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No. 86293-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CEDAR RIVER WATER AND SEWER DISTRICT and SOOS CREEK
WATER AND SEWER DISTRICT,

Appellants,

v.

KING COUNTY, *et al.*,

Respondents.

**ANSWER OF RESPONDENT SNOHOMISH COUNTY TO
APPELLANTS' STATEMENT OF GROUNDS FOR DIRECT REVIEW**

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ORIGINAL

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I. INTRODUCTION

This is a case about a sewage treatment plant known as “Brightwater” which was built by King County but is located in Snohomish County. It will open in September of 2011, but the planning process began a decade ago. In 2008, Appellant Sewer and Water Districts (“the Districts”) sued King County, Snohomish County, 17 cities, and 14 other sewer districts in the Puget Sound region in Pierce County Superior Court. Among other claims, they challenged the legality of King County’s payment to Snohomish County to fund reasonable mitigation for the impacts of the construction and ongoing operation of the Brightwater sewage treatment plant on the affected local communities. The trial court ruled that this kind of mitigation is both reasonable and lawful, and that the Districts’ challenge is untimely.

The only “ground” for direct review invoked by the Districts under RAP 4.2(a)(4) is “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” In support of their petition, the Districts assert this “case presents important issues of first impression which build on well-established legal limitations on spending by publicly owned utilities.”¹ However, on summary judgment, the trial

¹ Appellants’ Statement of Grounds For Direct Review at p. 9. “[I]ssues of first impression” is not a basis for direct review under RAP 4.2(a)(4).

court properly dismissed the Districts' claims regarding "community mitigation" based on (1) the Land Use Petition Act time limits and (2) the merits as reasonable mitigation for the impacts of the sewage treatment plant. The issues presented here can be easily handled by the Court of Appeals; direct review by this Court is simply not warranted.

II. NATURE OF CASE AND DECISIONS

Brightwater will serve residents in King County and southern Snohomish County for the next 50 years and handle 54 million gallons of sewage per day. Snohomish County is the permitting authority for the plant, although the majority of the sewage will come from King County. The construction of Brightwater and its related tunnels and pipes is nearly complete.

In early 2003, King County selected several potential sites for Brightwater, all of which were located in Snohomish County. Unsurprisingly, many Snohomish County citizens were opposed to the siting of a new sewer treatment plant near their respective communities. In response to this public opposition, the Snohomish County Council adopted ordinances establishing standards governing siting and permitting of essential public facilities ("EPF"s). King County and the City of Renton challenged many of those regulations before the Central Puget Sound Growth Management Hearings Board ("Board"), and the Superior

Courts of Skagit County and Thurston County.² Ultimately, King County announced its selection of the Brightwater site (“Route 9”) in unincorporated south Snohomish County.

In August 2005, Snohomish County filed an appeal with the King County Hearing Examiner challenging the adequacy of the Brightwater Final Supplemental Environmental Impact Statement (“FSEIS”) relating to seismic risks on the proposed Route 9 site. At this point, Brightwater had been brought to a halt by litigation. Both Counties were growing quickly, and the Growth Management Act (“GMA”) requires that EPFs such as Brightwater be available to serve development.³ The Counties entered into settlement negotiations to resolve this impasse.

Those extensive negotiations resulted in the December 2005 Settlement Agreement, the stated purpose of which was “to provide for regulatory certainty to both Snohomish County and its citizens, as well as King County for the timely construction of Brightwater ... within the unincorporated area of south Snohomish County,” and settle all outstanding litigation between the parties, including potential future appeals.⁴ The Agreement established “the total amount of community

² These four lawsuits are described in detail in the Settlement Agreement at issue. Settlement Agreement (Tab D to Appellants’ Statement of Grounds) at D-1-2.

³ RCW 36.70A.020(12). Also, local jurisdictions may not preclude the siting of essential public facilities. RCW 36.70A.200(5).

⁴ Settlement Agreement (Tab D to Appellants’ Statement of Grounds) at D-2.

mitigation funds that shall be provided to Snohomish County for the construction of projects to mitigate the community impacts of King County's wastewater treatment facilities."⁵ The Settlement Agreement also required the parties to execute a Development Agreement to govern the construction of the Brightwater project.

The Development Agreement for Brightwater, which was attached as an exhibit, was an integral part of the entire Settlement Agreement:

The proposed Development Agreement is set forth in **Exhibit A**, which is attached hereto and incorporated herein by this reference. The adoption of an ordinance by Snohomish County approving the terms and conditions of the Development Agreement set forth in Exhibit A is a material condition of this settlement agreement. The failure of King County to execute the Development Agreement or the failure of Snohomish County to adopt an ordinance approving the Development Agreement shall render this settlement agreement null and void.⁶

(Emphasis added.) The express purpose of the Brightwater Development Agreement was

to establish the permitting standards and conditions, certain mitigation measures, and permit process governing the review and construction of King County's Wastewater Treatment plant and related facilities within the

⁵ Id. at D-2, ¶4.

⁶ Id. at D-2, ¶5. Development Agreements are authorized in chapter 36.70B RCW. A development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of real property for the duration specified in the agreement. A development agreement shall be consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW. RCW 36.70B.170(1). A challenge to a development agreement is subject to the Land Use Petition Act. RCW 36.70B.200.

unincorporated areas of south Snohomish County, ... as well as providing certain additional requirements for the operation of Brightwater in the future.⁷

At the public hearing on October 17, 2005, the Snohomish County Council passed a motion approving the Settlement Agreement. The Motion provided the Settlement Agreement would become effective once the Development Agreement was approved. The Council approved the Development Agreement on December 7, 2005. No party appealed approval of the Settlement and Development Agreements.

Together, the Settlement and Development Agreements resolved the lawsuits between the parties and provided for \$70 million dollars to be paid from King County to Snohomish County for mitigation projects in the community surrounding the Brightwater project.⁸ The Settlement Agreement explicitly identifies the mitigation projects that were bargained for and agreed upon by the parties.⁹ By design, each project was vetted to ensure that it constituted reasonable mitigation for impacts to the residents and neighborhoods around Brightwater. This kind of mitigation had been contemplated since the inception of Brightwater; King County and Snohomish County worked together to choose

⁷ Id. at Ex. A. Development Agreement (Tab D to Appellants' Statement of Grounds) at D-10.

⁸ The \$70 million was composed of \$67,050,000 in cash, and \$2,950,000 for the construction of the Community Resource Center to be built as part of Brightwater. Id. at p. 3, ¶3. Settlement Agreement (Tab D to Appellants' Statement of Grounds).

⁹ Id. at Ex. B.

appropriate projects.¹⁰

Consistent with the Settlement and Development Agreements, in early 2006, King County applied to Snohomish County's Department of Planning and Development Services ("PDS") for Binding Site Plan ("BSP") approval for the Brightwater project. On May 5, 2006, the Hearing Examiner approved the BSP for Brightwater.¹¹ No party appealed the Hearing Examiner Decision.

All mitigation payments from King County to Snohomish County were made and work began on the projects identified in the Agreements. Snohomish County has not deviated from the projects agreed upon by the parties.

More than two years passed before the Districts filed this lawsuit against King County, Snohomish County and 31 nominal defendants on August 6, 2008. Part of the relief sought by the Districts is the return of the \$70 million mitigation payment that King County made to Snohomish County per the 2005 Settlement Agreement and the 2006 Examiner Decision approving the BSP for Brightwater.

All claims involving mitigation were dismissed in two summary judgment motions, at which point Snohomish County was effectively out

¹⁰ See RCW 36.70A.200(5); WAC 195-340(b)(vi).

¹¹ Attached hereto as Appendix A (Snohomish County Hearing Examiner Report and Decision.) The mitigation and improvements are identified at 14, ¶12.

of the case. The Districts tried the remainder of the case against King County and lost on the vast majority of their claims.¹²

III. ARGUMENT

Direct Supreme Court review is inappropriate because this appeal does not involve a fundamental and urgent issue of broad public import. Instead, it merely involves the trial court's application of the provisions of the Land Use Petition Act ("LUPA") to an untimely challenge of two final land use decisions.

A. The Settlement Agreement and Development Agreement and Hearing Examiner Decision are Land Use Decisions Under LUPA.

1. Settlement Agreement and Development Agreement.

The trial court correctly determined that the Settlement Agreement between King County and Snohomish County constitutes, at least in part, a land use decision within the meaning of LUPA.¹³

Therefore, the 21-day time limit of LUPA (RCW 36.70C.040(3)) bars any claims by plaintiffs challenging the validity, legality or enforceability of the Settlement Agreement, including any land use aspects of that Agreement, and any such claims of plaintiffs are hereby dismissed.¹⁴

¹² Snohomish County incorporates by reference King County's Response to Appellants' Statement of Grounds for Direct Review.

¹³ Order Granting in Part and Denying in Part Defendants' Motions for Summary Judgment (Tab G to Appellants' Statement of Grounds) at G-14.

¹⁴ Id. at 3.

The court's reasoning was supported by the fact that the Development Agreement is a material condition of the Settlement Agreement and the failure of either party to approve and execute the Development Agreement would render the Settlement Agreement null and void.¹⁵ Under RCW 36.70B.200, if a development agreement "relates to a project permit application, the provisions of chapter 36.70C RCW shall apply to the appeal of the decision on the development agreement." Thus, any interested party who wanted to challenge the approval of the Development Agreement was required to appeal Amended Ordinance No. 05-127 consistent with chapter 36.70C RCW.¹⁶ Under RCW 36.70C.040(2) and (3), a land use petition is "barred" if it is not filed and served "within twenty-one days of the issuance of the land use decision."

Consistent with LUPA, the trial court concluded any challenge to the mitigation required by the Settlement and Development Agreements as adopted by ordinance was several years too late. Contrary to the Districts' assertion, LUPA's statute of limitation is not an issue of first impression. The Districts have given no reason suggesting that the trial court's LUPA rationale was erroneous.

¹⁵ Settlement Agreement (Tab D to Appellant's Statement of Grounds) at D-2.

¹⁶ RCW 36.70C.020(2). If a land use decision is made by the county's legislative authority adopting it by ordinance, the date the land use decision is issued is the date the ordinance is adopted. RCW 36.70C.040(4)(b).

2. Hearing Examiner Report and Decision.

The trial court considered the fact that the Districts also failed to challenge the Examiner Decision approving the BSP. LUPA provides “the exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1).¹⁷

This Court has clearly stated that strict adherence to LUPA’s statutory filing and service requirements is a jurisdictional prerequisite to maintaining an action under LUPA. Chelan County v. Nykreim, 146 Wn.2d 904, 931, 53 P.3d 1 (2002). Strict compliance is required because there is a strong public policy favoring administrative finality in land use decisions. Id. at 931-32; Skamania County v. Columbia Gorge Commission, 144 Wn.2d 30, 48-49, 26 P.3d 241 (2001). This public policy makes a great deal of sense. “If there were not finality, no owner of land would ever be safe in proceeding with development of his property... To make an exception...would completely defeat the purpose and policy of the law in making a definite time limit.” Skamania County, 144 Wn.2d at 49 (citations omitted.)

