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COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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FREMONT NEIGHBORHOOD COUNCIL, Norm and Beverly DAVIS,  
Erika and John BIGELOW, and Mary SUSSEX,

*Appellants,*

vs.

CITY OF SEATTLE, OFFICE OF HEARING  
EXAMINER, a quasi-judicial body, and through its  
DEPARTMENT OF PUBLIC UTILITIES,

*Respondents.*

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**CITY'S RESPONSE BRIEF**

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## **I. INTRODUCTION**

This is a SEPA<sup>1</sup> case. The principal issue is whether the City of Seattle (“City”) Hearing Examiner was clearly erroneous when she decided that the proposed reconstruction of the City’s North Recycling and Disposal Station (“NRDS”) was unlikely to result in significant, adverse environmental impacts and that, therefore, an environmental impact statement (“EIS”) was not required. The Hearing Examiner found that the reconstructed NRDS would likely have fewer environmental impacts than the existing NRDS facility. The trial court affirmed the Hearing Examiner’s decision. A threshold issue is whether the trial court erred in finding that the Hearing Examiner’s decision was ripe for judicial review.

The NRDS was constructed in Seattle’s Wallingford neighborhood in 1967. The Appellants, some of who moved into homes across the street from the NRDS, want the City to remove the NRDS from their neighborhood and put it in a different neighborhood.

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<sup>1</sup> State Environmental Policy Act, RCW 43.21C.

## **II. STATEMENT OF THE CASE**

### **A. History of Planning for NRDS Improvements.**

In 1998, the Seattle City Council adopted a Solid Waste Management Plan (“SWMP”).<sup>2</sup> The SWMP contemplated that the NRDS would be upgraded at its existing location, including the possible construction of a recycling facility on adjacent property.<sup>3</sup> An EIS was prepared for the SWMP, which recognized that the EIS was the first, “programmatic” phase of environmental review for the facilities and programs described in the Plan.<sup>4</sup> Neither the adequacy of the EIS or the Council’s adoption of the SWMP was appealed.

In 2003, Seattle Public Utilities (“SPU”), which is the City department responsible for managing the City’s solid waste utility, prepared a draft Solid Waste Facilities Master Plan (“SWFMP”) that contained a more detailed description of possible solid waste facility improvements than that contained in the 1998 SWMP.<sup>5</sup> The principal component of the draft SWFMP was the proposed construction of a new Intermodal facility in south Seattle, in addition to proposed improvements to the existing NRDS and the existing transfer station located in south Seattle (“SRDS”). Although SPU

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<sup>2</sup> Resolution 29805.

<sup>3</sup> Administrative Record (“AR”) 00444 (Tab 35).

<sup>4</sup> CP 45 (Finding of fact 8).

<sup>5</sup> AR 00500-00748 (Tab 38).

originally planned to prepare an EIS that would encompass review of the transfer station improvements in addition to the construction of the new Intermodal facility, SPU decided to defer environmental review of the transfer station improvements until SPU was ready to proceed with those projects.<sup>6</sup> Accordingly, the EIS that SPU prepared in 2005 focused on the Intermodal facility and did not provide SEPA review of the future transfer station upgrades. The adequacy of this second EIS, including the decision to defer SEPA review of the transfer station upgrades, was not appealed. The City Council later made a decision not to build the Intermodal facility and to move ahead with improvements to the existing transfer stations, as contemplated in the 1998 SWMP.

**B. Procedural History of This Lawsuit.**

**1. Hearing Examiner Proceeding.**

On April 14, 2008, SPU issued a decision stating that an EIS was not required for the proposed reconstruction of the NRDS.<sup>7</sup> This decision is called a Determination of Non-Significance (“DNS”) under SEPA, meaning that the proposed project is not expected to result in “significant,” adverse environmental impacts. The Appellants appealed the DNS to the Seattle

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<sup>6</sup> AR 00770-00772 (Tab 40).

<sup>7</sup> AR 00233 (Tab 33).

Hearing Examiner.<sup>8</sup> After conducting discovery, the Appellants filed a Motion for Judgment on the Merits.<sup>9</sup> The Hearing Examiner heard oral argument on the motion and denied the motion by written order on August 11, 2008.<sup>10</sup> The Hearing Examiner then conducted a three day hearing on October 1, 2, and 7, 2008. The Hearing Examiner found that the Appellants had failed to prove that the proposed project was likely to result in significant, adverse environmental impacts, and therefore affirmed SPU's determination that no EIS was required. A copy of the Hearing Examiner's final decision may be found at CP 43-53.

## **2. Superior Court.**

The Appellants filed this lawsuit on December 1, 2008. In addition to appealing the Hearing Examiner's decision that no EIS was required, the Appellants challenged several decisions of the Seattle City Council based upon alleged noncompliance with SEPA. First, the Appellants challenged various budget actions by the City Council between 2004 and 2008 related to appropriations for the NRDS.<sup>11</sup> Second, the Appellants challenged previous

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<sup>8</sup> AR 01251 (Tab 83).

<sup>9</sup> AR 00971 (Tab 66).

<sup>10</sup> CP 183-189.

<sup>11</sup> CP 8.

City Council planning decisions to upgrade the NRDS, claiming that the City failed to comply with SEPA for those decisions.<sup>12</sup>

The City filed a motion for partial summary judgment to dismiss the challenges to the City Council decisions.<sup>13</sup> The Appellants filed a motion to stay judicial review, arguing that the case was not ripe for review.<sup>14</sup> The motions were heard by Judge McCarthy on April 24, 2009. Judge McCarthy denied the Appellants' motion for a stay.<sup>15</sup> He then granted the City's motion and dismissed all challenges other than the Appellants' appeal of the Hearing Examiner's decision that no EIS is required for the NRDS reconstruction project.<sup>16</sup> The court ruled that the Appellants' challenge to the Council budget decisions was barred because those decisions are "categorically exempt" from SEPA review, and because the challenge was untimely.<sup>17</sup> The court ruled that the Appellants' challenge to the City Council planning decisions to reconstruct the NRDS at its existing location was barred because it was untimely.<sup>18</sup>

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<sup>12</sup> CP 8.

<sup>13</sup> CP 231-246.

<sup>14</sup> CP 20-32.

<sup>15</sup> CP 96-97.

<sup>16</sup> CP 295-297.

<sup>17</sup> CP 296.

<sup>18</sup> CP 296.

Trial on the remaining issue, the Hearing Examiner's decision that no EIS is required, occurred on July 31, 2009 before Judge Doyle. Judge Doyle concluded that the Hearing Examiner's decision was not clearly erroneous, and entered a final order and judgment dismissing the Appellants' appeal with prejudice.<sup>19</sup> This appeal followed.

