COMMUNITY DEVELOP.

APR 1 9 2010

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April 16, 2010

Steve Pilcher
Community Development Director
City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010

Re: Black Diamond - Lawson Hills and The Villages SEPA Appeals
The Villages Hearing Examiner Decision with Exhibits A - D

Dear Mr. Pilcher:

At the request of Phil Olbrechts, enclosed is the original of the The Villages Hearing Examiner Decision with Exhibits A - D as well as a Declaration of Mailing in the above-referenced matter.

Sincerely,

OGDEN MURPHY WALLACE, P.L.L.C.

N. Kay Richards

N. Kay Richards, Legal Assistant to
Phil A. Olbrechts

/nkr
Enclosures

COMMUNITY DEVELOP.

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DECLARATION OF MAILING
Lawson Hills/The Villages Master Planned Developments
City of Black Diamond

I, N. Kay Richards, make the following declaration: I am a resident of the State of Washington, over the age of 18 years, not a party to this action, and competent to be a witness herein.

On the 16th of April, 2010, I mailed, via U.S. First Class Mail, a true and correct copy of The Villages Hearing Examiner Decision with Exhibits to the following individuals who were not served on April 15th by the email sent by Phil A. Olbrechts at 11:59 p.m.

Michael and Annette L. Smith
24319 SE Green Valley Road
Auburn, WA 98092

Steve Sundqvist
24713 SE Green Valley Road
Auburn, WA 98092

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, this 16th day of April, 2010.

N. Kay Richards

N. Kay Richards, Legal Assistant to
Phil A. Olbrechts, Hearing Examiner for the
City of Black Diamond

BEFORE THE CITY OF BLACK DIAMOND HEARING EXAMINER

IN RE: MASTER PLANNED DEVELOPMENT APPLICATION FOR THE VILLAGES, PLN09-0017	SEPA APPEAL NOS. PLN09-0040, PLN09-0041, PLN 09-0044 **HEARING EXAMINER DECISION**

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I. EXECUTIVE SUMMARY

The Villages Final Environmental Impact Statement (TV FEIS) is adequate. An EIS is adequate if it contains a reasonably thorough discussion of probable significant adverse environmental impacts. The TV FEIS satisfies this standard. To be sure, the EIS could be improved. The appellants of the EIS ("SEPA[1] Appellants") have identified several shortcomings in the EIS. Many of these shortcomings will be addressed through enhanced mitigation of the MPD permit, including mitigation

[1] "SEPA" stands for the Washington State Environmental Policy Act, Chapter 43.21C RCW. SEPA requires the TV FEIS that is the basis of the EIS appeals subject to this decision.

regarding noise, traffic and Green Valley Road. Overall, however, the EIS provides a more than adequate analysis of environmental impacts.

The writers of the FEIS[2] were faced with a monumental challenge. They had to address all of the impacts of the largest development ever proposed in King County in a manner that did not overwhelm and confuse the reader with an overload of information and complex technical analysis. The writers met the challenge by preparing a fairly easy to read document that is backed by hundreds of pages of technical reports and data. For the vast majority of impacts, the TV FEIS successfully alerts the reader to the most significant and vital information on environmental impacts.

The SEPA Appellants established a few instances where the TV FEIS failed to provide this vital information. This vital information was either not disclosed in the main text of the TV FEIS, or the text and appendices both failed to identify and/or adequately assess vital information on probable significant adverse environmental impacts. However, the adequacy standard does not require perfection. It requires reasonableness. This fairly broad standard allows the Examiner to assess the significance of shortcoming in the context of the entire scope of the EIS and the benefits of requiring the EIS or portions of it to be redone. Under this reasonableness analysis, all of the issues raised by the SEPA Appellants were relatively minor ("unfortunate but not fatal" under the case law) or there was little benefit found in additional TV FEIS review.

The most difficult issue by far in the TV FEIS was the adequacy of the Lake Sawyer water quality analysis. Development in the Lake Sawyer watershed has the potential to exact devastating consequences upon Lake Sawyer. Phosphorous from the stormwater runoff of development can result in blue-green algae blooms, which in turn can result in the release of toxins, closure of beaches, aesthetic blight through production of a green surface scum and damage to endangered fish. Due to past water quality issues, the US Environmental Protection Agency has designated Lake Sawyer an impaired water body under the Clean Water Act. This has triggered years of study and modeling with the input of a wide array of stakeholders, including Lake Sawyer residents, state agencies and representatives of the City of Black Diamond ("City"). One of the many documents to come out of these efforts was the Lake Sawyer Management Plan ("LSMP").

Much of the debate during the SEPA appeals concerned the adequacy of the LSMP phosphorous mitigation. The Applicant based its Lake Sawyer water quality analysis upon the LSMP. The LSMP includes years of data collection on Lake Sawyer water quality, a detailed assessment of phosphorous generation from future development

[2] Reference to the "FEIS" as opposed to the Villages FEIS or Lawson Hills FEIS encompasses both the Villages and Lawson Hills FEIS.

and a comprehensive list of mitigation measures. However, the SEPA appellants successfully established that the LSMP makes no assurance that its mitigation measures will prevent the adverse impacts of phosphorous contamination, despite the clearly erroneous belief of the Applicant's consultant that it would. The SEPA Appellants also established that under the modeling used in the LSMP to predict future phosphorous levels, there was a reasonable chance that the MPD proposals alone could "tip" Lake Sawyer into producing the blue-green algae blooms and all associated adverse impacts. The SEPA appellants call the phosphorous levels at which the algae begins to wreak havoc the "tipping point."

If the LSMP was the final word on the issue, the City would be tasked with drafting a new TV FEIS. However, the LSMP was released in 2000 and based upon data from 1995. In 2009 the Washington State Department of Ecology ("DOE") released a Water Quality Implementation Plan, designed to implement measures to protect Lake Sawyer Water Quality. In that document DOE concluded that if specified mitigation measures were followed, new development would not jeopardize Lake Sawyer water quality. DOE employed a standard that prohibits phosphorous levels from exceeding a 5% risk of reaching the tipping point. The Applicant provided unrefuted testimony that the MPDs do incorporate the standards required by DOE to meet the 5% risk standard. The Implementation Plan also reveals that Lake Sawyer water quality has improved dramatically since the 1995, the base year for LSMP data. Lake Sawyer is no longer anywhere near the tipping point and it appears unlikely that the MPD proposals would exceed the tipping point, given that the Villages and Lawson Hills MPDs only take up 10% of the land area and 4% of the developable area of the Lake Sawyer watershed.

The DOE Implementation Plan provides no analysis or modeling to show how DOE determined that its recommended conditions for new development would preserve Lake Sawyer water quality. The modeling in the LSMP was left unchanged in the Implementation Plan. There is certainly a gap of information in the record that could be of use in assessing the phosphorous impacts of the project. However, the purpose of the LSMP and Implementation Plan is to provide a watershed-wide uniform standard to address phosphorous impacts. Any additional analysis required of the Applicant would necessarily entail new modeling based on full build out in order to determine the Applicant's proportionate allocation of phosphorous loading to Lake Sawyer. If the Applicant's analysis finds that build-out won't preserve water quality as concluded by DOE, the Applicant would be subject to a proportionate allocation that differs from those used by the government agencies and developers relying upon the conclusions of the Implementation Plan. Subjecting the Applicant to this disparate treatment ultimately does little to preserve water quality and would be an unreasonable requirement given the watershed-wide standard set by DOE.

Although it would not be reasonable and be of limited benefit to have the Applicant redo the LSMP, the SEPA Appellants have raised valid questions about the utility of the LSMP and the gap between the modeling results of the LSMP and DOE's

conclusions that development can proceed in the Lake Sawyer watershed without jeopardizing water quality. Information outside the record of his proceeding may or may not be readily available to these questions. The MPD conditions of approval will encourage the City Council to investigate these issues and to promote a reevaluation of the LSMP and Implementation Plan if necessary to protect Lake Sawyer water quality.

Despite the adequacy of the TV FEIS Lake Sawyer mitigation and analysis, there was a serious shortcoming in the identification of potential impacts in the text of EIS. The TV FEIS text mentions that Lake Sawyer has phosphorous problems, but it does not identify the consequences of those problems, i.e. blue-green algae blooms, toxins, beach closures etc. Absent this paragraph the Examiner has to conclude that the EIS is still adequate given the overall thoroughness of the document and the analysis of Lake Sawyer that is included. The reference to phosphorous problems in the text and technical assessment in the appendices would at least put the reader on notice that water quality is an issue for Lake Sawyer. The extensive discussion of phosphorous impacts in the SEIS appeals provided the public a detailed accounting of phosphorous impacts and this decision provides that information to the Council.

Perhaps the second greatest shortcoming of the TV FEIS is its analysis of noise. Some of the noise levels identified in the TV FEIS will generate levels of 90 db on some properties, which a SEPA Appellant expert testified is the equivalent of a fire alarm. These noise levels are primarily attributable to tree clearing activities, which presumably will not be adjacent to residences for extended periods of time (there are only so many trees). However, truck traffic needed to carry away fill could conceivably involve 153,000 two-way trips over the course the 15-year development, as testified by Thomas Hansen. According to the TV FEIS, dump trucks can generate 82-92 dBA within 50 feet from a residence. The TV FEIS noise analysis does a good job in identifying noise sources and their impacts. However, it doesn't take into account the exceptional scale and duration of the MPD projects. In this context, construction noise is not "temporary" as contemplated in typical noise regulations, such as those adopted by DOE. The TV FEIS should have included an assessment of noise duration and mitigation that was reasonably designed to protect residents during this time period.

As with the failure of disclosure in the Lake Sawyer analysis, the shortcomings in the noise analysis are not by themselves sufficient to render the entire TV FEIS inadequate. The noise appeal only concerned impacts to a handful of property owners, adequate analysis and mitigation can be handled through MPD conditions and it is very unlikely that the Council would conclude that either a significant redesign or one of the proposed alternatives is appropriate due to the impacts on a limited number of people. Additional analysis and mitigation will be required in the conditions of MPD approval, including a consideration of more aggressive mitigation, such as sound-proofing affected homes if reasonable and necessary.

As with any large development project, traffic is a major issue with the MPDs. Most of the issues raised by the SEPA Appellants highlight reasonable differences of professional opinion. The traffic expert hired by the City, John Perlic, was highly credible and qualified to take charge of the City's traffic analysis. Despite Mr. Perlic's expertise, there are three areas in the traffic analysis that did not hold up particularly well. The first was the use of a regional traffic model to project local traffic impacts. Maple Valley raised this issue, asserting that its local traffic model was more accurate than the Puget Sound Regional Council ("PSRC model") used by Black Diamond. Maple Valley and Black Diamond both had good reasons for the use of their respective models. Ultimately, the Examiner must provide substantial weight to the determination of the SEPA Responsible Official that the EIS is adequate, and this burden of proof requires ruling in favor of Black Diamond's traffic engineer. However, there are definite advantages to using a more localized traffic model and the Examiner will address this in the conditions of approval recommended for the MPD.

The second area of concern was Mr. Perlic's use of a 0.97 "peak hour factor" ("PHF"). This factor is used to measure variability during peak hour traffic and ultimately influences the amount of traffic projected for a project. The SEPA Appellants established that the PHF used by Mr. Perlic was at the outer boundaries of accepted professional judgment. The PHF was inflated and served to underestimate traffic impacts within intersections. Even so, the SEPA Appellant's traffic expert admitted that in some cases a PHF of 0.97 would be appropriate, but that would be extremely rare. Use of a lower PHF would probably have been more accurate, but its use does fall within the outer limits of professional judgment. The PHF used by Mr. Perlic does not affect the overall adequacy of the EIS, but sufficient evidence has been provided to require the use of a more mainstream factor as a condition of MPD approval.

The third traffic issue that needs greater attention is the traffic impacts to Green Valley Road. The Road has Heritage Status under the King County Historic Preservation Program. Testimony from several citizens makes it clear that this road is a historic, aesthetic and recreational resource. The road is frequently used by bicyclists, horses and farm equipment. The MPDs will add 300-400% traffic to this community resource. As a condition of MPD approval, further analysis should be undertaken to find ways to discourage MPD traffic from using Green Valley Road, such as the use of traffic calming devices like medians and speed bumps. The factors that merit special treatment of Green Valley Road are subjective and it is within the parameters of a "reasonable discussion" that the TV FEIS failed to single out Green Valley Road for additional analysis.

Another traffic issue that probably does not rise to the level of an EIS deficiency but is still worth addressing is SEPA Appellant Judith Carrier's concerns regarding Plass Road. Ms. Carrier believes that traffic congestion on SR 169 would lead some people

to bypass a portion of SR 169 by using Plass Road. This road is undeveloped and does not have the capacity to handle large volumes of traffic. The City's traffic expert, John Perlic, testified that it's unlikely that persons would choose to use Plass Road due to its low speed limit (20 mph verses 45 mph on SR 169) and because it's undeveloped. This may be the case but there's little doubt that traffic will increase on Plass Road if there is any congestion on SR 169. The Applicant has offered to support a vacation of Plass Road if the adjoining property owners and the City and King County do not object. The MPD will be conditioned to require the Applicant to pursue a street vacation and/or to work with the City Council in creating a cul de sac on Plass Road.

The TV FEIS Fact Sheet also failed to identify that the project would necessitate a hydraulic permit ("HPA") to address impacts to fish bearing streams. This omission was a clear violation of SEPA procedural rules. The Washington State Department of Fish and Wildlife ("WDFW") did not comment on the TV FEIS until after the close of the TV FEIS comment period, when the SEPA Appellants notified them of the project. HPAs are administered and issued by WDFW. WDFW may well have failed to provide timely comments because it didn't see that its jurisdiction would be invoked under the HPA process. However, the comments that WDFW did finally provide failed to reveal anything of substance that pertained to the nonproject level of the TV FEIS. WDFW merely stated that HPA and other permits would be required for those portions of the project that affects fish bearing streams and wetlands. Nothing in the WDFW comments or anything else in the record suggests that more timely comments from WDFW would have resulted in a need to consider any significant design changes to the MPD proposals. The omission ultimately does not affect the overall adequacy of the TV FEIS.

Many of the SEPA Appellants and persons who testified on the MPD proposals raised concern over the poor audio recording on the public hearing held on the Draft EIS. There were approximately 300 gaps in the audio recording of the hearing. No evidence was presented to show that any of this missing information would or should have made a difference in the analysis of the TV FEIS. The Examiner's review is limited to determining whether the EIS is adequate. The gaps in the Draft EIS audio recording are only relevant to the adequacy standard if they relate to the adequacy of analysis in the EIS. Had someone testified that they made some comments on significant impacts during an audio gap and the substance of these comments had never been considered by the EIS drafters, this could have made a difference. In the same vein, there were portions of the technical appendices that were missing in versions of the Draft EIS distributed for public comment. Since there was no evidence presented that these missing documents affected the adequacy of the TV FEIS, the missing documents also do not affect TV FEIS adequacy.

The paragraphs above represent the sum total of all deficiencies that the Examiner found in the TV FEIS. Taken together, they do not justify a finding of inadequacy. Given the broad range of impacts that were thoroughly discussed in the TV FEIS, the

deficiencies identified above are relatively minor in comparison. Overall, the TV FEIS provides a reasonably thorough discussion of environmental impacts.

Although the SEPA Appellants successfully identified the above TV FEIS deficiencies identified above, there were several instances where their concerns did not reveal any EIS deficiency. The most significant of these issues was schools. The TV FEIS does not provide any detailed analysis on school impacts. The TV FEIS assumes that schools will be located within the MPD project areas, even though the most recent information suggests that it's fairly likely some of the schools will be located outside of the project area. The SEPA rules clearly provide that only a general discussion of mitigation measures such as schools is required for an EIS. Within this general discussion a priority should be placed upon cumulative impacts, i.e., impacts that build upon the impacts generated by the MPD proposals. Many of the school impacts the SEPA Appellants raise, such as impacts on wells outside the MPD, are not cumulative and can be addressed in the environmental review of a specific school proposal without detracting from the effectiveness of the TV FEIS in its discussion of overall impacts. The traffic and other cumulative impacts were addressed in the TV FEIS. It's unclear, but possible, that some of this traffic analysis was premised upon an erroneous understanding of the location of the schools. Given that the location of the schools has been a moving target and their final location and number is still not certain, the Applicant's general assessment of school impacts is reasonable and meets EIS requirements of adequacy.

The SEPA Appellants raised several other EIS issues in addition to those identified above. Most of those remaining issues the SEPA Appellants did not pursue beyond mentioning them in their appeal statements. Insufficient evidence was presented to support most of those issues or, as a matter of law, those issues were not germane to an EIS adequacy appeal. All of those remaining issues are addressed in more detail below or in the Order on Dismissal, Email Ex. 300.

II. TESTIMONY

A comprehensive summary of all testimony will be provided with the MPD permitting decisions. As required by SEPA consolidation rules, all testimony in The Villages hearings, including testimony related to the MPDs as opposed to SEPA issues, can be considered for the decision on SEPA adequacy.

III. EXHIBITS

There were several hundred exhibits admitted into evidence. The Exhibit lists are attached and summarized as follows:

A. Index of "H" Documents: These exhibits were admitted during the hearings.

B. Black Diamond MPD Hearing Exhibits: These documents, primarily composed of written comments from citizens, were submitted during the hearing and admitted at the end of the hearing process.

C. Index of Prehearing Documents: These documents were identified in pre-hearing exhibit lists submitted by the SEPA Appellants.

D. Black Diamond Emails for the Villages-Lawson Hills MPDs: These were emails that the SEPA Appellants and Examiner exchanged on SEPA appeal issues.

IV. PROCEDURAL ISSUES

A. Findings of Fact:

1. Issuance of FEIS: The City of Black Diamond ("City") issued the TV FEIS on December 11, 2009.

2. Appeals. The SEPA Appellants filed three appeals on the TV EIS on December 28, 2009. The Appellants are as follows:

a. Chris Clifford, along with several co-appellants, Ex. MG-9.

b. Melanie Gauthier, Ex. MG-8

c. Cynthia and William Wheeler, Ex. CBD-11.

The Exhibits identified above (MG-8, MG-9 and CBD-11) will be referenced as the "Appeal Statements." The parties to the appeals identified above will be referenced as the "SEPA Appellants."

