Municipality authorizes the County to include in the Comprehensive Solid Waste Management Plan provisions for the management of solid waste generated in each Municipality.” The authority for the County to act on behalf of the cities is borne of RCW 70.95.080(3), which allows cities to authorize the county to prepare a plan for the city's solid waste management for inclusion in the comprehensive county plan. The City chose this option, which effectively committed the City to follow the County’s lead concerning solid waste management. When the County amended the CSWMP to allow for two transfer

stations, the City opposed the amendment. However, the City remained bound by the Interlocal Agreement to follow the CSWMP as amended, despite its objection. The Interlocal Agreement with the County was not undone by Resolution No. 706-04. Because Resolution 706-04 was contrary to the City's 2004 Interlocal Agreement and its obligation to follow the CSWMP, the City has never acted on nor operated under the resolution and did not have the legal latitude to do so. Therefore the Applicant's statement: "[i]f City staff had diligently and objectively reviewed the Deluxe application...it is obvious that City staff would have rejected the Deluxe proposal out of hand" is incorrect; the City staff did review the application for compliance with its Comprehensive Plan and the CSWMP. The City staff found that the application is in accordance with both for the reasons listed above.

- *Appellant comment titled "Inadequacy of Mitigation"*- Appellant makes the broad assertion that the conditions in the City's MDNS are illusory and not sufficiently specific to be enforceable. The City's MDNS, however, contains 27 separate conditions on specific and disparate potential environmental impacts. Many of the conditions are quite specific; e.g. "1. Hours of construction shall be limited to 7:00 a.m. to 9:00 p.m. weekdays and 8:00 a.m. to 9:00 p.m. weekends as required in SWMC 9.46.020. Other potential impacts require more general conditions, so as to enable the City to deal with more unpredictable issues, like odor. See Conditions 24-26. For example, any attempt to identify the chemical composition of air samples associated with odors or maximum storage times would almost certainly prove cumbersome and/or arbitrary. Through the MDNS conditions, the City staff properly identified and limited certain conditions conducive to producing odor (composting; storage) and left itself the ability to limit such activities. This approach strikes a balance between the need for some specificity and the need to preserve sufficient flexibility to deal with unforeseeable problems. It is a common approach to MDNS conditioning and one with substantially more specificity than has been used in other similar cases.

By comparison to another relatively recent MDNS challenge in Skagit County concerning the development of a materials processing facility for storing and processing recyclable materials from mixed municipal solid waste, the present MDNS is much more specific and thorough. In 2004, Skagit County issued a MDNS (Exhibit E) for such a facility on a 9.4 acre piece of land near Ovenell Road and Farm to Market Road. The County's MDNS included no specific mitigation to address odor, traffic, lighting, noise or any other potential impacts. The MDNS included a broad statement addressing more specific potential impacts. Mitigation item number 9 of the County's MDNS reads:

"A contract shall be required between Skagit County and the applicant to specify:
-Monitoring and reporting of inbound and outbound materials;
-Procedures and compensation methodology for disposal of all residual and non-processable materials."

The County's MDNS was appealed and upheld. The City's MDNS for the proposed Deluxe facility is far more specific and addresses potential impacts identified in the comment letters received as well as other potential impacts identified by staff. Considering the City MDNS is vastly more comprehensive than the MDNS for an almost identical facility that withstood appeal, the City MDNS should also be upheld.

1. *MDNS condition 21-*

The Appellant asks "what about garbage that floats out of a container or recyclable materials?" This question is answered clearly and directly by the Condition 21; "materials are to be secured or located *to prevent displacement during flood*" (emphasis added). The Appellant also asks about the penalty for non-compliance (this question is asked several times throughout the appeal, let the following answer apply to subsequent repetitions of this question). For any conditions in the SEPA MDNS that are applicable to construction and site preparation, the applicant is required to comply with the conditions or a certificate of occupancy (CO) is not issued. As for conditions that are applicable to the ongoing operation of the facility, those will be included as conditions to the certificate of occupancy. Thus any non-compliance with said conditions can be enforced through the Code Enforcement Officer and the CO can be revoked if non-compliance is not rectified. Additionally, any violations of Title 17 SWMC – Zoning, are subject to enforcement per the regulations in Chapter 17.80 SWMC.

2. *MDNS condition 24-*

See above response to Appellant's comment titled "Inadequacy of Mitigation." The exact length of time that material may be on site prior to transporting will be established and enforced by the City based on the type of material, the method of storage, any additional odor control provided, etc. MDNS condition #24 prohibits the storage of material on site for a length of time and in such a way that result in unreasonably offensive odors interfering with the quiet enjoyment of uses on neighboring properties. Any use that would create a nuisance would certainly qualify and be subject to this condition.

3. *MDNS condition 26*

Odor and dust control as referenced in MDNS condition #2 and #26 will continue to be regulated as the City currently does; by using the NW Clean Air Agency regulations in compliance with the Washington State Clean Air Act RCW 70.94. These are as specified at: <http://www.nwcleanair.org/formsRegs/regulations.htm>. The City retains full discretion necessary enforce this MDNS condition.

4. *MDNS condition 9, 10, 11 and 12-*

MDNS Condition Nos. 9, 10, 11 and 12 regarding traffic issues. The first paragraph notes that Deluxe hired Gibson Traffic Consultants to prepare a Traffic Impact Assessment (TIA). It goes on to state "[a]pparently, this study was not used in developing the MDNS."