### III. ARGUMENT<sup>20</sup>

#### A. The Standard of Review.

The City agrees with the standards of review identified by the Appellants. The trial court's decision that the case was ripe for judicial review is a question of law that is reviewed de novo. *See Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 75-76, 768 P.2d 462 (1989). The Hearing Examiner's decision that no EIS is required is reviewed under the clearly erroneous standard. *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001). The Hearing Examiner's decision is accorded substantial weight. RCW 43.21C.090, *Moss, supra* at 13-14.

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<sup>19</sup> CP 222-223.

<sup>20</sup> For the convenience of the court, the order of argument presented here follows the order of argument and numeration in the Appellants' Opening Brief.

**B. The Trial Court Correctly Decided That the Case is Ripe for Judicial Review.**

The Appellants' first argument is that the trial court erred in deciding that the Appellants' claims are ripe for judicial review.<sup>21</sup> In order to analyze that argument, it is necessary to distinguish the two classes of City actions that are the subject of the Appellants' First Amended Complaint.

First, the Appellants appealed the Hearing Examiner's decision that no EIS is required for future City decisions regarding reconstruction of the NRDS. Second, the Appellants challenged past decisions of the City Council related to the NRDS, for the Council's alleged failure to comply with SEPA.<sup>22</sup> The trial court ruled that both challenges were ripe for review.<sup>23</sup> The City will first address ripeness in the context of the Hearing Examiner's decision, and then in the context of the Appellants' challenge to the City Council decisions.

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<sup>21</sup> Appellants' Opening Brief, p. 11-17.

<sup>22</sup> CP 8-9.

<sup>23</sup> CP 96-97.

**1. When a development project requires multiple permits or “actions” that are subject to SEPA, judicial review of SEPA compliance is ripe after the first action is taken.**

Many development projects are subject to multiple permit and approval requirements by government. Many of these permits and approvals are subject to review under SEPA. Typically an EIS, or SEPA threshold determination if no EIS is required, will evaluate the potential environmental impacts of all permits or actions that are needed for a project, rather than preparing a separate EIS or threshold determination for each permit or action.

SEPA generally provides that judicial review of compliance with SEPA occur when government has acted on a proposal. RCW 43.21C.075(6)(c). When a project entails multiple permits or actions, judicial review of compliance with SEPA is ripe when the first action is taken that is subject to SEPA. As stated in SMC 25.05.680(C)(3):

If the proposal requires more than one (1) governmental decision that will be supported by the same SEPA documents, then RCW 43.21C.080 still only allows one (1) judicial appeal of procedural compliance with SEPA, which must be commenced within the applicable time to appeal the first governmental decision. (Emphasis added.)

There are several policy reasons for this rule. First, the principal purpose of SEPA is to inform decisionmakers of the probable adverse impacts of a proposed development, based upon adequate environmental

analysis. *Moss, supra* at 14. If the SEPA analysis for various decisions is inadequate, then those decisions will not be made based upon the quality of analysis that SEPA requires. If the adequacy of SEPA analysis is established at the beginning of the development process, then subsequent decisions will be informed by adequate SEPA review. On the other hand if the adequacy of the SEPA analysis is not determined until after all decisions have been made, and then the analysis is found to be inadequate, those decisions will not have the benefit of adequate environmental review, thus frustrating the purpose of SEPA.

Requiring a determination of the adequacy of SEPA review at the beginning of the development process, rather than at the end, also provides predictability to the developer, and avoids waste. If a developer obtains a multitude of government permits and approvals for a project, potentially over the course of several years, only to learn at the end of the regulatory process that those permits are void because of an inadequate EIS or an erroneous threshold determination, the result would be a significant waste of time and money for the developer, as well as for the government and other parties (e.g., citizens) who were involved in the regulatory process. By having to go back to square one to repeat the regulatory process, the development project, which may include important public projects as well as private development, can be delayed for years. It makes much more

sense to obtain judicial review of an EIS or threshold determination at the outset of the development process so that the developer, government and the public can know that SEPA compliance has been achieved and that they can rely upon the permits and decisions that are necessary for the project to proceed. This policy basis for the early determination of SEPA compliance is consistent with the following SEPA statement of purpose:

The purpose of this 1974 amendatory act is to establish methods and means of providing for full implementation of chapter 43.21C RCW (the state environmental policy act of 1971) in a manner which reduces duplicative and wasteful practices, establishes effective and uniform procedures, encourages public involvement, and promotes certainty with respect to the requirements of the act.”

Section 1, Chapter 179, Washington Laws, 1974 1<sup>st</sup> Ex. Sess.

The proposed reconstruction of the NRDS in this case is an example of a project that is subject to multiple permit and approval requirements including, for example, various land use permits, construction permits, a street vacation, and a rezone or zoning text amendment. The SEPA environmental checklist and threshold determination for the NRDS project encompassed an analysis of these various actions, excluding the potential rezone or zoning text amendment. If this court affirms that no EIS is required for these future actions, then the City can proceed with the project and seek these various approvals without fear that the approvals will be invalidated later, after having made

the substantial investment that is required to obtain the approvals and develop the project.

The Appellants argue that the adequacy of SEPA review may not be determined at the beginning of the regulatory process, and must wait until the end of that process, until all permits have been issued and decisions made.<sup>24</sup> That argument is directly contrary to the requirement of SMC 25.05.680(C)(3), that judicial review “must be commenced within the applicable time to appeal the first governmental decision.”

The Appellants’ argument also conflicts with requirements for judicial review applicable to other statutes. For example, judicial review of a land use decision must be commenced under the Land Use Petition Act (“LUPA”), RCW 36.70C, within twenty-one days of the governmental decision to be reviewed. RCW 36.70C.040(3). If the land use decision is challenged on a basis of, among other things, an alleged failure to comply with SEPA, that SEPA challenge must be joined in the LUPA action. *See R. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis*, section 20.01 [1], (19<sup>th</sup> Ed. 2007). Under the Appellants’ theory, however, the SEPA challenge to the land use decision would not be ripe at the time of the LUPA appeal if there were subsequent

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<sup>24</sup> Appellants’ Opening Brief, p. 3.

governmental actions, and would not be ripe for any of those subsequent actions until the final governmental action was taken.

For example, in this case it is envisioned that a rezone, street vacation, Master Use Permit, and various construction permits will be necessary for the reconstruction project. Typically the rezone would occur first, followed by the other actions. Under the Appellants' theory, a LUPA action to review the rezone would occur without including a judicial review of whether the rezone complied with SEPA. That review, the Appellants argue, could not occur until the final construction permit is issued, which could be years following the rezone decision. In other words, the LUPA decision on the rezone would be incomplete and provisional because it did not address the SEPA claim. Not until there was judicial review of the final action under SEPA would one know whether any of the prior actions were lawful. This is the antithesis of the predictability that the law fosters and that is one of the essential purposes of LUPA. RCW 36.70C.010.