3. Applicant. The Applicant is BD Village Partners.

4. Proposal Description: BD Village Partners is requesting approval of a Master Planned Development (MPD) pursuant to Black Diamond Municipal Code 18.98, for The Villages MPD. Proposed uses include low, medium and high density residential; retail, commercial, office; light industrial; educational, recreational and open space. The requested entitlement is for 4,800 dwelling units and 775,000 square feet of retail, offices and light industrial on 1,196 acres. If approved, the request will result in the rezoning of portions of the property from the current R6 Single Family Residential and CC Community Commercial zones to MPD.

The Villages project consists of two subareas, the Main Property and the North Property (also known as Parcel B). The "Main Property" is located primarily south of Auburn-Black Diamond Road at Lake Sawyer Road, extending approximately 2 miles south and eventually east to SR-169 along the southern city limits. A portion of the Main Property (aka Parcel C) is located on the north side of Auburn-Black Diamond Rd., west of Lake Sawyer Rd. The "North Property" (approx. 80 acres) is located to the west of SR 169, approximately two miles north of the Main Property and north of SE 312th Street (if extended). The North Property is south of and adjacent to the North Triangle property that is part of the proposed Lawson Hills MPD project.

The details of the Villages MPD are outlined in the Master Planned Development application, dated 5/11/09. Subsequent to the issuance of the Villages TV FEIS, the Applicant revised its application on 12/31/09. The Villages EIS includes a 12/31/09 proposal to connect the "South Connector" directly to SR 169 instead of Green Valley Road as proposed in the 5/11/09 application. Beyond this there is no information in the record as to whether the Villages EIS addresses the other 12/31/09 modifications. The assessment of EIS adequacy in this appeal decision only relates to the proposal as detailed in the 5/11/09 application. The Examiner also finds that the 5/11/09 application sufficiently describes the project for environmental review.

5. Hearing. The hearing on the Villages MPD exceeded 50 hours in length. The hearings were continued day to day, starting on March 6, 2010. The verbal testimony concluded on March 22, 2010. The record was left open for written comment from the City, Applicant and Maple Valley on the adequacy of the traffic modeling used in the TV EIS and the different modeling advocated by Maple Valley. Final written comments on the traffic issue were due from the City on April 12, 2010. The record was also left open indefinitely to allow the SEPA Appellants an opportunity to review and voice any objections to exhibits that had not been entered into the record. The same documents were made available at City Hall for any other interested citizens. The Examiner asked the hearing audience if there were any objections to addressing the admission of exhibits in this fashion and no objections were made. After the close of the verbal portion of the hearing the deadline for objections to exhibits was set for 4/13/10. No objections were filed by the SEPA Appellants.

6. Not Enough Time: The greatest procedural concern for project opponents was the timeframe. Many citizens, the SEPA appellants in particular, felt that there was not enough time to consider the Environmental Impact Statements or the master plan applications. The MPD hearings were scheduled to begin on March 6, 2010. The FEIS for the projects were issued on December 11, 2009. The SEPA appellants were given almost three months to prepare their appeals. The draft environmental impact statements were issued on September 1, 2009, giving the SEPA appellants advance notice of the major issues they would be confronting. Although this may appear to be a lot of time, the Council should recognize that the FEIS contained hundreds of pages of technical analysis and the SEPA appellants are lay persons with no technical or legal expertise to even have a remote understanding of how to begin their appeals. The appellants were fortunate enough to have hired probably the best legal representation available for their type of issues. This attorney was skilled enough to mount a comprehensive attack with what probably amounted to limited resources. His tactics included using the threat or actual use of the Examiner's subpoena authority to compel attendance of government expert witnesses. Overall it appears that the SEPA appellants were able to address all of the significant issues related to the EISs. However, there is no question that all parties and the

Examiner himself were under intense pressure to meet the decision deadlines imposed by local code and state law.

B. Conclusions of Law:

1. Not Enough Time. State and local permit processing deadlines mandated the March 6, 2010 deadline. Before the hearings commenced, the City was legally required to issue a final decision on the SEPA appeals (from the Examiner) by March 28, 2010 and a final decision on the MPD applications (from the City Council) by the end of April, 2010. The Applicant had the authority to waive these deadlines (or at least absolve the City of liability), but declined to do so at the request of the Examiner before the hearings commenced. *See Email Ex. 156* (Examiner to applicant: "If the applicant provides a written waiver to objection over extending review periods, I will continue the hearing dates. The applicant is strongly encouraged to waive."); Email Ex. 159 (Applicant concurring with City that hearing dates should not be rescheduled).

Permit processing deadlines are to be taken very seriously. They can serve as a source of significant liability for the City. *See Westmark v. Burien* 140 Wn. App. 540 (2007). In the Burien case, the trial court awarded a $10.7 million dollar judgment against the City for taking too long to make a permitting decision on a 175 unit apartment building. The delay in that case was three and a half years, which is probably not the type of additional time that the SEPA appellants had in mind. However, the MPDs are obviously several magnitudes greater in scale than a 175 unit apartment building. A delay of even a few months for a project this size could conceivably result in significantly more liability than a delay in years for a relatively small apartment building.

The strict deadlines that applied to the master plan applications originated in state law and were incorporated into the Black Diamond Municipal Code. RCW 36.70B.080(1) generally requires decision makers to issue a final permit decision within 120 days of the filing of a complete application. BDMC 18.08.100(C)(2) incorporates this state mandate by requiring staff to set processing deadlines for MPD applications that do not exceed 120 days. The master plan applications for this case were deemed complete in late December. BDMC 18.08.220 provides that decisions on EIS appeals must be issued within 90 days from the date an appeal is filed, which is March 28, 2010 for the subject appeals.

At the time that the Applicant vested its permit applications, there was no exception to these deadlines. This was unfortunate because RCW 36.70B.080(1) allows local jurisdictions to provide for longer processing deadlines for EIS appeals and permit applications that involve special circumstances. Given that the subject applications comprise the largest development project in King County, the Council would have

been well justified in adopting extended permit processing deadlines[3] for master plan applications.

The Council is no doubt aware that it did adopt an ordinance allowing for extended deadlines. There are two reasons the Examiner was unable to take advantage of this ordinance to postpone the March 6, 2010 hearing date. The first reason is that there is substantial legal uncertainty that the Examiner could apply the ordinance to permits that have already vested. Under Washington's vested rights doctrine, cities cannot change the permitting criteria once the applicant has filed a complete permit application. *See, e.g., Abbey Road Group, LLC v. City of Bonney Lake, 167 Wn.2d 242 (2008)*[4]. In lay language, the permit is "grandfathered in" once the applicant has submitted all the required information. The courts have not directly addressed whether the vested rights doctrine applies to procedural requirements such as permitting deadlines. However, the only law journal article addressing the issue concludes that the courts have at least indirectly concluded that vesting does apply to procedural requirements. *See, Wynn,* Seattle University Law Review, V. 24, p. 851 with the procedural vesting discussion at pages 879-882. The City Council adopted Ordinance 10-935, which extended the due date for SEPA appeal decisions, on February 18, 2010, well after the two MPD applications had vested. Given the legal uncertainty of the applicability of the ordinance to the MPD applications, the Examiner could not take the risk of applying it given the huge liability involved if the gamble proved wrong.

The second reason the Examiner did not apply Ordinance 10-935 to extend the March 6, 2010 deadline is because the City Attorney's Office advised that the Council did not adopt the ordinance with the intent of extending the March 6, 2010 hearing date. When the SEPA appellants notified the Examiner about Ordinance 10-935, the Examiner advised the Applicant that they were "strongly encouraged" to waive the decision deadline and agree to an extended hearing date. The Applicant and the City Attorney's Office both objected. The City Attorney's Office sent an email to the Examiner providing as follows:

> *Black Diamond opposes any continuance of the hearings, now scheduled to begin on March 6. While we recognize that Mr. Bricklin was brought into this matter only recently (as were we), the hearing dates had been set with the input of his clients, as well as all other parties. In reliance on that schedule, the City has secured facilities*

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[3] RCW 36.70B.80(1) can be interpreted as allowing the Council to make project specific deadline extensions without any code amendment, even after a permit had vested. In any event, the Council did not adopt any findings allowing for an extended MPD review period prior to the MPD hearing dates.

[4] The Bonney Lake case is the most recent case on vested rights and there the court specifically declined to extend the vested rights doctrine to site plan review. However, the courts have extended the vested rights doctrine to a wide range of other permits including conditional use permits, grading permits, septic tank permits, and shoreline permits.

and audio equipment for the hearings, and public notice has been provided. The public notice includes approximately 1,850 mailed notices, advertisement in three separate newspapers, posting of notice boards, and posting at City facilities and on the City's website. All parties have also (or should have) confirmed the availability of witnesses for the hearings as scheduled.

In addition, after speaking earlier this morning with the Mayor and City management, I can advise that the intent of the ordinance adopted by the City Council last night is not to confer upon the Examiner the ability to extend the existing 90 day limitation set forth in BDMC 18.08.220.B to hear any appeal. Rather, and as originally requested of the City Council by appellants Proctor and Wheeler (the original citizen-sponsors of this ordinance), the intent of the ordinance is to provide the examiner with additional time to render his decision, upon entry of the necessary findings. That intent is clearly identified in the Council Agenda Bill attached to Mr. Bricklin's e-mail.

The ordinance attached to Mr. Bricklin's e-mail will not become effective, pursuant to state law, until February 28. If necessary, the Mayor is prepared to call a special meeting of the City Council next week in order to amend this ordinance to expressly reflect this clarification...

2. Separate Hearings: The SEPA Appellants argued that the Lawson Hills and Villages MPD applications should have been consolidated into one hearing. BDMC 18.08.130 and RC 36.70B.120 allow for the consolidation of multiple permit applications for single projects. However, these provisions do not authorize the consolidation of permit applications from different projects. Further, RCW 36.70B.120 only authorizes consolidation of permit applications if requested by the applicant. In this case the Applicant objected to consolidation of its permit applications. The City has no authority to require consolidation over the objection of the applicant.

3. Consolidation of SEPA Appeals with MPD Applications: Although the City does not have the authority to require the consolidation of the Villages and Lawson Hills MPD applications, it is required to consolidate the Villages EIS appeal into the hearing on the MPD application. WAC 197-11-680(3)(a)(v) provides that the EIS appeal must be consolidated with the MPD hearing in a single simultaneous hearing before one officer.

4 Segregation of SEPA Testimony from MPD Testimony: Although the Examiner must consolidate the TV FEIS hearing with the Villages MPD hearing, this does not deprive the Examiner of the authority to segregate EIS testimony from MPD testimony. The Examiner also has the authority (which was exercised in this hearing)

to limit EIS testimony to the SEPA Appellants. Black Diamond, like most if not all other cities and counties, imposes strict requirements for the filing of administrative appeals – time limits are enforced, filing fees are required and the appeals must identify appeal issues. None of these requirements would have much meaning if people can circumvent them by showing up at a hearing and testifying on an appeal filed by someone else. The Examiner only has jurisdiction to hear appeals from people who complied with jurisdictional requirements, i.e., the requirements for filing a SEPA appeal.

5. All Evidence Available for Decision: As previously mentioned, WAC 197-11-680(3)(a)(v) requires a single "simultaneous" hearing when an EIS appeal is consolidated with an MPD hearing. In construing legislation (and regulations) no word should be treated as surplusage. Every word must be given meaning. "Simultaneous" must mean something different than "single." The only additional meaning that "simultaneous" can be interpreted to add to the "single" hearing requirement is that all of the evidence in the hearing must be "simultaneously" available for any of the land use decisions subject to the hearing. This is consistent with the Regulatory Reform Act, Chapter 36.70B RCW definition of a hearing, where the focus in the definition of a hearing is the evidence submitted in the hearing. RCW 36.70B.020(3) defines an "open record hearing" as a hearing conducted by a single hearing body that "creates the local government's record through testimony and submission of evidence and information."

The combination of the "simultaneous" hearing requirement with the jurisdictional requirements for SEPA appeals has created some confusion amongst the public. The ground rules are actually not that complicated. Only EIS Appellants may testify on EIS appeal issues, but the entire record is available to the Examiner to review EIS adequacy and compliance with the MPD criteria. Consequently, even though Maple Valley was excluded from the EIS appeal, the Examiner may use its testimony on transportation-related MPD criteria relating to transportation issues to review the transportation adequacy issues raised by the SEPA Appellants. Similarly, the evidence presented during the SEPA appeals can be used to craft conditions for MPD approval to the extent that the SEPA testimony is relevant to MPD approval criteria.

Some may question why testimony had to be segregated if the simultaneous hearing requirement mixes all the evidence anyway. A quick review of the transcripts should reveal a ready answer. EIS Appeal proceedings are highly legalistic, with an emphasis upon expert witnesses, cross-examination, evidentiary objections and lawyers. Unlike the MPD portion of the hearing in which the Applicant has the burden of proof, the SEPA Appellants have the burden of proof in a SEPA Appeal. Under procedural due process, this burden of proof gives the SEPA Appellants the right to have the first and final word on their appeal issues. Segregation of the hearing facilitates the accommodation of that right. By contrast, MPD hearings are not dominated by lawyers or evidentiary objections. The emphasis is upon making it easy for people to express their opinion, without intimidating them by threats of cross

examination and objections. Segregation of an EIS appeal from the testimony on the underlying permit application is a common strategy employed by hearing examiners to address the procedural differences between a permit decision and a SEPA appeal. The Villages hearings serve as a good example of why that segregation is necessary.

6. Jurisdiction/Authority/Review Process: The jurisdiction of the Hearing Examiner to hear the appeals on EIS adequacy is subject to extensive discussion in the Examiner's Second Revised Prehearing Order, Email Ex. 165. As determined in the Order, the Examiner has jurisdiction to hear the EIS Appeals. The Examiner's decision is final, appealable to superior court.

7. Consideration of Revisions to MPD after TV FEIS Issuance: Any substantial revisions to the MPD application after issuance of the TV FEIS require additional environmental review to precede or accompany the staff recommendation on the application to the Examiner and City Council.

WAC 197-11-055(3)(a) provides that a final TV FEIS or threshold determination shall normally precede or accompany a final staff recommendation in a quasi-judicial proceeding. WAC 197-11-600(3)(b) provides that a new threshold determination or supplemental EIS shall be required for any substantial changes to a proposal that are likely to have significant adverse environmental impacts. Consequently, any of the 12/31/09 revisions that would trigger additional environmental review cannot be considered by the Examiner or City Council, since the additional environmental review did not accompany the staff report on the Villages MPD.

The SEPA Responsible Official is responsible for determining whether the 12/31/09 revisions require additional environmental review. The SEPA Responsible Official has subjected the 12/31/09 revisions to the MPD staff report, suggesting that he did not find a need for additional environmental review.[5] The decision of the SEPA Responsible Official to not require additional environmental review is not subject to administrative appeal. *See* WAC 197-11-680(3)(a)(iii). Consequently, it is not within the Examiner's authority to consider the issue. The City proceeds at its own risk in considering the 12/31/09 revisions without further environmental review. Since the issue is not subject to administrative appeal, the absence of environmental review can be brought up for the first time during judicial review.

V. Standard of Review/Overall Adequacy

A. Standard of Review:

The standard of review for EIS adequacy is the "rule of reason", defined as "a reasonably thorough discussion of significant aspects of the probable environmental

[5] For future reference, the SEPA Responsible Official could have issued a SEPA addendum on the revisions, making it clear that he found no additional environmental review necessary.

consequences." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633 (1994). Under the broad rubric of a "reasonable" analysis, the courts have highlighted what is meant by the rule of reason as follows:

1. The rule of reason is "in large part a broad, flexible cost-effectiveness standard." *Id.* " ...the EIS need include only information sufficiently beneficial to the decision making process to justify the cost of its inclusion." *Id.* at 641.

2. Under the rule of reason, "an EIS need not list every remote, speculative, or possible effect or alternative." *Id.* at 631.

3. "Impacts or alternatives which have insufficient causal relationship, likelihood, or reliability to influence decision makers are "remote" or "speculative" and may be excluded from an EIS." *Id.*

4. Challenges may not "flyspeck" an EIS; omissions in analysis may be "unfortunate, but not fatal." *Mentor v. Kitsap County*, 22 Wn. App. 285, 290 (1978).

5. The "comprehensive review envisioned by SEPA is to be detailed and does not invite a lackadaisical approach." *Leschi Improvement Council v. Washington State Highway Commission*, 84 Wn.2d 271, 280 (1978).

6. SEPA requires agencies to take a "hard look" at environmental factors. *PUD No. 1 of Clark County v. PCHB*, 137 Wn. App. 150, 158 (2007).

B. Programmatic Review v. Project Review:

The parties appear to agree that the MPD review is a nonproject as opposed to project action. The Examiner also agrees that MPD review qualifies as nonproject action because it involves "regulations that contain standards controlling use or modification of the environment" as opposed to "a construction or management activity located in a defined geographic area." *See* WAC 197-11-704(2)(a) and (b). An agency has more flexibility in preparing an EIS on a nonproject action "because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals." WAC 197-11-442. The SEPA Appellants have pointed out that the MPD does have some characteristics of a project action due to the specificity of improvements proposed and, in a broader sense, because the review is treated as a quasi-judicial proceeding. This is quite true, but hybrid actions are covered in the nonproject regulations that specify that the level of detail must be appropriate "to the scope of the nonproject proposal and to the level of planning for the proposal. *Id.* Given these requirements, the level of detail is expected to be comparatively high for project specific impacts.

C. Burden of Proof

The hearing examiner must give "substantial weight" to the Responsible Official's determination that the EIS is legally adequate. RCW 43.21C.090; BDMC 19.04.250(E). BDMC 18.08.220(D) provides further that the decision of the responsible official shall only be overturned if it is clearly erroneous. BDMC 18.08.220(D) also provides that the appellant shall carry the burden of proof in the appeal and that the burden of proof shall be met by a preponderance of the evidence in order for the appellant to prevail.

D. Overall Adequacy.

The adequacy of each issue raised by the SEPA Appellants is discussed in detail below. However, the reasonableness standard is also broad enough to encompass an assessment of deficiencies in light of the overall thoroughness of scope of an EIS. The Executive Summary provides an overview of all of the significant EIS deficiencies within the context of the overall thoroughness of the EIS. The number of deficiencies is fairly minor within the context of the extensive review of environmental impacts in the EIS. The deficiencies can be remedied by further analysis and mitigation under the MPD conditions of approval without depriving the decision maker of significant information to assist in the decision making process. Given these circumstances, it would certainly not be cost effective, as referenced in COL No. 14, to require the entire review process to commence anew to address problems that can be resolved under MPD conditions of approval. Overall, the FEIS is adequate.

