

CITY OF MONROE EAST
MONROE APPEAL
DOCUMENTS
FILE #13-APHE-0001



**City Response to Appeal of the
Final Environmental Impact Statement (FEIS) for the
East Monroe Comprehensive Plan Amendment and Rezone**

13-APHE-0001

October 31, 2013

TO: MR. CARL COX, CITY OF MONROE HEARING EXAMINER
FROM: MELISSA SARTORIUS, AICP, SENIOR PLANNER/SEPA OFFICIAL
HEARING DATE: NOVEMBER 7, 2013
SUBJECT: SEPA APPEAL DATED OCTOBER 18, 2013 OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS) ISSUED FOR THE EAST MONROE COMPREHENSIVE PLAN AMENDMENT AND REZONE

Dear Mr. Cox;

This letter is in response to the appellants' October 18, 2013 Notice of Appeal. The appellants raise a list of twelve issues to which we respond below.

Background.

First and foremost we would like to provide background on this matter, which has been a contentious matter in the Monroe community for years. A summary timeline is attached as Exhibit M14 and abbreviated below.

An application for amending the Comprehensive Plan and rezoning certain properties in East Monroe from their current designation of Limited Open Space to Commercial was first received by the City on July 23, 2010. The original application resulted in a Draft Phased Environmental Impact Statement (DPEIS) issued by the City of Monroe on February 29, 2012. Numerous comments were received on the DPEIS and addressed in the April 23, 2012 Final Phased EIS (FPEIS). An appeal of the FPEIS was filed and an open record hearing was held on July 19, 2012. The Monroe Hearing Examiner concluded that the FPEIS was inadequate as a matter of law. In summary, although the proposal is a non-project action, additional detail and analyses of potential impacts was determined necessary to aid the decision making process of amending the Comprehensive Plan and Rezone.

After consideration of the 2012 Hearing Examiner decision, the size of the proposal was reduced to exclude an easternmost parcel, (formerly known as Lot F). The current proposal under consideration consists of five parcels totaling 42.8 acres and is zoned Limited Open Space. Since the Hearing Examiner decision, the applicant hired a team of consultants to perform the necessary analyses and expand on previous work to draft the EIS that is the subject of this appeal.

While the City believes the background is important and may provide supplemental information, the matter under current consideration should be decided on, and only on, the project record on this application up to this point and any oral testimony given by parties of record at the public hearing on November 7th.

Brief Chronology.

- 1970 – Area annexed into City of Monroe, zoned RS-9600 (residential?)
- 1987 - Two east parcels annexed into the City of Monroe, zoned agricultural
- 1994 - All parcels rezoned to Limited Open Space (LOS)
- 2004 - Submittal from applicant to change 48 acres from LOS to General Commercial (GC)
 - Planning Commission recommended denial of docketing the application; proposal considered to be inconsistent with the goals and objectives of the Comprehensive Plan; concerns about impacts to the Capital Facilities Plan and levels of service
- 2004- Heritage Church Boundary Line Adjustment and Short Plat designating Native Growth Protection Areas (NGPAs) on site. Filed with Snohomish County Auditor on May 3, 2004.
- 2005 - Council did not approve docketing the proposal; in lieu of docketing for 2005, Council voted to consider preparing a Sub-Area Plan as part of the 2006 docket
- 2006 - Council denied Sub-Area Plan due to lack of funding
- 2010 - Applicant submitted expanded area of 68 acres to change from LOS to GC
 - Planning Commission recommended denial of docketing the application
 - Council voted approval of proposal for the 2011 docket less 18 acres within the shoreline jurisdiction
- 2012 - Council adopted ordinance amending Comprehensive Plan and Rezoning from LOS to GC
 - Phased EIS ruled inadequate by Hearing Examiner
 - Council voided ordinance amending Comprehensive Plan and Rezoning from LOS to GC
- 2013 - Applicant initiated preparation of full Environmental Impact Statement

As part of the 2013 EIS process, the East Monroe EIS Comprehensive Plan Amendment and Rezone was or will be presented before the Monroe Planning Commission at the following meetings:

- August 26 – Introduction of East Monroe DEIS
- September 9 – Review of East Monroe DEIS
- September 30 - Introduction of East Monroe FEIS
- October 14 – Review 2013 East Monroe Comprehensive Plan Amendments/ East Monroe
- October 21 – Review 2013 East Monroe Comprehensive Plan Amendments/ East Monroe
- October 28 – Review 2013 East Monroe Comprehensive Plan Amendments/ East Monroe
- November 18 – Public Hearing on 2013 Comprehensive Plan Amendments/ East Monroe
- November 25 – PC Recommendation on 2013 Comprehensive Plan Amendments/ East Monroe

The issue was presented before the Monroe City Council at the following 2013 meetings:

- October 15 - Introduction of East Monroe Final Environmental Impact Statement
- October 22 - Review East Monroe Comprehensive Plan Amendment and Rezone
- December 3 - Review 2013 Comprehensive Plan Amendments/East Monroe

Additionally, the following are public comment periods/public noticing for the 2013 project separate from the City Council and Planning Commission notices:

- August 14 – September 13, Notice of Availability of Draft EIS. 30 day Public Comment Period on Draft EIS. Publication in the SEPA Registrar
- September 5 – Public Hearing on Draft EIS
- September 27 – Issuance of Final EIS with Notice of Availability. Publication in the SEPA Registrar. 15 working day appeal period on Final EIS begins
- October 22 - Notice of Appeal and Public Hearing at City Hall
- October 18 – 15 working day appeal period on FEIS ends
- November 7 – SEPA Appeal Hearing before Hearing Examiner

Standard of Review.