None of the cases cited by the Appellants in support of their ripeness argument address the issue presented here, i.e, when SEPA review encompasses multiple permits or actions, when should judicial review of SEPA compliance occur? After the first action is taken, as maintained by the City, or after the last action is taken, as asserted by the

Appellants? All of the cases cited by the Appellants address the general proposition that SEPA review should be tied to an underlying action, but none address the issue of timing when multiple actions are included within the scope of a SEPA review.

The Appellants suggest that the City has not taken any “action” based upon the DNS, and that judicial review is therefore premature.<sup>25</sup> However, the City has taken an action based upon the DNS. The SEPA rules define an “action” that triggers the application of SEPA as follows (emphasis added):

WAC 197-11-704 Action.

(1) “Actions” include, as further specified below:

(a) New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies.

\* \* \*

(2) Actions fall within one of two categories:

(a) Project actions. A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:

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<sup>25</sup> Appellants’ Opening Brief, p. 11.

(i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.

\* \* \*

Following the Hearing Examiner's decision that no EIS was required, SPU decided to proceed with the NRDS project.<sup>26</sup> Had the Hearing Examiner instead required preparation of an EIS, then SPU would have to await completion of the EIS before deciding, in light of the environmental impacts described in the EIS, whether to proceed with the project or whether to consider an alternative course of action. When the Hearing Examiner held that no EIS was required, SPU decided that the project should proceed and that decision is an "action" under SEPA, i.e., an "agency decision to... undertake any activity that will directly modify the environment." WAC 197-11-704(2)(a)(i).

In summary, SMC 25.05.680(C)(3) states that judicial review of SEPA compliance must occur when the first governmental action takes place, rather than at the end of the development process. Therefore the trial court correctly concluded that the Hearing Examiner's decision was ripe for judicial review.

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<sup>26</sup> CP 56-57.

**2. The City Council's past decisions are ripe for judicial review.**

In their appeal to this court, the Appellants focus on ripeness as it applies to the Hearing Examiner's decision, as described above. They appear to abandon any argument that the case is not ripe as it applies to their challenge to the City Council decisions, stating that "[t]he City moved for partial summary judgment to dismiss non-SEPA claims, and that was done; those claims are not at issue here."<sup>27</sup> However, all of the claims were SEPA claims,<sup>28</sup> and elsewhere in their brief to this court the Appellants appear to challenge previous Council decisions.<sup>29</sup> In light of this ambiguity, the City will briefly address the issue of ripeness as it pertains to the Appellants' challenge to the past City Council decisions.

The basis for the Appellants' argument (above) that future City actions are not ripe for SEPA review is that the actions have not occurred. The converse of that logic is that if an action has occurred, it is ripe for judicial review. It is undisputed that all of the City Council budget and planning actions that the Appellants challenged in their complaint were actions that have occurred. And presumably the Appellants would not

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<sup>27</sup> Appellants' Opening Brief, p. 7.

<sup>28</sup> CP 8-9.

<sup>29</sup> Appellants' Opening Brief, p. 2 ("... the City has failed to properly apply SEPA to its decision making concerning solid waste facilities generally...."), p. 25, p. 32-36 (phased review argument.)

have filed this lawsuit challenging the Council's decisions if they did not believe that the challenge was ripe for judicial review.

In short, both the City Council's decisions and the Hearing Examiner's decision are ripe for judicial review, and therefore this court should affirm the trial court's decision denying the Appellants' motion for a stay of judicial review.

**C. The City is Unable to Respond to Part C of the Appellants' Brief Because the Appellants Fail to Apply the Abstract Statements of Law Contained in Part C to the Hearing Examiner Decision Under Review.**

Part C<sup>30</sup> of the Appellants' brief recites various general rules of law, principally relating to SEPA. However, the Appellants fail to describe how these rules apply to the alleged errors in the Hearing Examiner's decision under review. As a result, the City is unable to respond to the Appellants' argument. The City is not required to respond to abstract statements of the law that the Appellants fail to apply to the decision under review. RAP 10.3 (argument must refer to relevant parts of the record), *see Nostrand v. Little*, 58 Wn.2d 111, 120, 361 P.2d 551 (1961) ("It is the duty of counsel to be specific in presenting their contentions to an appellate court.")

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<sup>30</sup> Pages 17-32.

**D. The Appellants Have Failed to Prove That the Hearing Examiner's Conclusions Rejecting the Appellants' "Phased Review" Argument are Clearly Erroneous.**

Part D of the Appellants' brief assigns error to various conclusions in the Hearing Examiner's decision regarding phased review under SEPA. However the Appellants fail to explain how these alleged errors, even if true, would invalidate her decision that no EIS is required for the NRDS project.

First, the Appellants refer to the Examiner's Conclusion of Law 3,<sup>31</sup> in which the Hearing Examiner described the phased environmental review process applicable to the City's solid waste plans and projects. The Examiner's conclusion is that the 1998 EIS that was prepared for adoption of the 1998 Solid Waste Management Plan states that the City was going to use phased environmental review, and that project-specific environmental review of some kind would occur in the future, following adoption of the programmatic Solid Waste Management Plan in 1998.

The Appellants argue that "the hearing examiner's conclusion is not based on any fact in evidence, and cannot be supported."<sup>32</sup> However, the Examiner cited the page of the EIS that contains the statement, and review of the page shows that it says exactly what the Examiner said it

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<sup>31</sup> CP 49-50.

<sup>32</sup> Appellants' Opening Brief, p. 33.

says.<sup>33</sup> Additionally, the Hearing Examiner adopted several findings of fact (5-8) directly related to that conclusion.<sup>34</sup> Therefore, the Examiner's conclusion is supported by a fact in evidence (the EIS), and the Appellants' argument to the contrary must be rejected.

The Appellants also appear to argue that the statement in the 1998 EIS was incorrect, arguing that "there has never been any SEPA review of the NRDS prior to the challenged DNS, programmatic or otherwise."<sup>35</sup> However, the EIS accurately described the nature of phased review for the City's solid waste plans and projects. The 1998 EIS was a programmatic EIS that evaluated the likely adverse impacts of the City's programmatic decision to adopt the 1998 Solid Waste Management Plan. That plan entailed a decision to upgrade the NRDS rather than move the facility to another neighborhood. For example, the plan states that

SPU will invest in capital improvements at the North Recycling and Disposal Station. *A Plan for Seattle's Recycling and Disposal Stations* describes plans to perform critical facility repairs, operational enhancements, and expand station capabilities.<sup>36</sup>

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<sup>33</sup> CP 142 (EIS section 1.3.2).

<sup>34</sup> CP 44-45.

<sup>35</sup> Appellants' Opening Brief, p. 33.

<sup>36</sup> AR 00444 (Tab 35).