That public policy is evidenced here. The 21-day appeal period

¹⁷ A “land use decision” means a “final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on ... [a]n application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used.” RCW 36.70C.020(2)(a).

applicable to the Development Agreement had passed with no appeal. King County relied upon the validity of the Agreement and moved forward with its proposal, seeking approval of its BSP for Brightwater through the procedures outlined in the Development Agreement. Again, when there was no appeal of the Examiner Decision approving the BSP, so both King County and Snohomish County moved forward with the review, permitting, and construction of Brightwater.

B. The Districts' Collateral Attack of the Mitigation in the Settlement Agreement and Hearing Examiner Decision are Barred.

The trial court also rejected the Districts' attempts to undo the mitigation by collaterally attacking the 2005 Agreements through a declaratory action filed more than two years later. The Districts' assertion that they "were seeking monetary relief and not challenging any land use decision and would have lacked standing to challenge a land use decision"¹⁸ was unpersuasive and contrary to well-settled law.

"[O]nce a party has had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA's specified timeline." Habitat Watch v. Skagit County, 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005). Conditions imposed on the

¹⁸ Statement of Grounds at p.8.

issuance of a permit, including impact fees, are “subject to judicial review under LUPA.” James v. County of Kitsap, 154 Wn.2d 574, 586, 115 P.3d 286 (2005). This is because the “conditions imposed on the issuance of permits is inextricable from land use decisions and are subject to the procedural requirements of LUPA.” Id. at 590. Once the 21-day appeal period under LUPA lapses, the conditions on the issuance of the permit are no longer reviewable. Id. at 586. Thus, LUPA renders the mitigation and other conditions of development under the Settlement and Development Agreements, and the BSP valid as a matter of law and not subject to challenge via untimely collateral attack. Wenatchee Sportsman Ass’n v. Chelan County, 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000); Samuel’s Furniture, Inc. v. State Dep’t of Ecology, 147 Wn.2d 440, 463-64, 54 P.3d 1194 (2002). As Samuel’s establishes, the failure to file a LUPA petition within 21 days of the local land use decision precludes any collateral attack upon that decision, even an independent enforcement action by another agency. This rule is so well settled in Washington that it is beyond dispute.

The trial court correctly determined that the Snohomish County Council’s approval of the Settlement and Development Agreements and the Examiner Decision constitute land use decisions that are reviewable only under the requirements of LUPA. It also properly ruled that failure

of the Districts to timely challenge them means that the conditions and mitigation set forth in the Agreements and the Examiner Decision “became valid once the opportunity passed to challenge those decisions.” James, 154 Wn.2d at 586.

C. Requirements of RAP 4.2(a)(4).

The only basis invoked by the Districts under RAP 4.2(a) is (4), requiring a “case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” The Districts have not been prompt in pursuing this action, missing relevant LUPA timelines, and have failed to identify any urgency or broad public import in this case which, as described above, involves a land use decision and contractual issues from 2005. Additionally, the relief sought by the Districts is largely monetary. Even if the Districts succeed, no one will be harmed by the additional temporal delay, as interest is available to compensate delayed receipt of monetary damages.

Fundamentally, this case resembles Adams v. City of Spokane, 136 Wn. App. 363, 149 P.3d 420 (2006). There, this Court denied direct review in a common fund doctrine case where public utility ratepayers filed a class action against the city claiming it was illegally collecting money from its ratepayers to pay business and occupation tax imposed by the city on public utilities. Id. at 365. This case also involves the common

fund doctrine and claims of illegal payments by a governmental entity.

This Court has denied direct review in many cases similar to this. See Demopolis v. Peoples Nat. Bank of Washington, 59 Wn. App. 105, 796 P.2d 426 (1990) (direct review denied in Consumer Protection Act case); Jefferson County v. Seattle Yacht Club, 73 Wn. App. 576, 870 P.2d 987 (1994) (direct review denied in challenge to a permitting decision where the county board of commissioners declined to issue a development permit for purposes of building an outstation – including a sewage facility - on the bay); Clallam County Citizens for Safe Drinking Water v. City of Port Angeles, 137 Wn. App. 214, 151 P.3d 1079 (2007) (direct review denied because the citizens are categorically exempt from stating a claim for relief under SEPA review); Foxworthy v. Puyallup Tribe of Indians Ass'n, 141 Wn. App. 221, 169 P.3d 53 (2007) (direct review denied on issue of first impression, whether sovereign immunity insulates tribes from private dram-shop-act-based tort litigation).

In stark contrast to this appeal, cases which have merited direct review under RAP 4.2(a)(4) clearly met the elements of urgency and broad public import. See Pierce County Office of Involuntary Commitment v. Western State Hospital, 97 Wn.2d 264, 644 P.2d 131 (1982) (evaluative and treatment centers experienced overcrowding that led to problems relating to a policy which required the facility to accept patients for whom

it has neither adequate staff or beds; direct review needed to eliminate the necessity of applying to the court each time a patient is rejected); State ex rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 88 P.3d 375 (2004) (action to halt the construction of a multi-million dollar second Tacoma Narrows bridge.)

This action was not “prompt.” The factual chronology demonstrates the Districts missed the LUPA deadlines by more than two years, and then repeatedly delayed bringing this litigation to its conclusion. Many of the delays were of the Districts’ making, or at least supported by them. If this had been truly urgent, the Districts would have filed a LUPA action in 2005.

Nor is this a case of “broad public import.” For instance, this is not a case where Appellant is alleging this is a violation of the Washington State Constitution. Alverado v. Wash. Publ. Power Supply Sys., 111 Wn.2d 424, 759 P.2d 427 (1988), cert. denied, 490 U.S. 1004 (1989) (mandatory urinalysis and drug screen required for applicants at nuclear power plant violated Fourth Amendment). While the Districts may point to the dozens of entities and municipalities involved, all but one has been deemed “nominal” by the Districts and are only in the lawsuit because they got sued. The nominal defendants have not participated at all. The size of the case caption should not connote importance. Nor will the result

bring about some change which would impact the taxpayers; whichever side prevails will only create an impact into the relative funding sources of King County.

The Districts have not identified any error or conflict of law in their Statement of Grounds. As the Districts cannot identify any urgency or broad public importance to this case, it should proceed to the Court of Appeals.

IV. CONCLUSION

This is a garden-variety LUPA case. The 21 days time bar to land use decisions is sacrosanct. The districts missed the deadline by two years. The Court of Appeals is abundantly capable of deciding this matter and should be allowed to do so.

Respectfully submitted this 11th day of August, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By 
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Subject: RE: Cedar River, et al. v. King County, et al. - Supreme Court No. 86293-1

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Subject: Cedar River, et al. v. King County, et al. - Supreme Court No. 86293-1

Attached please find the Answer of Respondent Snohomish County to Appellants' Statement of Grounds for Direct Review and Certificate of Service. The appendix to the Response is being sent by U.S. mail.

Case Name: *Cedar River, et al. v. King County, et al.*
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Appendix A

To Respondent Snohomish County's Answer to
Appellants' Statement of Grounds for Review

Case No. 86293-1

STATE OF WASHINGTON
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JAMES D. A. CHRISTENSEN
CLERK

OFFICE OF THE HEARING EXAMINER

SNOHOMISH COUNTY

REPORT AND DECISION

CASE NO.: 04-109621 BG BRIGHTWATER WASTEWATER TREATMENT FACILITY

OWNER/ APPLICANT: King County Development of Natural Resources and Parks
Wastewater Treatment Division
201 South Jackson Street
Seattle, Washington 98104-98121

CONTACT: Chris Tiffany, Real Property Agent IV
Brightwater Project Office
22509 State Route 9
Woodinville, Washington 98072-6010

PROJECT LOCATION: 22509 State Route 9
Woodinville, Washington 98072-6010

SUMMARY OF REQUEST:

The applicant is requesting approval of a Binding Site Plan Pursuant to the Brightwater Development Agreement; Landscape Modification per SCC 30.25.040.

SUMMARY OF DECISION:

Request granted, subject to conditions.

PUBLIC HEARING:

After reviewing Department of Planning & Development Services Staff Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on April 4, 2006, at 9:00 a.m. and concluded at 2:20 p.m.
The hearing was reconvened on April 4, 2006, at 6:30 p.m. and concluded at 6:43 p.m.
The hearing was reconvened on April 5, 2006, at 9:00 a.m. and concluded at 9:30 a.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

1	Land Use Permit Master Application filed 11/1/05
	Binding Site Plans received 11/1/05 - SUPERSEDED
2A	Sheet 1 of 9: Cover Sheet
2B	Sheet 2 of 9: Declarations
2C	Sheet 3 of 9: Proposed Site Plan – North
2D	Sheet 4 of 9: Proposed Site Plan – South
2E	Sheet 5 of 9: Proposed Easements 1 of 3
2F	Sheet 6 of 9: Proposed Easements 2 of 3
2G	Sheet 7 of 9: Proposed Easements 3 of 3
2H	Sheet 8 of 9: Proposed Drainage and Critical Areas North
2I	Sheet 9 of 9: Proposed Drainage and Critical Areas South
	Final Environmental Impact Statement dated 11/03
3A	Volume 1 – Chapters 1-3
3B	Volume 2 – Chapters 4-10
3C	Volume 3 – Chapters 11-17
3D	Volume 4 – Appendices
3E	Volume 5 – Appendices
3F	Volume 6 – Appendices
3G	Volume 7 – Appendices
3H	Volume 8 – Appendices
3I	Volume 9 – Appendices
3J	Volume 10 – Appendices
	Addendums to Brightwater Final Eis
4A	Addendum No. 1 to Brightwater Final EIS dated 2/2/04
4B	Addendum No. 2 to Brightwater Final EIS dated 4/2/04
4C	Addendum No. 3 to Brightwater Final EIS dated 4/30/04
4D	Addendum No. 4 to Brightwater Final EIS dated 9/04
4E	Final Supplemental Environmental Impact Statement, Addendum 1 dated 12/05
5	Traffic Analysis prepared by CH2M HILL dated 2/11/05
6	Final Design Geotechnical Recommendations Report prepared by CH2M HILL dated 3/05
7	Draft Supplemental Environmental Impact Statement dated 4/05
8	Draft Supplemental Environmental Impact Statement – Technical Appendices dated 4/05
9	Draft Haul Route Plan prepared by CH2M HILL dated 6/10/05
10	Final Supplemental Environmental Impact Statement – Response to Comments on the Draft Supplemental EIS dated 7/05
11	Facilities Plan dated 5/05
12	Addendum to the Brightwater Treatment Plant Traffic Analysis Dated

