August 3, 2012

John E. Galt, Hearing Examiner
City of Monroe
806 W. Main Street
Monroe, WA 98272

Re: APN2012-01—City of Monroe's Request for Reconsideration and Clarification

Dear Mr. Galt:

Pursuant to MMC 21.50.080, the City of Monroe hereby requests reconsideration and clarification of the Hearing Examiner's decision designated as APN2012-01, which was entered on July 23, 201.[1] The subject decision determined that the Final Phased Environmental Impact Statement (FPEIS) for the proposed East Monroe Comprehensive Plan amendment and associated rezone application was inadequate.

1. Standard of Review. Preliminarily, the City is extremely concerned that the standard of review employed by the Hearing Examiner did not afford appropriate deference to the City's SEPA responsible official as required by state law. The relevant statute unequivocally provides that an agency's SEPA determination is entitled to "substantial weight". *See* RCW 43.21C.090. A lengthy body of Washington caselaw reaffirms this principle. *See, e.g., OPAL v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996) (citations omitted); *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 480, 245 P.3d 789 (2011). While the Hearing Examiner generally acknowledged this authority, the Examiner's decision included a footnote questioning whether such deference applies in the context of an FEIS adequacy challenge. *Decision at 14 n.8.* The Examiner reasoned that the EIS at issue in this appeal is a "detailed statement" rather than a "procedural determination".

There should be no legal uncertainty regarding this point. In defining the deference mandate, RCW 43.21C.090 specifically lists "an attack on a determination by a governmental agency *relative to. . . the adequacy of a 'detailed statement'"* as one of the circumstances under which the agency's decision must be accorded substantial weight. (Emphasis added.) Caselaw clarifies that the "agency's decision" in this regard refers to the SEPA responsible official's work product (i.e., the EIS itself) and not to subsequent decisions of an administrative hearing officer. *See, e.g., Glasser v. City of Seattle*, 139 Wn. App. 728, 739-40, 162 P.2d 1134 (2007). This deferential standard of review has repeatedly been applied in cases involving challenges to the adequacy of an EIS. *See, e.g., Glasser,* 139 Wn. at 740; *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993); *Citizens for Clear Air v. City of Spokane*, 114 Wn.2d 20, 34,

[1] The decision was issued and mailed on July 24, 2012.

785 P.2d 447 (1990); *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 37, 988 P.2d 27 (1999).

Although the Examiner ultimately noted that this point "would make no difference to the outcome of this appeal", the City takes little comfort in this disclaimer. *Decision at 14 n.8.* The standard of review in a SEPA challenge is a critical factor that bears significantly upon all aspects of an appeal decision. That the Examiner apparently raised this issue *sua sponte* and suggested—erroneously—that the East Monroe FPEIS may *not* be entitled to deference raises concerns that the City's environmental determination was subjected an inappropriately heightened standard of review. The City respectfully asks that the Examiner clarify the correct standard of review for this appeal and reconsider its substantive conclusion that the FPEIS is inadequate.

2. **Presumption of City Council Awareness.** One of the Examiner's chief conclusions of law was that the challenged FPEIS "does not give the city council sufficient information to make a reasoned decision" concerning the East Monroe Comprehensive Plan amendment. *Decision at 14.* The City respectfully disagrees with this conclusion. The legislative record demonstrates that the Monroe Council did in fact carefully review and accept the FPEIS and that the Council Members fully understood its contents. Two Council Members indicated their preference to delay action on the underlying Comprehensive Plan amendment until the pending SEPA appeal was complete; however, a clear majority of the Council (five members) affirmatively voted to proceed with the amendment because they had reviewed the EIS and felt sufficiently informed. Specifically, the City Council's deliberations demonstrate the Council's understanding that future site-specific development proposals for the subject property would require additional, more intensive environmental review. They made the legislative determination as presented by the applicant that the cost of a full, project-level EIS analysis was economically prohibitive and illogical due to the lack of any specific project-level permit application at this time.

The Hearing Examiner is respectfully requested to clarify the Examiner's reasoning in Conclusion of Law No. 2 of the appeal decision. In addition to the WAC provisions cited in the decision, the Examiner is requested to supplement the decision with applicable Growth Board cases and/or judicial precedent defining the difference between the legislative discretion granted to the Council under GMA (where economic matters can be considered - i.e., why pay for a report now when the City does not—and cannot—know the specific impacts of any future development proposal for the site?) versus relevant SEPA requirements, which are silent on the economics for EIS review.

3. **Appeal Venue.** The Hearing Examiner's decision states that "[j]udicial review may be sought pursuant to the provisions of Chapter 43.21C RCW, WAC 197-11-680 and MMC 20.04.210 and 21.60.030." *Decision at 20.* The City requests reconsideration and/or clarification regarding this point. As the City construes applicable state law, the right to judicial review "shall without exception be of the governmental action together with its accompanying environmental determinations" RCW 43.21C.075(6)(c). The venue for the "governmental action" at issue here (the City's Comprehensive Plan amendment) would presumably be the Growth Management Hearings Board. *See, e.g.,* RCW 36.70A.280;

Davidson Serles & Assocs. v. City of Kirkland, 159 Wn. App. 616, 246 P.3d 822 (2011). The Examiner is respectfully requested to reconsider the appropriate appeal venue for the decision and/or explain why the Superior Court is the correct appellate destination.

Thank you for your consideration of the above points. The City looks forward to your response.

Sincerely,

Brad Feilberg, P.E.
Public Works Director / SEPA Responsible Official
City of Monroe