The Hearing Examiner entered findings of fact that further document the programmatic decision to upgrade the NRDS at its existing location,<sup>37</sup> including references to *A Plan for Seattle's Recycling and Disposal Stations*.<sup>38</sup> Because the City prepared an EIS for adoption of the SWMP, including the programmatic decision to upgrade the NRDS rather than move the NRDS to another neighborhood, the Appellants are incorrect in claiming that there was no programmatic SEPA review related to the NRDS.

Furthermore, even if the Appellants believe that the 1998 EIS was inadequate because it did not analyze moving the NRDS to another neighborhood, it is too late for the Appellants to challenge the adequacy of that EIS. Both the Hearing Examiner<sup>39</sup> and the trial court<sup>40</sup> held that such a challenge is untimely, and the Appellants did not assign error to those rulings.

Because no statute or ordinance specifically establishes a limitations period for bringing a SEPA challenge to adoption of an ordinance, the court identifies a reasonable limitations period by reference to the limitations

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<sup>37</sup> CP 44, Findings of fact 5-7.

<sup>38</sup> AR 00446-00493 (Tab 36).

<sup>39</sup> See CP 50 (Conclusion of Law 5).

<sup>40</sup> CP 296 (“The plaintiffs’ SEPA appeal challenging the alleged City Council decision to proceed with replacement of the City’s North Recycling and Disposal Station is barred because it is untimely.”)

period for analogous decisions. *Brutsche v. Kent*, 78 Wn. App. 370, 376, 898 P.2d 319 (1995). In *Brutsche* the court adopted a general, thirty day limitations period for challenges to municipal land use ordinances. In doing so, the court referred to *Concerned Organized Women & People Opposed to Offensive Proposals, Inc. v. Arlington*, 69 Wn. App. 209, 847 P.2d 963, review denied, 122 Wn.2d 1014 (1993), stating in footnote 9 of *Brutsche* that *Concerned Women* recognized a thirty day deadline for challenges to a SEPA decision that an EIS is not required. Accordingly, the applicable limitations period for bringing a SEPA challenge to the adequacy of the EIS for the 1998 Solid Waste Management Plan is, at best,<sup>41</sup> thirty days. Because the Appellants failed to file this lawsuit challenging the 1998 SWMP and EIS until ten years later, the Appellants' challenge is untimely.

That a bright-line limitations period for such a SEPA challenge is appropriate is underscored by *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004). In that case the court, citing *Brutsche, supra*, stated that “[s]tatutes of limitation assume particular importance when swift resolution of potential legal uncertainties is in the public interest.” Although *Reid* involved an election challenge rather than a challenge to a municipal ordinance, the public interest factor is present in both. Municipalities need to

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<sup>41</sup> After *Brutsche* the Legislature amended the limitations period for challenges to land use decisions, including SEPA appeals, to twenty-one days. RCW 36.70C.040(3), RCW 43.21C.080(2).

rely upon the predictability of municipal decisions in order to plan and implement public projects and programs. If opponents of such projects may challenge those decisions long after the decisions are made, the government's ability to serve the public in a coherent, predictable way would be impaired. Because the Appellants failed to bring a SEPA challenge to the 1998 EIS, they may not now argue that the EIS was inadequate.

An additional reason the Appellants may not now challenge the 1998 EIS is that they failed to exhaust administrative remedies by appealing the adequacy of that EIS to the Hearing Examiner in 1998. SEPA requires that administrative appeals be pursued in order to later seek judicial review. RCW 43.21C.075, *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997).

The Appellants may argue that they are not attempting to challenge the adequacy of the 1998 EIS, but only the 2008 DNS for the NRDS. But that argument is belied by their challenge to Hearing Examiner Conclusion of Law 3, above, as well as their complaint, which challenged the City Council's planning decision to upgrade the existing NRDS.<sup>42</sup> Moreover, the essence of their phased review argument is that the DNS for the project-level decision was unlawful because neither the 1998 programmatic EIS nor the 2005 EIS evaluated other neighborhoods for the relocation of the NRDS. In

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<sup>42</sup> CP 8.

other words, although the Appellants attempt to couch their challenge as only a challenge to the 2008 DNS, in effect that are claiming that the earlier EISs were inadequate. This stratagem is directly contrary to recent case law holding that a project opponent who fails to challenge a programmatic EIS may not, in a subsequent appeal challenging a project-level decision, collaterally attack the previous, programmatic decision. *Glasser v. City of Seattle*, 139 Wn. App. 728, 738, 162 P.3d 1134 (2007) (“Allowing opponents to use a project EIS to collaterally attack previous programmatic policy decisions would disrupt the finality of the decision and eliminate any benefits of phased review.”)

In short, the Hearing Examiner’s conclusion regarding the City’s 1998 programmatic decision to upgrade the NRDS was not erroneous, and the Appellants’ phased review argument to the contrary should be rejected.

Second, the Appellants note that in her Conclusion 3, the Hearing Examiner mistakenly identified “Appendix L” of the draft Solid Waste Facilities Master Plan (SWFMP) as being Appendix L of the Final Supplemental Environmental Impact Statement (FSEIS) for the SWFMP, also referred to as the Intermodal Facility EIS.<sup>43</sup> However, in the Examiner’s Finding of Fact 9, the Examiner correctly attributes Appendix

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<sup>43</sup> Appellants’ Opening Brief, p. 33-34.

L to the SWFMP.<sup>44</sup> The Appellants never explain why the citation error in Conclusion 3 should invalidate the Examiner's rejection of the Appellants' phased review argument. (Appendix L<sup>45</sup> described "Alternatives Considered But Not Recommended," including the possible relocation of the transfer stations.)

Essentially the Appellants make the same argument about the 2003 draft SWFMP and the 2005 FSEIS for that plan as they do about the City Council's adoption of the Solid Waste Management Plan in 1998 and the EIS for that plan, discussed above: that the 2005 FSEIS is inadequate because it did not include an evaluation of other neighborhoods in which the NRDS could be relocated. However as noted above, the Hearing Examiner correctly found that the Council's decision to upgrade the existing NRDS was made when the Council adopted the SWMP in 1998, and that "[a]lthough project-specific SEPA review could include preparation of an EIS, nothing in the environmental documents prepared for the City's SWMP or SWFMP gives any indication that an EIS would be prepared for the NRDS rebuild, or that the City would give further consideration to alternative locations for the NRDS."<sup>46</sup>

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<sup>44</sup> CP 45.

<sup>45</sup> AR 00745-00748 (Tab 39).

<sup>46</sup> CP 49-50 (Conclusion of Law 3).

Furthermore, the Hearing Examiner found that the City's decision to defer project-specific environmental review for the NRDS and SRDS projects, rather than include that review in the FSEIS for the Intermodal Project, was made when the City issued the FSEIS in 2005. Accordingly, she concluded that, to the extent the Appellants were arguing that the 2005 SEIS was inadequate because it did not consider relocating the NRDS to another neighborhood, the challenge was untimely.<sup>47</sup> The trial court reached the same conclusion<sup>48</sup> and, again, the Appellants did not assign error to that conclusion.