	February 11, 2005 prepared by CH2M HILL dated 6/10/05
13	United States Army Corps of Engineers Notice of Authorization, Permit 200201289 dated 6/15/05
14	Route 9 Site Critical Area Study: Wetlands, Streams, and Fish and Wildlife Habitat Conservation Areas prepared by Adolfsen Associates, Inc. dated 7/05
15	Joint Aquatic Resource Permits Application and Attachments in Support of Brightwater Treatment Plant Site HPA dated 8/05
16	Draft Targeted Drainage Plan prepared by CH2M HILL dated 10/05
17	Letter to Tom Barnett, PDS from Chris Tiffany, King County Wastewater Division regarding North Mitigation Area Grading Permit Submittal dated 2/17/05
18	Technical Memorandum to Chris Tiffany, King County from John Rogers, CH2M HILL regarding Groundwater Compliance dated 10/21/05
19	Memorandum to Chris Tiffany, King County from Sean Cryan, Mithun regarding Parking Counts dated 10/21/05
20	Memorandum to Chris Tiffany, King County from Laura Brent, Shockey / Brent, Inc. regarding Applicable Use Compliance SCC 30.41D.100(6) dated 10/21/05
21	Technical Memorandum to Chris Tiffany, King County from John Rogers, CH2M HILL regarding Building Fire Ratings dated 10/24/05
22	Memorandum to Chris Tiffany, King County from Roger Kitchin, CH2M HILL regarding Fire Flow Requirements dated 10/26/05
23	Technical Memorandum to Chris Tiffany, King County from John Rogers, CH2M HILL regarding Noise Model dated 10/26/05
24	Memorandum to Chris Tiffany, King County from Jim Goetz, CH2M HILL regarding Treatment Plant Emergency Spill Containment dated 10/26/05
25	Memorandum to Chris Tiffany, King County from Roger Kitchin, CH2M HILL regarding Quality Assurance Plan dated 10/26/05
26	Memorandum to Chris Tiffany, King County from John Rogers, CH2M HILL regarding Environmental Mitigation dated 10/27/05
27	Memorandum to Chris Tiffany, King County from Scott Smith, Hargreaves regarding Landscape Modification Request dated 10/27/05
28	Technical Memorandum to Calvin Locke, Chris Tiffany, John Rogers and Jim Goetz from Bhaskar Thapa and Dan Adams, MWH Jacobs Associates dated 10/27/05
29	Memorandum to Chris Tiffany, King County from Stan Hummel, Treatment Plant Program Manager, King County regarding Brightwater On-site Sewer Availability dated 10/27/05
30	Memorandum to Chris Tiffany, King County from Stan Hummel, Treatment Plant Program Manager, King County regarding Traffic Studies dated 10/27/05

31	Memorandum to Chris Tiffany, King County from Stan Hummel, King County regarding Building Code Compliance dated 10/27/05
32	Exhibit number intentionally left blank
33	Statement of Intent to Vacate Existing Woodinville North Business Park Binding Site Plan received 11/1/05
34	Memorandum to Chris Tiffany, King County from Stan Hummel, King County regarding Water Availability dated 11/1/05
	Critical Areas Site Plan
35A	Tax Acct. #: 27052600300300
35B	Tax Acct. #: 27052600300400, 27052600300500, 27052600301400
35C	Tax Acct. #: 27052600300800
35D	Tax Acct. #: 27052600303500
36	Amended Ordinance No. 05-127 Relating to the Approval of a Development Agreement with King County for its Brightwater Wastewater Treatment Facilities
37	Memorandum to Mark Brown, Snohomish County DPW from Laura Brent, Shockey / Brent, Inc. regarding Brightwater Background – Traffic dated 12/14/05
38	Brightwater Odor Control Monitoring and Response Plan
39	Brightwater Parcel Map Check REVISED Binding Site Plans dated 2/06
40A	Sheet 1 of 8: Cover Sheet
40B	Sheet 2 of 8: Declarations
40C	Sheet 3 of 8: Record of Survey
40D	Sheet 4 of 8: Proposed Site Plan – North
40E	Sheet 5 of 8: Proposed Site Plan – South
40F	Sheet 6 of 8: Proposed Easements – 1 of 3
40G	Sheet 7 of 8: Proposed Easements – 2 of 3
40H	Sheet 8 of 8: Proposed Easements – 3 of 3
41	Haul Route Agreement / County Road Right-Of-Way Use Permit, 2705-B4-186-05, dated 9/30/05
42	Proposed Drainage and Critical Areas South dated 10/05
43	Vicinity Map
44	Ownership – Zoning Map
45	Aerial photo – Sec 35 Twp 27 Rge 3 ('03)
46	Verification of Legal Description
47	Affidavit of Mailing – Notice of Open Record Hearing
48	Affidavit of Notification (publication) - Notice of Open Record Hearing
49	Posting Verification – Notice of Open Record Hearing
50	Exhibit B to the Settlement Agreement dated 10/3/05
51	Second Addendum to the February 11, 2005 Brightwater Treatment Plant Traffic Analysis dated 3/23/06
52	Exhibit numbers intentionally left blank

53	Letter to Tom Barnett, PDS from Victoria Yeager, Stillaguamish Tribe of Indians dated 11/18/05
54	Letter to Barnett, PDS from Dean Saksena, Distribution, Snohomish County PUD No. 1 dated 11/30/05
55	Memorandum to Barnett, PDS from Brent Raasina, Snohomish Health District dated 12/15/05
56	Exhibit number intentionally left blank
57	Exhibit numbers intentionally left blank
58	STAFF RECOMMENDATION with Attachment No. 1 - Settlement Agreement between Snohomish County and King County for the Brightwater Wastewater Treatment Plant and Accompanying Exhibits: (Exhibit A – Development Agreement; Exhibit B – Snohomish County Mitigation Project List) - Department of Planning and Development Services
59	Draft Environmental Impact Statement – Volume I dated 11/02
60	Draft Environmental Impact Statement – Volume II dated 1/02
61	Draft Environmental Impact Statement – Technical Appendices dated 11/02
62	Decision Denying Appeal, Subject to Conditions dated 8/3/04
63	Memorandum to Chris Tiffany, King County from Jim Goetz, CH2M HILL regarding Treatment Plant Approach to Seismic Design dated 10/26/05
64	Proposed condition submitted by Steve Dickson
65	Average weekday traffic volumes on SR-9
66	Modification to Section V Condition E
67	Handout for Speakers of Hearing
68	Emails and comments from SKEA re: Notice
69	Remarks on Notice for the BSP Hearing
70	Agreed to Condition re: Traffic
71	Emails from SKEA
72	DNS on Code Chapter 30.75
73	Letter to Tom Barnett from Anderson dated 11/04/05
74	DNS on Development Agreement
75-100	Intentionally left blank
101	Map showing existing and future treatment system with Brightwater
102	Map showing portals
103	Aerial photograph of site
104	Map showing facilities
105	Aerial photograph of proposed facilities
106	Artist rendition of future view of plant as seen from SR-9
107	Map showing SWIF trench locations
108	Brightwater Processes indicating their enclosure
109	Brightwater Odor Prevention System
110	Snohomish County Community Impact Mitigation

111	Neighboring Mitigation Projects
112	Decisionmaking Summary
113	SEPA Provisions
114	Excerpt of RCW
115	Emergency Ordinance No. 05-121 of Snohomish County Council
116	Emergency Ordinance No. 05-122 of Snohomish County Council
117	Email from SKEA and response from Randy Sleight, Snohomish County PDS 4/5/06
118	Email to Kay Wheeler, Snohomish County PDS from Emma Dixon, SKEA 4/5/06
119	Email to SKEA from Tom Barnett, Snohomish County PDS 4/5/06
120	Email to SKEA from Randy Sleight 4/6/06
121	Comments from SKEA #1 4/9/06
122	Comments from SKEA #2 4/9/06
123	Comments from SKEA #3 4/9/06
124	Comments from SKEA #4 4/9/06
125	Comments from SKEA #5 4/9/06
126	Comments from SKEA #6 4/9/06
127	Comments from SKEA #8 4/9/06
128	Comments from SKEA #9 4/9/06
129	Comments from Gary and Patricia Brzezinski 4/10/06
130	City of Woodinville letters and response to City of Woodinville letter dated 3/7/06 from King County 4/7/06
131	Comments from Emma Dixon, SKEA 4/12/06
132	Letter from City of Woodinville dated 4/5/06
133	Letter from City of Woodinville dated 4/25/06
134	Memorandum from Examiner dated April 6, 2006
135	Memorandum from Examiner dated April 10, 2006

NOTE: A complete record of this hearing is available in the office of Department of Planning & Development Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.

BACKGROUND

2. King County Department of Natural Resources and Parks Wastewater Treatment Division (applicant) has responsibility for planning, constructing, maintaining, and

operating wastewater treatment facilities serving residents in King and southern Snohomish County. The applicant presently operates facilities in Renton which serve the southern and eastern portions of King County and a second facility in Seattle which serves central and northern King County and portions of southern Snohomish County. Due to continuing population growth, in 1992 the applicant began the planning process to site and construct a third regional wastewater treatment facility, to include the adoption of a Regional Wastewater Services Plan (RWSP). RWSP Ordinance No. 13680 required a new regional wastewater treatment system which became known as "Brightwater".

