BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the matter of the appeal of	Hearing Examiner File:
MacDonald, Douglas B.	**W-19-007**

from a SEPA Determination of Non-Significance (DNS) issued by the Director, Seattle Department Of Transportation

APPELLANT'S BRIEF IN REBUTTAL

This rebuttal brief has three parts.

First. The duties in a SEPA DNS challenge: Who first bears what duty? What must the City demonstrate? How is the City's duty judged? When, if at all, must the DNS challenger take up an evidentiary burden?

> Five decades ago the enactment of SEPA (and NEPA) made a new and much-needed\ promise that it would be the duty of agencies (not the lot placed merely on citizens) to meaningfully develop and disclose the environmental consequences of proposed actions prior to decisionmakers' deliberations. That *fundamental* purpose of SEPA is still enshrined in the SEPA Rules and in the authority drawn from judicial review by our courts. No agency has fulfilled *its* SEPA obligation in preparing a Determination of Non-Significance until the agency has demonstrated *actual consideration, analysis and disclosure* – judged against the very special broad level of review insisted upon by our courts -- of a proposal's environmental impacts and their assessment.

Second. The fatal fallacy of the City's use of the 20,000 SDOT bike share bike "baseline."

Third. Several shorter points -- required by the City's Response Brief -- directed to inappropriate weighing of benefits; missing analysis of cumulative impacts; and failure to offer alternatives analysis. All in contravention of the City's duty of supporting its DNS threshold determination.

I.

Who has the duty to demonstrate what in a challenge to a SEPA Determination of Non-Significance.

The very strong policy foundations of SEPA have led courts from the very beginning of SEPA litigation to declare that the proponent of a challenged DNS – the City here – *inescapably* has the duty of presenting a record demonstrating that SEPA-required considerations have been properly developed. *That* responsibility on an agency, tested in reference to the law and the entire record, is tied to no burden on a challenger (the Appellant here) to make or supplant an evidentiary record when the rerecord made by an agency is insufficient to sustain a review of its duty under the "clearly erroneous" standard. Especially as case law has made clear how application of that standard should be brought to bear on a negative threshold determination that an agency has sought to enshrine in a SEPA Determination of Non-significance.

What first might best be stressed is the *clear order of priority* in a SEPA threshold determination challenge -- established without any subsequent deviation from the very outset of SEPA jurisprudence. In *Juanita Bay Valley Comm. v. Kirkland*[1] the appeals court remanded to the City to reconsider under SEPA's rules the issuance of a permit for a grading permit ancillary to the proposed conversion of a gravel pit into an industrial park. As to the conduct of any future review of that SEPA determination, the court instructed:

> "*If*, in the event of such review, the City can affirmatively demonstrate prima facie compliance with the procedural requirements of SEPA, *then* the burden will fall upon the appellant, if the City's decision is averse to appellant. . . to prove the City's decision was invalid." (Emphasis supplied).

The necessary duty placed on the proposing agency (SDOT as the executive agency of the City here) is labeled (as seen in *Juanita Bay*) as the *prima facie* test. To meet it is to satisfy a "procedural" requirement in the special sense that the requirement at issue – *actual consideration and analysis of environmental impacts* – is the policy core of the SEPA *process* and the very foundation of its statutory purpose. It is a *substantive* requirement of adherence to procedure, never to be confused with some kind of mere *pro forma* attention. It is an unassailable precept of SEPA jurisprudence (see below) that the requirement on the agency is not satisfied merely by making a record that would contain no more than "substantial evidence to support [an] administrative finding or decision" under the more forgiving, less broad, arbitrary and capricious standard.[2]

Our courts have instructed that in a SEPA "threshold determination" review a judicial officer should examine the entire record in light of SEPA policies and SEPA Rules (the SMC SEPA

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[1] 9 Wn. App. 59, 74 (1973).

[2] *Norway Hill Preservation & Protection Ass'n v King County Council,* 87 Wn.2d 267, 274. (1976) (hereinafter *Norway Hill;* see further discussion below).