Now, the Appellants attempt to argue the merits of the 2005 decision in the FSEIS to defer project-specific review for the NRDS,<sup>49</sup> while disclaiming that “[t]here was no justiciable appeal of a decision regarding phased review of the NRDS in 2005 because no such decision was made.”<sup>50</sup> The Appellants are incorrect. The FSEIS clearly states that environmental review for the transfer station projects is to be deferred.<sup>51</sup> They could have appealed the adequacy of the FSEIS in 2005, on their theory that the FSEIS should have included a project-specific analysis of

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<sup>47</sup> CP 50 (Conclusion of Law 4 and 5).

<sup>48</sup> CP 296.

<sup>49</sup> Appellants' Opening Brief, p. 34-35.

<sup>50</sup> *Id.* at 34.

<sup>51</sup> AR 00770-772 (Tab 40).

the NRDS, but they failed to do so. As noted above, the trial court concluded that the Appellants' challenge was untimely, and the Appellants failed to assign error to that conclusion. Accordingly, their phased review argument regarding the 2003 SWFMP and the 2005 FSEIS should be rejected.

Finally, the Appellants refer to Hearing Examiner Conclusion of Law 6,<sup>52</sup> in which the Examiner found that SMC 25.05.060 and .784 authorize the City to define a proposal as a particular course of action and do not require the City to consider relocating the NRDS to another neighborhood.<sup>53</sup> The Examiner's conclusion summarizes her analysis and decision to the same effect, that was contained in her Order on Motions for Judgment on the Merits and In Limine.<sup>54</sup> The Appellants offer no legal authority in support of their claim that the Hearing Examiner's description of SMC 25.05.060 and .784 is incorrect, and that the City was required to consider relocating the NRDS when the City Council adopted the Solid Waste Management Plan in 1998. Accordingly, this court should reject the Appellants' claimed error regarding Hearing Examiner Conclusion of Law 6.

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<sup>52</sup> CP 50.

<sup>53</sup> Appellants' Opening Brief, p. 36.

<sup>54</sup> CP 184, 187.

In summary, the Appellants' phased review arguments in section D of their brief fail to show that the Hearing Examiner's conclusions were incorrect, or that the Examiner's decision not to require preparation of an EIS should be reversed.

**E. The City Did Not Err in Its Measurement of Potential Environmental Impacts.**

Part E of the Appellants' brief alleges that the City made two errors in measuring the magnitude of potential environmental impacts that may result from reconstruction of the NRDS. The manner in which potential impacts are measured is important because it is determinative of whether an EIS is required: only projects that are likely to result in "significant" adverse environmental impacts are required to prepare an EIS. RCW 43.21C.030(2)(c), *Moss v. Bellingham, supra* at p. 15. The first alleged error is that the City unlawfully used a baseline of existing conditions from which to measure the magnitude of potential impacts. Second, the Appellants claim that the City weighed the environmental benefits of a reconstructed NRDS against possible adverse impacts to determine if impacts are likely to be significant. Neither alleged error is correct.

**1. The City did not err when it used existing conditions as the baseline from which to measure the magnitude of potential environmental impacts.**

When the City analyzed the potential environmental impacts from the proposed project, the City used a baseline of existing conditions from which to measure the likely magnitude of potential impacts. For example, for purposes of traffic impact analysis, the City compared the number of vehicle trips per day from the existing facility with the number of trips expected to occur after the facility is reconstructed. The City then evaluated the difference between the two numbers to determine whether the increase in vehicle trips should be considered environmentally “significant.”<sup>55</sup>

The Appellants argue that it was unlawful for the City to use existing conditions as the analytic baseline, and that the City should instead have used one of two alternative, hypothetical baselines. They have argued that the City should have assumed either that the existing site is a vacant lot,<sup>56</sup> or that the existing site should be assumed to have another unspecified, but less “intensive” use on it.<sup>57</sup> Using either one of

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<sup>55</sup> AR 00271-00296 (Tab 30).

<sup>56</sup> Sub. 23, Hearing Examiner transcript, October 1<sup>st</sup>, p. 20, lines 23-24: Mr. Thaler: “...a baseline for environmental review or land use review or any review of that facility is an empty lot.”

<sup>57</sup> CP 194, paragraph 3: Mr. Bricklin: “Just to be very clear, we are not suggesting that the baseline is some pre-settlement condition.”

these hypothetical baselines, they argue that the potential impacts of a reconstructed NRDS would necessarily be “significant”, and that an EIS is therefore required.

The theory of the Appellants’ baseline argument is that the existing NRDS will soon cease to operate, and at that time the existing site will be without impacts, such that a reconstructed NRDS would have significant impacts relative to the absence of impacts from an empty lot. Using our traffic example, when the NRDS is demolished there will be no traffic from the site, but when the new NRDS begins operation, the vehicle trips from the reconstructed facility will, in the Appellants’ opinion, necessarily be “significant” relative to the absence of traffic from the vacant lot.

The assumption underlying the Appellants’ theory, that the NRDS will soon cease to operate, is unsupported. The Hearing Examiner found that “there is no evidence before the Examiner of an established closure date for the NRDS, and the evidence presented does not establish that the NRDS will cease to exist in the short term, as the Appellants contend.”<sup>58</sup> The Appellants do not dispute that finding. Rather they argue that it “misses the point,”<sup>59</sup> which they then suggest is that the existing facility needs to be upgraded. The City agrees that the facility needs to be

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<sup>58</sup> CP 186.

<sup>59</sup> Appellants’ Opening Brief, p. 40.

upgraded, and that is why the project has been proposed. But it is one thing to say that the facility needs to be upgraded, and another to say that the facility will be closed if it is not. It is the latter assumption that underlies the Appellants' baseline theory, and as the Hearing Examiner correctly found, there is no support for that assumption.

The Hearing Examiner concluded that there is "no legal authority for the proposition that existing conditions constitute an incorrect baseline for analyzing a proposal's environmental impacts" and that "environmental impact analysis in relation to existing conditions is the norm."<sup>60</sup> The Appellants have failed to show that the Hearing Examiner's conclusion is erroneous, and therefore the court should reject the Appellants' argument.