3. The Brightwater project required a site large enough to accommodate a plant with a capacity to treat 36 million gallons of wastewater per day (mgd) by 2010 and an eventual maximum capacity of 54 mgd. Following an extensive siting process which included the preparation of an Environmental Impact Statement (EIS), on December 1, 2003, the applicant selected a site for the Brightwater plant, the outfall location in Puget Sound, influent and effluent conveyance routes, and portal locations.
4. The Brightwater system proposes a wastewater treatment plant on a 114 acre, rectangular parcel abutting the east side of SR-9 immediately north of its intersection with SR-522 approximately $\frac{3}{4}$ mile north of the City of Woodinville. Effluent conveyance pipes will extend south and west from the plant along SR-522 to Woodinville and then directly west through Kenmore and Lake Forest Park and then northwest to the King County/Snohomish County line to an outfall in Puget Sound at Woodway.
5. During and/or subsequent to the selection process the Snohomish County Council adopted emergency ordinances setting standards for the siting and permitting of essential public facilities (EPF) which included a wastewater treatment plant; establishing odor control standards for sewage treatment facilities; and authorizing the imposition of seismic protections in addition to those standards set forth in State building codes. King County and the City of Renton challenged said ordinances in appeals to the Growth Management Hearings Board. King County and the City of Renton also filed lawsuits in King County Superior Court alleging several causes of action arising out of the adoption of the odor and seismic ordinances. Snohomish County filed an appeal challenging the adequacy of the Brightwater Final Supplemental Environmental Impact Statement (EIS) before the King County Hearing Examiner. In a "Settlement Agreement and Release" dated December 20, 2005, King County and Snohomish County settled all outstanding litigation between the parties and agreed upon a method of processing permits for construction of the Brightwater Wastewater Treatment Plant (Attachment to Staff Report/Exhibit "58"). Paragraph 5 of said agreement reads in pertinent part:

5. Permit Process and Review Criteria – Development Agreement – Public Hearing Required. Pursuant to RCW 36.70B.170, the parties intend to enter into a development

agreement governing the processing of permits for the construction of the Brightwater wastewater treatment plant and related facilities....The agreement shall provide for the review and permitting of Brightwater facilities using a voluntary binding site plan permit approval and a Type 2 process under Snohomish County's Unified Development Code (which process provides for a public hearing on certain permits before a hearing examiner prior to permit approval)...The parties agree to retain an independent hearing examiner to preside over the public hearings for the permit approvals...The proposed Development Agreement is set forth in Exhibit "A", which is attached hereto and incorporated herein by this reference. The adoption of an ordinance by Snohomish County approving the terms and conditions of the Development Agreement set forth in Exhibit "A" is a material condition of this settlement agreement....

The parties retained this Examiner as the independent examiner required by the settlement agreement to preside over the public hearing and issue a decision in accordance with the scope of the hearing as set forth in the Development Agreement.

6. The Brightwater wastewater treatment plant meets the definition of an essential public facility as set forth in RCW 36.70A.200, a portion of the Growth Management Act (GMA) as follows:
 - (1) ...Essential Public Facilities include those facilities that are typically difficult to site such as...solidwaste handling facilities....
 - (5) No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

RCW 36.70B.170 authorizes the entry of a development agreement "with a person having ownership or control of real property within its jurisdiction". RCW 36.70B.170(1) provides in part:

...A development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement. A development agreement shall be consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW.

- (3) For the purpose of this section, “development standards” includes, but is not limited to:

...

- (c) Mitigation measures, development conditions, and other requirements under Chapter 43.21C RCW [SEPA].

RCW 36.70B.180 provides in part that:

...A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement.

King and Snohomish Counties have entered into a development agreement pursuant to RCW 36.70B.170 to site an essential public facility. Said agreement sets forth development standards and mitigation of the development for the 35 year term, and in accordance with RCW 36.70B.180, the purpose of the public hearing is to determine whether the proposed binding site plan (BSP) is consistent with the development agreement.

SCOPE OF PUBLIC HEARING

7. The Development Agreement governs the scope of the public hearing and provides in pertinent part:

1.1(a) BSP required. The parties agree that King County shall submit an application for its Brightwater wastewater treatment plant located at the Highway 9 site through a binding site plan (“BSP”) process that will include a recommendation by the Director of Planning and Development Services (“Director”), followed by a public hearing on the permit and a decision by a Hearing Examiner as described in Section 5 of the Settlement Agreement between the parties....

(b) Phased Development. The purpose of the voluntary BSP process will be to ensure...that the collective lots continue to function as one site concerning, but not limited to, public roads, improvements, open spaces, drainage and other elements...for both an

initial phase to treat 36 million gallons per day (mgd) of wastewater and a second phase to treat 54 mgd. The application of this BSP process will recognize that the Brightwater facility is an essential public facility (EPF) under the Growth Management Act....

- (c) Voluntary Participation in the BSP Process. Snohomish County acknowledges that King County's agreement to submit its project to a BSP process is voluntary, and is not otherwise required by the existing provisions of the Snohomish County Code, and has been agreed to by Snohomish County in lieu of pursuing additional new regulations under an essential public facilities ordinance for the Brightwater project....(emphasis supplied).

Section 1.1 of the Development Agreement requires King County to submit its project to a BSP process which the Snohomish County Code (SCC) does not require, since the zoning of the parcel authorizes a wastewater treatment facility as a permitted use subject only to administrative approval. The voluntary Type 2 permit process 1.2 Expedited type 2 process requires the public hearing.

- (a) Public Hearing Required. The BSP shall be processed using the Type 2 permit process set forth in Chapter 30.72 SCC requiring an open record public hearing, except that the Hearing Examiner's decision shall be the final decision of the County in order to expedite the permitting process....[no appeal to the Snohomish County Council as authorized by the SCC]
- (b) Special Hearing Examiner. The parties agree to jointly select a special Hearing Examiner who shall conduct the open record public hearing and issue a decision on the BSP permit for the Brightwater facilities....

8. Section 1.3 of the Development Agreement sets forth the requirements for the "Director's recommendation" and provides in pertinent part as follows:

- (i) Environmental documents. For purpose of recommending mitigation, the Director shall make a recommendation on the BSP permit application utilizing the Final Environmental Impact Statement (FEIS) issued by King County in November, 2003, and the Supplemental Environmental

Impact Statement (SFEIS) issued in July, 2005 pursuant to Ch.43.21C RCW (SEPA) for the project, which are hereby deemed adequate for purposes of permitting under Ch.30.61 SCC...

- (iii) Standards and Conditions. The Director's recommendation shall be limited to whether King County's BSP application meets the requirements of this Development Agreement. If the Director determines that it does not, the Director may not recommend denial of the permit given the fact that the proposal is for an EPF, but the Director may recommend to the Hearing Examiner that additional mitigation be imposed consistent with the terms and conditions set forth herein.

Thus, the Director in making its recommendation had to consider the FEIS and SEIS as adequate, and had to recommend mitigation in accordance with said documents. The Director could not recommend denial, but could recommend additional mitigation. In the present case, the Director did recommend additional mitigation in the conditions of approval set forth in the staff report and at the public hearing.

- 9. Section 1.4 of the Development Agreement sets forth the public hearing procedures and provides in pertinent part:

- (a) Requirement for a Public Hearing.Notice of the open record public hearing shall be as specified in SCC 30.72.030...The Hearing Examiner shall receive written comment or oral testimony from any person or entity desiring to comment on the project and the proposed conditions or approval for each permit application....
- (b) Conduct of the Hearing. ...The Hearing Examiner may, in his or her sole discretion on a one-time basis, continue the public hearing to a date and time certain no more than ten-days from the last date of hearing if, in his or her sole discretion, it becomes necessary to do so in order to provide adequate time for all citizens present to testify....

The Development Agreement requires Snohomish County to provide notice of the public hearing in accordance with SCC 30.72.030 which, as found hereinafter, the County did. The Examiner heard testimony from all persons in attendance at the hearing who desired to testify, and for the reasons set forth hereinafter, does not find it necessary to reconvene the hearing "to provide adequate time for all citizens present to testify."

- 10. Section 1.5 of the Development Agreement sets forth the criteria which the

Examiner may consider in rendering a decision and provides as follows:

- a. Scope of Decision. Recognizing that Brightwater is a regional EPF (RCW 36.70A.200(5)), the Hearing Examiner's authority shall be limited to approving the BSP permit as proposed, or approving it with modifications or conditions. The Hearing Examiner shall accept the SEPA documents prepared by King County...as adequate for purposes of imposing mitigation of significant adverse environmental impacts as part of the BSP permit approval. The Hearing Examiner's decision shall not include challenges to the SEPA documents....
- b. Review of Conditions and Mitigation of Impacts. In rendering a decision on the BSP permit , the Hearing Examiner shall limit his or her review to whether the conditions of this Development Agreement relating to the BSP permit have been met for the Brightwater project as set forth in Section 2.0 (General Conditions), and Section 3.0 (Special Conditions). In reaching a decision on the BSP, the Hearing Examiner shall accord the recommendation of the PDS Director substantial weight....

Section 1.5 requires the Examiner to accept as adequate the SEPA documents evaluating the Brightwater project and prohibits consideration of any challenges thereto. Furthermore, the Examiner must limit his review to whether the Brightwater project satisfies the general and special conditions specifically set forth in Sections 2 and 3 of the Development Agreement. Furthermore, in imposing additional conditions, Section 2.3 of the Development Agreement requires the Examiner to:

...ensure that any Additional Conditions do not render the construction of the Brightwater Wastewater Treatment System impossible or infeasible within the meaning of RCW 36.70A.200(5). The Hearing Examiner shall not impose conditions to mitigate odor and/or seismic impacts other than the requirements specified in the special conditions set forth in Section 3.0.

The Development Agreement prohibits the Examiner from considering and imposing additional conditions regarding odor and seismic impacts. Furthermore, the Examiner may not impose conditions which would render construction of the facility impossible or infeasible. Section 4.0 provides that Sections 1-3 set forth the BSP process for the Brightwater project, and further provides that all other required permits are "outside of the BSP process" and exempt from administrative Type 1 or Type 2 appeal provisions. These permits include treatment plant building permits, north mitigation area grading and building permits, haul route agreements, right-of-

way use permit, treatment plant site preparation, and grading permits within the right-of-way.