The primary purpose of an environmental impact statement is to ensure that SEPA policies are an integral part of the ongoing programs and actions of state and local government. An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures that would avoid or minimize adverse impacts or enhance environmental quality. WAC 197-11-400(1)-(2).

The legal sufficiency of the analysis and data contained within an environmental impact statement (EIS) is to be judged by what the courts refer to as "the rule of reason." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993); R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, §14(a)(i) (4th ed. 1983). Under this rule, an EIS is adequate if it contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action. *Organization to Preserve Agricultural Lands (OPAL) v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996); *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 38, 873 P.2d 498 (1994). In other words, an EIS is adequate if the environmental effects, reasonable alternatives, and potential mitigation measures for the proposal are "reasonably disclosed, discussed, and substantiated with supporting opinions and data." *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 209-11, 634 P.2d 852 (1981); *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 744 P.2d 110 (1987). An EIS need not address every remote and speculative consequence of an action; only probable, significant, environmental consequences must be addressed. *Cheney v. Mountlake Terrace*, 87 Wn.2d at 344; *SEAPC v. Cammack II Orchards*, 49 Wn. App. at 614. It is extremely rare to find a case under Washington law in which an EIS has been held to be inadequate. In fact, there are only three reported decisions in which that has been the case. Settle, *Washington State Environmental Policy Act*, § 14.01[1].

In an appeal proceeding challenging the adequacy of an EIS, the burden is on the appellants to prove that the EIS is inadequate by a preponderance of the evidence. *Juanita Bay Valley Community Ass'n. v. Kirkland*, 9 Wn. App. 59, 73-74, 510 P.2d 1140 (1973) (once SEPA

procedures have been complied with, burden is on appellant to show City's decision was invalid). A proposition is proved by a preponderance of the evidence when the decision maker finds, after considering all of the evidence which bears on the issue, that the proposition is more probably true than not true. *In re Seago*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). In an appeal of EIS adequacy, this means that an appellant must show that, in light of all of the evidence, it is more probable than not that the EIS fails to adhere to the requirements of the SEPA's statute or regulations, or that it fails to "reasonably disclose, discuss, and substantiate its opinions" as to the probable significant adverse environmental impacts of the proposal. In determining whether an appellant has met that burden, the Hearing Examiner is required to give the SEPA Responsible Official's determination that the EIS is adequate "substantial weight." RCW 43.21C.075(3)(d); RCW 43.21C.090; WAC 197-11-680(3)(a)(viii); MMC § 20.04.200(C).

With respect to EISs on nonproject proposals, the SEPA Rules acknowledge that the lead agency is accorded more flexibility in the EIS's content than for "project" proposals, given that there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. WAC 197-11-442(1). The lead agency is only required to "discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal." WAC 197-11-442(2). In addition, if the nonproject proposal concerns a specific geographic area, site specific analyses are not required. WAC 197-11-442(3).

Response to Issues.

Issue 1.

SEPA requires that an EIS evaluate the proposed action, a "no-action alternative", and other "reasonable alternatives." WAC 197-11-440(5)(b)(ii). The SEPA Rules do not define what the "no-action" alternative must look like. Thus, as stated in the Department of Ecology's SEPA Handbook¹, "the lead agency has some discretion in its design." As further stated in the Handbook, "It [no-action alternative] is typically defined as what would be most likely to happen if the proposal did not occur. *If a rezone is proposed, what is the most likely development on the site under existing zoning?*" The Appendix to the SEPA Handbook also states:

Q: What is an "alternative" when preparing an EIS for a comprehensive plan? How is the no action alternative defined?

A: A range of alternatives should be evaluated, exploring the different land use options, including different urban growth area boundaries, characteristics and densities of development, etc. The no-action alternative for a comprehensive plan is generally defined as no change in existing regulation—zoning, development regulations, critical area ordinances, etc. (or the lack thereof) would be unchanged. The environmental impacts *of predicted growth* under this "no-action" scenario are then compared to that of the other alternatives.

SEPA Handbook, Appendix A.10. *See also, Hood Canal Coalition v. Jefferson County*, 152 Wn.

¹ Source: <http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbch03.html#3.3.2.1>

App. 1065 (2009) (unreported) (no action alternative entailed analysis of mining development as a permitted use on the property under then-current zoning); *Davidson Serles v. City of Kirkland*, GMHB No. 09-3-007c, FDO (Oct. 5, 2009) (no action alternative analyzed for a comprehensive plan amendment and rezone projected build-out on the three parcels under existing zoning).