In fact, the City's comments quote the TIA analysis of the existing West Nelson/SR9 intersection as level of service (LOS) F as one of three justifications for requiring upgrade

of the Jameson/SR9 intersection. The others were the substandard condition of West Nelson/Batey Street and the residential nature of the route from SR9 to Jameson via West Nelson/Batey.

4.a quotes the TIA as excluding extension of Jameson through the former lumber mill from consideration. The first paragraph claims that the TIA and MDNS are inconsistent. The TIA however assumed routing the additional traffic on existing city streets, which as noted above is not acceptable to the City for the reasons given. The TIA data on traffic impact was used in making this determination. The purpose of the TIA is to assess impacts. It is up to the City to determine if these impacts are acceptable or not, and to require mitigations that are in accordance with the overall comprehensive plans of the City.

The second paragraph of 4.a claims that the City's MDNS is erroneous and an abuse of discretion, and goes on to claim that the City failed in its legal obligation to adequately assess environmental impacts. In fact, the mitigations proposed by the City are designed to mitigate the impacts identified by the TIA.

4.b discusses the requirement that truck traffic be limited to the route west of the proposed site. It also notes that opening up the proposed route on Jameson to SR9 would redirect east-west traffic. In fact, this route already exists, via West Nelson and Batey Streets, and is classified as a Secondary Arterial in the City's 2005 Transportation Element of the Comprehensive Plan (Transportation Plan) and the federal Functional Classification System. The City's requirements are in accordance with the Transportation Plan and the connection of Jameson to SR9 across the former lumber mill site is identified as future arterial project C-14 in the Transportation Plan. The Appellant assumes that the potential impacts of opening the Jameson Street right-of-way are "unintended and unstudied." However, the potential impacts have been thoroughly studied, reviewed by the public (through the Comprehensive Plan update process) and those potential impacts were weighed by the City Council. The City Council then approved inclusion of the opening of the Jameson Street right-of-way in the Transportation Plan after considering the potential impacts. The TIA did address normal growth projections for the route and the added traffic from the project.

4.c discusses the existing West Nelson/SR9 intersection condition at LOS F and alleges that the City does not mitigate this in the MDNS. The City is very aware that the project would cause further unacceptable delays to this intersection based on the TIA. As noted above, this is one of the reasons given for the MDNS condition of reestablishing the Jameson Street connection.

4.d discusses the MDNS requirement that the site approach be channelized to avoid use of Jameson Street east of the site. Traffic destined for the project site from the east will not be necessarily under the control of the project applicant. Nonetheless,

proper design and channelization of the site entrance, coupled with a properly designed intersection at SR9/Jameson, will discourage this usage and accomplish the City's goal.

5. *MDNS condition 22-*

The first paragraph of appeal comment number 5 discusses traffic mitigation fees calculated by the TIA. The fee calculation is for the purpose of the applicant and not binding on the City. The City will determine actual Impact Fees on completion of the plans and submission of the final TIA. Transportation Impact Fees are codified in the Sedro-Woolley Municipal Code Section 16.60, with the fee to be determined by the Director of Public Works in accordance with the provisions of the Code, and are due prior to issuance of the Building Permit. Issuance of the MDNS does not in any way relieve the applicant of the responsibility for paying these fees.

The second paragraph of comment 5 asserts that assessing SEPA mitigation fees and GMA traffic impact fees is unlawful. SWMC Section 15.60.060.C provides for a credit to the developer for improvements to facilities that are identified on the Transportation Impact Fee project list. This credit is available to the applicant and will be calculated in the final Transportation Impact Fee for the project. The proposed mitigation is lawful.

6. *MDNS condition 23-*

The "voluntary police impact fee" was included in the MDNS simply because the developer has already agreed to pay this fee. Per SWMC 15.48.040, the payment of said fee cannot be a condition of permit approval.

7. *SEPA Checklist item referring to Site Designation and Systems Operator's Agreement with Skagit County-*

The first paragraph of comment 7 asserts that the City raises no issues on the amount of materials that the applicant would be able to bring to the proposed facility. There has not been a limit established on the exact quantity of material that may be processed, but rather prohibitions on affecting the community as a result of the operation. The amount of material that may be processed without affecting the community will be limited by the effectiveness of the methods employed by the applicant in their operation while ensuring that no adverse results occur.

RECOMMENDATION

Based on the review of the Notice of Appeal and the above staff comments on each of the Appellant's comments, staff recommends that the Hearing Examiner **uphold the SEPA responsible official's threshold determination** and deny appeal filed by Annie Janicki by and through her attorney, C. Thomas Moser. Appellant's assertion that the mitigation required in the MDNS is inadequate is untenable.

PUBLIC PARTICIPATION

The Hearing Examiner will hold a public hearing May 5, 2008 at 10:00 AM at the City Hall Council Chambers located at 325 Metcalf Street.

NOTICE OF PUBLIC HEARING PUBLISHED IN THE COURIER TIMES: April 16, 2008

EXHIBITS:

- A. SEPA MDNS issued March 7, 2008
- B. Public Comments received during open public comment period
- C. Resolution No. 743-07
- D. Interlocal Cooperative Agreement between Skagit County and Cities and Towns in Skagit County for Solid Waste Management
- E. Skagit County SEPA MDNS for materials handling facility