

Lathrop, Winbauer, Harrel, Slothower & Denison L.L.P.

Attorneys at Law

Post Office Box 1088, 201 West Seventh Avenue, Ellensburg, WA 98926

F. Steven Lathrop, P.S.
John P. Winbauer
Susan K. Harrel
Jeff Slothower
James T. Denison, Jr.
Douglas W. Nicholson

Jeff Slothower
jslothower@lwbsd.com

Tel (509) 925-6916
Direct Fax (509) 343-3206
www.lwbsd.com

June 20, 2013

Via Hand Delivery

Lindsey Ozbolt
Planning Official
Kittitas County Community Development Services
411 North Ruby, Suite 2
Ellensburg WA 98926

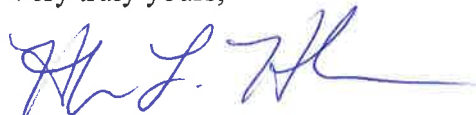
**Re: Conditional Use Permit Application of: Cascade Field and Stream Club
CU-11-00003**

Dear Ms. Ozbolt:

I enclose an original and three copies of *Applicant's Supplemental Response to Memorandum of Appellant With Respect to SEPA Appeal*. As we discussed in our telephone conversation on Friday, June 7, 2013 regarding another SEPA appeal, I understand the procedure the County follows in SEPA appeals is that your office collects and distributes copies of briefing to counsel and the Hearings Examiner.

Please do not hesitate to contact me with questions. Thank you for your assistance.

Very truly yours,



Heather L. Hazlett
Legal Assistant to
Jeff Slothower

HH

Enclosures

cc: Client (via email, w/encls.)
James C. Carmody (via email, w/encls.)
Neil A. Caulkins (via email, w/encls.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

KITTITAS COUNTY HEARINGS EXAMINER

Conditional Use Permit Application of:
CASCADE FIELD AND STREAM CLUB

CU-11-00003

APPLICANT'S SUPPLEMENTAL
RESPONSE TO MEMORANDUM
OF APPELLANT WITH RESPECT
TO SEPA APPEAL

I. INTRODUCTION

The Applicant, Cascade Field and Stream Club (hereinafter the "Club" or the "Applicant"), submitted *Applicant's Memorandum of Authorities in Response to the SEPA Appeal and In Support of the Issuance of the Conditional Use Permit* filed on May 9, 2013 (hereinafter "*First Brief*") when that document was due on May 9, 2013. Thereafter, the Appellants, Dean and Danielle Tonseth, David Homquist and Ken Fyall (hereinafter "Appellants") indicated that they were unaware of the scheduling letter and thus were not aware that their brief had been due on April 23, 2013. The Hearings Examiner held a pre-hearing conference and proposed a stipulation, which the parties agreed to.

Appellants then filed their *Memorandum of Appellant with Respect to SEPA Appeal* dated June 6, 2013 (hereinafter "*Memorandum of Appellants*") dated June 6, 2013 and Applicant now responds. In responding, the Applicant does not intend to completely restate all of the points made in the *First Brief*. Instead, the Applicant intends to supplement its response in the *First Brief*.

1 **II. ARGUMENT**

2 At p. 4, l. 1 through p. 13, l. 14, the Applicant addresses the issues raised in the Appellants'
3 initial SEPA appeal. Nothing provided by the Appellants changes that analysis. However, the
4 Applicant supplements its prior brief as follows:

5 **2.1 Site Visit Request.**

6 Based on the site characteristics and the arguments raised, the Applicant requests that the
7 Hearings Examiner conduct a site visit to the Applicant's property. With a site visit, the Hearings
8 Examiner will understand that this site is remote and not located in a residential area as Appellants'
9 suggest. The site visit will also give the Hearings Examiner perspective on the location of the
10 boundaries of the property and the existing and proposed location of improvements on the property
11 for the both the SEPA appeal and on the merits of the conditional use permit. The Applicant can
12 arrange access to the site prior to the public hearing.