The FEIS followed precisely the Handbook's guidance by using development under the parameters of the existing LOS zoning designation as the "no action" alternative. As stated above, a no-action alternative does not mean "no development" of the property. Rather, land uses that could occur under the existing zoning designation of LOS include single-family homes, group homes, mobile home/manufactured homes, greenhouse, fitness club, agricultural uses², day care center (conditional), religious institution (conditional), school (conditional), cement manufacturing (special use), and animal slaughtering (special use). For a complete listing, see the zoning matrix table in MMC 18.10.050, which is also included in the FEIS as Appendix B. Accordingly, the FEIS does not include 'no development of the site' as the no action alternative, because under the current zoning designation, development could occur. The concept of analyzing no development whatsoever of the site would presumably be a change to the existing LOS zoning, and subsequently a new alternative in itself.

In any case, even assuming *arguendo* that the lead agency is required to utilize the existing use of the property as the "no action" alternative, Appellants have incorrectly identified agricultural purposes as the East Monroe site's existing use. The property is not currently used for productive agriculture and nor has it been used for agricultural purposes since the applicant purchased it 15 years ago in September 1998. Some portions of the site have been used for agriculture in the known past, mainly for the grazing of livestock and raising hay. Currently, it is best described as vacant with a portion of abandoned agricultural land. The Snohomish County Assessor's Database classifies the property as use code "910" Undeveloped (vacant) Land. The Growth Management Act defines agricultural land as land primarily devoted to the commercial production of crops³. The property has no commercial operations associated neither with it currently nor in the recent past. Nevertheless, the DEIS acknowledged that the site has been used in the past for agriculture in Sections 3.4, 3.6, 3.7.1, and Appendix D as well as pastoral uses (Table 3, Section 3.1, 3.4, 3.5, Appendix D). As a result of comments received on the Draft EIS (DEIS), additional sections were added to the document. Specifically, a section titled "Existing Conditions" was added to Sections 1.1 and 2.2 of the FEIS to include additional information on the existing and historical use of the site, including its prior agricultural use. Additionally, under Section Three, the Affected Environment section of each environmental element contains the background and existing conditions of each element.

² Per MMC 18.02.010, "Agricultural use" means those activities conducted on lands defined in RCW 84.34.020(2), and activities involved in the production of crops or livestock for wholesale trade. An activity ceases to be considered agriculture when the area on which it is conducted is proposed for conversion to a nonagricultural use or has lain idle for more than five years, unless the idle land is registered in a federal or state soils conservation program, or unless the activity is maintenance of irrigation ditches, laterals, canals, or drainage ditches related to an existing and ongoing agricultural activity.

³ RCW 36.70A.030(2) "Agricultural land" means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by *RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.

Moreover, as stated in the response to comments, the City of Monroe does not currently have any designated agricultural lands within City limits as per RCW 36.70A.170 nor any land zoned specifically for agricultural production. A goal of the Growth Management Act is to preserve productive agricultural and resource lands outside of urban limits and within urban limits if the city has enacted a program authorizing the transfer or purchase of development rights [RCW 36.70A.060(4)]. This is reflected in the Snohomish Countywide Planning Policies, though the City of Monroe does not currently have a program authorizing the transfer or purchase of development rights. A primary goal for cities is to develop to urban densities; that is what the City of Monroe and other cities in Washington State are required to do per the GMA.

In sum, the City appropriately defined the no action alternative as encompassing authorized development under the existing Limited Open Space (LOS) Comprehensive Plan designation and current zoning. Utilizing agricultural uses as the “no action” alternative is neither representative of the current use of the property nor is reasonable given that new agricultural uses are not favored within the urban growth area. The City’s designation of the no action alternative is in accordance with the Department of Ecology’s guidance and, for the reasons stated above, is well within the discretion given to the lead agency to design the appropriate “no action” alternative.

Issue 2.

The FEIS discloses and discusses, in reasonably appropriate detail given the nonproject nature of the proposal, the environmental impacts related to compensatory flood storage and the cut and fill estimated to raise the site above the 100-year floodplain elevation primarily in Section 3.1.2 and Table 3. Because the proposal is a nonproject action, the FEIS is only required to analyze the broad impacts of the proposal per WAC 197-11-442(2) and WAC 197-11-443(2). In fact, the FEIS goes into extensive detail to determine the amount of cut and fill required to raise the site above the floodplain elevation. This level of detail is above and beyond the level of detail required for a non-project action (see pages 25-44). Figure 10 shows cut and fill areas at a conceptual level and Figure 11 is a cross-section of the property showing the general areas to be cut and filled. Figure 11 also illustrates the estimated amount of fill to raise the property above the 100 year floodplain elevation.