VI. EIS APPEAL ISSUES

A. Lake Sawyer Water Quality

Due to the complex nature of Lake Sawyer water quality, this topic will be presented in narrative format. Section headers should be considered findings and conclusions in addition to all of the findings and conclusions made in the text as well.

The SEPA Appellants have described Lake Sawyer water quality as at a "tipping point" between ecological health and devastation. Lake Sawyer also serves as a tipping point on the adequacy of both MPD EISs. Determining the adequacy of the Lake Sawyer water quality analysis was by far the most difficult decision to make on the SEPA EIS appeals. The SEPA Appellants presented a compelling case that the MPDs could indeed tip the quality of Lake Sawyer into a condition where blue-green algae would bloom and create health hazards, beach closures, aesthetic blight and harm endangered fish. However, DOE has identified conditions that, if followed by new development, would meet TMDL. TMDL is a limit on phosphorous loading and concentration to Lake Sawyer that if followed, creates a 5% or less chance of surpassing the tipping point. The DOE conclusions are based upon a series of scientific studies that assess Lake Sawyer water quality. These studies are based upon years of data, collaborative efforts from a broad array of stakeholders and

extensive modeling and assessment of impacts. The MPD proposals are consistent with the conditions DOE has imposed for TMDL compliance. The Applicant has adopted the recommended mitigation of these studies to mitigate its water quality impacts. The studies used and prepared by DOE serve as a standard of water protection for the entire Lake Sawyer watershed. Any additional information required of the Applicant, short of subjecting it to a different standard than that prepared by DOE, would not provide any useful information.

1. Lake Sawyer is a Significant Water Body

Lake Sawyer is the fourth largest lake in King County, covering 280 acres. Ex. NR-TV-11, p. ES-1. Its watershed encompasses 8,300 acres. Ex. H-9, p. vii. Over 200 people live upon its shorelines. The lake is used extensively for recreational purposes such as sailing, water skiing, scuba diving, swimming, picnicking, wildlife observation and aesthetic enjoyment. Ex. NR-TV-11, p. ES-1. Public access is provided by two city parks, one on the northwest side of the lake and another on the southern end of the lake. The lake provides habitat for three federally listed species: steelhead, Coho and Chinook salmon. TV FEIS at 4-71, 4-73.

2. Phosphorous Poses a Significant Threat to Lake Sawyer Water Quality

The role that phosphorous plays in the water quality of a lake was well summarized in the DOE Lake Sawyer Water Quality Implementation Plan, Ex. H-9, which provides at p. 6 as follows:

> *Phosphorus is a basic element found in nature, and is also a primary nutrient that all living organisms need to survive. Lakes typically build up phosphorus levels as they age, and ultimately fill in with vegetation and sediment, a process that usually takes thousands of years. This process is called eutrophication. Increased amounts of phosphorus due to human activity can accelerate eutrophication and be detrimental to a lake's water quality and its beneficial uses. Higher levels of phosphorus from sediment, fertilizers, waste, and other sources can cause excessive plant and algae growth, which in turn may have unfavorable impacts to water clarity, aquatic habitat, fish survival, swimming, boating, and aesthetic enjoyment (Murphy et al. 2002). Human activities, such as home building, road construction, and deforestation, can drastically speed up a lake's aging process and adversely affect lake uses.*
>
> *In lakes of the Puget Sound Lowlands, phosphorus is often the nutrient in least supply, meaning that biological productivity is often limited by the amount of available phosphorus (Abella, 2009). Thus, for lakes such as Lake Sawyer, phosphorus is usually the main nutrient that*

drives the eutrophication process. Though other nutrients, such as potassium and nitrogen, can affect surface water quality, the amount of phosphorus being transported through various sources and pathways, such as human and animal waste, fertilizers, and stormwater in the watershed, often limits the amount of algal growth and aquatic plants (Minnesota Department of Agriculture, 2004). Nutrient levels generally determine a lake's level of biological activity or trophic state.

Lakes with low levels of biological activity are classified as oligotrophic. Those with moderate biological activity are mesotrophic. When lakes get older, or when they are polluted with excessive levels of nutrients and have high biological activity, they are considered eutrophic. Lakes with lower levels of biological activity have better water clarity and are more desirable for swimming and boating activities.

When a lake reaches a eutrophic state the consequences are serious. Blue-green algae bloom creating toxics that are lethal to aquatic life, birds and shore animals, including cats and dogs. The blue-green algae form a scum over lake surfaces, causing beach closures. Testimony of Abella, 3/8/10, p. 555. The toxins are also under study as a cause for liver ailments in humans. *Id.* A eutrophic state also harms coldwater fish. Coldwater fish need to stay in the lower, colder layers of a lake. A eutrophic state deprives the lower waters of necessary oxygen and leaves it in the warmer upper layers. Zisette testimony, 3/6/10, pp. 72-73.

Lake Sawyer has an unfortunate history of problems associated with elevated phosphorous levels. In the 1970s, evidence of failing septic systems in the Lake Sawyer watershed resulted in a decline in water quality in Lake Sawyer and the rivers that feed into it. To correct this problem the City of Black Diamond constructed a sewage treatment plant in 1981. A unique feature of the treatment plant was that its treated effluent was discharged into a natural wetland, which ultimately discharged into Lake Sawyer. Implementation Plan, p. 1. The treated effluent caused a significant degradation of Lake Sawyer water quality. As phosphorous levels went up, algae blooms occurred. A green scum covered the lake, rendering the lake virtually unusable for all recreational and other public activities. Testimony of Wheeler, Tr. 3/19, pp. 3647-3648. Due to the water quality problems caused by the treated sewer water, the Department of Ecology required the diversion of the effluent from the natural wetland to a secondary treatment plant in Renton via a King County sewer line. Implementation Plan, p. 1. This diversion was completed in 1992. *Id.* Despite the diversion, Lake Sawyer water quality took several years to recover, finally reaching what DOE considered to be acceptable (consistent with TMDL as discussed below) levels in 1998. Implementation Plan, p. 11-12. Lake Sawyer had phosphorous concentrations of 12 to 23 micrograms/L from 1990 to 1998. From 1999 to 2007 the phosphorous levels have been in the 8 to 16 microgram/L range. *Id.*

As a result of Lake Sawyer's water quality problems, DOE listed Lake Sawyer as an "impaired water body" pursuant to the requirements of the Clean Water Act. The Clean Water Act requires a total maximum daily load (TMDL) to be developed for impaired water bodies. The TMDL is subject to approval by the US Environmental Protection Agency. The TMDL sets a limit to the amount of phosphorous that is allowed into a water body. Implementation Plan, p. 3. EPA approved a phosphorous loading capacity TMDL for Lake Sawyer at 715 kilograms of phosphorous per year. Wheeler Ex. 20, p. 1. This means that all external sources of phosphorous may not exceed a total of 715 kilograms per year. This corresponds to an in-lake concentration of 16 micrograms/L. Implementation Plan, p. 5.

3. The Lake Sawyer Management Plan and 2009 Lake Sawyer Water Quality Implementation Plan Provide a Highly Credible and Thorough Review of Phosphorous Impacts and Control for Development in the Entire Lake Sawyer Watershed; the Management Plan does not Conclude or Warrant that its Recommended Mitigation will Satisfy TMDL.

In 2000 King County prepared the Lake Sawyer Management Plan, Ex. NR-TV-11 ("LSMP"). It is considered a supporting document of the Lake Sawyer TMDL. H-9, p. 1. The purpose of the LSMP was to complete a Phase 1 study initiated in 1989-90. LSMP, p. 1-5. The primary purpose of the Phase 1 Study is to assess the impact of the water treatment plant diversion on water quality, update the lake's nutrient and water budgets, and to evaluate and recommend restoration alternatives that will maintain and protect Lake Sawyer's water quality and beneficial uses. *Id.* The LSMP was based upon years of data collection and employed the input of several stakeholders representing public and private organizations. It included a detailed projection of phosphorous levels at full build out of the Lake Sawyer watershed, with and without recommended mitigation[6].

The LSMP makes no assurance that its recommended mitigation will achieve TMDL and the Examiner does not find that they were made for that purpose. The LSMP lists several lake management goals at Table 6-1 and the LSMP expressly states that "these goals were used in the analysis of management strategy alternatives to develop the plan recommendations." The management goals include maintaining the mesotrophic status of the lake but none mention meeting TMDL. The LSMP identifies several mitigation measures directed at the Lake Sawyer watershed to control phosphorous loading. LSMP, Chapter 6. If these measures fail to reach or maintain lake management goals, the LSMP identifies "contingency in-lake measures" to improve water quality. LSMP at 6-22. These measures consist of

[6] This document will use "restoration" -- the term used in the LSMP -- interchangeably with "mitigation." Technically the "restoration" measures include "mitigation" of future development, such as the MPDs.

buffered alum treatment (treating the lake with alum) and hypolimnetic aeration and circulation (pumping oxygen into the lake through a piping system). Notably, the LSMP wasn't even confident that the watershed and in-lake measures combined would meet the general water quality goals: "Prior to implementation, the City of Black Diamond, King County and Ecology will want to confirm that some combination of in-lake and watershed controls will be able to achieve water quality goals." Wheeler Ex. 20(e), Appendix I of LSMP, p. 7. Table 6-3 of Appendix I shows a lake phosphorous concentration of 31 micrograms/L for build out with "watershed controls" and 37 micrograms/L for build out with "internal load control." It is unclear, but likely, that these categories of mitigation measures encompass all the mitigation measures recommended in the LSMP. The resulting concentrations are significantly above the 16 microgram/L TMDL limit.

In 2009 DOE released the Lake Sawyer Total Phosphorous Maximum Daily Load Water Quality Implementation Plan, Ex. 9 ("Implementation Plan"). It is considered the follow up document to the Lake Sawyer Total Phosphorous TMDL. Ex. H-9, p. 2. It provides a framework for corrective actions to address sources of phosphorous pollution in Lake Sawyer and the surrounding watershed. Unlike the LSMP, it did not include any modeling of future lake conditions. Like the LSMP, the Implementation Plan was based upon the input of several stakeholders participating in the Lake Sawyer Steering Committee, consisting of representatives of DOE; King County; City of Black Diamond; King County Conservation District; Washington Department of Fish and Wildlife; the Muckleshoot Indian Tribe; and local watershed residents.

The corrective actions identified in the Implementation Plan largely mirrored the mitigation recommended in the LSMP, with the important distinction that the Implementation Plan also contemplated the City's adoption of the 2005 Stormwater Management Manual for Western Washington. The Implementation Plan concluded that with the adoption of the 2005 DOE Manual and a monitoring program for the implementation projects that the City of Black Diamond would meet TMDL.

Based upon the above and the plans themselves, the Examiner finds that the LSMP and the Implementation Plan build upon years of research and hundreds of pages of scientific analysis. The plans are the result of significant collaboration of all major stakeholders. The conclusions on TMDL compliance are made by the Department of Ecology, whose primary mission and expertise is the protection of environmental resources, such as Lake Sawyer.

4. The Villages and Lawson Hills FEIS fail to adequately disclose potential phosphorous impacts to Lake Sawyer

As previously determined, Lake Sawyer is a significant environmental and recreational resource for the Black Diamond community. The impacts of phosphorous on this resource have also been an on-going significant concern for the

Black Diamond community. Black Diamond constructed a sewage treatment plant in 1981 due to the water quality impacts of failing septic systems on Rock Creek, Grinder Creek and Lake Sawyer. Lake Sawyer water quality once again became an issue when water quality problems forced the City to divert treated effluent from a wetland feeding into Lake Sawyer to a sewer line connecting to King County treatment facilities in Renton in 1992. Implementation Plan, p. 1. As discussed in both the LSMP and the Implementation Plan, volunteers in the area over the last several years have participated in lake monitoring programs and are active in assessing and recommending implementation projects. City of Black Diamond staff and the Black Diamond City Council have been active in assessing and implementing phosphorous control measures.

Despite the rigor of the scientific analysis conducted in the LSMP and the Implementation Plan, it is clear from those documents that there is still a great deal of uncertainty in predicting phosphorous loading. The LSMP acknowledges this uncertainty by recommending contingency measures should recommended mitigation fail to protect water quality. The modeling in the LSMP falls far short of predicting the current phosphorous concentrations in Lake Sawyer – the baseline in the model is 84% above the 715 kg/yr TMDL while the most recent data in 2007 shows that Lake Sawyer could be as much as 50% below the lake concentration TMDL. *See* Wheeler, Ex. 20; Implementation Plan, p. 12. The 1992 diversion of effluent highlights the shortcomings of predicting phosphorous loading – the initial drainage of the effluent into a natural wetland, termed an "innovative project" was based upon the erroneous conclusion that the natural wetland would prevent phosphorous contamination of Lake Sawyer. Implementation Plan, p. 1. The TMDL itself only presents a risk of eutrophic status. It is set at a 5% risk of eutrophication. *See* LSMP, Appendix F, 2/11/93 Wong Memo.

WAC 197-11-080(3) requires environmental review to provide a worst case scenario and likelihood of occurrence when acting in the face of uncertainty, to the extent the information can be reasonably developed. Given the uncertainty in the potential eutrophication of Lake Sawyer, the Villages and Lawson Hills EISs should identify the impacts of eutrophication to notify the decision maker of what could happen, even if the risk of that occurring is within the level of risk adopted by the TMDL conclusions in the Implementation Plan.

Neither the Villages EIS or the Lawson Hills EIS adequately identifies the impacts associated with reaching eutrophic status, e.g. the health hazards, beach closures, harm to endangered fish and aesthetic blight discussed in I(B) of this document are not identified. The Villages contains a fairly good description of the history of phosphorous problems associated with Lake Sawyer, but there is no recitation of specific impacts. Inexplicably, the Lawson Hills EIS doesn't even include the background information. It just mentions in one sentence that Lake Sawyer "...has a 303(d) listing for phosphorous, based upon past water quality problems" and in another sentence that "Lake Sawyer is susceptible to eutrophication." LH EIS, p.

4.36 and 5-11. The appendices to both EISs also fail to identify specific impacts. 65% of the Village sand 100% of Lawson Hills drains into Lake Sawyer. .

Given the prominence that Lake Sawyer water quality plays in the Black Diamond community, the significance of phosphorous impacts and the uncertainty in the science backing Implementation Plan, it was unreasonable for the EIS to fail to warn of the specific problems that could arise from phosphorous contamination of Lake Sawyer. Given the large amount of development involved in the MPD proposals, the information on specific impacts could spur decision makers into advocating for updated modeling the LSMP or a greater commitment to implementing the regional mitigation measures identified in the Implementation Plan. Given the overall scope and context of the EIS, the failure to include these specific impacts cannot by itself justify a finding of inadequacy for the entire document, especially given that the reference to eutrophication in both documents does provide inquiry notice to persons concerned about water quality.

5. The Villages and MPD projects are within the phosphorous loading assumptions employed by the LSMP.

The Applicant has not chosen to conduct its own analysis of how much phosphorous the MPDs will discharge to Lake Sawyer. Instead, it relies upon the phosphorous loading estimates of the Lake Sawyer Management Plan ("LSMP"), prepared by King County in 2000. Through extensive analysis and testimony, the Applicant has established that the MPD projects are consistent with the assumptions used by the LSMP in predicting phosphorous loading. In point of fact, the preponderance of evidence in the record establishes that the LSMP significantly overstates the amount of phosphorous generated by the proposed development.

The record of this proceeding conclusively establishes there are three factors that result in an overstatement of phosphorous loading in the LSMP model. The first factor is that the LSMP overstates the amount of the MPD development area that drains to Lake Sawyer. The Applicant's geotechnical consultants performed 110 test borings to determine the location of impermeable surfaces and the resultant subsurface flows of stormwater. Tr. 2641. Through this geotechnical analysis the Applicant determined that 30% of the project area does not drain into Lake Sawyer as assumed in the LSMP. Kindig Testimony, 3/12/10, pp. 2032-2033.

The second factor is that the LSMP overstates the amount of the development in the MPD project area. As shown in Exhibit H-8 and as testified by Al Fure, the LSMP overstates development of the MPDs by 25%. Fure testimony, 3/12, p. 2007.
The third factor is the baseline used for the phosphorous concentration of the lake. The LSMP model was based upon in-lake phosphorous concentrations from March 1994 through April 1995. *See* Wheeler Ex. 20(e), Appendix C, Figure E6. The concentrations during this base period ranged from 20 to 60 micrograms/L, significantly higher than the TMDL concentration of 16 microgram/L. As shown at

p. 12 of the Implementation Plan, the 2007 phosphorous concentration was 8 or 9 micrograms/L. *Id.* The "typical year" baseline used in the LSMP model was 84%[7] over TMDL. Wheeler Ex. 20. The significant disparity in current phosphorous concentrations and those used in the baseline of the LSMP model is probably due to the five year recovery period of the lake from the treatment plant diversion in 1992. *Id.* Table 6-7 of the LSMP, which provided the projections on future phosphorous loading, noted that "it is assumed that internal loading will not change in the future."

A fourth factor may be the City's adoption of the 2005 DOE Stormwater Manual. The LSMP was based upon the application of the 1992 stormwater manual and the MPDs will use the 2005 manual. Abella testimony, 3/8/10, p. 558. As noted in the testimony of Sally Abella, a SEPA Appellant witness, the 2005 manual provides "better by far" phosphorous safeguards than the 1992 manual. Abella Testimony, 3/8/10, p. 564. However, the benefits of the 2005 Manual may already be integrated into the LSMP model. One of the recommended stormwater controls in the LSMP is the adoption of the 1998 King County Surface Water Design Manual. LSMP, p. 6-6 to 6-7. In the alternative the LSMP recommends adoption of the "Lake Protection Standard", a component of the King County Surface Water Design Manual. In recommending these standards, the LSMP focuses upon the fact that they have a phosphorous treatment reduction goal of 50%, which is the same standard required under the 2005 DOE Manual. If the 2005 DOE Manual does not provide any level of phosphorous protection better than the 1998 King County Manual, the City's adoption of the 2005 DOE Manual is simply an adoption of one of the LSMP mitigation measures and its actions fall squarely within the LSMP modeling. However, if the 2005 DOE Manual provides better protection than the 1998 King County Manual, as is probably the case, then the LSMP model can be said to overstate phosphorous levels of future build out.