Ordinance) under the "clearly erroneous" standard of review: That is to say, according to the Washington Supreme Court: [3]

> ". . . a higher degree of judicial scrutiny than is normally appropriate for administrative action. . . In applying the clearly erroneous test to an administrative decision, we examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision [citation omitted[4]]."

Within that broad ambit of judicial scrutiny, the proponent's duty of demonstrating SEPA *prima facie* compliance demonstration is *not* met even when an *otherwise* fulsome agency record is irretrievably flawed by an unfilled gap or other substantive shortcoming. *Almost prima facie* is not good enough. That is why, forty years ago in *Gardiner v. Pierce County Board of Commissioners*[5] the Court of Appeals found Pierce County's failure to evaluate a critical percolation test for a subdivision plat (irrespective of the challenger not having called out the gap) merited the reversal of a threshold determination. The court held:

> "[T]he County had an affirmative duty to demonstrate its justification for a negative justification under SEPA. . . Without a clear record on this point [the necessary soil perc test] the County has failed to demonstrate its justification for its negative declaration under SEPA. The lack of a record renders the County's demonstration clearly erroneous. "[6]

The court in *Gardiner* articulated the clear link between the substantive nature of an agency's *prima facie* duty and the broad sweep of review under the "clearly erroneous" test. The County "must demonstrate that *environmental factors were considered* in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA."[7] (Emphasis supplied),

The holding in *Gardiner* is directly grounded on the authority of *Norway Hill,*[8] the leading 1976 Washington Supreme Court case (further discussed below) from which the *Gardiner* court drew this teaching:[9]

> "The SEPA policies of full disclosure and consideration of environmental values require actual consideration of environmental factors before a determination of environmental significance can be made." (Emphasis supplied).

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[3] *Polygon Corp. v. Seattle,* 99 Wn.2d 59, 69-70 (1978), explicating *Norway Hill.*
[4] The omitted citation in the above quotation from the opinion in *Polygon Corp.* is to *Ancheta v. Daly,* 77 Wn 2d 255 (1969).
[5] 27 Wn. App. 241 (1980)
[6] *Id.* at 245-246, relying on *Norway Hill, supra,* note 2.
[7] *Id.* at 245.
[8] *Supra,* note 2.
[9] *Gardiner, supra* at 245.

A useful overall explanation of how a test under the "clearly erroneous" standard must be conducted for a SEPA threshold determination was provided by the Washington Supreme Court in 1977 in *Sisley v. San Juan County*:[10]

> "The scope of judicial review of a governmental determination of 'no environmental significance' is extremely broad. The appropriate standard by which to review such administrative decisions is the 'clearly erroneous' test. [Citation omitted[11]]. A negative threshold determination is . . . ' 'clearly erroneous' if despite supporting evidence, the reviewing court on the record can firmly conclude 'a mistake has been committed.' ' [Citations omitted[12]]. In applying the 'clearly erroneous' standard the court is expected to do more than merely determine whether there is substantial evidence to support an administrative or governmental decision. The entire record is opened to judicial scrutiny and the court is required to consider the public policy and environmental values of SEPA as well."

In *Sisley,* the court remanded to the San Juan County Board of County Commissioners for further proceedings on the construction of a proposed marina on Orcas Island. The court held that the trial court had *mistakenly* upheld the Commissioners' SEPA negative determination on the basis of the Board only had determining "substantially complied with the provisions of SEPA" and that the negative threshold determination was supported only by "substantial evidence. "Such standard of review [*Sisley* states] does not comply with *Norway Hill."*[13]

Sisley, reinforcing *Norway Hill, explicitly* therefore gives lie to the proposition that a record of "substantial evidence" that would support administrative decision-making under an "arbitrary and capricious" standard is all that is required to pass scrutiny for *prima facie* SEPA procedural compliance under the broad "clearly erroneous" standard. Mere "substantial evidence" offered by an agency has, on its own force alone no effect, of relieving it of demonstrating its affirmative duty of *prima facie* compliance, or putting ("then," as stated in *Juanita* Bay, see above) an evidentiary burden on a challenger to contend on its own account against the sufficiency of a *prima facie* showing. "Clearly erroneous" is a standard of review laid wholly upon the judicial officer in consideration of the entire record. It is a duty on the agency from which there is no relief for the agency seeking to defend its negative threshold determination in satisfying the judicial officer that a mistake has not been made. "Substantial evidence" that

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[10] 80 Wn.2d 78, 84 (1977).