Compensatory flood storage is required at a 1:1 ratio where for every 1 cubic foot of fill placed below the 100-year flood elevation in the floodplain limits, 1 cubic foot of volume of compensatory flood water storage must be added to offset the volume lost by placement of the fill. When a specific development is proposed, an analysis of the precise volume of compensatory storage required will be performed. This will determine the need and extent of excavation for compensatory flood storage. If and when the area develops, the excavation proposed would likely occur south of the slough, in critical area buffers, and outside of both stream and wetland boundaries. The excavation, fill and grading would provide for flood storage to help ensure that flood water levels will not exceed the flood water elevations that could currently be reached on the north bank of the slough.

Landslide evaluation was included in the EIS process. Preliminary site evaluation indicated that development south of the toe of the slope will not impact landslide activities at the higher elevations. See the Geotechnical Soils Evaluation in Appendix C of the FEIS for more detail.

Protection of steep slopes is provided by maintaining setbacks in accordance with City of Monroe Critical Areas Ordinance (MMC 20.05); this reference has been added to the FEIS.

Detailed earthwork calculations are not required in a non-project EIS. Rather, they are typically required at project action level in accordance with the standards set forth in WAC 197-11-442 and 443, which recognize that nonproject proposals may be approved based on an EIS assessing broad impacts and that when a project is proposed consistent with the nonproject action an additional EIS will be prepared.

In sum, it is appropriate for a non-project EIS to analyze the general environmental impacts of cut and fill proposed by an alternative. It is neither appropriate nor required to analyze specific earthwork calculations at a non-project level. However, this EIS went above and beyond the standard to quantify the amount of earthwork in the EIS to provide decision makers with as much detailed information as possible for an informed decision.

Material excavated from the site may or may not be used for fill. It is likely that unsuitable excavated materials will be hauled to a pre-approved disposal site and suitable fill material will be imported as necessary. It is incumbent on the applicant to demonstrate compliance with the standards in the MMC and all other local, state, and federal regulations at the time of application for development.

Any evidence that the Geotechnical Evaluation is insufficient or incorrect shall be borne by the Appellant's technical expert in this field.

Issue 3.

Under the state's Growth Management Act, local governments are required to use the best available science when reviewing and revising their policies and regulations on critical areas per WAC 365-195. "Best available science" means current scientific information used in the process to designate, protect, or restore critical areas that is derived from a valid scientific process as defined by WAC 365-195-900 through 365-195-925 (MMC 20.05.030). Thus, "best available science" is a term of art specific to the Growth Management Act and designation of critical areas. The only standard by which an FEIS is to be judged is the "rule of reason," which merely requires that the environmental impacts of a proposal are reasonably disclosed, discussed, and substantiated with supporting opinions and data. According to WAC 197-11-420, the lead agency must assure that the EIS is prepared in a "professional manner and with appropriate interdisciplinary methodology."

In accordance with this standard, the FEIS acknowledges that in order to develop on the developable portions of the property as shown in Figure 3, fill would be needed to prevent flooding. This is cited in Section 3.1.2 and Table 3 of the FEIS. The FEIS proposes filling the developable portions of the site above the 100 year floodplain elevation and cutting areas within critical area buffers only for compensatory flood storage. The FEIS uses the preliminary 2007 FEMA/FIRM maps to set the 100 year floodplain elevation and attempts to calculate the amount of fill needed to raise the site at 46,500 cubic yards using appropriate interdisciplinary methodology.

The FEIS analyzes the impacts associated with the proposed extensive filling of portions of the site. The impacts associated with the fill are proposed to be mitigated primarily through the provision of compensatory flood storage to off-set the placement of fill. This approach also provides the opportunity for restoration and enhancement of low functioning critical areas as further described in Appendix D. The analysis of the cut and fill and compensatory flood storage required was performed by technical experts in the Geotechnical Evaluation and the Wetland Resources Critical Areas Report (Appendices C and D respectively), none of whose opinions have been rebutted by the appellants. It will be incumbent on the applicant to demonstrate compliance with the standards in the MMC, and all other local, state, and federal regulations at the time of application for development. Please also see the response to Issue 8 below.

Issue 4.

Pursuant to WAC 197-11-440(6)(e), an EIS must describe significant impacts of the proposal on the built environment, including the “cost of and effects on public services, such as utilities, roads, fire, and police protection.” Section 3.12 of the FEIS specifically discusses and is exclusively devoted to the impacts of the proposal on public utilities, including water, sewer, and stormwater. Section 3.12 identifies that in any alternative, development of the site would require connection to and installation of public utilities.

The water and sewer lines to the site will most likely be tied in and connected to the City’s systems at the intersection of US-2 and Main St. Extension of these lines will likely be built within existing US-2 right-of-way for the majority of the route with the exception of the crossing of Woods Creek. A decision on whether the lines should be elevated and run under/alongside the existing bridge over the creek or bored underneath the creek will be determined at the time of development. Boring under water sources usually results in minimal or no impacts and is an accepted methodology when dealing with environmental concerns. A full analysis of the potential environmental impacts from the construction of the water and sewer lines is appropriate at a project action level. Such an analysis at a non-project action stage without knowing the use and size and location of lines is speculative at best. In general, the environmental impacts of extending water and sewer lines to the site would primarily be ground disturbance where the water and sewer lines would actually be constructed, and any environmental impacts associated with crossing Woods Creek. The ground disturbance impacts are temporary and can be mitigated using existing local, state, and federal regulation and best management practices. Impacts associated with crossing the creek would be examined as part of the project level environmental review and could also be mitigated using existing local, state, and federal regulation and best management practices.