13 **2.2 Kittitas County Followed Required Review Procedures.**

14 **(a) The Notice of Application and Review Did Not Violate the Optional**
15 **Review Procedures of WAC 197-11-355.¹**

16 Kittitas County (hereinafter the "County") issued a Notice of Application on October 17,
17 2011 (see *First Brief*, Exhibit 17) indicating the County intended to use the optional DNS process.
18 The notice indicated the County anticipated certain mitigation measures would be required under
19 the zoning code, critical area codes and fire codes. The County also indicated that additional
20 mitigation measures may be imposed. Based upon that Notice of Application, comments were
21 solicited from various agencies and the public. Based upon those comments, certain issues were
22 identified and the County requested additional information from the Applicant relating to noise.

23 The optional DNS process is set out at WAC 197-11-355. WAC 197-11-355(2) specifies
24 the form of the notice that must be used with the optional DNS process. The County's Notice of
25 Application meets the criteria of WAC 197-11-355(2)(a) and (b). There is no allegation the notice

26 ¹ See *First Brief*, p. 7, l. 16 (§2.2.3.1).

1 was not sent properly to any other individuals or agencies who should have or were entitled to
2 notice.

3 WAC 197-11-355 provides the responsible official shall consider timely comments on the
4 Notice of Application and either issue a DNS or Mitigated DNS (hereinafter “MDNS”) with no
5 comment period using the procedures in subsection 5 of WAC 197-11-355. The County has the
6 discretion to reopen the comment period under WAC 197-11-355(4)(b). However, the County is
7 not required to do that. Additionally WAC 197-11-355(4)(d) allows the County to require more
8 information or studies prior to making a threshold determination. In this case, the County did
9 require additional information from the Applicant related to noise and the allegations that this
10 project would create excessive noise. Once the County got the information from the Applicant in
11 the form of Mr. Noxon’s report (*see First Brief*, Exhibit 16), the County then determined it could
12 issue an MDNS with no comment period and proceeded to do so.

13 As set forth in the Applicant’s *First Brief* at p. 7, l. 16 through p. 9, l. 12 (§2.2.3.1), the
14 County followed the optional DNS process set forth in the statute and the procedure used was not
15 erroneous.

16 **(i) The Optional DNS Process is Appropriate Here.**

17 The Appellants argue under WAC 197-11-355(1) the County should not have used the
18 optional DNS process. In particular, the Appellants assert the administrative record demonstrated
19 the County did not have had a reasonable basis for determining significant adverse environmental
20 impacts are unlikely. However, WAC 197-11-355 allows the County the discretion to determine
21 when it will use the optional DNS process. All the County has to have is a reasonable basis for
22 determining significant adverse environmental impacts are unlikely from the application. The
23 Appellants argue the noise impacts and the lead management issues required the County to not use
24 the optional DNS procedures. Throughout their brief, the Appellants argue that there is “noise
25 impacts in excess of a maximum permissible noise levels under state regulations. WAC 173-60-
26 040.” (*Memorandum of Appellants*, p. 3, ll. 23-24.) This is false and unsubstantiated. WAC 173-

1 60-050 sets out certain exemptions to WAC 173-60-040, one of which is “[s]ounds created by the
2 discharge or firearms on authorized shooting ranges” that occurs “between the hours of 7:00 a.m.
3 and 10:00 p.m.” In its application, the Applicant has never proposed to operate the shooting range
4 outside of those hours. Therefore, asserting the application disclosed noise impacts in excess of
5 maximum permissible noise levels under WAC 173-60-040 is irrelevant because this activity is
6 exempt so long as it occurs between 7:00 a.m. and 10:00 p.m. The Appellant also cites to lead
7 management issues. However, when the application was filed, the Applicant proposed it be
8 required as a condition of the Conditional Use Permit to adopt and follow the U.S. Environmental
9 Protection Agency’s Best Management Practices for Lead at Outdoor Shooting Ranges (hereinafter
10 “Best Management Practices”). (Index #2, Attachment C-1.²) With the requirement for following
11 the Best Management Practices, all aspects of the Applicant’s use of lead shot and cartridges at the
12 site are regulated and controlled to prevent environmental contamination. Thus, the two issues
13 cited by the Appellants of creating the likelihood of a significant impact to the environment were
14 adequately dealt with in the application. As a result, the County’s decision to use the alternate
15 review process was correct.