There is no evidence in the record that identifies any factors that would result in an underestimation of phosphorous loading in the LSMP. Sally Abella testified that the LSMP was outdated, but from that factor Ms. Abella could only conclude an updated LSMP could "go either way" in changing the outcome of phosphorous loading predictions. Ms. Abella testified that the LSMP is based upon data and development regulations from 1995. *Id.* At p. 174. She noted that development projections in the LSMP may not be accurate, due to possible changes in Black Diamond comprehensive plan policies and development regulations and Black Diamond annexations that occurred subsequent to 1995. *Id.* At p. 179. The Applicant addressed Ms. Abella's concerns about projected MPD development in the preparation of Ex. H-8 and the testimony of Al Fure, who as noted previously concluded that the LSMP actually overestimates development within the MPD project areas.

[7] The LSMP phosphorous loading baseline was based on kg/L, so the Examiner was only able to provide a % over TMDL as opposed to a conversion to micrograms/L.

In short, the record identifies three factors that markedly skew the LSMP assumptions to overstate MPD phosphorous loading. No factor was offered into the record to that understates phosphorous loading. The evidence in the record conclusively establishes that the LSMP overstates the amount of phosphorous loading from the MPDs. Consequently, the MPDs are well within the LSMP assumptions for phosphorous loading.

6. The Villages and Lawson Hills MPDs Adequately Mitigate Phosphorous Impacts to Lake Sawyer

The Washington State Department of Ecology has concluded that mitigation measures recommended in the LSMP will satisfy the TMDL for Lake Sawyer. The SEPA Appellants do not dispute the data or methodology used in the LSMP to assess the effectiveness of mitigation. They point out that the data and methodology shows that the MPD projects will load phosphorous in excess of TMDL and that this phosphorous loading will approach (but not exceed on its own) the eutriphication point for Lake Sawyer. This information is insufficient to refute the conclusions of DOE.

The conclusions of DOE are expressed in the Lake Sawyer TDML Water Quality Implementation Plan, Ex. H-9 ("Implementation Plan"). DOE published the Implementation Plan in 2009. The Implementation Plan implements the LSMP by providing a framework for corrective actions to address ongoing and future sources of phosphorous pollution in Lake Sawyer and the surrounding watershed. Implementation Plan, p. v. DOE concludes at p. 31-32 of the Implementation Plan that the City will establish compliance with the TMDL under the following conditions: compliance with the Western Washington Phase II Municipal Stormwater Permit, compliance with the 2005 Ecology Western Washington Stormwater Manual and the continuation of a water quality monitoring program in coordination with implementation projects. Dr. Kindig testified that, as designed, the MPD projects meet the DOE conditions for consistency with the TMDL. Dr. Kindig's testimony on this point was unrefuted. Robert Zisette, the Appellant's water quality expert, agreed that the mitigation implementation measures identified in the Implementation Plan are incorporated into the MPD proposals. Zisette testimony, 3/19/10. The Examiner finds that the Master Plan proposals meet the conditions for DOE's finding of TMDL compliance.

The SEPA Appellants assert that compliance with the mitigation measures outlined in the LSMP (and presumably the Implementation Plan) are not sufficient to comply with the Lake Sawyer TMDL or to prevent Lake Sawyer from reaching eutrophic status. As to TMDL compliance, Mr. Zisette did an interpolation of the modeling used to predict phosphorous loading for total build out to determine that the phosphorous loading attributable to the MPD proposals, with LSMP stormwater controls, would generate an additional 353 kg/yr above the 715 TMDL limit. See

Wheeler Prehearing Ex. 20. In making this calculation Mr. Zisette roughly used the same MPD area calculated by the Applicant as draining into Lake Sawyer, employing the area outlined in Exhibit H-7. Had Mr. Zisette used the higher developable area assigned by the LSMP model to the MPD proposals, his phosphorous loading results would have been higher.

Mr. Zisette's TMDL calculations did not reveal any new information that wasn't readily apparent to DOE when it found TMDL compliance in the Implementation Plan. It is important to note that beyond adjusting downward for development area, Mr. Zisette's calculations did not alter any of the assumptions used in the LSMP model. The LSMP model predicted a total phosphorous load of 2,255 kg/yr at build out, which is 1,540 kg/yr above TMDL. Mr. Zisette's calculation merely showed that the MPD's proportionate share of this excess phosphorous is 353 kg/yr. All of this information is easily predictable from the LMSP. The baseline "typical year" in the LMSP model was already 627 kg/yr above TMDL. Given this context and the presumed assumption in the LSMP model that all nonpoint source development contributes phosphorous, any new development would increase the phosphorous load to somewhere between the baseline and the 2,255 kg/yr build out amount.

Mr. Zisette's calculations touch upon the most difficult issue of the Lake Sawyer EIS appeals: how could DOE conclude that the Lake Sawyer 715 kg/yr TMDL would be reached when the LSMP model predicted 2,255 kg/yr at full build out? The LSMP and the Implementation Plan do not provide any explanation. As noted by the SEPA appellants, the mitigation measures in the LSMP don't get you there – Table 6-7 of the LSMP reveals that all mitigation measures combined only attain an annual phosphorous loading of 1,793 kg/yr, still well above the 715 kg/yr. These mitigation measures include public improvements that cost eight to twelve million dollars to implement. See LSMP, p. 6-24 and 6-26. Nothing in the record suggests that these improvements have occurred and, in fact, the Implementation Plan states generally that most mitigation measures have not been funded. Implementation Plan, p. 12.

Balanced against the gap between the LSMP build out phosphorous loading projections and the TMDL is the fact that this gap was apparent in the LSMP and DOE still found TDML compliance. DOE has the expertise and authority to oversee TDML on behalf of the EPA. There is nothing in the record to suggest that DOE would have any self-interest or political reason to find TMDL compliance when that was not the case. The Applicant raised the issue of DOE approval prior to the Appellants' rebuttal and nothing was offered by the Appellants to explain why DOE would reach such a conclusion if there was no reasonable basis for it. It is noteworthy that DOE placed emphasis upon compliance with the City's NPDES permit and the 2005 Stormwater Manual for compliance with TMDL. The 2005 Stormwater Manual was not used in the LSMP and, as testified by the Appellant's expert, the 2005 Manual is significantly more effective in controlling phosphorous than the 1992 Manual that was used in the LSMP. The Implementation Plan also noted at p. 12 that the TMDL target of 16 micrograms/L has been met since 1998,

down to 8 or 9 micrograms/L in 2007. This is a substantial improvement over the "typical year" baseline used in the LSMP model, which was 84%[8] over TMDL. Also, as identified in Mr. Zisette's analysis, Wheeler Pre-hearing Exhibit 20, these recently low figures are probably the result of a a five year recovery period from the diversion of sewage treatment plan effluent. Consequently, the low numbers are probably not a temporary state of the lake (setting aside the impacts of future development). Given the objectivity and expertise of DOE, the use of the 2005 DOE stormwater manual, the significant improvement in Lake Sawyer water quality that was not factored into the LSMP modeling, and the substantial weight that the Examiner must provide to the determination of the SEPA responsible official, the Examiner finds that the DOE's conclusions on TMDL compliance provide reasonable assurance on the adequacy of the mitigation measures incorporated into the MPD proposals.

In addition to stating that the MPD projects will exceed TMDL, the SEPA appellants also assert that the proposals may cause Lake Sawyer to exceed 24 micrograms/L, the "scientific dividing line between a mesotrophic and eutrophic lake." Bricklin post-hearing brief, p. 16. The SEPA appellants found this dividing line in Table 4-10 of the LSMP, which provides that under the "Carlson's Trophic State Index" lakes reach eutrophic status at 24 micrograms/L. The meaning of this "dividing line" is not explained in the LSMP. The TMDL is set at a point where there is a 5% chance of reaching eutrophic status. *See* LSMP, Appendix F, 2/11/93 Wong Memo. The eutrophic risk associated with 24 micrograms/L is not identified in the LSMP, although one has to conclude it is significantly more than the TMDL, which at 16 micrograms/L has a 50% less phosphorous concentration. The SEPA Appellants then point to Table 6-3 of Appendix I to the LSMP, which provides that the current condition of Lake Sawyer is at 23 micrograms/L and that build-out of the watershed, with watershed controls, will reach 31 micrograms/L.

Table 4-10, if reflective of current conditions, does show that Lake Sawyer is at the "tipping point", just one microgram/L from eutropic status. If Lake Sawyer is indeed this close to eutrophic status, there is a reasonable chance that the MPD proposals could tip the balance into eutrophic status. Under this scenario, additional EIS analysis study would be merited. However, Table 4-10 does not reflect current conditions. As discussed previously, the Implementation Plan shows the current state of the lake at 8 or 9 micrograms/L and these levels are anticipated to be stable, absent further development. The lake concentration has been under 16 micrograms/L since 1998. There is nothing to suggest in the record that the MPD proposals, alone, will push the phosphorous concentration beyond the 24 micrograms/L given the current conditions of Lake Sawyer. Mr. Zisette testified that as little as a 5% increase could push Lake Sawyer into eutrophic status, but he did not explain the basis of this conclusion or identify whether he had taken into consideration the current state of the

[8] The LSMP phosphorous loading baseline was based on kg/L, so the Examiner was only able to provide a % over TMDL as opposed to a conversion to micrograms/L.

lake as identified in the Implementation Plan. Zisette testimony, 3/19/10, p. 3640. All of Mr. Zisette's calculations (e.g. Wheeler Ex. 20) had been based upon the "current" status of the lake as identified in the LSMP, which was set at 23 micrograms/L.

In reaching these conclusions it is not lost on the Examiner that the Applicant must discredit data in the LSMP at the same time that it relies upon it as its EIS analysis. A final and important inquiry on the LSMP is whether, given the apparent shortcomings of the LSMP, the Applicant should have updated and/or refined the LSMP for its analysis. Under the broad adequacy standard of a "reasonable" discussion of environmental impacts, it is pertinent to evaluate the utility of any additional information. As shall be discussed, any additional information that could be reasonably required of the Applicant would not yield any useful information. The Applicant could only provide a useful analysis if it essentially rewrote the LSMP, which is not a reasonable requirement.

On the utility of additional information, Mr. Zisette testified that the Applicant failed to determine how much phosphorous the MPDs would add to Lake Sawyer. He noted that the Applicant could have easily made this determination since it had data on both projected stormwater volumes and phosphorous concentrations. The Applicant did not rebut this testimony and the Examiner finds that the phosphorous loading would not have been unreasonably difficult to compute. However, this additional information would not have provided anything of significant use to the decision maker. As ably demonstrated by Mr. Zisette, there's no question that under the modeling of the LSMP that the MPD phosphorous loading would exceed TMDL, no matter what amount of phosphorous was generated by the projects. Similarly, these computations would not be of much use in an assessment of the EIS alternatives. Any reduction in phosphorous loading, unless it's to zero, would exceed TMDL. TMDL would be exceeded in both the 24% development reduction in Alternative 3 and the more than 50% reduction in Alternative 4.

Of course, with more work[9] the Applicant could recalibrate the LSMP model to include current lake conditions, the Applicant's adjustments to the drainage basins and the benefits of the 2005 stormwater manuals. In short, the Applicant would prepare its own LSMP. The resulting information could indicate how close the MPDs will bring Lake Sawyer to TMDL and what the Applicant's proportionate share of phosphorous loading would have to be in order to keep full build out below TMDL.

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[9] In its closing brief the Applicant asserts that requiring it to prepare its own management plan would be unreasonable given that the MPDs only take up a fraction of future build out. There was no testimony on this issue so the Examiner has insufficient information to draw any conclusions. Certainly, it would be unreasonable to require the Applicant to take hundreds of test borings throughout the watershed to reevaluate the contours of the drainage basins. However, it does appear that useful and more accurate information could be derived by relatively simple refinements to the LSMP modeling, by measures such as using current lake conditions for a baseline.

The price of this additional information is to hold the Applicant to a different standard than the watershed standards developed in the LSMP and the Implementation Plan. Along these lines, any proportionate share analysis would be meaningless unless other development and regional watershed implementation measures are held to the same standard. The only watershed standard is the LSMP and Implementation Plan. Further, any conclusion that the MPDs would fail to meet TMDL would be directly contrary to the findings of DOE, made in 2009, that the MPDs would satisfy TMDL. Given these factors, the reliance of the Applicant upon the LSMP, instead of its own calculations, provides a reasonably thorough discussion of stormwater impacts to Lake Sawyer as required for an adequate EIS.

7. Dr. Kindig's Conclusions on Stormwater Phosphorous Concentrations and Treatment Efficiencies are Adequate.

The SEPA Appellants presented a considerable amount of argument and testimony challenging the assumptions made by the Applicant in concluding that its proposed stormwater facilities would reduce phosphorous in stormwater by 50% as recommended in the LSMP and required by the 2005 DOE Stormwater Manual. They also challenge the phosphorous concentrations assumed by Dr. Kindig for untreated stormwater.

As to the untreated stormwater, Dr. Kindig used data from only one development project when data is readily available from numerous other projects in a national data base. *See* Bricklin Closing Brief, p. 26-27. Dr. Kindig testified that he preferred to rely upon the one project utilized in his study because it is local and takes into account the unique weather of the Pacific Northwest, which results in phosphorous concentrations that differ from other regions in the country. However, as noted by the SEPA Appellants, the data in the national data base can be tailored to only reflect projects in the Pacific Northwest. *Id.*

As to treatment efficiencies, the Dr. Zisette testified that Dr. Kindig did not take into account stormwater that bypasses stormwater ponds during storm events. Mr. Zisette also testified that studies finding a 50% treatment rate are based upon much higher phosphorous influent concentrations than those that will occur in the MPDs. Treatment efficiencies go down with lower influent concentrations. Finally Mr. Zisette also testified that the 50% rate is based upon peak performance of new facilities and that this rate will go down for a facility with time. *Id.* at p. 27-29. Dr. Kindig responded that the overflow is a relatively rare occurrence accounting for only 5% of stormwater. The Applicant also asserts that the influent concentrations are higher than those assumed by Mr. Zisette, because Mr. Zisette allegedly did not take into account that influent into the facilities came from multiple sources, such as roads, where phosphorous concentrations are high. The record is unclear as to whether Mr. Zisette took this into consideration or not. The MPDs also include a monitoring plan to ensure that they are designed to meet the 50% treatment requirements of the 2005 DOE Stormwater Manual. If not already proposed, the MPD should be conditioned

to require an improvement to the stormwater facilities if monitoring reveals less than 50% removal. It is also noteworthy that the DOE Stormwater Manual requires 50% treatment, at least creating an implication that DOE considers this level of treatment achievable.

The disagreements between Dr. Kindig and Mr. Zisette fall squarely within differences in professional judgment. Both experts are highly qualified and both have a side to advocate – Mr. Zisette was hired to find problems with the stormwater/water quality analysis and Dr. Kindig was hired by and works for the Applicant. The SEPA responsible official has determined that the stormwater analysis is adequate and the Examiner must give substantial weigh to this determination. Consequently, the Examiner finds the analysis, discussion and mitigation measures adequate. Dr. Kindig's use of one data source for influent concentrations when additional data is readily available is a little troubling. The Examiner may recommend as an MPD condition of approval that a broader range of data be employed in designing stormwater facilities.

B. Noise

Findings of Fact:

1. Page 8-10 of the Harp Appeal Statement raises concerns that the FEIS does not adequately disclose and analyze the impact of construction noise on their homes. Their Appeal Statement limits their noise concerns to three residences "on acreage listed on page 3-29 of the Villages EIS." Their appeal regarding noise impacts is construed as limited to these residences, which includes the residence of Cindy Proctor, another SEPA Appellant.

2. Specifically, the Harps and Ms. Proctor allege that the FEIS did not adequately address the impact of construction noise on their property, that the FEIS failed to disclose the duration of construction noise, and that the FEIS failed to disclose the location of the sources of expected noise. *See* Harp Appeal Statement, p. 8-9.

3. In both the Villages and Lawson Hills FEISs, the Applicants have devoted a section of Chapter 3 to noise impacts of the proposed MPD construction. The Applicants have provided noise studies describing the existing noise levels in the area of the proposed development. Existing noise levels along SR 169 have been measured between 54 and 66 decibels (dBA), depending largely on the speed of vehicles. Noise levels have been measured at 62 dBA on Roberts Drive/Auburn-Black Diamond Road at the City offices, but noise levels in residential areas at a distance from major roads drop to between 46 and 53 dBA, with noise levels in more rural and undeveloped areas as low as 31 dBA. Lawson Hills FEIS & Villages FEIS, p. 3-25.

4. In both the Villages and Lawson Hills FEISs, the Applicants have described various standards for noise control. The Applicants disclosed that, generally, 55 dBA is an acceptable level of outdoor noise in a residential area per the "environmental designation for noise abatement" classification system utilized by Washington State and the U.S. Department of Housing and Urban Development Index. Lawson Hills FEIS & Villages FEIS, p. 3-27. The Federal Highway Administration Noise Criteria indicate that 52 dBA is an acceptable noise level for the interior of a residence. Lawson Hills FEIS & Villages FEIS, p. 3-28.

5. Also in both the Villages and Lawson Hills FEISs, in Exhibit 3-12, the Applicants have included a table with the estimated decibel level at varying distances from the source activity. For example, the activity of clearing is listed as creating noise levels of 80 to 96 dBA at 50 feet from the source, 74 to 90 dBA at 100 feet from the source, and 68 to 84 dBA at 200 feet from the source.

6. In addition, both FEISs include the following statement: "The parties most likely to be affected by construction noise include residents adjacent to the site including single-family residential development to the east on both sides of Roberts Drive and one resident to the west of the property south of Roberts Drive which could experience peak noise levels up to 90 dBA." Lawson Hills FEIS & Villages FEIS, p. 3-29. Both Mr. Jerry Lilly, expert acoustical consultant for the Appellants, and Mr. Richard Steffel, principal consultant with Environ International Corporation for the Applicants, testified that they believed this statement to be referring specifically to the Harps' property, though the FEIS did not specifically indicate that in the text. Tr. at 795, 2760. Mr. Lilly testified that 90 dBA is "shockingly loud," equivalent to a fire alarm sounding in your house. Tr. at 795.

7. Neither FEIS nor their Technical Appendices disclose the anticipated duration of each of the construction activities listed in the table in Exhibit 3-12. Tr. at 795-96.