Section 3.12 of the FEIS does discuss temporary impacts associated with the installation of water and sewer mains. It also discusses options for the utility connections, including additional facilities. Stormwater utilities are discussed at length in Section 3.12. Potential mitigating measures are also proposed. The above is also summarized and analyzed in Table 3 of the FEIS. Generally, most utility impacts can be mitigated by existing local, state, and federal regulation as well as utility impact fees. It is incumbent on the applicant to demonstrate compliance with the standards in the MMC and all other local, state, and federal regulations at the time of application for development.

Connection to city services within an urban growth area is generally seen as a positive benefit by the State of Washington to protect basic public health and safety and the environment [RCW 36.70A.020 (1) and (12).] The Growth Management Act directs jurisdictions to provide public facilities and services to support development. Positive environmental benefits include the removal or preclusion of septic facilities, the capture and adequate treatment of pollutants and sediments, and other benefits that may occur as a property is connected to urban services.

Accordingly, to the extent possible at the nonproject stage, Section 3.12 and Table 3 identify the impacts of the proposal upon the water, sewer, and stormwater utility and disclose the applicable mitigation measures to satisfy the rule of reason.

Issue 5.

Proper public noticing and commenting procedures were followed on the DEIS and FEIS as per WAC 197-11-455, 197-11-510, and 197-11-460. See Exhibits M4-M6 for copies of the notices and affidavits. This EIS went above and beyond the standard for a non-project action by holding a voluntary public hearing to gather public comments on the DEIS on September 5, 2013. The FEIS resulted in 16 written comments from 19 individual commenters as well the oral testimony received at the public hearing. All comments on the DEIS were organized into a comment/response matrix and included with the FEIS in the Comments/Responses section.

As per WAC 197-11-560, possible agency responses to comments are meant to (a) Modify alternatives including the proposed action, (b) Develop and evaluate alternatives not previously given detailed consideration by the agency, (c) Supplement, improve, or modify the analysis. (d) Make factual corrections, and (e) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support the agency's response and, if appropriate, indicate those circumstances that would trigger agency reappraisal or further response.

The appellants have not specifically identified any of the city's responses which they believe fail to meet this standard, except those responses made to the comments of the Department of Ecology (DOE). Thus, in general, comments seeking further information were responded to with additional explanation or clarification as explained above if they were valid and effective in making the FEIS a more clear and concise document. As demonstrated by the FEIS Comments/Response section, comments were responded to with meaningful discussion. In addition, some comments received were not specific to the content of the FEIS, in which case the agency response was "comment noted." WAC 197-11-560 states that "Recognizing their generally more limited resources, members of the public shall make their comments as specific as possible and are encouraged to comment on methodology needed, additional information, and mitigation measures in the manner indicated in this section." The SEPA Handbook states that "It may be appropriate to respond to a comment on the draft EIS with "comment noted" when the comment lacks substance (e.g. "I don't want the proposal"). If the comment is generic or nonspecific (e.g., "There will be unacceptable air quality impacts"), the response might be: "Your comment was noted, but the comment was not specific enough to respond to. Please see Section XX of the Final EIS for a discussion of air quality impacts and possible mitigation'" (SEPA Handbook Chapter 3.5.1). The City's responses were made in compliance with this guidance.

With respect to the comments made specifically by DOE, the City responded to each of DOE's three major concerns as outlined in the letter dated September 13, 2013. As to the first concern regarding lack of analysis on the baseline/no action alternative, the FEIS added a section titled "Existing Conditions" to Sections 1.1 and 2.2 of the FEIS to address this issue in part. In addition, as explained above in the response to Issue 1, the no-action alternative does not necessarily equate to analysis of a "no development" scenario in accordance with the guidance established by DOE. The lead agency has discretion in the design of the no action alternative.

As to DOE's second concern relating to loss of agricultural land and economic concerns, see the responses to Issues 1, 7, and 11 respectively.

Finally, DOE expressed concern that the proposed habitat enhancements and excavation for compensatory flood storage have the potential to significantly alter the slough and wetlands. To address DOE's concerns, the Applicant and Respondent communicated with Mr. Paul Anderson, DOE's Snohomish County Wetland Specialist, to better understand and alleviate the concerns raised in his letter. On September 30th, 2013, Mr. Anderson met on site with Scott Brainard of Wetland Resources, Inc. and Paul Popelka of the City of Monroe to verify the wetland delineation boundaries. Through this process it became apparent that Mr. Anderson believed some work was proposed to take place within the actual wetland and stream boundaries when, in fact, that is not the case as proposed by the EIS. The work proposed would occur within the critical area buffers only. This was clarified with Mr. Anderson and also reflected in the FEIS. Mr. Anderson then sent a letter to the City following the meeting that confirmed that he concurred with the delineation and that he had no remaining questions. This letter is presented as Exhibit M15. Thus, the concerns raised by DOE relating to the wetland delineation boundaries in the FEIS have been addressed and resolved.