[11] The omitted citation is to *Norway Hill supra,* note 2., the first Washington Supreme Court decision (in 1976) to lay out and extensively elaborate on the use of the "clearly erroneous" standard. See discussion below.

[12] The omitted citations are to *Norway Hill, supra,* note 2, and also to a 1973 Washington Supreme Court case, *Stempl v. Dept. of Water Resources,* 82 Wn. 2d 109 (1973). *Stempl* was a water withdrawal permit case in which the court determined the application of SEPA to a permit issuance process that straddled SEPA's effective date, but did not rule on any issue of SEPA compliance process. It is, however, the case originating the enduring *dictum* that enactment of SEPA was "an attempt by the people too shape their future environment by deliberation, not default." 82 Wn.2d at 118.

[13] *Sisley, supra* at 85.

would do for meeting an "arbitrary and capricious" standard, is not a Get Out of Jail Free card excusing a DNS proponent from its full affirmative duty of meeting SEPA *prima facie* compliance.

This brings matters back to *Sisley's* restatement of the basic point:[14]

> "When a governmental agency makes the initial threshold determination it must consider environmental factors even if it concludes that the action does not significantly affect the environment and therefore does not require an EIS. [Citation omitted[15]] We recently stressed the importance of the initial threshold determination in [*Norway Hill, supra,* note 2, at 273] where we stated: 'The policy of the act which is simply to ensure in via a 'detailed statement' the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect threshold determination is made.'"

In *Sisley*, the court added, shedding considerable light on how clearly erroneous review and the proponent's burden of showing *prima facie* compliance are regarded in the view of the Washington Supreme Court in light of a weak record relied on by the proponent:[16]

> "As previously indicated we have held that the record of a negative threshold of determination by a governmental agency must 'demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.' [citation omitted[17]]. With this in mind we are compelled to comment on the inadequacy of the Board's record. It is filled with many assertions, numerous unanswered questions and a paucity of information."

Finally, *Sisley* (in 1977), reminds us that the entire body of SEPA jurisprudence is rooted in the 1976 Washington Supreme Court case, *Norway Hill*[18] a case in which neighborhood citizens contested permits for a big subdivision just south of Bothell. *Norway Hill* is the holding that still most broadly illuminates what a *prima facie* demonstration in a SEPA case must achieve. It first declared, for example, that judicial review of all the evidence must be other than "just a search for substantial evidence to support an administrative finding of decision."[19] And more:

- "[T]hat determinations of no significant impact under SEPA, i.e., "negative threshold determinations require a reasonably broad standard of review. We believe that in addition to the 'arbitrary and capricious' standard, the broader "clearly erroneous" standard of review is appropriate." 87 Wn.2d 267 at 271-272.

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[14] *Id.* at 83-84.
[15] The omitted approving citation is to *Juanita Bay, supra,* note 1, at 73.
[16] *Sisley, supra* at 85.
[17] The omitted citation is to *Juanita Bay, supra* note 1, at 73.
[18] *Supra,* note 2.
[19] *Id. at 272*

- What SEPA requires is appropriate consideration in decision-making to make good on SEPA as "an attempt by the people to share their future environment by deliberation, not default."[20] *Id.* at 272.

- "The initial determination by the 'responsible official' [citation omitted] as to whether the action is a major action significantly affecting the quality of the environment is very important. The policy of the act which is simply to ensure via a 'detailed statement' the full disclosure of environmental information so that environmental matters can be given the proper consideration during decision making is thwarted whenever an incorrect threshold determination is made. . . Consequently, '[w]ithout the judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary and capricious standard.'"[21] *Id.* at 273.

- "[W]e feel that judicial review of 'negative threshold determinations' beyond that provided under the 'arbitrary and capricious standard is necessary. A 'negative threshold determination' is more than a simple finding of fact because the correctness of a no significant impact determination is integrally linked to the act's mandated public policy of environmental consideration." *Id.* at 273.