8. Thomas Hanson, a member of the public, was the only person to provide testimony regarding the duration of construction noise. Mr. Hanson testified that Yarrow Bay is proposing to remove 4,753,000 cubic yards of dirt during construction. Approximately 1,685,000 cubic yards of fill will be needed to replace the dirt removed. Tr. at 1640. One of the conditions placed on the Yarrow Bay development is that the dirt removed must be used as fill. Consequently, trucks will presumably not be used to export the entire 4.7 million cubic yards of dirt. Thus, approximately 3,680,000 cubic yards of dirt would have to be removed from the site. This is equivalent to approximately 153,000 truckloads of material being exported. If ten truckloads are removed per hour, eight hours per day, five days per week, that would be 400 truckloads a week for about 7.35 years. Tr. at 1640. Exhibit 3-12 states that dump trucks operate at 82–94 dBA 50 feet from the source and 76–88 dBA 100 feet from the source.

9. Both FEISs also identified possible noise mitigation measures, including limiting the hours of construction, employing quieter tools, and locating equipment as far as possible from residences, and turning equipment off while not in use. Lawson Hills FEIS & Villages FEIS, p. 3-30. The MPD Rebuttal package, dated March 22, 2010, also states that the Applicant has agreed to implement a noise reduction program and to accept cessation of construction activities as a potential penalty if the best management practices mitigation measures identified in the EIS are not followed.

10. In addition to the foregoing, Appendix C provided background information regarding the decibel scale, with common examples to illustrate how load a certain decibel level may sound to a normal recipient. Appendix C also includes the ranges of decibels at which hearing loss and other physiological effects may occur due to sustained or long-term exposure to noise. Appendix C, Technical Memorandum dated November 16, 2009 from Susan Graham to City of Black Diamond.

11. Appendix C also identified the five locations where sound level measurements (SLMs) were taken to establish the base line or existing environmental noise level along SE Auburn-Black Diamond Road/Roberts Drive. Mr. Steffel submitted a Declaration with the Applicants' Rebuttal to Additional Public Testimony also indicating that the SLMs were taken after a traffic detour on SR 169 was discontinued to ensure that unusual traffic conditions were not present to influence the findings of the noise analysis.

12. At least one member of each household referenced on page 3-29 of the Villages FEIS suffers from medical conditions which may be exacerbated by the construction noise. Harp Appeal of the Villages FEIS, pp. 8-9.

13. The Harps' appeal mentions only three residences that are specially affected by the impacts of construction noise. According to the Harps, their residence is located within 35 feet of the Villages main property.

Conclusions of Law:

1. The FEIS and its Technical Appendices reasonably disclose, discuss, and substantiate the loudness of construction noise that may be attributable to the proposed development. Exhibit 3-12 of the Villages and Lawson Hills FEISs includes a table outlining the decibels to be expected from various construction activities, including clearing, grading, paving, pouring foundations, building construction, and finishing according to distance from the source. In addition, Technical Appendix 6 described the decibel system such that a lay decision maker, with no acoustical engineering background, could determine the potential volume of

construction noise. Appendix C, Technical Memorandum dated November 16, 2009 from Susan Graham to City of Black Diamond.

2. Furthermore, both Mr. Lilly and Mr. Steffel agree that the passage in the FEISs referenced in Finding of Fact NO. 6, identifying a possible decibel level of 90 dBA during construction, referred to the Harp property specifically. Therefore, there should be no confusion regarding site-specific potential noise impacts with respect to the Harp property. The possible 90 dBA level was adequately disclosed in the FEIS such that both experts, and even the Harps themselves, identified the reference. Lawson Hills FEIS & Villages FEIS, p. 3-29; Harp Appeal of the Villages FEIS, pp. 8-9.

3. The Applicant proved that the existing noise levels in the FEIS were sufficiently accurate. Mr. Steffel's Declaration stated that the SLMs were measured when the traffic detour would not compromise their accuracy. Though the Appellants indicated in their appeal that seasonal or mine traffic also contributed to the SLMs' overstatement of the existing traffic noise levels, the Appellants have not submitted any evidence in the record demonstrating the extent to which these factors contributed to this overstatement. Consequently, the SLMs were adequately disclosed and substantiated for purposes of the FEISs.

4. The FEIS and its Technical Appendices do not adequately disclose or discuss the duration of the construction noise impacts. Mr. Lilly testified that there is no information in the record disclosing the duration of the noise generated by construction, and a reading of the FEIS and accompanying Appendices confirms this testimony. Tr. at 795-96. While a decision maker could infer the loudness of a particular construction activity based upon the table in Exhibit 3-12, he could not assess the overall impact upon surrounding and adjacent property owners as construction progresses for fifteen years. With a more moderate sized project, duration would not be a concern since construction would cease within a relatively short period of time. That is not the case for the MPDs, where construction activities could go on as long as 15 years. The Examiner recognizes that the 90 dBA clearing activities will probably be of short duration, since there are only so many trees adjacent to the properties of the SEPA Appellants. However, truck traffic, as testified by Mr. Hanson (see Finding of Fact No. 8 above) could involve over 150,000 trips over the 15 year construction period. As noted previously dump trucks exceed 90 dBA for receivers within 50 feet. The construction noise exemptions in the noise standards adopted by DOE and other agencies do not adequately address construction noise impacts associated with the scale and construction duration of the MPD proposals. As amply demonstrated in the testimony and FEIS, long term exposure to high noise levels can lead to health problems. The duration of construction noise impacts is a significant impact that has not been adequately addressed in the EIS.

5. It is reasonable to require that the Applicants identify with specificity the decibel levels that could be heard by a resident on each property that could

reasonably be subject to unhealthy noise levels due to construction. Though an EIS is not intended to be a compendium of every conceivable effect of a proposed project, it is reasonable to require such a site-specific analysis for properties where noise levels reasonably could reach unhealthy levels -- continuous exposure above 70 dBA, as identified in Appendix C, Technical Memorandum on Noise (November 16, 2009). *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 641, 860 P.2d 390 (1993).

6. Although the TV FEIS does not adequately address noise impacts upon the Harp and potentially the Proctor property, this does not render the entire FEIS inadequate. The noise appeal was limited to impacts upon the three residences identified in Finding of Fact No. 1. Mitigation and further analysis of noise impacts upon those properties can be handled under the MPD conditions of approval without having any substantial impact upon the noise analysis conducted in the EIS. Further, the information in the FEIS was sufficient to notify the decision maker that noise impacts could be severe for some property owners, such as the Harps and Ms. Proctor.

C. Transportation

Findings of Fact:

1. Several witnesses testified regarding transportation impacts. Witnesses for the SEPA Appellants included:

a. Mr. Ramin Pazooki, Local Agency and Development Services Manager, Washington State Department of Transportation,

b, Mr. Matthew Nolan, Traffic Engineer, King County Department of Transportation,

c. Dr. Natarajan Janarthanan, Transportation Planning Engineer, the consulting firm Fehr and Peers, and

d. Mr. Ross Tilghman, Principle, the consulting firm Tilghman Transportation Planning.

Witnesses for the City included John Perlic, Transportation Division Manager, the consulting firm Parametrix, and Steve Pilcher, SEPA Responsible Official, City of Black Diamond.

Each of these witnesses is well-qualified and highly credible.

2. In addition to the expert testimony, several SEPA Appellants and lay witnesses also testified regarding transportation issues during the EIS portion of the

hearing. These included SEPA Appellant Judith Carrier and local residents Robert Taeschner, Susan Ball and Lori Seaman.

3. During the Master Planned Development public hearings, information relevant to the transportation portion of the EIS was introduced. Information with bearing on the EIS decision criteria is considered herein.

4. The City hired the third party consulting firm Parametrix to produce the environmental impact statement review of transportation impacts.

5. Parametrix employed an unusually extensive scoping process to gather input from the stakeholders and design the methodology, size and parameters of the study area. King County, Washington Department of Transportation, and SEPA responsible officials and transportation professionals from neighboring jurisdictions were invited to participate. Representatives from Maple Valley, Covington, Auburn and Washington Department of Transportation participated. Participants provided input and concurred with the size of the study area, scope of the review, intersections to be studied, and the broad methodology and assumptions of the analysis including trip generation, distribution and assignment. At these scoping meetings, Parametrix supplied preliminary data on trip distribution and project traffic Tr. pages 1,487-1,493.

6. Significant transportation related issues raised during the SEPA EIS hearing and MPD hearings included:

a. The choice of transportation demand model used;

b. Methodological assumptions including the background traffic projections, the analysis of queue lengths from intersections and cycle timing, the choice of projected peak hour factor, the internal trip capture rate, the analysis of mode split and others;

c. Impacts to roads within the City of Black Diamond including Railroad Avenue;

d. Safety issues and impacts to area rural roads;

e. The level of detail and type of information presented in the EIS;

f. The determination of appropriate impacts and mitigation measures; and

g. The timing of mitigation and the assignment of financial responsibility for those impacts.

7. In preparing the transportation analysis, Parametrix used two models – the Puget Sound Regional Council demand model and a modified version of the City of Black Diamond's transportation model. The City of Maple Valley's representative Mr. Natarajan Janarthanan testified that because the PSRC model is regional in nature, the use of the PSRC regional model was inappropriate for the purposes of determining local impacts and mitigation due to the lack of local validation and the coarse structure of the model with regard to the size of transportation analysis zones. Exhibit 15, Janarthanan First Declaration, pages 10-13 and Exhibit 67, Janarthanan Second Declaration pages 1-2. Dr. Janarthanan noted the PSRC model was created to identify systems level impacts at freeways and major arterial networks and is more fully developed in some parts of the region than others. He stated the unmodified PSRC model does not contain a level of detail sufficient to be appropriate for measuring the local development impact of analysis for these projects. He further noted the PSRC model is not validated for use in this region. Exhibit 15, Janarthanan First Declaration, page 11. Mr. Perlic agreed Parametrix had not re-validated the model for use in this area Tr. page 1,582.

Dr. Janarthanan suggested the appropriate model to use would be the City of Maple Valley's model because it has been validated recently and contains fine grained information for the communities of Black Diamond, Covington, Kent, Maple Valley and Auburn. Exhibit 15, Janarthanan First Declaration pages 17, and 23-25. Mr. Perlic testified the City of Maple Valley model, being a local model would not be sufficient to determine regional impacts. Mr. Perlic also noted the City of Maple Valley model would be inaccurate for trips going south to Enumclaw because of the gross assumptions about the external zones. Perlic Declaration page 16. Janarthanan testified that the PSRC and Black Diamond models together are not capable of accurately estimating the impact on Maple Valley. Exhibit 15, Janarthanan First Declaration page 17. Dr. Janarthanan also testified he would rather see the analysis use one single model to analyze all the impacts within the study area Tr. page 1,438. The PRSC model is superior for determining regional impacts and does provide high level impacts analysis data. The Maple Valley model provides a better picture of the very localized impacts of the projects.

8. In analyzing increase in traffic volume, Parametrix assumed a 1.5% growth rate in background traffic over the next 15 years, based on 5-10 years of traffic counts and predictions from the PSRC model. Tr. page 1,494. Dr. Janarthanan testified that due to the expected length of build out of the project and the variability of growth over a long time frame, they would have used land use models to estimate future growth rather than recent growth trends. Exhibit 15, Janarthanan First Declaration pages 9. Dr. Janarthanan testified that in the case when the future analysis year is more than five to six years beyond the current year, one should not simply use a historical annual growth rate to estimate the background growth. It would be advisable to use a travel demand model. Exhibit 15, Janarthanan First

Declaration page 8. Dr. Janarthanan agreed that the model used by Parametrix would provide a conservative analysis with respect to total future traffic by overstating the need for future infrastructure improvements. However, by estimating a higher number of total trips, this method would also reduce the pro-rata contribution from the developments and would influence both the calculation of impacts and necessary mitigation measures with respect to the development. The calculation advocated by Dr. Janarthanan would result in higher contribution by the Applicant toward mitigation projects in Maple Valley Exhibit 15, Janarthanan First Declaration pages 23-25.

9. The FEIS did not include a detailed analysis of potential queue lengths resulting from increased traffic. Mr. Tilghman testified that long queues at intersections posed a safety hazard from motorists coming upon an unexpected back up due to queues and that queues from adjacent intersections overlapping might cause gridlock. Tr. page 594-600. Mr. Pazooki testified that WSDOT provided a standard request as part of the DEIS a queue analysis and an analysis of volume over capacity at individual intersection legs as part of an EIS. Tr. page 1,444-1,445. Mr. Perlic testified that queue analyses are more appropriately done at the project level, because the determination of whether there is a significant adverse impact analysis will occur in conjunction with construction, rather than trying to guess what will happen 15 years from now. A queue analyses at the project level will allow consideration of signal timing, actual volumes, intersection design, and will more accurately predict what the specific mitigation needs would be, such as whether a left turn lane is needed to be added, and the necessary length of that left turn lane. Tr. pages 1,472-1,512. Mr. Pazooki stated WSDOT felt this information was needed now rather than later in the MPD process. Tr. page 1,447.

10. The FEIS did not address individual turning movement failures at the various "legs" of each intersection. The FEIS concluded that all proposed alternatives would result in increased traffic volumes and delays, some resulting in failing levels of service. The Transportation Technical Report analyzed individual turning movements, but the FEIS itself only addressed failing intersections. Appellants assert that while concurrency regulations only require analysis of delay averages for the entire intersection, a full analysis should have been done addressing legs of each intersection to determine impacts of individual turning movements. Tr. pages 1,443. Both Mr. Perlic and Mr. Tilghman testified that it is standard practice to analyze the entire intersection because mitigation is tied to failure of the whole intersection. Tr. pages 1,527 and 607. Mr. Pazooki testified that WSDOT requested information about individual legs of intersections and that that information was a standard EIS item for inclusion. Tr. pages 1,444-1,447.

11. The peak hour factor measures the variability of traffic flow within that particular hour. The peak hour factor is the total hour's volume divided by the peak 15-minute volume times four. The more aberrant any given 15-minute period is, the smaller that ratio becomes, indicating a greater intensity of traffic due to delays.

The lower the peak hour factor, the lower the level of service rating. In urban and near-urban situations, peak-hour ratios are frequently about 0.85 to 0.94. A factor approaching 1.0 indicates either wide open traffic conditions with no delays and an absolutely uniform flow, or severe congestion where cars are unable to move. As volumes increase, the factor will have an ever greater influence and may result in a lowering of level of service rating. When transportation impacts are analyzed as part of an FEIS, an increased peak hour factor is applied to reflect build-out or increased traffic over a particular horizon period. According to Mr. Perlic's Declaration, a peak hour factor default value of 0.92 is reasonable when there are greater than 1,000 vehicles expected to enter an intersection while a more conservative peak hour factor below 0.90 is likely to occur when entering volumes are lower than 1,000 vehicles. Perlic Declaration, Attachment C, page 49, and paragraph 3.

12. At dispute is the proper increased peak hour factor to apply. Parametrix applied a peak hour factor of 0.97, on the premise that 85% of the 39 intersections addressed in the FEIS had peak hour factors of 0.92 or more, and an adjustment of 0.05 would be warranted to reflect the reality of additional congestion and volumes in traffic projected to occur in a 15- to 20-year period. Tr. pages 1,529-1,524. The Appellants argue that a peak hour factor of 0.97 is too high, and artificially improves conditions, resulting in fewer failing intersections. Tr. pages 584-587. The Highway Capacity Manual, on which the level of service procedures are based, recommends a fault value of 0.92. Perlic Declaration, Attachment C, page 49. A recent National Cooperative Highway Research Program report that looked at a variety of analysis factors and determined that the 0.92 peak-hour factor is a reasonable assumption to make. Perlic Declaration, Attachment D, page 14. While Mr. Tilghman would not rule out ever using a peak hour factor of 0.97, he said it was extremely rare. Tr. page 585-587.

13. The internal trip capture rate is a measure of the number of trips that would be generated by the project and stay within the project rather than access the roadway system. An example of this would be a resident who travels to work at an office site within the project. Mr. Perlic testified Parametrix had used the Institute of Traffic Engineers manual to determine internal capture. Perlic Declaration, Attachment C, page 7. He testified and Mr. Nolan of King County Tr. page 520-523 agreed this is the standard method for determining trip generation. In the City's comments to the DEIS, Maple Valley expressed concern that the internal trip capture rate would be too low and understate impacts from the project. Matt Nolan from King County testified the County was concerned the rate was overly optimistic and requested the analysis include studies of trip capture rates from recent, local master planned developments including Snoqualmie Ridge, Redmond Ridge, Issaquah Highlands and others. Tr. page 520-523.

14. The FEIS did not identify safety concerns as a probable significant adverse impact. Mr. Nolan testified King County was concerned about safety on the rural roads including Southeast Green Valley Road. Tr. 389. Mr. Nolan identified

concerns including safety issues and issues related to the physical geometry of the roads, problems with site distances, and curves in the roads. Tr. 427. Mr. Nolan further testified that he was not aware of any piece of the Draft Environmental Impact Statement or the Final Environmental Impact Statement that specifically addresses potential safety issues related to the increased volumes on the rural unincorporated King County roads. Tr. 428.

Ms. Carrier introduced the Department of Transportation accident history detail report, showing reported collisions that occurred on Southeast Green Valley Road from Auburn/Black Diamond Road to State Route 169, January 1, 2001 through October 31, 2009 Exhibit IJ. Mr. Clifford introduced an updated version of the report, which includes details of all reported accidents in that area from 2001 through 2009. Exhibit H22. The Department of Transportation accident history detail report included a period during 2008, during which traffic volumes increased substantially due to a detour resulting from a bridge closure. Ms. Carrier also raises additionally concerns regarding the failure of the FEIS to analyze an additional eastern outlet to SR-169 from the Villages. She stated that many of the proposed projects are not going to be funded, and that there will be no highway capacity improvements for a very long time on SR 169. Without these projects, the existing roads will simply not be safe enough for increased travel, nor will they be able to maintain the necessary levels of service regarding traffic. Tr. pages 199 & 205.

Mr. Perlic testified that he would have expected the number of accidents to increase as traffic volumes increase in conjunction with the project. In spite of the increased traffic during that period, the number of accidents did not increase from the average for this nine-year reported period. Tr. pages 1,541-1,543.

Mr. Perlic stated that in his traffic analysis, he found no high incident intersections; the accidents in the study area were random and not tied to any particular hazards on the roads. Mr. Perlic noted while some of the safety impacts are mitigated by the improvements called for in the FEIS, the randomness of the accidents makes it difficult to predict and impose more specific mitigation that would decrease the risk. He further testified there is no known way to analyze safety impacts except to evaluate the particular configuration of a high-accident location. Tr. pages 1,541 - 1,543.