DOE's more general concern that discussion of environmental impacts in the FEIS is cursory and general in nature is explained by the fact that the proposal is a non-project action. The EIS acknowledges that additional analysis and permitting will be required at the project application stage.

Mr. Anderson also questioned how commercial development of the site will provide an overall net benefit to the environment in the long term versus leaving the property undeveloped in its current state. While this is an interesting question, it is not the question before the Hearing Examiner to be decided because the property could develop now under its current zoning designation (LOS). The option before the community is not whether to develop it or preserve it forever; it is whether to keep the existing zoning designation or change it to commercial zoning. Therefore, as explained in detail above, the comments received on the DEIS were thoroughly reviewed and appropriately responded to according to the standards established in WAC 197-11-560.

Issue 6.

Again, under the "rule of reason," the FEIS must only contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences to Highway 2 caused by the proposed action. In this case, the FEIS is clearly drafted to inform decision makers of the probable

impacts to Highway 2, as much as they can be determined at the nonproject stage.

The FEIS addresses transportation issues associated with potential development of the property in several sections of the document but most specifically in the form of a Transportation Impact Analysis (TIA) Report found in Appendix F. Intersection level of service analysis was conducted in the report, which concluded that off-site intersections will operate at acceptable levels of service under any of the three alternatives presented in the EIS.

The report does not fail to address access to Highway 2; in fact the TIA concludes that access will require improvements in the form of inbound left-turn channelization, separate outbound lanes, and an outbound left-turn acceleration lane. The transportation environmental impacts are also summarized in Table 3, which establishes the daily trips that will potentially be generated along Highway 2 by each of the three alternative development scenarios and the mitigation measures already mentioned.

Deference should be given to WSDOT and WSDOT's comments on the DEIS (Comment Letter #6, page 20 in the Comments/Responses Section) since US-2 is a state highway. The analysis and detailed construction plans of a roundabout as specified in WSDOT's letter are appropriate at a project specific level. Gibson Traffic Consultants reached out to WSDOT to ensure they would comment on the DEIS and in doing so showed their support of the FEIS in deferring specifics until the time of a specific development proposal.

Conducting a comprehensive traffic evaluation at a non-project level will not necessarily yield the results sought by the Appellants since it is undetermined when and where improvements to US-2 by WSDOT will occur; it is merely too speculative at this point. WSDOT does have some preliminary plans for this corridor and those have been incorporated into the FEIS in Sections 3.10 and in the TIA. It is understood that since this is a non-project action, a comprehensive traffic evaluation will be required at the time of development and be borne by the applicant. Any development on the property will require coordination with WSDOT, and it is noted in the FEIS that WSDOT has already acquired additional right-of-way along the southern edge of the property to accommodate planned improvements to SR-2.

Any evidence that the TIA is insufficient or lacking shall be borne by the Appellant's technical expert in this field.

Issue 7.

The issue raised is irrelevant and not germane to the SEPA process. The economic feasibility of a project and specifically, the risk associated with the cost of developing a property, is not a criterion for environmental review under the SEPA.

As stated in the response to comments of the FEIS, per WAC 197-11-450, a cost-benefit analysis is not required by SEPA:

A cost-benefit analysis (WAC 197-11-726) is not required by SEPA. If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered by an agency for the proposal, it may be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. For purposes of complying with SEPA, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations

Simply put, a fiscal analysis is not an environmental element under SEPA per WAC 197-11-444. A lead agency may include optional elements in an EIS based upon comments received during the scoping process per WAC 197-11.440. In this instance, the scoping process identified the elements in the EIS and a fiscal analysis was not included.

Additionally, the cost of development will be the sole responsibility of the owner/developer. Public infrastructure will be financed by private development consistent with GMA goals of 'growth pays for growth'. The City may incur some costs in the future associated with maintenance and increased load on utility systems; however those costs are generally offset by the City's required impact fees and connection fees at the time of development.

Issue 8.

The FEIS responded to most if not all of the comments. In some cases where the content of the comments addressed the same or similar issues, one comprehensive response was provided and referred back to in future comments. This EIS went above and beyond the standard for a non-project action by holding a voluntary public hearing on September 5, 2013 to gather public comments on the DEIS.