Neither the SEPA statute or rules identify the baseline for the analysis of environmental impacts, but courts have consistently used existing conditions as the baseline against which to measure the significance of potential impacts. *Marino Property Co. v. Port of Seattle*, 88 Wn.2d 822, 831, 576 P.2d 1125 (1977) (no change in existing uses, therefore no adverse impact); *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 278, 552 P.2d 674 (1976) ("In addition to its magnitude, the project will constitute a complete

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<sup>60</sup> CP 51, Conclusion No. 9.

change of the use of the existing area.”); *Narrowsview Preservation Ass’n v. City of Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974) (Development under rezone would not impact the area to any greater degree than development under the existing zoning, so no EIS required), *abrogated on other grounds by Norway Hill, supra*; *Richland Homeowners Preservation Ass’n v. Young*, 18 Wn. App. 405, 411, 568 P.2d 818 (1977) (“...we do not find adverse environmental affects created by the project exceeding those created by existing uses.”). The preeminent treatise on SEPA provides that, “...a proposal must degrade the existing condition of the environment to have a significant adverse impact.”<sup>61</sup>

In her decision, the Hearing Examiner cited to some of these and other cases in support of her conclusion that “environmental impact analysis in relation to existing conditions is the norm.” The Appellants argue that the cases cited by the Hearing Examiner, below, are not evidence that reference to existing conditions is common.<sup>62</sup> But in *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 435, 105 P.3d 94 (2005), the County did evaluate potential impacts against existing conditions. The same is true of *Richland Homeowner’s Preservation Ass’n. v. Young*, 18, Wn. App. 405, 415, 568 P.2d 818 (1977) and

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<sup>61</sup> R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, p. 13-20 (19<sup>th</sup> Ed. 2007).

<sup>62</sup> Appellants’ Opening Brief, p. 42.

*Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 59, 52 P.3d 522 (2002). Plaintiffs are correct that the fourth case cited by the Hearing Examiner, *Floating Homes Assoc. v. Washington Dept of Fish and Wildlife*, 115 Wn. App. 780, 785, 64 P.3d 29 (2003) was not a SEPA case, but the case nonetheless shows that comparison of impacts from existing conditions to those expected from proposed development is commonplace in environmental impact assessment. The Hearing Examiner was not mistaken when she said that “environmental impact analysis in relation to existing conditions is the norm.”

Further, existing conditions is the standard baseline for the measurement of significance in other jurisdictions that apply a SEPA type statute. For example, *Fat v. County of Sacramento*, 97 Cal.App.4th 1270, 119 Cal.Rptr.2d 402 (2002) involved a challenge to the proposed expansion of an airport. The court, relying on SEPA-like state guidelines, recognized “the general rule that environmental conditions existing at the time environmental analysis is commenced ‘normally’ constitute the baseline for purposes of determining whether an impact is significant.” *Id.* at 1274.

The 9th Circuit also uses “existing environmental conditions” as the appropriate baseline for measuring significance under the National

Environmental Policy Act (“NEPA”)<sup>63</sup>. In *American Rivers v. F.E.R.C.*, 201 F.3d 1186, 1195-1199 (2000), the court stated that using a hypothetical or historical baseline rather than existing conditions “defies common sense and notions of pragmatism” and that “no authority exists” to use a baseline other than existing conditions. *Id.* at 1199.

The SEPA environmental checklist also demonstrates the appropriateness of using existing conditions as the baseline for environmental impact analysis, because the checklist contains numerous questions that require a description of existing environmental conditions. SMC 25.05.960(B)(1), (4), (5), (8), (9), (10), (12), (13), (14).

The City presented evidence to the Hearing Examiner showing that existing conditions are the standard accepted baseline used by SEPA responsible officials, environmental consultants, and others in measuring the significance of potential impacts. For example, Laura Van Dyke, the senior transportation engineer who participated in the preparation of the Transportation Technical Report for the NRDS, and Carl Bloom, who performed the air quality analysis, testified before the Hearing Examiner regarding the lack of significant impacts from the proposal and referred to

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<sup>63</sup> 42 U.S.C. section 4321 *et seq.*

“existing conditions” as the baseline from which that conclusion was drawn.<sup>64</sup>

The Appellants make a number of arguments based upon SEPA rules and a NEPA case in support of their theory that existing conditions is an unlawful baseline. However, the Appellants confuse and conflate a number of concepts, including “the absolute quantitative effects of a proposal,” “short and long-term impacts,” “incremental impacts,” and “cumulative impacts.”

The Appellants claim that the City failed to consider the “absolute quantitative effects” and the “long-term impacts” of the proposal. These claims are based upon the Appellants’ erroneous assumption that the NRDS will cease to operate in the foreseeable future, as discussed above.

In essence, the Appellants argue that this court should indulge in the fiction that the current NRDS facility does not exist. It is like arguing that because the existing SR 520 bridge (Evergreen Floating Bridge) needs to be replaced, the Washington Department of Transportation should pretend that the bridge was never built, and use the primordial condition as its baseline for environmental review of the proposed replacement bridge.

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<sup>64</sup> Sub. 23, Hearing Transcript, October 2, 2008, Testimony of Laura Van Dyke, p. 32, lines 7-8, and p. 38, lines 14-15 (“The analysis showed that the proposed project could result in a minor increase in vehicle trips...”); and Testimony of Carl Bloom, p. 51, lines 5-7 (“Our air quality analysis started with trying to find as much information as possible about the existing conditions at the site...”).

This court, like the Hearing Examiner and trial court, should decline the Appellants' invitation to employ that fiction. The Hearing Examiner specifically concluded that "the evidence presented does not establish that the NRDS will cease to exist in the short-term,"<sup>65</sup> and Appellants have failed to establish otherwise.

The Appellants note that SEPA rules say that the "absolute quantitative effects" of a proposal should be considered in determining whether potential impacts are significant, and they construe this language to mean that existing conditions may not be used as the baseline for measuring significance. However, the Appellants cite no legal authority in support of that construction, and they fail to explain what the calculation of "absolute quantitative effects" entails or clearly identify what baseline they believe is required under SEPA, if not existing conditions. On the one hand they state that the proper baseline does not reflect undeveloped conditions, and at another time claim that it should. The Appellants inability to describe the baseline they believe the law requires undermines their argument that existing conditions is an unlawful baseline.

The Appellants cite *Grand Canyon Trust v. FAA*, 290 F.3d 339 (C.A.D.C. 2002), for the proposition that existing conditions is an improper baseline for environmental analysis. Unlike the instant case,

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<sup>65</sup>CP 186.

however, *Grand Canyon Trust* involved a proposal to build a *new* airport at a *new* location, not to rebuild a facility at the facility's existing location. Furthermore, the focus of the court's analysis was the application of federal cumulative impact principles to noise impacts upon Zion National Park and did not address what baseline should be used for making a threshold determination. In that case the court held that cumulative impacts analysis required an evaluation of total noise impacts upon the Park from all noise sources, not only noise from the new airport. *Id* at 347. ("Because there is no analysis of cumulative noise impacts on the Park against which the additional noise impact of the replacement airport can be evaluated, the FAA's error in ignoring cumulative impact of man-made noise is not harmless.")