15. The FEIS addressed levels of service and included a reasonable discussion of the impacts resulting from increased traffic volumes and decreased levels of service. The FEIS generally describes mitigation measures in general and in more extensive terms in the body and technical appendices. The Applicant has also proposed a monitoring plan and a mid-point review condition to analyze transportation impacts and ensure the mitigation measures are effective. The mitigation measures proposed by the FEIS did not discuss whether funding exists to implement the measures, or whether such measures are feasible. Forty-six intersections were identified for review in the scoping process, an unprecedented

number for a non-project FEIS. In accordance with standard practice and the City of Black Diamond code, entire intersections (rather than portions thereof) were studied at PM peak hours, to address the most congested time of day. When the levels of service become unacceptable, mitigation is identified to reduce delays and return to acceptable levels of service. Additional review and potential additional mitigation will be done in conjunction with specific projects. Appellants also argue that the FEIS analysis should have included a review of other times, such as morning commutes, in addition to the PM peak hour analysis. (Exhibit 211, Janarthanan Third Disclosure, page 10. Mr. Perlic explained that it is customary to use the highest travel hour so mitigation is imposed for the worst-case traffic scenarios. Perlic Declaration, page 24. Dr. Janarthanan testified that a full disclosure of impacts would indicate failing intersections during the AM peak hour as well Exhibit 211, Janarthanan Third Disclosure, page 10.

The FEIS did not include an analysis or estimate of anticipated increases in travel times. The Appellants assert that the FEIS should have included a discussion of how the projects would impact travel times, arguing that such a discussion would be more meaningful to the decision-makers than LOS analyses. Tr. page 594. Mr. Perlic testified that travel time analyses are not typically provided in a programmatic FEIS. Tr. page 2,467-2,468.

16. It is anticipated that traffic on the Green Valley Road will increase by as much as 300 – 400%. Tr. page 476. Green Valley Road currently has very low traffic volumes, and the anticipated increase in traffic volumes resulting from the project will not exceed Green Valley Road's capacity. Testimony from Mr. Perlic indicated that intersections along Green Valley Road can handle the projected increase in traffic. Tr. pages 476-478. Green Valley Road has been designated under King County's Historic Heritage Corridor. It is a historical, aesthetic and recreational resource of the City. The anticipated increases in traffic on Green Valley Road will most likely impact the rural nature of the road. Tr. page 388-389. SEPA's required environmental review must include aesthetics, recreation and historic preservation. See WAC 197-11-448(2)(b)(iv)-(vi). Testimony was also presented that bicyclists and pedestrians may also face safety hazards, especially on Green Valley Road. Tr. 611, page 466. The FEIS does not address these impacts.

Green Valley Road also is a major concern of Ms. Carrier. She states that it has limited or no roadway shoulders, has trees and fences in very near proximity to the roadway, and very curvilinear alignment. Additionally, Green Valley Road has a high number of large animals that regularly cross the road, and increased traffic on the road creates a higher likelihood of accidents and also threatens the general livelihood of the animals in regards to safety and habitat. There is also a high volume of bicyclists on the road, as well as hikers, joggers, tubers, swimmers, outdoor groups, and fishermen using the shoulder, and only one-tenth of a mile of legal passing zone. Tr. pages 209-212. In addition to safety concerns on Green Valley Road, Ms. Carrier is also concerned about its historic and aesthetic qualities. It is a

designated Heritage Corridor, and goes back to 1884. There are also many historical homes and sites, as well as an agricultural district and farmland, which King County has designated as a significant area in need of protection. The farm areas have their own safety issues regarding farm equipment crossing the road. Additional traffic on the road will require mitigation factors that would disrupt the nature of the historic and agricultural areas to an irreversible degree. Tr. pages 213-215.

17. The City's Comprehensive Plan designates Railroad Avenue as a collector road, with a level designation of C, and whose purpose is to collect and distribute traffic between local roads and arterial system. Mr. Perlic testified that Railroad Avenue has sufficient capacity to handle projected increases in traffic. Tr. pages 1,535-1,536. Railroad Avenue is part of the City's Old Town historic district overlay. The Comprehensive Plan policies state that the historical character "should be retained and enhanced, and this area should become the focus of tourist and specialized retail activities." (Black Diamond Comprehensive Plan, *Commercial and Mixed Use Development Policies* Old Town Mixed Use.) The Comprehensive Plan's objectives and policies look to "Maintain those historical qualities in the environment that bring value to the community." (Black Diamond Comprehensive Plan, 5.6.8. Historic Preservation Objective, Policies and Concept Historic Preservation Objective and Policies, Objective LU-7). The Appellants are concerned that increased traffic will destroy the historical character of Railroad Avenue. Tr. pages 1,015-1,016. However, Mr. Perlic named several other roads in the area, such as the main roads through North Bend and Snoqualmie, with historical characteristics similar to Railroad Avenue that have been able to retain their rural character in spite of development and increases in traffic. Mr. Tilghman testified the specific section of Railroad Avenue is being reconfigured to have head-in parking and that under the City's design standards the volume for a collector assumes there is no parking lane. These are two very different scenarios here. Tr. 1,015. Mr. Tilghman also noted that despite the road's designation, it functions like a local access street due to the head-in parking and is therefore, not functionally capable of safely handling the proposed project traffic. Tr. Pages 1,015-1,016.

18. Judith Carrier, one of the SEPA Appellants, has raised concerns that the TV FEIS did not adequately address and disclose the environmental impacts arising from the potential for increased traffic along Plass Road/257th Ave. SE. Tr. 201-222; 2269-2276. Plass Road can serve as a bypass to traffic on SR 169 through a connection between SR 169 and Green Valley Road. It connects Green Valley Road to n alternate route for persons travelling to SR 169 from the Villages. John Perlic testified that there is no mention of Plass Road within the EIS. Tr. 2543. Mr. Perlic stated that it is possible that some small portion of traffic may reroute onto Plass Road in order to avoid increased traffic on surrounding roads, but that no studies have been done to look into the matter. Vol. VIII pgs. 2545-2546. Mr. Perlic states that he does not believe a reroute is likely due to the current state of Plass Road, which is just gravel in parts, has potholes, and can be travelled at only 20 miles per hour; whereas SR169 is in much better condition, and although it may be more congested, the posted

speed is 50 miles per hour. Tr. 2702 & 2707. Mr. Perlic points out that even if a small number of drivers do choose to use Plass Road as an alternative that will not result in a probable significant adverse impact. Tr. 2702. Finally, Mr. Perlic stated that a further reason Plass Road is not a feasible alternative route is due its absence from the Comprehensive Plan list for road improvements, which results in the road remaining in its current condition. Tr. 2737. On behalf of the Applicant, Nancy Rogers states that the Applicant has no intention of using Plass Road and would agree to vacate a portion of the road to assure no use if there is support from Plass Road residents, the City of Black Diamond and King County Applicant's Rebuttal to Additional Public Testimony, pg. 7; Applicants' Closing Brief in Support of EIS Adequacy, pg. 35.

19. The FEIS contains no discussion of the traffic impacts posed by construction of the proposed projects. It is clear that the many years of construction arising out of the extensive development proposed by applicant will result in ongoing construction traffic impacts.

20. The FEIS did not go into great detail with regards to Alternatives 3 and 4; it merely noted the percentage increase posed by each alternative.

21. Jeff Dixon, Principle Planner, City of Auburn testified that the analysis does not adequately depict mode split and does not characterize the impacts of development on the Auburn Regional Transit Station's parking garage or overflow parking onto adjacent city streets Exhibit 16.

Conclusions of Law:

1. Although many facets of the transportation analysis could have been better, the choices made by Parametrix are all within the parameters of reasonably justified professional judgment, especially given the substantial weight that must be given to the SEPA Responsible Official's determination that the analysis is adequate. The FEIS contains a reasonably thorough discussion of significant adverse transportation impacts of the proposed project at the programmatic level of analysis. However, the use of a regional model to project local traffic impacts, the divergence in the effect of modeling assumptions, along with concern related to the effect of the choice of models on potential impacts and mitigation will lead the Hearing Examiner to recommend additional mitigation measures based on the outcome of this subsequent study in the MPD.

2. While the FEIS did not identify safety concerns as a probable significant adverse impact, the Appellants did not present evidence that these issues could be adequately addressed at this higher level review. It is reasonable to conclude that decision-makers would recognize that vehicle accidents will increase proportionately with increased traffic volumes.

3. It was not necessary that the FEIS discuss the anticipated increases in travel times resulting from increased traffic. The FEIS addressed levels of service and contained a reasonable discussion of the impacts resulting from increased traffic volumes and decreased levels of service. The LOS analysis is the more customary manner to address traffic issues. The Growth Management Act requires an LOS analysis to gauge the performance of local transportation systems. RCW 36.70A.070(6)(a)(iii)(B). City and County elected officials deal with level of service on a regular basis in their review of planning documents required by the Growth Management Act and their review of land use applications. Mitigation is based on level of service; thus a discussion of LOS is more meaningful than increased travel times. Mitigation is shown when the levels of service become unacceptable. It is reasonable to conclude that decision-makers are familiar with LOS analysis; additional analysis of anticipated increases in travel time was not necessary. This information was sufficient to inform the City of the environmental impacts associated with making a reasoned decision regarding MPD approval, and allow its officials to make reasoned decision.

4. Use of the PM peak hour analysis was sufficient to establish necessary mitigation for traffic increases. While Appellants would have the FEIS address other times, including AM peak hours, as Mr. Perlic testified it is customary to use the highest travel hour so mitigation is imposed for the worst-case traffic scenarios. The FEIS is not intended to be a compendium of every conceivable effect or alternative. The information presented was sufficient to enable the decision-makers to understand the effects of the traffic. Moreover, Appellants have not met their burden of showing evidence of an impact not addressed.

5. Analysis of whole intersection failure was sufficient to establish necessary mitigation. The City's LOS standard for intersections applies to the whole intersection, and Mr. Perlic and Mr. Tilghman both testified that it is standard practice to analyze the entire intersection because mitigation is tied to failure of whole intersection. While Appellants would have the FEIS also examine the various legs of each intersection, such detail is inappropriate for the FEIS itself; this analysis is included in the Transportation Technical Report. Analysis of the LOS at intersections contained a reasonably thorough discussion of significant aspects of probable environmental consequences

6. Green Valley Road contains aesthetic, recreation and historic elements that are not addressed in the FEIS. While Green Valley Road's designation under King County's Historic Heritage Corridor program has no regulatory significance, an environmental review under SEPA must include aesthetics, recreation and historic preservation. See WAC 197-11-448(2)(b)(iv)-(vi). King County's designation supports the conclusion that Green Valley Road is an aesthetic, recreational and historic resource. However, it is recognized that this is ultimately a subjective determination. As Mr. Perlic testified, analyzing impacts to "rural character" would be speculative and subjective. Consequently, it would not be reasonable to find the

EIS inadequate on impacts that cannot be objectively assessed and could be subject to reasonable differences of interpretation. However, the Examiner will recommend added mitigation in MPD to control traffic on Green Valley Road, potentially including features such as traffic calming devices and bicycle lanes.

7. Railroad Avenue is characterized in the City's Comprehensive Plan as a collector arterial. The Appellants raised issues regarding the ability of Railroad Avenue to safely carry the additional traffic due to the projects given its existing physical function as a head-in parking local access street. The Appellants suggested this road is misclassified giving the impression it can handle more traffic than it can. While there is concern regarding the safety, capacity and historical aspects of Railroad Avenue that are designated for preservation by the City's Comprehensive Plan, testimony indicated that the historic nature could be retained in spite of increased traffic impacts, as had been done in North Bend and Snoqualmie. Moreover, analyzing impacts to "rural character" would be speculative and subjective. The EIS is not responsible for potential errors in the City's roadway classification system. As labeled, Railroad Avenue is a collector arterial, a designation that suggests the road is able to carry a greater traffic capacity than is proposed from the projects. Appellants have not met their burden of showing evidence of an impact that could be addressed in the FEIS.

8. Although Mr. Perlic testified that it is unlikely that there will be much traffic generated on Plass Road by the MPD projects, it is very possible this could occur if congestion becomes a problem on SR 169. As noted in the Standard of Review section of this decision, an EIS is not required to address every conceivable impact of a project. The off-chance that SR 169 will become congested enough to motivate drivers to use Plass Road to by-pass traffic probably falls under the "every conceivable" category and does not affect the adequacy of the EIS. However, Ms. Carrier and the Applicant have proposed some reasonable solutions to this problem in case Ms. Carrier's fears do materialize. For this reason, the Examiner will recommend some MPD conditions along the lines recommended by the Applicant and Ms. Carrier.

9. While the FEIS gave short shrift to Alternatives 3 and 4, merely noting the percentage increase posed by each alternative, failure to go into more detail is not fatal to the validity of the FEIS. The SEPA Responsible Official made a determination that the FEIS adequate. The FEIS provided sufficient information to enable the decision-makers to making a reasoned choice among alternatives. The issues that Appellants claim should have been addressed in more detail with regard to each alternative, such as safety, hours of commute analyzed, character and travel times are discussed elsewhere herein, and were not necessary for the validity of the FEIS.

10. It was not necessary that the FEIS address the feasibility of implementing mitigation measures. SEPA requires the FEIS to discuss reasonable

mitigation measures that would significantly mitigate impacts, and indicate what the intended environmental benefits of mitigation measures are for significant impacts. WAC 197-11-440. The FEIS *may* discuss the economic practicability of mitigation measures *if* there is concern about whether a mitigation measure is capable of being accomplished. Id. It *need not* analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, and those measures will not be subsequently analyzed under SEPA. Id. In this case, the measures will be subsequently analyzed, and it would be premature to attempt to analyze the feasibility of implementation of mitigation measures at this juncture. Such an analysis is of limited use given the multitude of other factors that could derail the project. Cost-sharing arrangements may be addressed by development agreements entered into between the developer and City.

These issues are more appropriately addressed later as part of the review of the specific project pieces when the City has the permitting authority to condition the project on implementation of mitigation measures. If level of service impacts mandate mitigation, any development can only proceed if mitigation is actually implemented. While SEPA does not require the FEIS to discuss mitigation measures in detail in all instances, mitigation but must be reasonable and capable of being accomplished. If mitigation is determined to be unfeasible at the time the project will be built, then GMA concurrency will prevent the development from proceeding. Consequently, any feasibility analysis at this point would only speculate on whether the development will proceed to completion if approved.

11. It was not necessary for the FEIS to analyze queue lengths. Review of queue lengths is more appropriately done at the project level, rather than the programmatic stage. Such analysis should be done when looking at specific improvements in the construction phase, so that determinations of significant adverse impacts can occur in conjunction with construction, rather than trying to guess what will happen 15 years from now. The FEIS contained a reasonably thorough discussion to inform the City of the environmental impacts of traffic while recognizing that more detailed information on environmental impacts will be available with subsequent project proposals. However, the Hearing Examiner will recommend additional conditions for this topic as part of the MPD.

12. Application of the 0.97 peak hour factor does not make the FEIS inadequate. While there was testimony that a 0.92 peak hour factor is the accepted standard, applying that factor to an intersection already at 0.92 or higher would be superfluous, and a higher factor would be appropriate. The City should have done an individual analysis of each intersection under consideration, and applied a factor appropriate to that intersection. However, the application of the 0.97 peak hour factor does not fall beyond the range of professional judgment, and is not clearly erroneous; substantial deference must be given to substantial deference the SEPA Responsible Official's determination that FEIS is adequate. Application of a higher than necessary peak hour factor is not a conservative analysis with respect to the project's

pro-rata impacts. The Hearing Examiner will recommend additional conditions for this topic as part of the MPD.

13. Parametrix's use of a 1.5% growth rate in background traffic based on recent growth trends was within the bounds of professional judgment. The background rate of growth is subject to change and a straight line projection based on historical trends may under or overstate total background traffic and therefore affect the calculated share of pro-rata project impacts. A high background growth is conservative with respect to total impacts in that it will increase apparent impacts and required mitigation. A higher rate is not conservative with respect to the project's pro-rata contribution to those impacts because higher background traffic figures would reduce the project's perceived pro-rata contribution to the impact and reduce the project's share of mitigation proportionately to the increase in background traffic assumptions. Although the Applicant's projections may not be the most accurate methodology, they are reasonable, within the bounds of professional judgment and suffice under the substantial weight standard. Appellants did not meet their burden of showing the calculation was erroneous or why the SEPA responsible official's judgment should be overruled. However, the Hearing Examiner will recommend additional conditions for this topic as part of the MPD.

14. It is clear that the many years of construction arising out of the extensive development proposed by applicant will result in ongoing construction traffic impacts. The FEIS did not address the traffic impacts posed by construction of the proposed projects. However, mitigation of such impacts is more appropriately handled at each phase of the project. There is no evidence that addressing these impacts at this stage of environmental review would result in a more effective mitigation. SEPA allows the City to determine the appropriate scope and level of detail of environmental review to coincide with meaningful points in their planning and decision-making processes, and to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready. WAC 197-11-060(5). Construction impacts are such issues not ripe for consideration. The City's Engineering and Construction Standards will require a traffic control plan that will address the specific impacts prior to commencement of construction.

15. As is evident from the findings above, the EIS traffic analysis is adequate but in several instances there are more accurate methodologies and assumptions available to ensure more complete mitigation. The Examiner will recommend conditions on the MPD that incorporate the better methodologies and assumptions.

D. Faulty Audio Recording of DEIS Hearing

Findings of Fact:

1. Page 3 of the Gauthier Appeal Statement, p. 5 of the Clifford Appeal Statement, p. 2 of the Wheeler Appeal Statement, and p. 2 of the Harp Appeal Statement all express concern over the poor audio recording of the hearing on the Draft EIS for both MPD projects.

2. A transcription of the audio recording identifies over 300 "inaudible" gaps in the recording. *See* Transcript attached to Harp Appeal Statement. The testimony from at least one individual is completely missing from the recording.

Conclusions of Law:

1. There is no legal requirement for the recording of a hearing on a Draft EIS.

2. Procedural errors occurring during the EIS process are reviewed under the rule of reason. Where such errors are not consequential, they must be dismissed as harmless. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 637 (1993).

3. As noted in the Examiner's Order on Motions to Dismiss, Email Ex. 300, p. 10-11, the gaps in the recording are relevant to a determination of adequacy if they reveal that significant impacts presented by the citizens were not considered in the FEIS. No evidence was presented that this occurred. The record fails to establish that the audio recording had any relevance to the adequacy of the FEIS.