PROJECT DESCRIPTION

11. The portion of the site proposed for the Brightwater plant consists of 74 acres, abuts SR-9 for approximately 3,400 feet, and extends 1,000 feet eastward to the Burlington Northern Railroad right-of-way. According to testimony and the aerial photograph (Exhibit "45"), the southern half of the site consists of wrecking yards and other outdoor storage facilities on impervious surfaces with few, if any, storm drainage controls. The northern portion of the site consists of the Woodinville North Business Park, the largest building of which houses the Stockpot Soup business owned by Campbell Soup. An architectural rendition of the site plan (Exhibit "105") shows the treatment facility buildings located in the eastern portion of the site adjacent to the railroad tracks in a north-south orientation, and environmental and storm drainage features located in the western and southern portions adjacent to SR-9. Environmental features include wetland mitigation, stormwater detention ponds, boardwalks and trails, ponds and overlooks, wetscapes, and an education and community center building. Access to the site is provided from SR-9 opposite the intersection with 228th St. SE. The northern 40 acres of the 114 acre overall site will remain undeveloped with the exception of stormwater ponds. The applicant will establish forested wetlands, meadow hills, and upland forest on the site. No improvements other than trails, boardwalks, and a field house and garden will occur on the northern 40 acres.
12. In addition to the significant environmental mitigation provided on-site, the applicant will provide to Snohomish County \$30,400,000 for recreation and parks, \$25,850,000 in public safety improvements, \$10,800,000 in habitat mitigation, and a \$2,950,000 community resource center located on the site (Exhibit "110"). The applicant will focus the active recreation and park improvements in an area east and northeast of the site and will construct the community facility in the northern portion of the site. Habitat mitigation will occur both north and south of the site on Little Bear Creek and Cutthroat Creek. Public safety improvements will consist of bike lanes, sidewalks, and walkway improvements along 228th St. E. and roads connecting therewith; and a North Creek area trail to the northwest of the site between Mill Creek and Bothell. The project also includes paved shoulder and bike safety improvements on Broadway Avenue within and north of the Maltby area (Exhibit "111").
13. The Brightwater service area includes both southern Snohomish County and northern King County. The King County service area consists of areas around north Lake Sammamish and the Sammamish Slough, and north Lake Washington. This area generally represents the Lake Washington drainage basin (Exhibit "101"). The applicant can provide gravity flow of effluent from the Brightwater plant all the way to

the outfall located in Puget Sound one mile off shore at the 600 foot depth. The applicant will install a deep tunnel pipeline the entire distance. The plant will provide state-of-the-art sewage treatment which will exceed secondary treatment. Following completion of construction, the plant will generate significantly fewer vehicle trips both throughout the day and during morning and evening peak periods. The Brightwater Treatment Plant, traffic analysis prepared by CH2M Hill dated February 11, 2005, anticipates that in the year 2040 the treatment plant will generate a total of 90 peak hour trips, whereas the existing businesses presently generate a total of 211 peak hour trips (Exhibit "5").

14. A pipeline located in a deep tunnel will transport sewage into the plant at portal 46, and all sewage treatment will occur within buildings and/or underground. Storm drainage improvements will dramatically improve the present uncontrolled and untreated stormwater runoff to Little Bear Creek both from the site itself and from present flows onto the site. Berms and vegetation will provide buffering from the buildings along SR-9 and to the south, and will also keep all storm drainage on-site. The project will maintain 70 acres of the 114 acre site in open space. The applicant will design and operate the Brightwater plant in a manner to meet the standard of "no detectable odor" at the property boundaries even in a "worse-case" condition to include times when temperature inversions and stagnant air coincide with peak odor releases. The applicant will continuously measure odor producing matters and will routinely monitor odors at the property boundary. The applicant has established a procedure for responding to complaints and will also establish a Brightwater Air Quality Board to review exceedences and/or odor complaints (Exhibit "38"). The applicant has conducted and will conduct additional seismic investigations on the site in accordance with the Development Agreement (Exhibits "28", "63").

COMPLIANCE WITH DEVELOPMENT AGREEMENT

15. Section 2.1(a) of the Development Agreement sets forth the BSP decision criteria of Chapter 30.41D SCC applicable to the Brightwater project. Findings on each such criteria are made hereinafter.
16. Section 30.41D.100 SCC requires the Director to find prior to approving a BSP that the newly created lots function and operate as one site. The 114 acre Brightwater site consists of 24 separate lots which the applicant has separately acquired. The applicant proposes no new lots, and approval of a binding site plan covering the entire project site will ensure that the lots "function and operate as one site". Staff and the Examiner have reviewed the project for compliance with the Development Agreement as if located on one large parcel as opposed to individual lots.
17. Section 30.41D.100(2) SCC requires compliance with the Snohomish County Noise Ordinance. Exhibit "23", a Technical Memorandum prepared by CH2M Hill, Brown and Caldwell, Mithum, and Associated Firms, evaluates noise exposure levels produced by the operation of the Brightwater plant. Section 10.01.030 SCC limits

sound levels to 57 dba daytime and 47 dba nighttime as measured at rural residential zoned properties and 65 dba as measured at adjacent commercial property lines. Since the plant will run continuously, the applicant designed it to meet the nighttime limits of 47 dba. Because of the highway noise associated with SR-9 and SR-22, the current ambient sound levels at the Brightwater site significantly exceed the nighttime noise limit for residential properties. Thus, the plant should meet SCC requirements. The plans propose housing noise producing elements in buildings with exterior walls consisting of eight inch concrete panels or grout filled CMUs and roofs consisting of four inch concrete topping over a three inch metal deck. The buildings will also include a curtain wall framing system with one inch laminated/insulated glazing. While such construction should ensure compliance with the Noise Control Ordinance, the applicant will also perform further noise analyses prior to the detailed design of the facilities. Such analyses may require additional screening and custom enclosures. The Director recommends a condition imposed hereinafter which requires an updated noise model prior to issuance of the first building permit for a noise generating element of the treatment facility.

18. The City of Woodinville (City) in a letter dated April 5, 2006, (Exhibit "132") raised issues regarding compliance with noise criteria during both construction and plant operation and recommended a condition prohibiting the applicant from applying for and receiving variances or modified standards or exemptions from noise standards. The City asserts that the "reclaimed water pump station" has not been designed as yet and was generally ignored in the current noise model. However, said pump station is a future facility and will not be included during the initial phase of construction. Furthermore, conditions of approval require the facility to meet noise limits and also require the applicant to prepare an updated noise model prior to issuance of a building permit for a noise generating element. The City also questions the noise produced by a 600 kw standby generator as opposed to co-generation. Again, co-generation is proposed for the future facility and will generate electricity from digester gas. The co-generation facility is shown on the site plan, but is no longer located within the energy building which handles the standby generator. Furthermore, as previously found, conditions require the applicant to meet SCC noise requirements, and the berms and vegetation will provide additional sound attenuation. The City expresses concern regarding sounds created by construction equipment during the years it will take to complete the plant. The SCC exempts construction equipment noise during daytime hours, but not during nighttime hours. The applicant must meet the requirements of the noise ordinance. The Development Agreement prohibits the imposition of additional noise mitigation measures pursuant to SEPA authority as SEPA review is deemed final.
19. Section 30.41D.100(3) SCC requires compliance with public/private road standards, right-of-way establishment and permits, access, and other applicable road and traffic requirements. The applicant has provided a traffic analysis (Exhibit "5") and an addendum to the analysis (Exhibit "12"). The Snohomish County Department of Public Works reviewed the documents during the environmental review process.

The project will access directly onto SR-9, and since no County roads abut the site, the County needs no additional right-of-way. The project will generate significantly less traffic than the businesses on the parcels prior to their purchase by the applicant. Therefore, the applicant need not provide traffic impact fees. However, as mitigation for overall plant impacts, the applicant will provide \$25,850,000.00 in public safety improvements. (Exhibits "110" and "111") The applicant and Snohomish County have negotiated mitigation measures for construction traffic which provides hours of construction shifts so that workers will arrive and depart from the site during non-peak hour periods (Exhibit "70"). Such minimizes the potential for traffic conflicts.

20. Section 30.41D.100(4) SCC requires compliance with fire lanes, emergency access, fire rated construction, hydrants and fire flow, and other requirements of Chapter 30.53A SCC. The Technical Memorandum entitled "Building Fire Ratings" (Exhibit "21") and "Fire Flow Requirements" (Exhibit "22") establish that the project will provide adequate fire protection to include building access and design. The Snohomish County Fire Marshal's Office has determined that the BSP meets all of its requirements, and that the applicant will design the project in accordance with fire protection ordinances. The County will ensure detailed compliance with fire regulations during the building permit application process to include fire hydrant locations and fire flow rates.
21. The City expresses concern that the BSP vests the applicant to the criteria set forth in the 2003 International Fire Code (IFC). The Development Agreement does set forth the vesting date of various building and development codes as authorized by RCW 36.70B.170. The Examiner does not have authority to impose a different vesting date or different standards than those set forth in the Agreement. RCW 36.70B.170(3)(i) provides that a development agreement can vest a project, and the present Development Agreement vests the Brightwater plant and related facilities to the codes, standards, and requirements in effect on the date of execution of the agreement which includes the 2003 IFC.
22. The City also raises issues regarding fire sprinkler system requirements, and points out that the installation of such systems does not allow a reduction in flow rate and duration in the Woodinville Municipal Code. However, the Snohomish County Fire Marshal's Office established fire flow requirements, and the SCC allows reductions of 50% for a fully sprinkled building, 25% for a rural area, and 25% for fire detection alarm systems. The Fire Marshal's Office also determined the fire hydrant spacing. The BSP meets all requirements of the Fire Marshal, the SCC, and the Development Agreement.
23. The City asserts that the BSP shows fire emergency access roads at a width of 20 to 22 feet whereas the Woodinville Municipal Code requires 26 foot wide roadways to access buildings over 30 feet in height. Again, the applicant designed the site following consultation with the Snohomish County Fire Marshal's Office which

requires 20 foot wide fire lanes and a truck turning radii of 20 feet on the inside of curves and 40 feet on the outside. Only three facilities will exceed a height of 30 feet above finished ground level, and roads providing access to said buildings will measure a minimum of 24 feet in width. Such exceeds the minimum requirements of Snohomish County. Furthermore, the County will review fire protection for the plant in detail during the building permit process.

24. Section 30.41D.100(5) SCC requires compliance with applicable construction codes. The applicant has shown the building layout on the BSP (Exhibit "40A" – "40H"), but has not as yet developed the building detail. However, the applicant will design said buildings to current editions of the International Building Code (IBC) and the SCC (Exhibit "31"). Review of the buildings will occur at the building permit stage, and in accordance with Section 4 of the Development Agreement, are beyond the scope of the present hearing. The City once again raises concerns regarding the authority of a Development Agreement to vest a project to current building codes. However, again, such is consistent with RCW 36.70B and also beyond the Examiner's authority to consider.
25. Section 30.41D.100(6) SCC requires the applicant to show compliance with applicable use and development standard requirements of Subtitle 30.2 SCC. The SCC at Section 30.22.100 classifies the Brightwater facility as within the "Utility Facilities – All Other Structures" use category and authorizes such use as outright permitted in the applicable Light Industrial (LI) and Heavy Industrial (HI) zone classifications. The SCC also allows utility facilities subject to a conditional use permit in the Freeway Service (FS) zone classification. The applicant will construct the entire Brightwater Plant on the portion of the site located within the LI and HI zone classifications, and will install environmental mitigation measures in the portion of the site located in the FS classification. Therefore, the applicant need not apply for a conditional use permit. The Brightwater facility will meet the bulk regulations of the LI, HI, and FS zone classifications. The more restrictive LI classification limits the maximum building height to 50 feet and requires setbacks of 25 feet from public and private rights-of-way, 50 feet from residential and rural zones, and 100 feet from Forest Resource Lands. The project more than satisfies said requirements. The SCC also requires a project to meet parking and landscaping requirements or obtain a modification thereof. The applicant prepared a Technical Memorandum which shows the ability to meet all parking needs of the site to include the community facility (Exhibit "19"). The applicant proposes a landscape modification which meets the intent of SCC 30.25.040 and provides a better result than would be achieved by following the standard requirements of the code (Exhibit "27").
26. Section 30.41D.100(8) SCC requires compliance with environmental policies and procedures, critical areas regulations, groundwater protection regulations, and resource lands requirements. The applicant prepared a Technical Memorandum addressing environmental mitigation for the Brightwater Treatment Plant which includes 19 pages of tables describing both construction mitigation and operation