Cumulative impacts analysis refers to the *sources* of environmental impacts, not to the *baseline* for environmental analysis. Under SEPA, "[a] cumulative impact analysis need occur only when there is some evidence that the project under review will facilitate future action that will result in additional impact." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 720, 47 P.3d 137 (2002). There is no such allegation in the instant case. The Appellants' attempt to equate cumulative impacts analysis with a requirement for use of a "pre-development" baseline is another example of mixing apples and oranges.

The Appellants also argue that by comparing the proposed project with existing conditions, the City considered only “short-term” impacts and not also “long-term” impacts. However, “short-term” impacts traditionally refer to construction impacts and “long-term” impacts refer to operational impacts expected after construction is complete. The DNS considered both.<sup>66</sup> Neither term refers to or limits the use of existing conditions as the appropriate baseline for environmental analysis.

Not only is the Appellants’ theory unsupported by the SEPA rules and case law, it is problematic as a practical matter. Under Appellants’ theory, a bifurcated significance analysis would be required. First, the agency would need to estimate the “useful life” of an existing building that is proposed to be replaced, and then measure the expected impacts from the new building against the impacts of the existing building for the term of that useful life. Next, the agency would need to measure the expected impacts from the new building against the hypothetical, vacant lot condition that arises when the existing building has reached the end of its useful life. The analysis at both points in time needs to account for not only the conditions as they relate to the existing and proposed buildings, but also to the existing and future conditions of the vicinity in which the project is located. This problem with the Appellants’ theory is

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<sup>66</sup> AR 00234-00239 (Tab 23).

exacerbated by the fact that the estimated “useful life” of a building has no necessary correlation to the length of time a building is actually used. Many buildings are years beyond their “useful life” but still in use. Suffice to say, the Appellants’ theory amounts to the attempted analysis of “remote and speculative impacts,” which SEPA does not require. WAC 197-11-060(4)(a), *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976). For a thorough discussion of the practical problems that result from attempting to use a hypothetical baseline rather than existing conditions, see *American Rivers*, *supra* at 1195-1199. In summary, the Appellants have failed to prove that the Hearing Examiner erred in determining that existing conditions are a lawful baseline for making the threshold determination.

**2. The Hearing Examiner correctly decided that the City did not weigh the benefits of the project against potential impacts.**

The Appellants allege that the City improperly balanced the environmental benefits of a rebuilt NRDS against its potential adverse impacts when it made the threshold determination.<sup>67</sup> The Hearing Examiner disagreed, stating that “[t]he Appellants point to nothing in the DNS that ‘balance[s] whether the beneficial aspects of the proposal

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<sup>67</sup> Appellants’ Opening Brief, p. 43.

outweigh its adverse impacts.”<sup>68</sup> Despite the Hearing Examiner’s finding, the Appellants again fail to identify, to this court, where in the DNS the alleged balancing occurs.

The Appellants are again confusing and conflating two different concepts. The Appellants accurately describe one concept, which is that in evaluating the significance of potential impacts “[a] threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts....” SMC 25.05.330(E). But the Appellants confuse this prohibition against “weighing” project benefits and impacts, taken as a whole, with the methodology used to measure the significance of a particular impact.

As discussed previously, the standard methodology for measuring significance is to compare, for example, the traffic impacts under existing conditions with the traffic impacts expected to result from a proposed project. If, as here, the replacement facility is expected to result in less vehicle queuing than occurs with the existing facility, that does not mean that the City has improperly weighed project costs and benefits. Rather, the City has merely measured the relative difference in impacts on traffic to determine if any change in impacts is environmentally significant.

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<sup>68</sup> CP 187.

If, on the other hand, the City had weighed the improvements to traffic expected from the new facility against hypothetical, significant adverse impacts to water quality, and concluded that the former outweighed the latter and therefore issued a DNS, that would be an example of improper weighing of benefits and impacts for the project taken as whole, which SEPA prohibits. However, as the Hearing Examiner found, there is no evidence that the City weighed project benefits against impacts in that manner, and therefore the Appellants argument should be rejected.

**F. The Appellants' Miscellaneous Claims of Error Should Be Rejected.**

Section F of the Appellants' brief alleges that the City's analysis of environmental impacts was deficient in several respects, and that the Hearing Examiner therefore erred in deciding that no EIS was required. The Appellants' argument should be rejected.

**1. Land use and zoning issues.**

The Appellants argue that the Hearing Examiner erred when she stated that "the Comprehensive Plan and zoning for the area remain industrial, and industrial uses are permitted."<sup>69</sup> The Hearing Examiner did not err. The existing site of the NRDS is zoned "Industrial" and the

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<sup>69</sup> Appellants' Opening Brief, p. 46.

Comprehensive Plan designation for the area is “Industrial.”<sup>70</sup> The Appellants attempt to distort the Examiner’s plain statement, suggesting that because the transfer station must obtain an administrative conditional use permit before it can be constructed, the Hearing Examiner’s statement that industrial uses are “permitted” is incorrect. But the Hearing Examiner was not discussing whether the transfer station needed to obtain a conditional use permit, she was discussing whether the zoning allows industrial uses on the existing site. It does. The Appellants also argue that the Hearing Examiner’s statement is “factually inconsistent with the land use reality in the neighborhood.” Again, the Appellants distort the Hearing Examiner’s statement, which did not purport to describe existing uses in the area, but only the use classifications contained in the zoning ordinance and Comprehensive Plan.

The Appellants argue that the neighborhood surrounding the NRDS is less industrial in character than it was historically, but fail to explain how this relates to the DNS under appeal. The SEPA checklist requires a description of the “current use of the site and adjacent properties,” and the checklist provides that description.<sup>71</sup> The Appellants have not argued that the description is inaccurate. Furthermore, the Hearing Examiner correctly

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<sup>70</sup> AR 00213 (Tab 15), 00186 (Tab 11).

<sup>71</sup> AR 00185 (Tab 11).

noted that whether the area should be rezoned to prohibit industrial uses such as the NRDS “is a policy issue outside the purview of an administrative appeal.”<sup>72</sup> The Appellants have not argued to the contrary.

The Appellants argue that the DNS lacked analysis of the project’s consistency with the City’s Comprehensive Plan, including the South Wallingford amendments to that plan, but they fail to describe any inconsistencies with the plan. The SEPA checklist correctly described the current Comprehensive Plan designation for the existing site (industrial)<sup>73</sup>, and stated that the proposed facility is consistent with that designation.<sup>74</sup>

The Appellants correctly note that the DNS did not include an analysis of potential environmental impacts that might result from a possible rezone of a portion of the NRDS site (the “Orowheat Bakery” lot.) That is because a rezone was not under consideration at the time the DNS was prepared. Subsequently the City determined that a rezone or zoning text amendment may be required, and has stated that environmental review for a rezone or text amendment will occur if and when those actions are proposed.<sup>75</sup> The Appellants will have an opportunity to appeal that environmental review to the Hearing Examiner and court. In short, the fact

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<sup>72</sup> CP 51, Conclusion 8.