16 **(ii) The County Provided Information on Mitigation and the Public**
17 **and Commenting Agencies Were Not Deprived of Their**
18 **Statutory Right to Comment.**

19 The Appellants also assert the County failed to list mitigation measures on the Notice of
20 Application. This argument is without merit. They rely on DOE SEPA Handbook, § 8.3, which
21 they assert specifically provides that “optional DNS process may also be used when mitigation
22 measures have been identified that will reduce all impacts to a nonsignificant level” (see
23 *Memorandum of Appellants*, p. 4, ll. 4-7), which is exactly what the Applicant did when it proposed
24 a lead management plan and a site with shooting berms used for sound mitigation designed by an
25 acoustical engineer. The Appellants assert the public was provided “no information regarding

26 ² References to “Index” numbers are to the record submitted by the County.

1 mitigation” (*Id.*, p. 4, *ll.* 8-9). That is simply not true, as the mitigation was proposed as part of the
2 SEPA Checklist (see generally, Index #2). It is false to assert that “public and commenting
3 agencies were deprived of their statutory right to comment” (see Memorandum of Appellants, p. 4,
4 *ll.* 12-13) on mitigation procedures because much of the mitigation the County ultimately imposed
5 when it issued the SEPA MDNS was proposed by the Applicant in the SEPA Checklist and the
6 application materials. In fact, the Notice of Application specifically indicated there would likely be
7 only one opportunity to comment, which is consistent with Section 8.3 of the DOE SEPA
8 Handbook.

9 **(iii) The County Had the Discretion to Accept Material**
10 **Environmental Information Following End of Comment Period.**

11 The Appellants also assert that Kittitas County accepted material environmental information
12 following the end of the comment period. However, when using the optional DNS process under
13 WAC 197-11-355, the County has the discretion to require additional information and accept that
14 information without an additional comment period. (See WAC 197-11-355(4).) The County acted
15 within the requirements of WAC 197-11-355 and there is no evidence the County abused its
16 discretion.

17 **(b) The County Did Consider and Incorporate Environmental Comments**
18 **and Materials from the Prior 2001 Application**

19 The Applicants also assert that Kittitas County failed to consider and incorporate
20 environmental comments and materials from prior applications. The Appellants assert that the
21 Applicant had submitted at least four prior applications for development of shooting ranges on this
22 specific site. As authority for that, they cite to Exhibit 48 of the Certified Record, which is in fact a
23 comment letter that they submitted on January 13, 2012. (See generally, *Memorandum of*
24 *Appellants*, p. 4, *l.* 26 through p. 5, *l.* 9.) There have not been four applications. The Applicant
25 submitted an application in 2001, which was processed over a several year period and then
26 ultimately abandoned prior to a final decision being made on the Conditional Use Permit. The
Applicant then filed a new application in 2011. When the Applicant submitted the 2011

1 application, it relied on documents that had been prepared in the processing of the prior application.
2 The specific information the Applicant relied on was a noise study done by Dr. Piascek (see Index
3 #2, Attachments E-1 through E-7) and some of the comment letters submitted when the prior
4 application was processed. Because of these existing comment letters, the Applicant was able to
5 address some of the prior comments when the 2011 application was prepared. The Applicant
6 referenced the final EIS prepared in Kittitas Valley Wind Power Project – EFSEC Application No.
7 2003-01 (see Index #2). The County had that available when it made its SEPA decision.

8 **2.3 The Application and Project Information is Complete and Sufficient.**

9 The Appellants also assert that significant portions of the application and project
10 information is incomplete, insufficient and contradictory. The Hearings Examiner is directed to
11 p. 9, l. 13 through p. 12, l. 15 (§2.2.3.2) of the *First Brief* as a partial response to this assertion. In
12 addition, based upon the *Memorandum of Appellants*, the Applicant has the following additional
13 responses.

14 **2.3.1 Project description and timing is not vague and/or unclear.**

15 When the Applicant filed its application it identified and described the project. (See Index
16 #2, Attachment A). Specifically, the proposal to build a small clubhouse, rifle and pistol ranges
17 with covered firing stations, a shotgun range and an archery field. (*Id.*; see also, Index #2,
18 Attachment B for a schematic drawing of the site at full buildout.) The application specifically
19 stated the facility would be constructed over time. (See Index #2, Attachment A). The mitigation
20 measures required by the MDNS will require the shooting stations be designed by an acoustical
21 engineer and constructed consistent with those designs. The property cannot be used for the
22 allowed conditional uses until the mitigation measures are complete.