mitigation measures (Exhibit "26"). The tables identify 14 categories of mitigation to include earth; air; water resources; plants; animals and wetland; energy and natural resources; environmental health; noise and vibration; land and shoreline use; aesthetic; light and glare; recreation; cultural resources; transportation; and public services and utilities. In addition, the applicant will provide \$10,800,000 for habitat mitigation along Little Bear Creek and Cutthroat Creek. A geotechnical analysis (Exhibit "6") addresses geologic hazards and seismic hazards. The applicant also prepared a Technical Memorandum entitled "Groundwater Compliance" (Exhibit "18") which proposes mitigation identified in the FEIS for groundwater protection to include withdrawing smaller volumes of groundwater within a smaller area of influence; eliminating construction of the effluent pumping station at the treatment plant site which the FEIS identified as the only structure which would have penetrated into the regional aquifer; identification of leakage in the under drain system; provision of secondary containment around the chemical storage tank; monitoring of regional aquifer elevations and quality upgradient of the site; and implementation of a contingency plan for emergency groundwater system and permanent resupply in areas where a shallow, unconfined aquifer is the primary source of household or business water supply. The Groundwater Monitoring Plan and Supply Replacement Plan will be developed in conjunction with the Cross Valley Water District and the Alderwood Wastewater and Water District. Such will assure compliance with groundwater protection regulations.

27. Section 30.41D.100(9) SCC requires compliance with applicable storm drainage requirements of Chapter 30.63A SCC. The applicant prepared a conceptual storm drainage plan which it submitted at the hearing (Exhibit "16"). The applicant will submit a final or full drainage plan for review and approval by the County prior to the issuance of building permits in accordance with SCC 30.63A.120(1)(b). Snohomish County professional engineers have reviewed the conceptual plan and concur with its feasibility. The storm drainage facilities will provide a substantial improvement over the present unregulated drainage flowing from many acres of uncovered impervious surfaces which support wrecking yards and other potentially polluting businesses.
28. Section 30.41D.100(10) SCC requires compliance with applicable impact fee ordinances. The SCC does not require utility facilities to pay park impact fees, and because the plant will decrease the present number of vehicle trips generated by businesses occupying the site, the applicant need not pay road impact mitigation. The Brightwater facility does not include residential dwelling units and therefore it will not have to pay school impact mitigation. However, the applicant will provide a park-like setting on the 40 acre parcel adjacent to the north edge of the facility known as the north mitigation area and will also provide \$30,400,000 in recreation and park improvements and a \$2,950,000 community resource center.
29. Section 30.41D.100(11) SCC requires compliance with applicable sewage regulations, provision of an adequate water supply, and proper refuse disposal. The

project satisfies such requirements as public water and public sewer will serve the site, and refuse service is available in the area. The Cross Valley Water District will provide sewage disposal during construction of the facility.

30. Section 30.41D.100(12) SCC requires compliance with other applicable provisions of Title 30, and the project complies with all applicable Snohomish County Development Ordinances.
31. Section 30.41D.105 SCC addresses subsequent development permits and requires compliance with zoning, building, and other land use codes and regulations at the time of development permit review unless addressed as part of the BSP review and expressly depicted on the BSP. Section 7.0 of the Development Agreement provides that its term extends 35 years or until December 15, 2040. In accordance with RCW 36.70B, a development agreement controls the standards of development. In the present case the standards of development are set forth in the edition of the SCC in effect at the date of execution of the Development Agreement. Such specifically complies with State law.
32. Section 30.41D.110 SCC sets forth the decision criteria for a BSP, and findings on each criteria are hereby made as follows:
 - A. Subsection 1 authorizes the Department of Planning and Development Services (PDS) to impose conditions and limitations on the BSP. The Director has recommended several such conditions which pertain to the timing of completion of the project but which do not modify County codes applicable to the project.
 - B. Subsection 2 requires that the project develop in accordance with the approved BSP. The parties have added such condition on the BSP (Exhibit "40B").
 - C. Subsection 3 allows the Director to authorize the sharing of open space, parking, access, and other improvements among properties subject to the BSP. Since the applicant will construct and use the entire project, the County can easily enforce conditions and restrictions on development, use, maintenance, shared open space, parking, access, and other improvements.
 - D. Subsection 4 requires that all provisions, conditions, and requirements of the BSP be legally enforceable on the owner. Once such are recorded they will become legally enforceable.
 - E. Subsection 5 provides that after approval of a BSP for land zoned for industrial uses, the applicant must record the BSP with a record of survey as one recording document. A condition requires recording of the binding site plan and record of survey prior to issuance of the first building permit.

- F. Subsection 6 provides that following approval of a BSP subject to Chapters 64.32 or 64.34 RCW, the applicant must record the approved BSP along with a record of survey. RCW 64.32 and 64.34 address condominiums and since the applicant proposes no condominiums, this criteria is not applicable.
 - G. Subsection 7 is not applicable since the applicant must provide a record of survey.
33. Section 30.41D.200 SCC sets forth design standards and access requirements to include public road establishment. In the present case the applicant proposes no public roads and the BSP requires none. However, the site access from SR-9 will meet the Snohomish County Engineering Design and Development Standards. The applicant will design and construct the accesses to various areas of the site. Since the BSP creates no new lots and the applicant will utilize the entire site, access requirements to lots within the BSP do not apply.
34. Section 30.41D.210 SCC sets forth the requirements for road and right-of-way establishment and right-of-way dedication. Findings on each criteria set forth therein are hereby made as follows:
- A. Subsection 1 addresses BSPs which require establishment of a road/right-of-way. The proposed BSP does not require right-of-way establishment or dedication. However, the applicant has agreed to provide the Washington State Department of Transportation (DOT) with right-of-way necessary for DOT's SR-9 widening project. The applicant and DOT will agree upon the dedication.
 - B. Subsection 2 addresses dedication of new right-of-way for BSP approval, and as previously found, new right-of-way dedication is not required.
 - C. Subsection 3 refers to road and right-of-way establishment and dedications, and again none is required.
 - D. Subsection 4 refers to the establishment of right-of-way and such requirement does not apply to the present BSP.
 - E. Subsection 5 refers to instances where dedication has already occurred, and no establishment or dedication of right-of-way is necessary for the present BSP.
35. Section 30.41D.220 SCC sets forth criteria for phased developments. Findings on each criteria are hereby made as follows:
- A. Subsection 1 requires an applicant for a phased development to submit along

with the BSP application a phasing plan consisting of a written schedule and a drawing illustrating the plan. The County then reviews the BSP and phasing plan concurrently. The applicant's facility plan (Exhibit "11") satisfies the "written schedule" required by this subsection. Furthermore, Section 1.1.b of the Development Agreement recognizes the initial phase of the plant which will treat a maximum of 36 mgd of wastewater as well as the second phase which will increase said amount to 54 mgd.

- B. Subsection 2 requires the phasing plan to note site improvements for the entire development, and requires that the phasing plan relate completion of the improvements to the completion of one or more phases. The BSP in conjunction with the facility plan serves as an appropriate phasing plan and specifies a completion schedule for improvements.
 - C. Subsection 3 provides that upon approval of a phasing plan, the required phasing information must be shown on or attached to the phasing plan and made part of the BSP. The FEIS, SEIS, and Development Agreement thoroughly identify the phasing of the Brightwater facility, and therefore the BSP contains adequate phasing information.
 - D. Subsection 4 emphasizes that approval of a phasing plan does not constitute approval of the BSP and that owners may not sell lots or occupy buildings. No evidence exists that the applicant would either use the buildings or sell lots other than in accordance with the BSP.
36. The Development Agreement requires compliance with Section 30.41D.320 SCC entitled "Revisions". Findings on each criteria set forth therein are hereby made as follows:
- A. Subsection 1 allows an applicant to revise a BSP application or request that the Director revise conditions of BSP approval. Following extensive environmental studies and planning, the Brightwater treatment facility is final to a very great extent. If revisions become necessary, the County will process them in compliance with the SCC and the Development Agreement.
 - B. Subsection 2 requires recordation of any revised binding site plan or record of survey and the County will assure that such is accomplished.
 - C. Subsection 3 addresses requests for a major revision for a project previously approved by the Hearing Examiner or County Council. Said section requires processing in the same manner as a previously approved BSP. While said section sets forth definitions of "minor" and "major" revisions, Exhibit "2" to the Development Agreement also sets forth definitions of "minor" and "major" revisions. The definitions set forth in Exhibit "2" will control as will the procedure for processing revisions to the BSP set forth therein.

- D. Section 30.41D.320(3)(c) SCC provides that increases in vehicle trip generations or vehicle access points must be reviewed in accordance with Section 30.66B.075 SCC. However, in accordance with the Development Agreement, any revisions to the approved BSP will be processed as either major or minor revisions, and major revisions will require approval by a “special Hearing Examiner”.
37. The Development Agreement requires compliance with Section 30.41D.330 SCC entitled “Taxes”. Subsection 1 requires payment of all taxes for the current year together with taxes for delinquent years prior to recording a BSP. As a governmental entity the applicant will not pay property taxes. However, should previous property owners owe delinquent taxes, such must be satisfied. Subsection 2 which sets forth a payment schedule for taxes will not apply to King County.
38. Section 30.41D.340 SCC sets forth requirements for recording a BSP with the Snohomish County Auditor and the applicant will comply therewith. The Auditor will record the BSP and Record of Survey following Hearing Examiner approval and signature by the Director. The BSP and Record of Survey become effective upon recording which must occur within 120 days following approval.
39. The Development Agreement requires compliance with Section 30.41D.350 SCC entitled “Vacation”. Said section sets forth procedures and standards for vacating a BSP. The applicant has provided documentation (Exhibit “33”) setting forth its intent to extinguish the existing BSP for the Woodinville North Business Park.
40. Section 3.0 of the Development Agreement sets forth special conditions governing the Brightwater facility. Said section provides in part as follows:

The parties have specifically negotiated the following special conditions that shall govern the construction and operation of the Brightwater Wastewater Treatment Plant. As such, compliance with the conditions in this section is a material condition of this Development Agreement.