- "The 'clearly erroneous' standard provides a broader review than the 'arbitrary or capricious' standard because it mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision."[22] *Id.* at 274.

- "The SEPA policies on full disclosure in consideration of environmental values requires actual consideration of environmental factors before a determination of no environmental significance can be made."[23] *Id.* at 275,

Indeed, a record absent of demonstration of adequate consideration of SEPA's environmental factors would not even survive review by the "arbitrary and capricious" standard.

- In the absence of a record sufficient to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA [citation omitted[24]] a negative threshold determination could not be sustained upon review even under the

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[20] Citing *Stempl v, Dept. of Water Resources*, 82 Wn.2d 475 (1973),

[21] Citing Anderson, The National Environmental Policy Act in Federal Environmental Law 361 (1974); and see Note, Threshold Determinations Under Section 102 (2)(C) of NEPA, The Case for "Reasonableness" as a Standard for Judicial Review, 16 Wm. & Mary L. Rev. 107, 109 (1975).

[22] Citing *Ancheta v. Daly*, 77 Wn.2d , 255, 260-261 (1974).

[23] Citing *Juanita Bay, supra,* note 13, at 73.

[24] *Id.*

arbitrary and capricious standard because the determination would lack sufficient support in the record.[25] *Id.*, at 276.

There follows from all the above:

1. One or even more elements of evidence in the record made by the City that might sustain administrative action under an arbitrary and capricious standard do *not* -- if the entire record fails to show actual disclosure and consideration of SEPA-required factors -- meet the City's *prima facie* duty of actual consideration of SEPA-required environmental factors even in the absence of *any* record made by the Appellant.

2. No "burden" of producing evidence is borne by the Appellant as to whether the City has sufficiently met its *prima facie* burden in consideration of the *entire* record, including the fatal consequence of gaps or outright mistakes of analysis, or contravention or ignoring of the SEPA Rules, in the City's assembly of its justification for a negative threshold determination.

Holes, gaps and errors, if they are present, in the City's demonstration *might* be, although need not be, enlarged upon in evidence presented by the Appellant. But there is never a burden on the Appellant to counter a proponent's *insufficient* demonstration of *prima facie* compliance.[26]

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[25]Citing *Stempl, supra,* note 20, at 114.

[26] One assertion in the City's Brief in Response must be very carefully parsed to avoid a misleading reading. "Mr. MacDonald must show that the DNS for the proposal was clearly erroneous." City's Response Brief at 5.

The law is that a reviewing judicial body (here, the Hearing Examiner) shall undertake a broad review of the entire record to determine whether a negative threshold determination is "clearly erroneous" for failure to meet the City's affirmative duty to establish *prima facie* compliance with the governing rules, policies and procedures of SEPA.

What a challenger "must show" need not be an evidentiary showing. "The burden of *demonstrating* the invalidity of agency action is on the party asserting invalidity." RCW 34.050.070(1)(a). (Emphasis supplied). That required demonstration by the party asserting invalidity can take many forms, including adducing from (and directing the Hearing Examiner to) the City's own record (such as in the Checklist, in the present case; and as illustrated in *Gardiner, supra*) the fatal gaps and other failings in the agency's own record. Moreover, so far as a SEPA threshold determination test is concerned, *another statute* (SEPA), as construed by our courts, *never* allows an agency to be relieved of its duty to make its showing of *prima facia* compliance through the placing of a burden on the Appellant when the invalidity of an agency action flows from the agency's failure to meet its affirmative duty. RCW 34.050.070(1).

To complete this discussion, one must comment on the reference sometimes seen that *Brown v. Tacoma,* 30 Wn App. 762 (1981) supports the proposition that the party appealing a negative threshold determination has the burden of proving that it is "clearly erroneous." *Brown* is a case in which the court of appeals, applying the clearly erroneous standard of review, *upheld* a trial court's conclusion that a negative declaration should not be overturned. However, there is not a word of discussion in *Brown* that the allocation of burden of proof and its relation to evidence in the record had any bearing on the review by either the trial court or the appeals court.