As a result of comments received on the DEIS regarding flooding of the property, city archives were researched for photos of the 2006 flooding event. Most of the photos from that event were of city-owned property including parks and recreational areas. Private property was not generally photographed by city staff as the priority was for city owned property. However, four photos were found showing the East Monroe property during the flood event. The photos provided in the FEIS in Figure 13 and in Section 3.3.2 are city archives and were added to the EIS as a result of public comment on the draft. Therefore, the FEIS uses the best information available at the time. Moreover, pursuant to WAC 197-11-402(4), "[d]escription of the existing environment and the nature of environmental impacts shall be limited to the affected environment and *shall be no longer than is necessary to understand the environmental consequences of the alternatives*, including the proposal." Because the FEIS extensively discusses the fact that the property is in the floodplain and acknowledges historical flooding of the site, an exhaustive set of photographs of flooding at the site is unnecessary and would violate WAC 197-11-402(5), stating that "EISs shall be no longer than necessary to comply with SEPA and these rules."

The City is not disputing that parts of the property are in the floodplain, hence the extensive discussion of cut and fill and compensatory flood storage utilizing the most conservative approach in consulting the preliminary FEMA/FIRM maps from 2007. If the appellants are arguing the depth of water in November 2006, the City has no time lapse photos of the site, therefore the four photos provided in the FEIS may not show the water level prior to or after the photos were taken. However, for the limited purposes of a non-project EIS analyzing the broad environmental impacts of the proposal, the FEIS demonstrates that the property will adhere to the adopted FEMA flood maps at the time of development.

Please also see the responses to Issues 3 and 5 above.

Issue 9.

The appellants incorrectly assert that the FEIS does not include a correct FEMA map. Appendix E of the FEIS includes the preliminary FEMA/FIRM map issued by FEMA in 2007. This map was intentionally used to obtain the most conservative estimate of the floodplain area, *i.e.*, the worst-case scenario. Although the 2007 FEMA map is considered “preliminary,” meaning there remains a question at the federal level as to whether the map will become “effective,”⁴ the preliminary map was used to examine the broadest spectrum of potential impacts from flooding. The preliminary maps were issued by FEMA for consideration by communities prior to finalization. They are, for all intents and purposes, considered the best available science for floodplains in the area even if they are not technically considered effective at this time. The EIS does consider the worst-case scenario for flooding and goes above and beyond the FEMA maps currently used by the City of Monroe. More discussion on this issue is found in the FEIS on page 39.

For further clarification, the City of Monroe currently considers areas of floodplain in its city limits as those areas depicted in the 2005 FEMA/FIRM map Panel #1357 of 1575 for the west half of the city and the 1999 FEMA/FIRM map Panel #1377 of 1575 for the eastern half of the city including the East Monroe property. This is best illustrated by Exhibit M16 showing the combination of the two different adopted panels. The City considers the two FIRM panels as the effective floodplain maps since the preliminary 2007 FEMA/FIRM maps have yet to be finalized.

In any event, the FEIS discusses the requirement for adhering to the adopted FEMA Flood maps at the time of development.

⁴ Source: <http://www.fema.gov/view-your-communitys-preliminary-flood-hazard-data-0>

What is the Difference Between Preliminary and Effective Data?

Preliminary data are not for use, distribution, or replication until the data are finalized and labeled as “effective” on the MSC. Preliminary data are for review and guidance purposes only. By viewing preliminary data, the user acknowledges that the information provided is preliminary and subject to change. Preliminary data, including new or revised FIRMs, FIS reports, and FIRM Databases, are not final and are presented on the MSC as the best information available at this time. Additionally, preliminary data cannot be used to rate flood insurance policies or enforce the Federal mandatory purchase requirement. Preliminary data will be removed and replaced once effective data are available.

Unlike preliminary data, effective data and maps are official and should be used for National Flood Insurance Program (NFIP) purposes and viewing risk premium zones applicable to a community. If you don’t want to view preliminary data, go to your community’s effective FIRM or effective FIS Report on the MSC Product Catalog.

As to the issue of flood insurance rates, the appellants must clarify how they believe using FEMA maps changes the rates and their specific concerns regarding this. As we understand it, the risk of flooding is not changing for downstream or upstream properties because the EIS contemplates mitigating the effects of the fill by creating the additional flood storage. This of course, would have to be demonstrated to meet local, state, and federal regulations at the time of development and would be reviewed at a project specific level.

Issue 10.

The Appellants complain that the FEIS relied upon LIDAR methodology rather than a 1999 field survey to obtain the elevations of the East Monroe site. As a result of comments on the DEIS, LIDAR is referenced in the FEIS in Table 2 and a topographic survey map using LIDAR technology were added to the FEIS as Appendix J. LIDAR (light detection and ranging) is a remote sensing technology that that measures distance with a laser and analyzes the reflected light. Mapping leader Environmental Systems Research Institute (ESRI) defines LIDAR as “an optical remote-sensing technique that uses laser light to densely sample the surface of the earth, producing highly accurate x,y,z measurements”⁵. The LIDAR data used in the FEIS came from the Puget Sound LIDAR Consortium from Snohomish County Information Services in March of 2010. The LIDAR data was collected between 2005 and 2006 and published on January 9th, 2007.