23 **2.3.2 The Environmental Checklist is Not Vague, Incomplete or Inaccurate.**

24 (See generally, *First Brief*, §2.2.3.2.)

25 Checklist A.6 – The Applicant indicated it would use the existing facility immediately upon
26 approval and would build the improvements over time. Given the SEPA MDNS, the Applicant will

1 now have to comply with the conditions imposed by the SEPA MDNS, including noise and lead
2 management before use of the facility.

3 Checklist A.7 and B.1(e) – Again, the Applicant will be required to comply with the SEPA
4 MDNS conditions prior to use of the facility.

5 Checklist 3 – The Applicant proposed to design and build storm water retention areas as
6 required by existing law. Nothing more was required in this section of the checklist.

7 Checklist 5.6 – The checklist in Section 5 does not require the Applicant to identify impacts
8 to wildlife (see Checklist 5.a, b, c). The Checklist asks for measures to preserve or enhance
9 wildlife. The Applicant indicated and the site plan confirms that the majority of the property will
10 remain undeveloped and available for wildlife.

11 Checklist B.11 – The lighting may be added in the future. At present the site does not even
12 have electricity to it. The site is within an industrial wind farm where each wind tower has flashing
13 lights to warn approaching planes of the existence of wind turbines. The lighting, if built, will be
14 in the nature of security lighting and because of the MDNS is now required to be constructed in a
15 certain way (see *First Brief*, Exhibit 15).

16 Checklist B.14 – Transportation impacts were identified in the Checklist. The County
17 indicates it will monitor transportation impacts and may require additional traffic mitigation in the
18 future if traffic increases. Here, the Appellants also rely on comments from the 2001 application.
19 These comments are not applicable now because Bettas and Hayward roads were improved
20 significantly as a result of the construction of the wind farm.

21 **2.3.3 The Plan was Considered as One Project.**

22 The County MDNS is based on the impact the project will have at full buildout. There is
23 nothing to suggest that the County based its review of the impacts on anything less.

24 **2.4 The Noise Analysis and Mitigation is Complete and Sufficient.**

25 The Appellants argue that the noise analysis and mitigation is incomplete and insufficient
26 (see *First Brief*, §3.2.2.2). The Appellants provided expert comment from JGL Acoustics, Inc.

1 Most recently, in a letter dated June 3, 2013 (see attachment to *Memorandum of Appellants*;
2 hereinafter “JGL Comment Letter”), JGL asserted eight points that were critical of the report
3 prepared by Arthur M. Noxon, PE (see *First Brief*, Exhibit 16). However, even though they are
4 critical of Noxon’s report, several of their comments are incorrect and/or irrelevant (see generally,
5 letter from Noxon dated June 17, 2013, attached hereto as Appendix 1).

6 Mr. Noxon addressed the tests done by Dr. Piacsek, the applicability of state noise codes,
7 the measurement at property lines, impulse noise and gun types. The Appellants suggest that
8 multiple types of guns should be tested, yet the tests were conducted with the “loudest” gun that
9 will be used at the site, a 30-06. In particular, without foundation, the Appellants assert the
10 material submitted by the Applicant is not a “noise study” and a “noise study” done by a licensed
11 acoustical engineer should be completed. Mr. Lily and Mr. Noxon are acoustical engineers. They
12 disagree on methodology but at the end there is no dispute that the mitigation measures proposed
13 by Mr. Noxon will mitigate sound emanating from the discharge of firearms at the site.

14 The JGL Comment Letter is silent on the mitigation measures proposed by Noxon, which
15 consist of bermed shooting lanes and three-sided shooting stations, both designed by an acoustical
16 engineer. Nowhere in the submission by the Appellants is there anything to suggest that the
17 mitigation measures will not fully mitigate any noise emanating from the firearms being discharged
18 on the facility. It is now undisputed that the noise of firearms being discharged can be fully
19 mitigated by the construction of berms and enclosed shooting stations.

20 In essence, you have two experts disagreeing about methodology and process but both agree
21 that any sound emanating from the property can be mitigated.