<sup>73</sup> AR 00186 (Tab 11).

<sup>74</sup> AR 00187 (Tab 11).

<sup>75</sup> CP 166-167.

that the DNS did not analyze the potential impacts of a rezone that had not been proposed is not a basis for requiring an EIS at this time.

## **2. Traffic issues.**

The Appellants appear to argue that the City's analysis of potential traffic impacts from the proposed project was erroneous.<sup>76</sup> The Hearing Examiner considered and rejected that argument. First, the Examiner found that in addition to preparing the required SEPA checklist, the City prepared various technical reports for the SEPA threshold determination. This included a 53 page Transportation Technical Report<sup>77</sup> which concluded that adverse traffic impacts from the proposed project were unlikely.<sup>78</sup> The Examiner also found that the transportation engineer who prepared that report testified that she had sufficient information about the project to properly analyze potential traffic impacts.<sup>79</sup> And notably, the Examiner concluded that "[w]ith respect to other impacts, including air quality, odors, traffic and noise, the evidence shows that the impacts from the proposal will be lower than those from the existing facility."<sup>80</sup> The Examiner's findings and conclusions are supported by substantial

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<sup>76</sup> Appellants' Opening Brief, p. 46-47.

<sup>77</sup> AR 00271-00324 (Tab 30).

<sup>78</sup> CP 46-47, Finding of Fact 17.

<sup>79</sup> CP 50-51, Conclusion 7.

<sup>80</sup> CP 52, Conclusion 10.

evidence in the record, including the Transportation Technical Report identified above.

The Appellants quote testimony from several neighbors to the effect that the existing NRDS causes traffic congestion. The City agrees that it does. However, the purpose of SEPA review is to determine whether the proposed project, not the existing facility, is likely to result in significant, adverse impacts compared to existing conditions. Substantial evidence in the record supports the Hearing Examiner's conclusion, discussed above, that the new facility is expected to have fewer impacts than the existing facility.

In short, the Hearing Examiner did not err in concluding that the proposed NRDS was unlikely to cause significant, adverse traffic impacts.

### **3. Adequacy of information for environmental analysis.**

Finally, the Appellants appear to argue that the City had insufficient information upon which to conduct the SEPA threshold determination.<sup>81</sup> The Hearing Examiner also addressed this issue. First, the Hearing Examiner described the various documents that were prepared by the City related to the DNS.<sup>82</sup> These included various technical reports

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<sup>81</sup> Appellants' Opening Brief, p. 48.

<sup>82</sup> CP 46-47, Findings of Fact 16-22.

concerning transportation, air quality, visual and noise impacts, that were prepared by consultants hired by the City to assess potential impacts. The Hearing Examiner then referred to applicable SEPA rules, including SMC 25.05.055(B), which states that a threshold determination should be prepared “at the earliest possible point in the planning and decision making process, when the principal features of a proposal and its environmental impacts can be reasonably be identified.” Finally, the Hearing Examiner rejected the Appellants’ argument, concluding:

7. The record does not support the Appellants’ allegation that the proposal lacks sufficient detail to assess its environmental impacts. The preservation deposition of Mr. Campbell, who performed the visual impact analysis, demonstrates that he used a widely recognized methodology for his study and had sufficient information on the project’s parameters, essentially using a “worst case” scenario to determine likely impacts on both public and private views. The transportation engineer who prepared the Transportation Technical Report testified that she had sufficient information from the trip generation and waste generation projection models prepared for the proposal to analyze its likely impacts on traffic, parking, and pedestrian safety. The consultant who prepared the Air Quality Technical Report also had sufficient traffic information from which to assess traffic related air quality impacts. With respect to other impacts on air quality, the analysis was based on sufficient parameters for the NRDS design and the consultant’s knowledge of the City’s waste stream policies and the pollutants generated by both construction activities and solid waste utilities. As required by SMC 25.05.055 B and SMC 25.05.784, the DNS was prepared at the earliest possible point in the decision making process when its principal features and environmental impacts

could be reasonably identified and meaningfully evaluated.<sup>83</sup>

In addition to the documents described by the Hearing Examiner, the record contains other information describing the proposed project.<sup>84</sup> In short, the Hearing Examiner did not err in concluding that sufficient detail about the proposed project existed to serve as a basis for environmental review.

**G. The Appellants Have Failed to Prove That the Project is Likely to Result in Significant, Adverse Environmental Impacts.**

As noted on page 25 of this brief, the test for determining whether an EIS is required is whether a proposed project is likely to result in significant, adverse environmental impacts. However the Appellants' brief is largely bereft of argument or evidence regarding the likelihood of such impacts from the NRDS project.

The Appellants identify some testimony from their witnesses alleging their beliefs that adverse impacts are likely, but expert testimony from the City's consultants and staff showed that significant adverse effects are unlikely.<sup>85</sup> The Hearing Examiner weighed the evidence and

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<sup>83</sup> CP 50-51, Conclusion 7.

<sup>84</sup> AR 00159 (Tab 10), AR 00160 (Tab 11).

<sup>85</sup> AR 00029 *et seq.* (Tab 8), AR 00271 *et seq.* (Tab 30), AR 00327 *et seq.* (Tab 32), AR 00863 (Tab 52).

found that significant adverse effects are unlikely. Indeed, the Hearing Examiner found that “[w]ith respect to other impacts, including air quality, odors, traffic and noise, the evidence shows that the impacts from the proposal will be lower than those from the existing facility.”<sup>86</sup> The Hearing Examiner’s findings are supported by substantial evidence. Because the Appellants have failed to prove that the Hearing Examiner was clearly erroneous in concluding that the proposed project is unlikely to result in significant, adverse environmental impacts, the decision of the Hearing Examiner that no EIS is required should be affirmed.

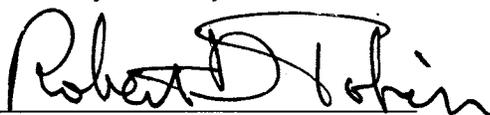
#### IV. CONCLUSION

This court should affirm the trial court’s decision that this SEPA appeal is ripe for judicial review. The court should also affirm the Hearing Examiner’s decision that no EIS is required for the proposed reconstruction of the NRDS.

DATED: December 14, 2009.

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By:

  
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<sup>86</sup> CP 51-52, Conclusion 10.

**CERTIFICATE OF SERVICE**

I certify that on the 14<sup>th</sup> day of December, 2009, I sent a copy of  
this document to the following party in the manner indicated below:

Toby Thaler  
P. O. Box 1188  
Seattle, WA 98111-1188  
**via e-mail attachment & U.S. Mail**

the foregoing being the last known address of the above-named party.

  
ROSIE LEE HAILEY