Section 3.1 sets forth “Odor Standards and Long-Term Odor Control”. As previously found, Section 2.3 of the Development Agreement prohibits the Examiner from imposing “conditions to mitigate odor and/or seismic impacts other than the requirements specified in the special conditions”. Therefore, the Examiner has no jurisdiction over odor issues as the parties to the Agreement have negotiated the criteria which the applicant must meet. Thus, odor mitigation issues are outside the scope of the BSP hearing and the authority of the Examiner to consider. Furthermore, Section 3.2 entitled “Seismic Investigation and Construction Standards” sets forth conditions which the applicant must meet and the investigation that it must conduct. Again, the parties to the Agreement have negotiated the

criteria which the applicant must meet, the seismic issues are also outside the scope of the BSP hearing and beyond the authority of the Examiner to consider.

PROPER NOTICE OF HEARING

41. The Sno-King Environmental Alliance (SKEA), an active, knowledgeable, well-informed, citizen's group, has involved itself in the Brightwater project since its beginning. SKEA members have attended and participated in numerous legislative and quasi-judicial hearings considering all aspects of the project to include the process which resulted in the selection of the present site. SKEA filed an appeal of the SEIS before the King County Hearing Examiner and also filed an appeal of the Washington State Department of Ecology's (DOE) issuance of two NPDES permits for discharge of water during construction of the Brightwater Treatment Plant. Despite its past involvement and interest in the permitting process, PDS did not mail SKEA or its members special notice of the public hearing scheduled before the Examiner on April 4 and 5, 2006.
42. The corporate limits of the City of Woodinville extend to a point approximately $\frac{3}{4}$ mile south of the 114 acre site. The City likewise has actively involved itself in the planning and site selection process for the Brightwater facility. On March 7, 2006, Cathy VonWald, Mayor, City of Woodinville, wrote a letter to DOE expressing concerns regarding the completeness and adequacy of seismic testing in preparation for the Brightwater plant. John Theiler, King County Wastewater Treatment Division, responded to Mayor VonWald's letter by letter dated March 27, 2006, but did not advise of the hearing scheduled to commence April 4, 2006. PDS likewise did not provide mailed notice of the hearing to the City.
43. The Settlement Agreement and Release executed by King and Snohomish Counties incorporates the Development Agreement. Section 1.4(a) of the Development Agreement requires Snohomish County to provide notice of the public hearing in accordance with the notice requirements of the SCC:

Notice of the open record public hearing shall be as specified in SCC 30.72.030.

Thus, the Settlement Agreement and Release requires Snohomish County to provide notice strictly in accordance with SCC 30.72.030. Said section provides in pertinent part:

- (1) Notice of the open record public hearing on a Type 2 application shall be provided at least 15 days prior to the hearing date...
- (4) Notice shall be provided by publishing, mailing, and posting

in the manner prescribed by SCC 30.70.045.

Section 30.70.045 SCC entitled "Notice – General" provides in pertinent part:

When posted, mailed or published notice is required pursuant to this title, such notice shall be given as follows, unless otherwise specifically provided:

1. When posting is required, the applicant shall post two or more signs which meet County standards in a conspicuous location on the property's frontage abutting public rights-of-way. If the property does not abut a public right-of-way, the sign shall be placed on the property at the point of access and on the public right-of-way at the easement or private road that accesses the property. Posting shall conform to the following requirements:
 - a. As evidence of posting the applicant shall submit a verified statement containing the date and location of posting;
 - ...
 - d. Signs and instructions for posting shall be provided to the applicant by the department;....

The applicant secured signs and instructions for posting from PDS, and on March 18, 2006, posted two signs, one on the north portion of the site adjacent to SR-9 and the second on the south portion of the site adjacent to SR-9. The notice advised of the time and dates of the hearing, the location of the hearing, the applicant, and the approvals requested. The notice also provided the name and phone number of the project manager (Exhibit "49"). PDS staff visually inspected the posting and found it proper prior to the hearing. Therefore, the applicant properly posted the site more than 15 days prior to the hearing date.

44. Section 30.70.045(2) SCC provides the following publication requirement:

- (2) When publication is required, the department shall publish one notice in the official county newspaper.

PDS published notice of the hearing in the Everett Herald, the official county newspaper, on March 19, 2006, (Exhibit "140"). In addition, PDS published notice in the Enterprise newspaper on March 24, 2006, and also published a notice in the Woodinville Weekly Newspaper on March 20, 2006, (Exhibit "142"). Therefore, the

applicant timely published the notice as required and also exceeded the requirement by publishing in two local newspapers in the vicinity of the site.

45. Section 30.70.045(3) SCC requires the following mailed notice:

(3) When mailing is required, the department shall mail notice to the following persons or entities:

(a) Each taxpayer of record and each known site address within:

- (i) 500 feet of any portion of the boundary of the subject property and contiguous property owned by the applicant;
- (ii) 1,000 feet, if the subject property is categorized as rural, natural resource, residential 20,000 (R-20,000) or rural use [it is not]; or
- (iii) 1,500 feet for subdivision applications where each lot is 20 acres or larger or $1/32^{\text{nd}}$ of a section or larger; [no subdivision is proposed].

(b) Any city or town whose municipal boundaries are within one mile of a proposed subdivision or short subdivision. [no subdivision or short subdivision is proposed]

The property is located within the Light Industrial, Heavy Industrial, and Freeway Service zone classifications and is not classified as rural, natural resource, R-20,000, or rural use. Furthermore, the project does not propose a subdivision. Therefore, PDS mailed 106 written notices to taxpayers of record and each known site address within 500 feet of the boundaries of the site. The SCC does not require mailed notice to the City of Woodinville or SKEA.

46. Section 30.70.045(3)(c) and (d) SCC require notice to:

(c) The Washington State Department of Transportation for every proposed subdivision or short subdivision located adjacent to the right-of-way of a state highway or within two miles of a boundary or state or municipal airport; and

- (d) Any other local, state, or federal agency or person or organization as determined appropriate by the department.

The Affidavit of Mailing (Exhibit "47") shows that PDS mailed notice of the hearing to 106 property owners and DOT, but not to any other local, state, or federal agency or to any person or organization.

47. Section 30.70.045(4) SCC reads:

- (4) The County may provide additional public notice by notifying the news media and community organizations, by placing notices in neighborhood/community newspaper, appropriate regional, neighborhood, ethnic, or trade journals, or by publishing notice in agency newsletters or on the department or county web page,

PDS published additional notice in the Woodinville Weekly and the Enterprise newspapers, but did not specifically notify news media or community organizations. As the Examiner stated orally at the hearing, had PDS asked he would have probably requested that notice be provided to SKEA (and the City of Woodinville). However, PDS did provide more than the minimum notice required by the SCC as it did publish notice of the hearing in two local newspapers. Therefore, PDS complied with the notice provisions of the SCC as required by the Development Agreement.

48. Shortly after the close of the public hearing on Wednesday, April 5, 2006, two SKEA members came to the hearing room. At the time of arrival the hearing had concluded and King and Snohomish County representatives and other parties in attendance had left. Reconvening the public hearing would not have been proper. Later in the morning the Woodinville City Manager delivered a letter to the Examiner's clerk for inclusion in the record, but did not request that the hearing reopen.

49. Prior to conclusion of the hearing and upon being made aware of SKEA's objections to the hearing due to lack of notice, the Examiner left the record open for a period of one week for SKEA members and the City of Woodinville to provide written comments. Upon SKEA's request, PDS provided a copy of all exhibits and the Examiner's office provided a copy of the hearing tapes. Because of the delay in copying the exhibits, the Examiner extended the comment time an additional two days. In his Memorandum dated April 6, 2006, the Examiner left open the possibility of reconvening the hearing following review of all written comments:

- D. Following review of said comments [SKEA, the City, and others] the Examiner will proceed to issue a written decision. Provided, however, that should issues be raised which were not adequately considered either at the public hearing or in the exhibits entered into the record, the Examiner, pursuant

to the authority set forth in the Development Agreement, may reconvene the public hearing for the purpose of considering said issues only.

Following careful consideration of all information submitted by SKEA members and the City, the Examiner finds no reason to reconvene the hearing. Virtually all SKEA comments addressed seismic and odor issues, both of which are beyond the Examiner's authority and outside the scope of the public hearing. Other issues raised by the City and SKEA members will be addressed at the building permit stage, are not properly considered at the BSP stage, are beyond the scope of the BSP hearing, or are addressed herein.

50. In determining not to reopen the record the Examiner also considered the following:
- A. SKEA asserts that the County did not make the BSP documents public until the last minute (Exhibit "139"). Yet, an email from Tom Barnett, PDS, to Linda Gray, SKEA member, dated March 6, 2006, advises that the BSP file is available for public review. Mr. Barnett also notified Ms. Gray that "Public notice of the hearing will be provided in accordance with the County Code once a date was scheduled". He did not advise that the County would advise SKEA by specific written notice.
 - B. On Monday, April 3, 2006, Millie Judge, Assistant Chief Civil Deputy, Prosecuting Attorney, advised SKEA's attorney of the commencement of the hearing on Tuesday, April 4, 2006. Thus, SKEA knew that the hearing would commence on April 4, 2006. In a subsequent email from Ms. Judge to SKEA members on April 4, 2006, she advised that SKEA could comment at the evening hearing which would commence at 6:30 p.m., April 4, 2006, and again at the April 5 morning hearing which would commence at 9:00 a.m. SKEA members did not appear at the 6:30 p.m. session and appeared subsequent to conclusion of the testimony at the April 5, 2006, hearing.
 - C. SKEA members did not advise either the Examiner, King County, or Snohomish County that they desired to present testimony at the April 5, 2006, hearing date but could not arrive until later in the morning. Had they done so, the Examiner would have awaited their arrival and heard their presentation prior to adjourning the hearing. Again, however, the Examiner would have had to exclude all testimony and evidence regarding seismic and odor issues or challenging the adequacy of the FEIS or SEIS.
 - D. In a letter dated April 25, 2006, the City of Woodinville objected to Snohomish County not providing written notice of the public hearing based upon the City's location approximately three quarters of a mile from the site. However, the letter itself establishes that the City received notice from the publication in the Woodinville Weekly newspaper. The first paragraph of the

letter reads:

In reference to the public hearing conducted (4-4-06 and 4-5-06) on the above application, the City of Woodinville learned of the hearing date through our local newspaper, the Woodinville Weekly (3-20-06) and a telephone conversation with a Planning and Development Services staff member (3-21-06). These were the only notifications provided to the City of Woodinville....