22 **2.5 Best Management Practices – Lead at Outdoor Shooting Ranges/NRA Range**
23 **Sourcebook.**

24 The Appellants assert there is no detailed site plan attached to the application, Attachments
25 A and B to the SEPA Checklist (see Index #2) depict improvements to be constructed on the
26 property at full buildout. Thus, it is absolutely incorrect to suggest there is no detailed plan

1 provided with the application. The Applicant has further indicated it proposes to adopt and follow
2 the EPA Best Management Practices for Lead at Outdoor Shooting Ranges. That document is a
3 detailed document that requires the Applicant to do certain things on the property. The Applicant
4 proposed that as part of its application and the County incorporated that into its SEPA MDNS as a
5 mitigating condition. The Applicant will be required follow that plan. Appellants spend several
6 pages going through the specifics of the EPA Best Management Plan for Lead Shot. The Applicant
7 has proposed, and assumes it will be required, to follow the Best Management Practices as a
8 condition of using the property as a shooting range. The Applicant will be required to follow all of
9 the Best Management Practices and to the extent compliance with the Best Management Practices
10 requires additional permits from the County or other state agencies, the Applicant will be required
11 to get those. The Applicant did provide a Lead Management Plan with its application (see Index
12 #2, Attachment C-1) wherein it cited to specific sections of the Best Management Practices,
13 including vegetation management on berms, lead reduction plan and removal and recycling of the
14 spent lead.

15 III. CONCLUSION

16 The Applicant has shown the existing site conditions and the site at full buildout. The main
17 issues raised by the Appellants, noise and lead, are both capable of being mitigated and managed.
18 As the Applicant asserted in its *First Brief* at p. 13, l. 16 to p. 2, l. 8, the proposed project meets all
19 of the conditional use criteria. The SEPA appeal should be denied and the Conditional Use Permit
20 should issue.

21 Respectfully submitted this 20 day of June, 2013.

22 LATHROP, WINBAUER, HARREL,
23 SLOTHOWER & DENISON L.L.P.

24 
25 _____
26 Jeff Slothower, WSBA #14526
Attorney for Cascade Field and Stream Club

CERTIFICATE OF SERVICE

I certify that I have this day caused a copy of the document to which this is attached to be served on the individual(s) listed below and in the manner noted below:

Lindsey Ozbolt, Staff Planner
Kittitas County Community Development Services
411 N. Ruby Street, Suite 2
Ellensburg, WA 98926

- BY U.S. MAIL
- BY HAND DELIVERY [Original + 3 copies]
- BY OVERNIGHT DELIVERY
- BY EMAIL: lindsey.ozbolt@co.kittitas.wa.us

Neil Caulkins
Kittitas County Prosecuting Attorney's Office
205 W 5th Ave, Rm. 213
Ellensburg, WA 98926
Attorney for Kittitas County

- BY U.S. MAIL
- BY HAND DELIVERY
- BY OVERNIGHT DELIVERY
- BY EMAIL: neil.caulkins@co.kittitas.wa.us

James C. Carmody
Halverson/Northwest Law Group
405 E Lincoln Avenue
PO Box 22550
Yakima, WA 98907
Attorney for Appellants

- BY U.S. MAIL
- BY HAND DELIVERY
- BY OVERNIGHT DELIVERY
- BY EMAIL: jcarmody@halversonNW.com

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

Signed at Ellensburg, Washington this 20th day of June, 2013.



Heather L. Hazlett
Legal Assistant to Jeff Slothower

Jeff Slothower, Atty.
LWHS, LLP
201 W 7th Ave
Ellensburg, WA 98926

6/17/2013

Re: Cascade Field and Stream Club / Response to JGL Acoustic Report

Jerry G Lilly of JGL Acoustics, Inc. ("JGL") submitted a report dated June 3, 2013, which is a review of my report dated 10/15/12. The purpose of this letter is to respond to JGL's review with observations and comments. There are 8 sections to the review plus a conclusion. It should be noted at the outset that JGL does not disagree with my conclusion that berms and three-sided shooting stations designed by an acoustical engineer will mitigate the sound emanating from the site.

1) Background Noise Study

Claim: 5 minutes is not enough time to define the background noise levels.