Brown does include the statement that under RCW 43.21C.090 a negative threshold decision shall be acceded "substantial weight." In 1976 the Washington Supreme Court specifically addressed the question whether

Indeed saddling the citizens with the job of making the environmental record against an agency that had defaulting on its own duty to do so (as it is the fundamental policy of SEPA to insist upon) would be simply to turn SEPA on its head through a perversion of process. Putting that affirmative duty on the agency is the policy initiative that SEPA brought into our law.

3. Finally, in the context of a review of a SEPA negative determination, any administrative maxim of "substantial weight" in favor of the agency determination has no bearing – it adds nothing to and it takes nothing away from -- the charge to the judicial officer to conduct the complete review under the "clearly erroneous" standard.[27]

Applying the foregoing to the review of this entire record.

The force of the above largely built from the case authority is only fully appreciated when read together with the SEPA Rules (laid out in full depth in the Appellant's Post Hearing Brief), none of which is more important than the injunction that SDOT in this case had an inescapable policy obligation to:

> "Prepare environmental documents that are clear, concise, supported by evidence that the necessary environmental analyses have been made." SMC [cite]

A Hearing Examiner reviewing a negative threshold demonstration may find outright gaps in the Checklist, assertions made without evidence or even neglecting available evidence, and outright disregard for SEPA policy in the Checklist or in testimony. When a Hearing Examiner characterizes such attempts at demonstrating *prima facie* compliance as "conclusory" this is not just a matter of literary criticism. This is the stuff of which a "clearly erroneous" judgment on the threshold determination not only may be made,[28] but *must* be made under the SEPA Rules and under the weight of judicial authority.

"substantial weight" in RCS 43.21C.090 adds anything to or takes away anything away from the neutrality by which the "clearly erroneous" test should be applied to examining an agency's affirmative duty of demonstrating *prima facie* compliance in a challenge to a SEPA negative threshold determination.

27 In *Swift v. Island County,* 87 Wn.2d 348, 355-356 (1976) the court nearly contemporaneously declared its reading of *Norway Hill* that "substantial weight" is subsumed within "clearly erroneous" review in a SEPA threshold determination case. Following *Swift,* there seems to be no independent "substantial weight" factor at play in the "clearly erroneous" weighing in this SEPA framework of judicial review. In light of *Swift* it is unlikely that a contrary inclination of the court in the later case of *Brown* (1981), taken literally, is correct.

[28] "Conclusory" statements can trip up SEPA arguments in every direction, not just when (as in the present case) an agency relies on mere conclusory statements to support a negative declaration. In *Cougar Mt. Assoc. v. King County,* 111 Wn.2d 742 (1988) the Washington Supreme Court (applying the "clearly erroneous" standard) overturned the King County Council's SEPA-based denial of a subnivium application, faulting the Council that its expressed concerns for environmental consequences were "merely stated in cursory fashion." In so doing, it noted. "The observation of [*Sisley, supra*] indicting the need for specificity is apropos." See *Findings and Decision of the Hearing Examiner, In the Matter of the Appeal of Seattle Mobility Coalition* (H.E. File W-18-013,(2019) at 10, applying SMC 25.05.030 B to lay the foundation for a finding of reversible error.

The demonstrations of deficiency in the City's *prima facie* demonstration have already been laid bare in detail in the Appellant's Post-Hearing Brief and need not be re-stated here.

Several specific points that must be touched on in light of arguments suggested in the City's Brief in Response are treated below. Just the single fallacy of the 20,000 bike share bike "baseline" (next section), should be enough to sink the negative determination as demonstration of grossly mis-placed analytic foundation for basic impact identification and assessment. But, of course, the instances the City's failure to do its job as SEPA requires are cumulative in the entire litany of its failure to meet its affirmative duty established in the SEPA Rules.

II.

The fatal fallacy of the 20,000 SDOT bike share device "baseline."

On one point we all agree: "A proposal's impacts are measured against a baseline of existing conditions." (City's Response brief, p. 5). So how did the City find itself high-centered on the notion that the baseline of "existing conditions" should be established by a hypothetical *allowance* under a prior SEPA DNS for a bike share program of 20,000 bike share bikes? That would be a "baseline" utterly detached from the *existing condition* (documented in the Checklist and nowhere contravened) that there were deployed on Seattle's right-of-way only between 6800 – 7300 shared bikes in SDOT's bike share program as of the 3rd quarter of 2019 (Checklist ¶ 11, page 4).