E. Schools

Findings of Fact:

1. Page 12 of the Clifford Appeal Statement asserts that the FEIS inadequately addresses school impacts, including the impacts caused by the construction of new schools to serve the project.

2. Mr. Clifford has raised concerns that because of the schools' location outside of the UGA, certain impacts related to school construction were not accounted for in the TV FEIS. Namely, the TV FEIS did not account for the increase in traffic in rural King County and for the effects related to an increase in impervious surfaces on nearby wells and septic systems. Tr. at 13.

3. Mike Nelson, the Superintendent of the Enumclaw School District, testified that in August 2006, the Enumclaw School District began negotiations with the City of Black Diamond and Yarrow Bay Development to develop a three-party Comprehensive School Mitigation Agreement. Tr. at 850-51.

4. According to the testimony of Mr. Nelson, the parties to the Comprehensive School Mitigation Agreement "firmed up" the location of the

elementary and middle schools identified in Finding of Fact No. 1 in April 2009 and the location of the high school in late August or early September 2009. Tr. at 878-79. These sites were not made known to the public before October 8, 2009, and Mr. Nelson gave a PowerPoint presentation at a public meeting on October 26, 2009, describing the details of the Agreement. Tr. at 852.

5. Additional public meetings were held on November 5, 2009, and November 12, 2009, at which time, a map of the location of the schools was distributed to the public. The map distributed at these public meetings depicted four schools, one elementary, two middle, and one high school to be located outside of the UGA and Black Diamond City limits. Tr. at 853-54. A middle school and elementary school will be located south of the Villages development, directly north of SE Green Valley Road. In the testimony, this site was described as the "twin school site." Another middle school has been proposed to be located to the west of the Villages, and a high school has been proposed to be located north of the Villages near Lake Sawyer. Pre-hearing Exhibit Bortleson 15.

6. The Comprehensive School Mitigation Agreement has not yet been signed by the respective parties and remains in draft form. Tr. at 527.

7. The "Summary of the Comprehensive School Mitigation Agreement," contained in Appendix K of both the Lawson Hills and the Villages TV FEIS, provides that Yarrow Bay shall convey property for school sites upon the occurrence of three events: (1) The District must secure construction financing; (2) Yarrow Bay must receive final plat approval for various stages of the development; and (3) Mr. Paul Reitenbach of the King County Department of Development and Environmental Services testified that the District would have to obtain a conditional use permit to locate the school in rural King County. See Tr. at 518. As Mr. Nelson stated, the schools will be owned and operated by the Enumclaw School District. Tr. at 889.

8. The Comprehensive School Mitigation Agreement contains provisions to locate the schools within the UGA and the City of Black Diamond in the event that King County denies conditional use permits for rural schools. Tr. at 890.

9. With respect to possible impacts on wells and septic systems, Mr. Gil Bortleson, a water chemist and a SEPA Appellant of this action (on Mr. Clifford's team), testified that building the twin school sites south of the Villages along Green Valley Road would create a "high risk" of drying out approximately ten shallow wells serving neighboring residents in rural King County. Tr. at 137. In addition, Mr. Bortelson indicated that increased runoff from the school sites would drain to the west, potentially flooding septic systems located in that area. Tr. at 144. Mr. Bortleson also expressed concern over the transport of sediments to Green River from the school sites. Mr. Bortleson has a Ph.D. in water chemistry. He has worked in the Water Resources Division of the US Geological Survey for 30 years, where he has

developed extensive experience in analyzing impacts to lakes, estuaries, streams and groundwater.

10. Mr. Bortleson did not review any site plan for the proposed school construction prior to giving his testimony and assumed that the entire twin school site, 70 acres of land, would be paved or graded, creating 70 acres of new impervious surface. Tr. at 148.

11. Mr. Bortleson was not able to give any testimony with respect to the quantity of water that currently infiltrates to the wells that would not infiltrate to the wells after the project. Tr. at 153. He also was not able to answer any question regarding the amount of surface water infiltration needed to sustain the operation of the at-risk wells. Tr. at 154.

12. With respect to the potential traffic impacts created by locating schools outside of the UGA, Mr. John Perlic, a Parametrix employee who drafted the transportation section of the TV FEIS, testified for the City of Black Diamond that when he conducted traffic analysis, the schools were considered to be located within the project site. Tr. at 1580, 2540. On March 11 during cross-examination, Mr. Perlic stated that he did not have specific site locations for schools when he conducted his trip generation analysis: "We didn't have specific site locations, but we knew generally within upper Lawson versus lower Lawson or which part of the Villages but not specific sites." Tr. at 1579. On cross-examination on March 16, however, Mr. Perlic stated that he did have particular school locations in mind, at least for the high school, though he could not recall exactly where the location was. Tr. at 2535. The Technical Appendix B to the Lawson Hills and the Villages TV FEIS also does not indicate exactly where the schools were assumed to be located for purposes of traffic analysis. Mr. Perlic did indicate, however, that the high school was located in the main Villages property for purposes of the traffic study. Tr. at 2535.

13. Mr. Perlic testified that locating the high school outside of the project site would not significantly change the traffic analysis if the same access road were to be used. Tr. at 2540-41. Mr. Perlic also stated that the location of the high school would generally only affect the AM Peak Hours analysis, which was conducted on a limited basis. AM Peak Hours analysis was conducted at only 6 intersections within the project area because traffic is heaviest during the PM Peak Hours. Tr. at 2541-42.

14. Appendix B of the TV FEIS regarding transportation appears to only examine AM Peak calculations for a total of four schools: one elementary school with 800 students in Lawson Hills, one elementary school in the Villages with 1,500 students, one middle school in the Villages with 550 students, and one high school in the Villages with 1,200 students. *See, e.g.,* Table 10, Page 3-7, Appendix B. However, Susan Graham, also employed by Parametrix, indicated that at the time the DEIS and TV FEIS were drafted, it was a known fact that the projects, if completed,

would create the demand for a total of seven schools. Tr. at 907. Ms. Graham also indicated that for purposes of the DEIS and TV FEIS, Parametrix identified the need for seven school facilities, but did not address where those schools would be located. Tr. at 936.

Conclusions of Law:

1. WAC 197-11-660(2) provides: "EISs are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures: (a) Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; *and* (b) Will not be analyzed in a subsequent environmental document prior to their implementation." (emphasis added). The new schools serve as mitigation by satisfying the demand for school facilities created by the MPDs. The testimony of Mr. Reitenbach clearly indicates that, in order for the schools to be built outside of the UGA, conditional use permits must be obtained from King County. Tr. at 518. A "subsequent environmental document," namely an environmental checklist or EIS, will be required under SEPA as part of the future process of obtaining such a permit. Accordingly, the environmental impacts of school construction in specific locations did not need to be analyzed in detail in the EIS.

2. WAC 197-11-660(2) only absolves the City from conducting a detailed analysis of the environmental impacts of schools. It still requires a general discussion. The FEIS comply with this requirement by identifying the level of service (LOS) standards for school facilities in the Enumclaw School District, calculating student generation caused by the development, identifying possible school mitigation fees to ensure that the availability of school facilities will not lag behind the demand for those facilities, and deferring to the City's MPD regulations (BDMC 18.98.080.A14), which allow school impacts to be mitigated at the time of MPD approval by the City Council through a separate agreement. The Villages and Lawson Hills TV FEIS, pp. 3-80 - 3-85. Because the City's regulations allow such a procedure, the discussion of school impacts meets the standard of WAC 197-11-660(2), requiring a general discussion of environmental impacts of mitigation measures.

3. The Appellants argue that the failure to disclose and discuss the location of schools outside of the UGA equates to a failure to address the cumulative environmental impacts of the project. The SEPA Rules require that EISs must analyze "cumulative impacts." WAC 197-11-060(4)(e); WAC 197-11-792(2)(c)(iii). A focus upon cumulative impacts early in the review process assures the most efficient design and use of infrastructure. A discussion of cumulative impacts is an appropriate part of the "general" discussion required for mitigation under WAC 197-11-660(2). While there is no definition of a "cumulative impact" in the SEPA Rules, "cumulative impacts seem to be the combined effects of the proposal along with those

of other actual or potential proposals." Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14.01[1][c][iii] (21st ed. 2009). Additional projects do not require review in an EIS for cumulative impacts if they are either substantially independent from the proposed action or are not necessary to meet the project's purpose and need. *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 380, 183 P.3d 324 (2008). Although the schools are clearly dependent upon the MPDs in the sense that they would probably not be built within the near future without them, they do have independent characteristics to the extent that environmental impacts do not build upon those of the MPD projects. An assessment of independence in this manner is consistent with the Settle conclusion that cumulative impacts are the "combined effects of the proposal" with other proposals. A focus upon impacts that build upon each other is also consistent with the goals of environmental review from a practical standpoint, since no benefits are lost by segmenting environmental review of impacts that are independent from each other.

a. The TV FEIS address the cumulative traffic impacts of the schools. According to Mr. Perlic's testimony, he assumed that all schools would be located within the project sites and inside the UGA for purposes of his traffic analysis, though the testimony is inconclusive with regard to whether Mr. Perlic conducted the traffic analysis with a particular site in mind, and if he did, where that site was located. Tr. at 1580, 2540. Nevertheless, Mr. Perlic calculated the trips that would be generated by school traffic and considered this when he evaluated the AM peak numbers at six different intersections within the project site. Tr. at 2535. The Appellants have not demonstrated that this analysis was deficient. Thus, if the schools are located within the UGA boundary, the TV FEISs, and specifically Technical Appendices B, adequately evaluated the cumulative traffic impacts that will be caused by school construction.

b. Even assuming that the schools will be located outside of the UGA boundary, which according to the testimony is not by any means certain, the Appellants have failed to sustain their burden of proving that the Applicants' discussion of cumulative impacts was inadequate. The record is devoid of evidence suggesting that aspects of the current MPD construction and planned road improvements will be rendered inadequate or that a waste of resources will occur if the planned infrastructure improvements are constructed without consideration of school impacts. Mr. Perlic stated that only AM peak traffic calculations could change if different access roads are used, specifically to access the high school. Tr. at 2541-42. However, appellants did not provide evidence suggesting which, if any, of Mr. Perlic's calculations would be rendered inadequate and how that may affect the proposed MPD construction and the associated planned road and intersection improvements.

c. The traffic impacts on rural King County are cumulative. As discussed in the traffic section of this decision, traffic generated by the MPDs will

increase traffic on Green Valley Road by 300-400%. It was further found that these anticipated increases in traffic (presumably not including school traffic) will not exceed the capacity of the road, so no road improvements are anticipated as a result of the MPDs. It would have been useful to know if the additional traffic generated by the proposed schools would exceed the capacity of Green Valley Road and trigger improvements. However, the burden is on the SEPA Appellants to provide some evidence that traffic generated from the proposed schools could exceed capacity. Since no such evidence was provided, the Examiner must conclude that traffic added by the schools would not create a significant cumulative impact.

d. The impacts identified by Gil Bortelson, the Appellants' water chemist, are not cumulative because they are independent of the MPD development. The only impacts Mr. Bortelson identified are to wells and septic systems outside of the MPD site. These impacts can be effectively evaluated when a specific proposal for school construction is submitted for permit review.

4. The general discussion of impacts of mitigation measures required by WAC 197-11-660(2) is also qualified by the limitation that this discussion does not need to include impacts that are remote and speculative. WAC 197-11-060(4)(a); WAC 197-11-782.

a. The impacts of school construction are too remote and speculative to warrant detailed environmental review in the MPD EIS. First, testimony is conflicting with respect to whether the location of the schools outside of the UGA has actually been conclusively determined and when school construction will occur. The Comprehensive School Mitigation Agreement is still in draft form, and in fact provides for measures to locate the schools within the development site if King County denies the necessary conditional use permits. Tr. at 527, 890. Furthermore, it is unknown whether the population growth will warrant the school construction at issue, when final plat approval will be granted for multiple stages of development for Lawson Hills and the Villages, and whether the necessary funding will be secured. See "Summary of the Comprehensive School Mitigation Agreement," contained in Appendix K of both the Lawson Hills and the Villages TV FEIS. As Mr. Nelson testified, these schools will not be owned and operated by Yarrow Bay. Tr. at 889. Thus, despite the fact that Mr. Nelson testified the school sites were "firmed up" by April and late August/early September of 2009, there are many conditions that have yet to occur before the schools will be built, which may take years.

b. The impacts identified by Mr. Bortleson were also speculative. Though Mr. Bortleson identified a "high risk" that surrounding wells would dry out as a result of the twin site school construction, he was unable to even identify the level of water necessary to sustain the wells and had not examined a site plan prior to giving his testimony. Tr. at 148, 154.

5. With respect to sediment impacts to Green River testified by Mr. Bortleson, the record is unclear as to whether the sediment would create significant impact or that it would add to any other sediment generated by the MPDs. Given the substantial weight that must be given to the SEPA Responsible Official, the Examiner cannot find that sediment impacts would be cumulative or significant to qualify for the general discussion required of mitigation measures.

F. Wildlife

Findings of Fact:

1. Page 14 of the Clifford Appeal Statement, p. 15 of the Wheeler Appeal Statement and p. 11 of the Harp Appeal Statement all express concern over development impacts upon wildlife.

2. Appellant Clifford has raised concerns that both FEISs were prepared without the benefit of site investigations, and that they are superficial and erroneous. Tr. at 13-14.

3. Appellants Wheeler, et. al., raised concerns that neither of the FEISs disclose the impact that the projects will have on elk herds, and do not provide adequate analysis on the effectiveness of proposed wildlife corridors. See Wheeler Post-Hearing Brief at 54.

4. Appellants Wheeler offered the testimony of Bruce Richards, a Dept. of Fish and Wildlife (DFW) employee, as their expert on wildlife. Tr. at 46.

5. Having assisted in preparing other EISs on wildlife in nearby regions and having a degree in biology, Appellant Clifford offered his own testimony as an expert on wildlife. Tr. at 164.

6. Applicant offered the testimony of Jason Knight, a wildlife biologist with Wetland Resources, as its expert on wildlife. Tr. at 2406.

7. According to the testimony of DFW employee Richards, there are elk groups at both the Villages and Lawson Hills sites. Being residential elk groups, they do not migrate in and out of this region. Mr. Richards thought that the EIS was well written, professionally done and contained a lot of information, but he also thought it did not speak to what was going to happen as a result of the projects. He felt that the EIS lacked effort in translating loss of habitat to impact on wildlife. He was adamant that any development, regardless of size, impacts wildlife and that such impacts are forever. Mr. Richards also opined that there was no way to mitigate such impacts. He did not feel that protecting a portion of the land that already serves as habitat was mitigation. He added that the corridors proposed already serves as elk habitat. He noted that elk are listed by the state as game species. He also noted that with habitat's

landscape changes, there is always the possibility that protected species, like a bald eagle, will take up residence. He felt that the EIS were deficient because they do not mention which species will survive and which will be lost despite mitigation and open spaces. He opined that elk would disburse into different areas as a result of development. He noted that band tailed pigeons migrate past the area in late summer, but neither they nor bald eagles nest at the subject sites. He also noted that there is the possibility of elk tearing down fences, invading yards and causing property damage. He added that bears do not move as a result of development and will be a problem to deal with, as will mountain lions. Finally, he noted that the EIS correctly addressed the impact of development on wildlife, which was that detrimental impact will occur. Tr. at 46-68.

8. According to testimony of Clifford, band tailed pigeons do nest in the area if one looks closely during mating season. He noted that there are a lot more species on the subject sites than those considered in the EIS. He opined that no survey was conducted for the EIS and the species listed were based on habitat wildlife profile prepared by other organizations like the DFW. He was adamant that thorough site survey should be required for an EIS. According to him, the EIS is superficial and does not address each site specifically. Tr. at 164-191.

9. According to testimony of Knight, about thirty days of site investigations were conducted in 2005, 2007 and 2008 for the EIS. He noted that the EIS contains a summary of species, however the appendix to the EIS contains a detailed list of all species considered for the EIS. He also noted that band tailed pigeons need mineral springs at their breeding site, which are not found at the subject sites. He added that no endangered or threatened species were found at the sites, which is also consistent with the findings by the DFW. He opined that development may benefit elk population because elk feed on landscape that is more likely to be present as a result of development. He also thought the contiguous corridors would provide adequate passage for wildlife. He noted that the corridors were sufficiently wide and met state guidelines. According to him, the EIS describes the impact of development on elk, discusses the impact of development on wildlife and proposes mitigation in the form of contiguous wildlife habitat corridors, road design, landscaping and open space. Finally, he added that the wildlife section of the EIS was prepared and based on findings from site investigations, records from DFW, PHS maps and knowledge acquired from similar sites in the region. Tr. at 2406-66.

10. In order to determine the types of wildlife and habitat present on the sites, a resource study was conducted, which involved multiple site investigations throughout several different months and years, in addition to research of records and documents from DFW and other agencies. Tr. at 178-180 and 2407.

11. Though a detailed catalog of species was prepared for the FEIS, the sites were not found to be habitat for any threatened, endangered or sensitive species of wildlife. Tr. at 60-61 and 2410-11.

12. The Davidson family put together a detailed journal spanning several years (since 2001) of their observations of wildlife around their home, see Exhibit H-6. Some of the wildlife they observed is not identified by the Applicant's consultant. However, the Davidson observations do not establish that any threatened, endangered or sensitive wildlife species nests or resides in the project area.

13. Appellants failed to prove that any threatened, endangered, or sensitive wildlife species are present at the sites. While the band tailed pigeons may be found during their migration, evidence presented support the findings that they do not inhabit or nest at the sites. Tr. at 60-61 and 2410-11.

14. The FEIS discloses and discusses the presence of a bald eagle nest off site near Lake Sawyer. See the Villages FEIS at 4-74.

15. The FEIS, including appendices for both projects, contains discussions of elk and other wildlife that is present at the sites, the probable impacts of the projects, and offers mitigation in the form of wildlife corridors and open space to lessen the impacts. It also acknowledges that certain detrimental impacts as a result of development are inevitable. In addition, the FEIS addresses and discusses impacts to habitat fragmentation resulting from road crossings in wildlife corridors and offers mitigation measures to minimize them. See FEIS at 4-79 through 84.