Response: Standard practice for ambient noise testing requires many hour long tests done at different times of the day, week and month. This is a very remote site and long term ambient testing will be prohibitively expensive. I did a test run of 28 data samples in still, cold air at different locations and times during the quiet hours of evening and morning over a two day period. I measured quietest part of the ambience at each location by excluding extraneous noise such as airplane flyovers and animal noise. Longer data runs which would include extraneous sound increases, not decreases the ambient noise level registered. My data points register are very conservative and serve to protect the sound of quiet in the neighborhood of the gun range.

JGL wants to see L90 data, which is the Leq for the most quiet 6 minutes of an hour. I physically measured the Leq for 5 to 6 minutes of quiet time at 28 different location/times in the area surrounding the gun range. I have supplied essentially 28 different L90 data points as requested by JGL.

2) Dr Piacsek's Test Report

Claim: Dr Piacsek measured "81 dB Peak" at neighbor home

Response: Misstatement of the facts. Dr Piacsek measured 81 dB, A Peak, not 81 dB Peak. JGL does not explain how Dr Piacsek's measurement does or does not relate to WAC 173-060.

Claim: Dr Piacsek's measurement "represents a violation of WAC 173-060".

Response: JGL did not respond to my conversion of Dr Piacsek's work into community noise measurement standards, which is the dB,A Fast measurement setting. In my report when the 81 dB,A Peak reading is converted into a normal community noise measurement, a violation of WAC 173-060 is noted and a mitigation is proposed.

3) Applicability of State Noise Codes.

Claim: Confusing, not sure of then point being made

Response: Confusion with respect to technical accuracy or confusion with respect to editing? I agree that the writing style in this section could have flowed better but the facts presented are not in dispute. It is a fact that the noise emanating from an approved shooting range is exempt from noise levels between the hours of 7:00 a.m. and 10:00 p.m. See WAC 173-60-050. It is a fact that land use planners have to assess the livability impact of a potential land use change. I pointed out that noise codes can be used to help define a standard of livability.

4) Psychological impacts

Claim: Noxon is not concerned with neighbor's psychological response to gunfire.

Response: A summary statement with out justification. No reference is given as to where the evidence exists which supports this conclusion. To the contrary, I did develop a section, Allowed Noise Level Exceedings, in which the psychological and physiological impact of single and multiple gun shots are discussed with respect to livability values.

5) Property line ordinance

Claim: Noxon does not feel property line noise ordnance applies in certain circumstances.

Response: The noise code obviously applies to an urban small lot line. But does it apply to a rural residential lot line when such huge distances are involved? The WAC noise code has anticipated grey zone problems in property classification and specifically allows the property classification involved in a noise related land use situation to be decided by the common sense discretion of the planners involved in the decision.

6) Impulse noise

Claim: The word impulse is not found in WAC 173-060.

Response: "Impulse sound" is defined in WAC 173-58-020(6). WAC 173-58 specifies sound level measurement procedures. It is simply not accurate to state that WAC "simply ignores the issue of time constants when measuring noise levels" JGL provides no evidence to justify the presumption that Peak noise levels must be used.

7) Land use

Claim: Gun noise from recreational land at residential property line is shown to be exceeded in the Piacsek report.

Response: Mitigation, sound berms and shooting stations are part of the applicant's plan, sufficient to reduce neighborhood noise so that the gun range activity will meet a livability standard based on the WAC noise code.

8) Gun types, testing

Claims: One gun, was used, more types of guns needed. Ambience + 5 dB,A is a good standard. 5 minute noise test is not good when weather was not reported

Response: A number of guns were tried, and only the loudest, worst case gun was used in Dr Piacsek's report and in my own noise studies on the site.

Ambience + 5 dB,A Fast is the proposed livability standard in my report, and which JGL agrees to. Note that JGL specifically agreed here to using the dB,A Fast form of measurement for the assessment of gun range noise impact on people in the community.

Finally, the weather was reported in the data table in the appendix of my report for each of the 28 data samples. The 5 minute noise test is therefore a good test according to JGL.

9) Recommendation

Claim: Noise from many different guns should be included and a formal ambient noise study is needed.

Response: There is no need to test quieter guns when high power loud guns were used. A formal ambient noise test includes extraneous noise and will be louder and less sensitive to community needs than my "cherry picked" quiet time ambient data. The potential livability impact from noise on the nearest two properties can be easily mitigated with sound berms and 3-sided shooting stations.

Sincerely,



**Art Noxon, PE
Acoustical Engineer**