Thus, the City learned of the public hearing through the March 20, 2006, Woodinville Weekly publication as well as a telephone conversation with a PDS staff member the following day. It is difficult to understand how the City was prejudiced by not receiving a mailed notice, and how that fact affected its actions. Furthermore, the City did not advise King County, Snohomish County, or the Examiner that it would attend the hearing and provide testimony on either of the hearing days. Again, had the City provided such notice, the Examiner would have recessed the hearing until the City representative arrived.

51 Proper issues raised by SKEA correspondence are addressed as follows:

- A. SKEA asserts that none of the geologic documents in the BSP file include appropriate stamps and signatures. However, Exhibit "6", the Final Design Geotechnical Recommendations Report, bears the stamp and signature of a registered professional engineer in the State of Washington.
- B. SKEA asserts that the project does not comply with Snohomish County's General Policy Plan (GPP). However, the GPP Future Lane Use Map Designation for the site is Urban Industrial, and zoning of the site is Heavy Industrial, Light Industrial, and Freeway Service. As previously found, the proposed use is permitted outright in the HI and LI classifications and the applicant proposes no development on any portions of the parcel zoned FS other than wetland enhancement.
- C. SKEA criticizes the staff report as inadequately discussing BSP issues not resolved by the Development Agreement. SKEA asserts that the staff report references technical memoranda, but does not set forth the contents of the memoranda within the staff report. The staff report properly referred to the conclusions of the technical memoranda to show compliance with all BSP criteria. Setting forth the contents of the technical memoranda within the staff report would provide far too many technical details and create a document difficult to use. The staff report serves as a "road map" through the exhibits. Those desiring the details may review the technical memorandum identified

in the staff report.

- D. It is not reasonably possible nor is it required to provide a full, detailed, or final drainage plan for the entire Brightwater plant at this stage of the BSP process. The applicant did provide a thorough, preliminary, drainage plan which the County approved.
52. The City of Woodinville asserts that backup generation systems are considered “essential” facilities for emergency response and operation, and therefore must be constructed to a strength of 1.5, but are listed as strength 1.25. However, backup generators are not considered essential facilities, and even so, the Brightwater plant has independent dual feeds which will provide reliable power. Generators provide power in the event that both power supplies to the plant are interrupted.
53. The City notes that the plant’s operation building (the converted Stockpot Soup structure) will have a variety of activities occurring therein and questioned whether it is an essential building. However, the City’s concern addresses seismic construction which is beyond the scope of the hearing.
54. The City questions the provision of emergency and auxiliary power and whether the applicant will provide a co-generation component or will limit the backup to a standard 600 kw generator. The applicant responded by noting the availability of portable generators at other County facilities which it can transport to the site in the event of a prolonged power outage. The electrical power generation facilities noted in the BSP are future facilities, and the 600 kw generator will provide backup power for the initial plant operations. Such appears sufficient for an extended emergency as the 600 kw standby generator can provide emergency power for partial wastewater treatment during a power outage of up to 48 hours. A power outage beyond 48 hours would allow time for diesel fuel delivery to the site to replenish the generator fuel supply. The applicant will not store fuel for more than 48 hours of operation as issues arise with the quality of diesel fuel stored for long periods without use. The applicant can also transfer sewage flows to its other two treatment plants if it cannot resupply the fuel.
55. The City questions the extent to which the County has evaluated existing fish spawning areas due to a 3% decline in stormwater during a 100 year event. The Brightwater stormwater system will vastly improve fish habitat of Little Bear Creek by slowing, cooling, and cleansing stormwater discharges from the site and from flows onto the site from other parcels. Gary Brzezinski, SKEA member, points out that King County has provided an emergency spill response plan for 4,000,000 gallons of sewage, but the worse case scenario identified in the SEIS reflects 9,000,000. Again, the Examiner cannot question the SEIS. However, many of the tanks will be constructed partially underground which will limit the volume of material that can spill onto the site.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The Director has determined that the applicant has satisfied all general and special conditions set forth in paragraphs 2.0 and 3.0 of the Development Agreement, and in accordance with Section 1.5 (b) of the agreement, the Examiner has accorded the Director's recommendations substantial weight. In accordance with said standard, the Examiner concludes that the applicant has satisfied all general and special conditions in the Development Agreement and therefore the Binding Site Plan should be approved subject to conditions set forth hereinafter.
3. Proper notice was given in accordance with the requirements of the Snohomish County Code. SKEA and the City bear the burden of showing that the notice was defective. Regional Transit Authority v. Miller et al, 156 Wn. 2d 403 (2006). In Miller, Sound Transit provided notice of a public meeting to consider a condemnation of Miller's property by posting it on its own web site. Sound Transit gave no written notice of the meeting to anyone including Miller, nor did it publish the notice in a newspaper. The Washington Supreme Court upheld the notice as satisfying the requirements of RCW 35.22.228 which requires a city to establish a procedure for notifying the public of upcoming hearings. In the present case, Snohomish County complied with its notice requirements. Furthermore, the County's notice of the present hearing far surpassed that given by Sound Transit to the public and Miller.

The purpose of notice statutes is to apprise fairly and sufficiently those who may be affected of the nature and character of an action so they may intelligently prepare for the hearing. Nisqually Delta Association v. City of Dupont 103 Wn. 2d 720 (1985).

In the present case Snohomish County notice requirements fairly and sufficiently apprised the community, especially considering the notice approved by the Supreme Court in the Miller case. Furthermore, even if the Examiner believed it equitable to have provided notice to both SKEA and the City of Woodinville, hearing examiners have no equitable authority, but are limited to interpreting, reviewing, and implementing land use regulations. As held by the Washington Court of Appeals in Chaussee v. Snohomish County Council, 38 Wn. App 630 (1984):

...His [hearing examiner] determination is limited to an administrative proceeding to determining whether or not a particular piece of property is subject to a county land ordinance...He had no discretion to exempt a landowner from SCC 20A based on what he deemed equitable without regard to statutory requirements and the need for substantial evidence to meet statutory requirements...

The Superior Court properly determined that the hearing examiner and County Council were without jurisdiction to consider equitable issues....38 Wn. App 630 @ 638, 641.

4. SKEA raises issues regarding the legality of the Development Agreement and also urges the Examiner to consider odor and seismic issues. However, hearing examiners and other administrative bodies do not have the authority to declare illegal or unconstitutional the statute or instrument which establishes the administrative body. Thus, in the present case, the Examiner cannot consider challenges to the legality of the Development Agreement which created the "special hearing examiner" procedure:

An administrative tribunal is without authority to determine the constitutionality of a statute and, therefore, there is no administrative remedy to exhaust. Yakima Clean Air v. Glasscam Builders, 85 Wn. 2d 255 (1975).

See also Bare v. Gorton, 84 Wn. 2d 380 (1974) and Prisk v. Poulsbo, 46 Wn. App 793 (1987).

DECISION:

The Binding Site Plan for the Brightwater Wastewater Treatment facility is hereby approved subject to the following conditions:

- A. The site plans marked Exhibits 40A through 40H shall be the official building site plans for this project. Revisions of the binding site plans is regulated by the Brightwater Settlement Agreement (Exhibit 58).
- B. The binding site plan is approved for the construction and operation of a wastewater treatment facility to consist of the buildings and improvements as shown on the approved site plans, and other buildings and appurtenances as necessary to operate the treatment facility.
- C. The groundwater protection measures listed in Exhibit "18", "Groundwater Compliance" shall be conditions of approval of the binding site plan.
- D. The odor control measures identified in Exhibit "38", "Brightwater Odor Control Monitoring and Response Plan," shall be conditions of the binding site plan.
- E. King County will provide mitigation to minimize the adverse impacts on the transportation system created by Brightwater construction activities as

follows: Contractually require construction personnel to being work at 7 AM and end work at 3:30 p.m. from Monday through Friday' except that Portal 46 construction personnel may begin and end work at other times, but will not be permitted to enter or leave the Brightwater Treatment Plant site at State Route 9 from 7:00 a.m. to 9:00 a.m. and 3:00 p.m. to 7:00 p.m. These restrictions will end for all phases of the Brightwater project upon completion of the State Route widening from SR-522 to 212th Street SE. Access to the site within the restricted hours will be subject to approval by Snohomish County.

- F. Prior to issuance of the first building permit for the treatment facility:
 - i. The binding site plan and record of survey shall be recorded with the Snohomish County Auditor's Office.

- G. Prior to issuance of building permits for any noise generating element of the treatment facility:
 - i. An updated noise model shall which demonstrates that the final design of the noise generating elements of the facility will comply with the SCC 10.01, the county's noise control ordinance, shall be submitted, reviewed, and approved by PDS.

- H. Prior to issuance of the first building permit for any traffic generating structure at the treatment facility:
 - i. Final comments from the Washington State Department of Transportation shall have been received by the Snohomish County Department of Public Works.

- I. Prior to the issuance of the first Certificate of Occupancy, or prior to the approval of the final inspection for structures where no Certificate of Occupancy is required, for any building at the treatment facility which has the potential to produce odorous emissions:
 - i. The elements identified in the "Brightwater Odor Control Monitoring and Response Plan" (Exhibit 38) shall be in place and operational;
 - ii. The "Brightwater Air Quality Board" identified in the Agreement in Section 3.1(h) shall be

operational; and

- iii. The "Odor Control Reserve Fund Budget" identified in the Agreement Section 3.1(i) shall be in place.
 - iv. Right-of-way for widening SR-9 along the site frontage shall be deeded to the state.
- J. Nothing in the permit/approval shall excuse the applicant, owner, lessee, agent, successor or assigns from full compliance with any federal, state, or regulations applicable to this project. In particular, no clearing, grading, filling, construction or other physical alteration of the site may be undertaken prior to the issuance of the necessary permits for such activities.

ORDERED this 5th day of May, 2006.

STEPHEN K. CAUSSEAU, JR.
Special Hearing Examiner

TRANSMITTED this 5th day of May, 2006, to the following:

OWNER/ APPLICANT: King County Development of Natural Resources and Parks
Wastewater Treatment Division
201 South Jackson Street
Seattle, Washington 98104-98121

CONTACT: Chris Tiffany, Real Property Agent IV
Brightwater Project Office
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Woodinville, Washington 98072-6010

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CASE NO: 04-109621 BG BRIGHTWATER WASTEWATER TREATMENT FACILITY

NOTICE

RECONSIDERATION: Any party of record may request reconsideration by the Examiner. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before May 15, 2006. There is no fee for filing a petition for reconsideration. **“The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing.” [SCC 30.72.065]**

A petition for reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner’s attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested;

state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
- (c) The Hearing Examiner committed an error of law;
- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
- (e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or
- (f) The applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

APPEAL: Appeals of the hearing examiner's final decision(s) shall be sent directly to Superior Court pursuant to the Land Use Petition Act (Chapter 36.70C RCW).