Tellingly, one baseline issue entering the scooter proposal discussion did not refer to bike share devices, but rather to TNCs (a/ka Uber and Lyft ride share) vehicles in Seattle as an input to "cumulative impacts" assessment. As to a baseline in that frame of reference, Ms. Macek testified (as SDOT's responsible official for making the threshold determination): , "I understood the baseline was – of them operating within the right-of-way . . The baseline I took into account was the operation of TNCs at the time of the Checklist publication December 2nd, 2019."[29]

The *authorized* (not *actual condition*) 20,000 bike share bikes for baseline purposes was referenced in the Checklist in response to the Checklist question: "6. How will the proposal be likely to increase demands on transportation or public service?" Twice. (Checklist Supplemental Sheet for Non-Project Actions ¶ 6, pages 33 and 35).

As for baseline impacts for assessing shared scooter impacts from shared scooters on "transportation" and "public services" as a delta relative to bike share bikes, Ms. Macek testified to her understanding that there were 20,000 bike share bikes at the time she worked

[29] Transcript at 155:1-6.

on the SEPA Checklist.[30] But in fact about the time when she worked on the Checklist, the Checklist actually stated that in the 3rd quarter of 2019 there were between 6800 and 7300 bike share bikes actually deployed in the bike share program. That was the "existing condition," or at least as close to it as the hearing record reveals.

But that faulty transposition of "authorized" bike share bikes into "existing condition" bike share bikes, confounding the clear evidence of the Checklist, was only the first mistake in the 20,000 device impact assessment breakdown.

The next problem was that Ms. Macek then testified that in making her Determination of Non-Significance finding, she concluded that impacts for a shared scooter and for a shared bikes would be similar.[31] That conclusion, she testified, was based on her reading of the Checklist and her knowledge of bike share.[32] But an attempt to elicit her understanding of details of bike impacts from bike share bikes, Ms. Macek testified: "Perhaps I should clarify. I have an awareness of a bike share program. I don't have a lot of specific details that I can bring off the top of my head."[33] Leaving her to testify that her conclusion was based solely on the Checklist examination of the similarity of impacts of scooters as compared to bikes. [34]. Unfortunately, no such examination was contained in the Checklist so that conclusion could not be founded on the Checklist.[35]

Assume, however, just for sake of argument, the aptness of Ms. Macek's unsupported assumption: a one for one correspondence of typical impacts between one bike share bike and one scooter share scooter. Under that assumption, the impact assessment of adding the shared scooter proposal to the existing condition would have had to compare 20,000 total

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[30] Transcript at 144:13 – 16. She also testified in the affirmative in responding to the City Counsel's question that she had heard Mr. Miller's testimony that under the bike share program there were 20,000 bikes. Transcript 144:11 – 15. In fact, Mr. Miller did *not* testify there was an "existing condition" of 20,000 bikes. He testified: "The combined total number of bikes under a separate permit, scooters will not exceed 20,000 devices. And that was consistent with the 20,000 for the 2018 bike share determination of non-significance." Transcript at 48:110-13. Mr. Miller (who testified at Transcript 93: 24 to 94: 2 that he did not know whether an e-scooter is a vehicle under the Traffic Code; and further testified at Transcript 99:4 - 14 that although he signed the Checklist, he was **"not the SEPA expert. I don't know the definition of impact in the SEPA context"** [emphasis supplied]) testified on redirect examination that the impact of 20,000 e-scooters would just be a substitution of e-scooters for bikes in bike lanes. Transcript at 139: 4-6. Impact, however, is measured against "existing conditions (6800 - 7300 bike share bikes then in actual deployment) not the DNS "authorized" deployment.

[31] Transcript at 156: 17 – 24.

[32] Transcript at 156: 25 – 157: 2.

[33] Transcript at 157:13-15.

[34] Transcript at 158: 1-9.