As stated above, the only standard by which an FEIS is to be judged is the “rule of reason,” which merely requires that the environmental impacts of a proposal are reasonably disclosed, discussed, and substantiated with supporting opinions and data. According to WAC 197-11-420, the lead agency must assure that the EIS is prepared in a “professional manner and with appropriate interdisciplinary methodology.” LIDAR is a widely accepted methodology used to discern the elevations and topography of property. The Appellants have not offered any technical expert in this field demonstrating otherwise and nor have they presented evidence that there are significant differences in the interpolated elevations between the 1999 survey and the LIDAR data. Other variables such as the calibration of equipment and field verification may also factor into the precision of elevation measurements even if such differences exist. Thus, the LIDAR methodology satisfies WAC 197-11-420’s required use of professional and appropriate interdisciplinary methodology. Even assuming that 1999 survey is preferable in terms of accuracy, site specific analysis is not required for a nonproject EIS. Therefore, use of the LIDAR data would reasonably inform decision makers regarding environmental impacts of the proposal even if the 1999 survey was more accurate.

Issue 11.

As with Issue 7 above, the issue raised is irrelevant and not germane to the SEPA process. The economic feasibility of a project and specifically, the risk associated with the cost of developing a property is not a criterion for environmental review under the SEPA.

⁵ <http://resources.arcgis.com/en/help/main/10.1/index.html#//015w00000041000000>

Although the FEIS did not need to address the economic feasibility of the developing the property under SEPA, it did do so in a general manner; not a detailed analysis. Sections 1 (Summary, pg. 2) and 3.12.1 briefly discuss the economic feasibility of development.

Issue 12.

The Appellants complain that the FEIS is inconsistent with GMA goals and requirements to protect critical areas, retain open space, conserve fish and wildlife habitat, and availability of public facilities to support development. However, Appellants' argument is misplaced. To the extent that the proposal violates the GMA goals and requirements, Appellants may appeal any decision by the City Council to adopt the Comprehensive Plan Amendment and Rezone to the Growth Management Hearings Board, which has exclusive jurisdiction to determine such matters. RCW 36.70A.280(1)(a) ("The growth management hearings board shall hear and determine only those petitions alleging either: (a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter [Chapter 36.70A RCW]. . . ."); *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 626, 246 P.3d 822 (2011) ("Growth management hearings boards have exclusive jurisdiction to determine compliance with the Growth Management Act The Growth Management Act (GMA), chapter 36.70A RCW, 'clearly contemplates that challenges to comprehensive plan amendments [and development regulations] must be brought before the [Board].'") Accordingly, the Hearing Examiner lacks jurisdiction to determine whether the proposal violates the GMA.

Conclusion.

In conclusion, the FEIS provides an impartial discussion of significant environmental impacts and *reasonably* informs decision makers and the public of reasonable alternatives, including mitigation measures that would avoid or minimize adverse impacts or enhance environmental quality. Particularly in light of the fact that the proposal is a nonproject action and that lead agencies are afforded "more flexibility in preparing EISs on nonproject proposals", the East Monroe FEIS reasonably and adequately informs decision makers and the public of the significant aspects of the probable environmental consequences of the proposed Comprehensive Plan Amendment and Rezone from LOS to General Commercial. The Responsible Official's determination of the FEIS's adequacy must be given substantial weight.

The appellants have failed to satisfy their burden of proof to show by a preponderance of the evidence that the FEIS fails to "reasonably disclose, discuss, and substantiate its opinions" as to the probable significant adverse environmental impacts of the proposal. Generally, the appellants' concerns can be categorized into the following areas: (1) the no action alternative is not a "no development" scenario; (2) the FEIS fails to adequately address or calculate the environmental impacts of increased fill required to raise the site, of increased traffic on Highway 2, and of increased demand on utilities; (3) the FEIS failed to adequately address comments received on the DEIS; and (4) that the financial challenges of commercial development at the site have not been adequately addressed. Each of these arguments is without merit.

As discussed at length above, the lead agency has discretion to fashion or design the “no action” alternative. In this case, the City utilized a “no action” alternative specifically recommended by DOE’s SEPA Handbook, *i.e.*, use of a development scenario under the current zoning as the benchmark for comparison. In addition, as allowed under WAC 197-11-420(2), the City as the lead agency required the applicant to retain an outside consultant to prepare the EIS in a professional manner and using appropriate interdisciplinary methodology. The authors of the EIS also utilized subconsultants such as wetland biologists, traffic engineers, and geotechnical engineers to develop expert opinions, none of which have been rebutted by a corresponding expert witness on behalf of the appellants. The FEIS does discuss the issues of fill and compensatory flood storage, impacts to Highway 2, and increased demand on utilities at length, as described above. In addition, the Comments and Responses section of the FEIS substantively address comments received where appropriate, including those of DOE. Finally, the economic viability of development following any enactment of the Comprehensive Plan Amendment and Rezone is simply not an element of the environment required to be studied under SEPA.

For the foregoing reasons, the City respectfully requests that the Hearing Examiner conclude that the FEIS is adequate as a matter of law.