16. The width of the wildlife corridors will be between 300 and 900 feet. The King County's network biologist's minimum recommended width for wildlife corridor is 150 feet. The width is wide enough for wildlife to traverse through the corridors even in places where natural barriers such as flooded wetlands are located. Tr. at 2410-16 and 2454.

17. Even though the FEIS may have left out certain species, it is clear that those that are threatened, endangered or sensitive were considered. As noted above, the FEIS also contains discussion on impacts on elks by the projects and proposed corridors and open space. Tr. at 2410-16.

18. Contrary to Appellants' claims, evidence was presented to show that site investigations, records from DFW, PHS maps and knowledge acquired from similar sites in the region, were all utilized in preparing the EIS. Tr. at 178-180 and 2407.

Conclusions of Law Regarding Wildlife:

1. The FEIS, for both the Villages and Lawson Hills, contain a reasonably thorough discussion of probable significant adverse impacts on wildlife as a result of the proposed projects as required under SEPA's "rule of reason." Even though the FEIS may have left out certain species, it is clear that those that are

threatened, endangered or sensitive were considered. As noted in the findings of fact, the FEIS also contains discussion on impacts on elk by the projects and of proposed corridors and open space. Although Appellants would have preferred these discussions to be more extensive, SEPA does not require every conceivable impact or alternative to be considered. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993).

2. As noted in the findings of fact, wildlife inhabiting the sites was cataloged, and impacts on them and proposed mitigation measures were disclosed and discussed sufficiently in the FEIS to aid the decision maker. The projects' impacts on species not present on the sites may be considered "remote" and "speculative," and therefore the FEIS was not required to address them in order to be adequate. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993).

3. Appellants failed to prove that the FEIS was inadequately prepared. Contrary to Appellants' claims, evidence was presented to show that site investigations, records from DFW, PHS maps and knowledge acquired from similar sites in the region, were all utilized in preparing the EIS, which is consistent with requirements of "rule of reason" for preparing an EIS.

4. The width of the wildlife corridors is adequate because it is at least double the minimum recommended by the King County's network biologist, and provides sufficient space for wildlife to travel around spots where natural barriers such as wetlands are present. The FEIS contains a reasonably thorough discussion of wildlife corridors, including their design and impacts, to assist the City Council in the decision making process, and therefore is adequate under the "rule of reason."

5. Appellants failed to prove that impact on wildlife as a result of the projects was not reasonably disclosed, discussed, and substantiated by the FEIS. The FEIS recognizes that there will be an inevitable loss of wildlife habitat as the result of development of the Master Plan and the FEIS recommends mitigation measures which address the creation/preservation of open space and contiguous wildlife corridors. The discussion, disclosure, and documentation of wildlife impacts in the FEIS are reasonable and adequate. The FEIS is therefore adequate on wildlife impacts.

G. Responses to DEIS Comments

Findings of Fact:

1. In his closing brief, Mr. Bricklin asserts that the TV FEIS did not adequately respond to comments made on the DEIS. *See* Bricklin Post-Hearing Brief, p. 61-66. In this discussion, Mr. Bricklin summarizes numerous letters, including

some addressing issues that were not included in the Appeal Statements of the SEPA appellants, most notably sewer.

2. The adequacy of FEIS response to DEIS comments were not included in any of the SEPA appellant appeal statements.

3. There is nothing in the record to suggest that the City failed to address DEIS comment letters that raised significant adverse environmental impacts that were not adequately addressed in the EIS. One notable exception is the Maple Valley DEIS comment letter, p. 248-251, Appendix R, TV FEIS. Maple Valley did raise the issue of using the PRSC model for local traffic. The adequacy of the PRSC was highlighted as one of the deficiencies of the EIS in the Examiner's analysis of traffic, supra.

Conclusions of Law:

1. BDMC 18.08.210(G) provides that "no new substantive appeal issues may be raised or submitted after the close of the time period for filing of the original appeal." Consequently, the failure to respond to DEIS comments on its own is not within the scope of the appeals of this decision.

2. Although the inadequacy of TV FEIS response is not sufficient on its own to qualify for review, it can be a factor if related to an appeal issue that has been timely presented. Procedural errors occurring during the EIS process are reviewed under the rule of reason. Where such errors are not consequential, they must be dismissed as harmless. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 637 (1993). An inadequate TV FEIS response could be consequential if it reveals a failure to address a significant environmental impact that is within the scope of a properly filed appeal. A permitting agency can find itself in a much more difficult position to argue a reasonably thorough discussion if it is given notice of a significant impact through a DEIS comment and still fails to address it. During the course of this appeal the SEPA Appellants have raised the adequacy of TV FEIS responses related to issues that they have properly presented, such as transportation and Lake Sawyer water quality. *See* Bricklin Post-Hearing Brief, p. 61-62. Except for the Maple Valley comment identified in Finding of Fact No. 3, nothing in the record establishes that the DEIS comments on properly presented issues were inadequately addressed in the EIS.

3. The failure of the City to use a more localized model after hearing from Maple Valley on this issue certainly detracts from the reasonableness of its discussion, but not enough to render it inadequate. Maple Valley did, in fact, use a local model for internal traffic. Further, its transportation engineer was highly qualified, worked for the City instead of the applicant and had good reason to use the PSRC model, i.e. its accuracy in regard to regional travel.

H. Missing Technical Appendices

Findings of Fact:

1. In his post-hearing brief, Mr. Bricklin asserts that technical appendices were missing and not made available to the public. During the hearing it was readily apparent that appendices were still missing, most notably diagrams in the TV FEIS Appendix B Associated Earth Sciences technical report. In his post-hearing brief Mr. Bricklin asserts that "Triad" reports were also missing, but he did not identify in which appendix that report should have been located so the Examiner was unable to verify that fact.

Conclusion of Law:

1. Under the Rule of Reason the missing appendices would be a problem if their absence deprived the EIS of a reasonably thorough discussion of significant adverse environmental impacts. There is nothing in the record to suggest that the missing appendices materially affected the adequacy of the EIS.

I. Joint Review and Cumulative Impacts

Findings of Fact:

1. In their appeal statements Clifford, Gauthier and Wheeler assert that the Villages and Lawson Hills MPDs should have been reviewed together. They also assert that the impacts of other projects in the area should have been considered.

2. The Villages EIS and the Lawson Hills EIS contain a significant amount of cumulative impact review regarding joint impacts. Many of the impacts are assessed jointly from both projects, such as traffic, stormwater, air quality, water, sewer and schools. *See* TV FEIS Appendices; TV FEIS Chapter 5.

3. In its post-hearing brief the Applicant asserts that the Villages and the Lawson Hills MPD projects are independent from each other – that one could be built without the other. *See* Applicant Closing Brief, p. 7-10. There is no evidence to the contrary in the record. The Examiner finds that the MPDs can be built independently of each other.

4. Although the projects can be built independently of each other, their joint development is reasonably foreseeable and is not remote or speculative. The MPDs are under simultaneous permit review and have the same development time frame, completion by 2025. The public hearings for each project are almost indistinguishable. The Applicant has also taken advantage of the efficiencies of joint mitigation by basing mitigation upon joint impacts upon capital facilities such as

schools and roads. Impacts upon the water quality of Lake Sawyer are also assessed jointly from both projects[10].

Conclusions of Law:

1. WAC 197-11-060(3)(a) and -060(3)(b)(i) provide that development projects must be reviewed together under SEPA when they are "related to each other closely enough to be, in effect, a single course of action," which means the projects either (i) "cannot or will not proceed" unless the other projects "are implemented simultaneously with them" or (ii) the projects are "interdependent parts of a larger proposal that depend on the larger proposal as their justification or for their implementation." Since the MPDs can be built independently of each other, they can be subject to separate environmental review. Although joint mitigation is involved, this mitigation can be "paired down" should only one project proceed to completion.

2. An EIS must address cumulative impacts. WAC 197-11-060(4)(d)-(e). The scope of SEPA review includes "cumulative harm that results from its [the project's] contribution to existing adverse conditions or uses in the affected area." *Narrowsview Preservation A'ssn. v. City of Tacoma,* 84 Wn.2d 416, 423 (1974). Cumulative impacts apparently include the impacts of the proposal along with the impacts of other actual or potential projects Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis,* Section 14.01(2)(a). Additional projects do not require review in an EIS for cumulative impacts if they are either substantially independent from the proposed action or are not necessary to meet the project's purpose and need. *Gebbers v. Okanagan County Public Utility District No. 1,* 144 Wn. App. 371, 380 (2008). The National Environmental Policy Act, which can be used to help interpret SEPA issues, define a "cumulative impact" as "the impact from the environment which results from the incremental impact of the action when added to past, present and reasonably foreseeable future actions." *Id.*

3. The EIS must address cumulative impacts since the projects are reasonably foreseeable and take advantage of joint mitigation and environmental analysis. Cumulative analysis for the MPDs should be limited to areas of "cumulative harm" as identified in the *Narrowsview* decision, infra. As noted in Finding of Fact No. 2, the FEIS do address a wide range of cumulative impacts. There is nothing in the record to suggest that any area of cumulative harm is missing from this analysis. The Examiner concludes that the EIS adequately addresses cumulative impacts between the two MPDs.

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[10] The Applicant is not being "punished" for being proactive enough to consider joint impacts and mitigation. For the most part, the joint analysis and mitigation prepared by the Applicant is in the Applicant's interest. Both the Applicant and the public benefit from the cost savings involved in this joint review. The Applicant's self interest in joint mitigation and analysis substantiates the interdependence of the projects and the need for cumulative review.

4. Cumulative review of noise impacts is addressed in the noise section of this decision. The record does not establish any degree of dependence necessary for cumulative review of impacts of any other projects.

J. Reliance Upon Technical Appendices

Findings of Fact:

1. The SEPA Appellants have raised the issue of over-reliance upon technical appendices on several occasions. *See, e.g.* Bricklin Post-Hearing Brief, pp. 6-8. This issue was not specifically raised in any of the SEPA appeal statements, but is sufficiently linked to the adequacy of issues that were raised in the SEPA appeal statements, such as traffic and Lake Sawyer water quality.

2. The TV FEIS overall does a fairly good job in summarizing significant impacts in the main text of the document. For example, on traffic the TV FEIS identifies all intersections that will fail to meet LOS under the different EIS alternatives. LOS is a commonly used measure of transportation performance for City and County decision makers and is used in the City's comprehensive plan to measure adequacy of transportation facilities. The TV FEIS section on noise identifies the maximum noise levels that will be reached through construction and build-out. The sections on water and sewer identify the demand that will be created by the MPDs and capital improvements needed to meet this demand. The section on stormwater identifies the regional facilities that will be needed for stormwater treatment and detention. The SEPA appellants have shown that the EIS does fail to disclose significant impacts in a couple of areas. As discussed for Lake Sawyer impacts, the most egregious lack of disclosure in the EIS concerns the potential impacts on Lake Sawyer water quality. The noise assessment doesn't identify the duration of noise impacts, which should be a key consideration in assessing the reasonableness of any noise mitigation. Overall, however, the EIS discloses the most significant and vital information regarding environmental impacts and alternatives.

Conclusions of Law:

1. WAC 197-11-425(1) requires that an EIS shall be readable and allow the reader to understand the most significant and vital information concerning the proposed action, alternatives and impacts "without turning to other documents." WAC 197-11-425(5) provides that if the lead agency determines that additional descriptive material or supporting documentation may be useful, it may place this "background" information in appendices or separate documents. Given the interplay of WAC 197-11-425(1) and WAC 197-11-425(5), the Examiner concludes that "vital" information regarding impacts and alternatives must be placed in the body of an EIS and not in its appendices. As determined in Finding of Fact No. 2, overall the EIS meets this standard.

K. King County Comprehensive Plan

Findings of Fact:

1. The Clifford Appeal Statement at page 8 asserts that the MPDs fail to comply with the King County Comprehensive Plan and the Growth Management Act ("GMA"). The Wheeler Appeal statement, in an assessment of wildlife impacts at p. 16, asserts that the project will exceed the growth targets in the "comprehensive plan" (whether the King County or Black Diamond comprehensive plan is not specified).

2. Testimony was provided during the hearing that the project would exceed King County growth targets. There was no evidence presented that any inconsistencies with King County Comprehensive Plan Policies or GMA revealed significant adverse environmental impacts.

Conclusion of Law:

1. In the "Order on Motions to Dismiss", Ex. 300, p. 2-3, the Examiner ruled that compliance with the King County Comprehensive Plan and the Growth Management Act could be considered in the EIS appeals to the extent that these inconsistencies revealed significant adverse environmental impacts. Since no such evidence was presented, the inconsistencies are not germane to the SEPA appeals.

L. Wetlands

Findings of Fact:

1. Page 11 of the Harp Appeal statement expresses concern about project impacts to wetlands. The Appeal Statement appears to be specifically concerned with the impacts of the Village Connector Road crossing Core Wetlands.

2. No evidence was presented on the issue of impacts to Core Wetlands or that the City's Sensitive Areas Ordinance is inadequate to protect these wetlands.

3. Chapter 4, Plants and Animals of the TV FEIS identifies the general impacts of MPD development on wetlands, including the amount of wetlands and wetland buffers that will be encroached by development. Stormwater impacts to wetlands are also identified.

Conclusion of Law:

1. The TV FEIS discussion on wetland impacts meets the rule of reason. It contains a reasonably thorough discussion of wetland impacts, identifying the overall encroachment to wetlands and their buffers and potential impacts from

stormwater. There is no evidence that the City's Sensitive Areas Ordinance will not adequately protect these wetlands.

M. Landslide Hazard

Findings of Fact:

1. Page 14 of the Clifford Appeal asserts that the EIS fails to adequately address landslide hazards.

2. There was no evidence presented on landslide hazards other than photographs of landslides.

3. There was no evidence presented on whether the City of Black Diamond's Sensitive Areas Ordinance is inadequate to address landslide hazards.

4. The TV FEIS identifies landslide hazard areas and provides an in-depth assessment of mitigation. *See* TV Appendix D, AESI Technical Report, p. 3-54, 4-2, 4-3, 4-11, 4-18, 4-21, 4-28-29, and 6-13 and 6-14. There was no evidence presented to show this analysis was inadequate.

Conclusion of Law:

1. Under the Rule of Reason, the TV FEIS provides a reasonably thorough discussion of development impacts, mitigation and alternatives regarding landslide hazards.

N. Mine Hazard

Findings of Fact:

1. Pages 13-14 of the Clifford Appeal, p. 16 of the Wheeler Appeal Statement and p. 6 of the Gauthier Appeal assert that the EIS fails to adequately address mine hazards. It should be noted that the Clifford Appeal is primarily concerned with the dumping of toxic waste at mine sites.

2. There was no evidence presented on mine hazards by the SEPA Appellants or any evidence in the record to suggest that the EIS was inadequate on its analysis of mine hazards, including toxic waste issues at mine sites. Several people testified about mine hazard issues during the MPD portion of the hearing, but there was no evaluation provided of the adequacy of the EIS on this issue.

3. There was no evidence presented on whether the City of Black Diamond's Sensitive Areas Ordinance is inadequate to address mine hazards.

4. The TV FEIS identifies mine hazard areas and concludes that only low hazard mines are located within the Villages MPD. TV TV FEIS 4-8, 4-14, 4-15 and Exhibit 4-6.

Conclusion of Law:

1. Under the Rule of Reason, the TV FEIS provides a reasonably thorough discussion of development impacts, mitigation and alternatives regarding mine hazards.

O. Health Services

Findings of Fact:

1. Appellant Chris Clifford has raised concerns in his appeal that Black Diamond has been identified by King County Public Hospital District #1 as an "underserved" area for health care. Clifford Appeal, p. 13. Specifically, Mr. Clifford has alleged that the FEIS documents fail to indicate where or how emergency and regular medical needs would be met for the over 8,000 new potential residents. Clifford Appeal, p. 13.

2. The Lawson Hills FEIS and the Villages FEIS locate medical facilities on the map in Exhibit 3-39.

3. The Lawson Hills FEIS and the Villages FEIS indicate at page 3-89 that existing medical facilities serving Black Diamond are three hospital/medical care facilities operate near the City of Black Diamond, including Enumclaw Community Hospital in Enumclaw, Valley Medical Center in Renton, and Auburn General Hospital in Auburn. Advanced Life Support services are provided by King County Medic and are funded through a separate county-wide tax assessment. In addition, emergency medical care is provided by Mountain View Fire and Rescue (also known as King County Fire District No. 44).

4. The FEISs do provide an analysis of how the proposed MPDs will affect the LOS for fire protection and emergency medical services and also provide that new development and increased population will enlarge the service area for providers, possibly requiring updated facilities as well as increases in staff and infrastructure to provide services. Lawson Hills FEIS and the Villages FEIS, pp. 3-89 - 3-91.

5. There was no additional testimony or evidence presented on health services other than the assertion in the Clifford Appeal that the FEIS was inadequate with respect to health services.

Conclusions of Law:

1. There was no testimony or evidence presented on whether the health services analysis in the FEIS was inadequate other than the bare assertion in the Clifford Appeal.

2. The FEISs adequately discuss existing medical facilities and the impacts of the MPD development on the availability of medical facilities, stating that additional fire fighters or volunteer EMTs will be required and that updated facilities as well as increased staff and infrastructure may be required for other medical facilities. Lawson Hills FEIS and the Villages FEIS, p. 3-90 - 3-91.

P. Historic and Cultural Resources

Findings of Fact:

1. Page 12 of the Clifford Appeal Statement asserts impacts to historic and cultural resources, specifically a collapsed mine site that still contains the remains of some miners and the potential for some Native American archaeological sites.

2. The SEPA Appellants did not pursue these claims during the hearing beyond traffic impacts to historic downtown areas, dealt with elsewhere in this decision. There is no evidence in the record to establish that the development project would create any significant adverse impacts in relation to cultural and historic resources.

VII. CONCLUSION

The Villages EIS is adequate. The City and the Applicant hired the best experts they could find and put a substantial investment into the analysis that comprises the EIS. It shows. The fact that the SEPA Appellants found so many problems with the EIS has more to do with Appellants' skill and diligence than the short-comings of the EIS. No document could survive unscathed the multi-pronged attack levied by the SEPA Appellants. The monumental work of the SEPA Appellants was not wasted in the least. Their efforts will result in substantial improvements to the MPDs by exposing areas that need further attention and mitigation. The SEPA Appellants have done much to better their community through these appeals. They and everyone else who participated in these appeals are to be congratulated for work well done.

DATED this 15th Day of April, 2010.

Phil Olbrechts
City of Black Diamond Hearing Examiner