[35] The jurisprudence of SEPA threshold determination challenges accepts that an agency need not rely solely on a SEPA-stipulated Checklist in assessing a proposal, but may rely on other sources. Here, however, the Checklist was the only information identified by the City as part of its consideration of the potential environmental impacts. Save, arguably for Mr. Dongho Chang's testimony at the hearing [Transcript at 23:17 to 24:1-23) regarding putative *benefits* to travel possibly observed in Portland, Tacoma and Spokane e-scooter pilot programs, which of course would be out-of-bounds conclusions for the purpose of assessing potential *adverse* environmental impacts of an agency e-scooter proposal.

devices, scooters plus bikes, to an existing condition of the 6800 – 7300 bikes (no scooters) in the existing condition of the bike share program. That analysis was never performed. This reveals the impact assessment flaw into which SDOT inescapably stumbled. SDOT in the 3rd quarter of 2019 could not possibly have known what impacts 20,000 bike share bikes *and* scooters would have generated, because there was no such volume of bikes in the existing condition. SDOT had no basis – no baseline for *actual consideration* -- what the putative impact of 20,000 shared e-scooters would be.

This is where SDOT's inexplicable default in failing to answer the direct question required in the Checklist on vehicle trip generation from the proposal (Checklist ¶ 14 f., page 26) presents such a problem That measure of trips could have been computed on some evidentiary basis (for example by comparison to the experience of the Portland e-scooter program known to SDOT as described on page 28 of the Checklist). The resulting number could then have been compared to the actual number of trips on its bike share program (Checklist ¶ 14 f., page 26), Then SDOT would have had at least a rudimentary evidence based point of departure for the impact analysis that by default was only presented as unsupported conclusory assertions. [36]

What was the result of the 20,000-device baseline fallacy on which the City found itself relying for impact assessment? A fatal failure of any impact analysis for transportation or public services grounded in that 20,000 device as not-a-baseline of existing conditions.

III.

<u>On the City-neglected reqirement to prepare alternatives analysis.</u>

Ms. Macek testified that she did not consider proposed alternatives when preparing the Checklist because the SEPA Checklist does not require an alternatives an analysis.[37] The problem is that the relevant and dispositive SEPA Rules, cited in the Appellant's Post-Hearing Brief at pages 16-17 (need not be restated here), do require agencies to the fullest extent possible to emphasize not just impacts, but also alternatives, and to identify and evaluate reasonable alternatives. Not done. The case cited in the City's Brief in Response to support Ms. Macek's testimonial declaration (ignoring the SEPA Rules) that the preparation of a DNS does not require alternatives analysis, *Chuckanut Conservancy v. Washington State Dept. of Natural Resources,* [38] is inapposite. In that case (unlike here, as plainly illustrated in SDOT's own

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[36] The oddest position to which this baseline that isn't a baseline position led the City was to discount the importance of the Seattle Police Department's inability (as testified to by Mr. Miller and restated in the City's Response Brief at 7) to commit to any sort of enforcement (of e-scooter rules) because, Mr. Milleer posited, "that had been the baseline against which the proposal ismeasured." (City's response Brief, 7-8). Equally strained is the position that the Checklist's extensive discussion of parking impacts is apparently, oddly (in the City's view) gratuitous inasmuch as the "total number of e-scooters and bikes under the proposal is the same as the baseline of the existing bicycle program." Wrong: the baseline of the *existing bike share program* at the time of the DNS was stated in the Checklist to be about 7000 shared bikes, *supra*.

[37] Transcript at 142:22 – 143:9.

[38] 156 Wn.App 274 (2010).

Emerging Technology Report),[39] the court found that *there was no alternative* to be considered -- the Department of Natural Resources did not have available to it the alternative of ceasing logging at Blanchard Mountain. *Chuckanut Conservancy* is distinguishable and is not authority for the proposition for which the City has offered it here.

Failure properly to consider cumulative effects as required in the SEPA Rules.

Controlling provisions of the SEPA Rules are set forth in the Appellants Post-Hearing Brief at pages 18-19[40]. The City offered a number of evasive twists on the topic of cumulative effects. But the oddest was the notion that a cumulative effects analysis would be in order if in the future SDOT wanted to authorize even more than 20,000 e-scooters (City Response Brief, 8-9[41]). That would indeed require another DNS, but that would be for reasons wholly apart from the required cumulative effects analysis for *this* DNS that SDOT avoided such as, for example failing to give account to the likely subsequent growth of TNC traffic volumes on Seattle right-of-way cumulative to the effect of trips generated (that number itself never calculated by SDOT, *supra*) for up to 20,000 shared e-scooter devices.[42]

Inappropriate accounting for claimed SSP benefits.

Assume, for sake of discussion, that Ms Macek in her task as the Responsible Official for making the threshold determination and issuing the DNS, was able, as she testified, to not balance the beneficial impacts of the proposal claimed over and over in the Checklist against the adverse impact of the proposal in reaching the Determination of Non-significance.[43] But that only deals with half the problem – how the threshold determination was made.

What about how the Checklist itself was prepared, incorporating time and again the recitation of beneficial impacts, and the distortion that presented to the *disclosure* of potentially adverse environmental impacts required to be made to decision-makers in the fundamental SEPA Rules?

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[39] See Appellant's Post-Hearing Brief, 17.

[40] Th applicable provisions are set forth ag that location, but unfortunately the citation needs to be corrected to **SMC 25.05.670.**

[41] Reflecting the testimony offered by Miss Macek: "If SDOT proposed additional devices, it would require further SEPA review." Transcript, at 144: 11-12; also at 145:5-7. Ms. Macek's testimony (Transcript at 145:2-5) that cumulative impact analysis need only occur when there is evidence that the project under review will facilitate further action that will result in additional impact is not aligned with the SEPA cumulative effects policy. Ms. Macek repeated her incorrect understanding of SEPA policy at Transcript, 155:1-7.

[42] One of the more curious vanishing acts in the Checklist as an underlying DNS preparatory SDP Checklist was *any* impact assessment of the SSP proposed code amendment to open Seattle's bike lane (hitherto closed) to *all* motorized e-scooters (20 mph vehicles), not just e-scooters deployed through an SDOT permitted shared e-scooter program. Cursory identification of *impact* my have been made at Checklist ¶ 14 f, at page 26. But no assessment of impact was offered.

[43] Transcript 144:18-21.

That is the other half to the problem, and that half seems to fall mostly on Mr. Miller, who was responsible for *preparing* the Checklist, as it was the duty of someone to do, under the SEPA procedures.[44] Lading "benefits" into the Checklist goes beyond compromising the ability of the Responsible Official (Ms. Macek) from properly excluding the propagandizing in the Checklist from her own threshold determination judgment. It destroys the intended utility of the SEPA information process in supporting the SEPA intended outcome that decision-makers, not proponent program staff members, should be making decisions for the public. Finally, as to the freedom from bias of the SEPA process leading up to a Determination of Non-Significance, a Checklist improperly and gratuitously laden with benefits calls into question whether the Checklist preparers brought a judgmental predisposition to their supposedly disinterested task of identifying and assessing potentially significant adverse environmental impacts. These are issues impossible to overlook in applying the broad "clearly erroneous" standard of review to the entire record before the Hearing Examiner. Especially when the rules are so plainly stated in the SEPA Ordinance.

Respectfully submitted:

Douglas B. MacDonald
Appellant, *pro se*

April 6, 2020

[44] Counsel for the City seemed to understand MS. Macek also had a role in *preparing* the Checklist as well as her role as responsible official in evaluating the checklist for making her threshold determination. Transcript at 142:22-23.

CERTIFICATE OF SERVICE

I certify that on this date I filed an electronic facsimile of **Appellant's Brief in Rebuttal** on the e-file website of the Office of the Hearing Examiner in accordance with the Office of the Hearing Examiner Temporary Rules. A copy of the filing was also mailed today by U.S. First Class Mail to the Office of the Hearing Examiner, Seattle Municipal Tower, 705 5th Avenue, Suite 4000, Seattle WA 98104 on account of the exigency of the current emergency.

I also certify that on this date a copy of the same document was sent via e-mail to the following party and also, as above, mailed today the following party by U.S. First Class Mail.

Patrick Downs
Assistant City Attorney
Seattle City Attorney's Office
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Dated this 6th day of April, 2020.

Douglas B. MacDonald