Supreme Court No. 101065-6

Court of Appeals No. 54474-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF PUYALLUP,

Petitioner,

v.

PIERCE COUNTY, a Washington governmental unit; KNUTSON FARMS, INC.; and RUNNING BEAR DEVELOPMENT PARTNERS, LLC

Respondents.

PETITION FOR REVIEW PURSUANT TO RAP 13.4

Peter J. Eglick,
WSBA No. 8809
Joshua A. Whited,
WSBA No. 30509
EGLICK & WHITED PLLC
1000 Second Avenue, Ste. 3130
Seattle, Washington 98121
(206) 441-1069 phone
(206) 441-1089 fax

Joseph N. Beck,
WSBA No. 26789
City Attorney
City of Puyallup
333 S. Meridian, 4th Floor
Puyallup, WA 98371
(253) 864-4196 phone
(253) 770-3352 fax

Attorneys for Petitioner City of Puyallup

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I. IDENTITY OF PETITIONER

Petitioner City of Puyallup ("City"/"Puyallup") seeks review of the Court of Appeals decisions designated in Section II below.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its Published Opinion in this case on December 14, 2021, reported at *City of Puyallup v. Pierce County*, 20 Wn. App. 2d 466, 500 P.3d 216 (2021). The Published Opinion is Appendix A-1 through A-9 to this Petition. On June 1, 2022, the Court of Appeals filed its Order Granting Motion for Reconsideration in Part and Amending Opinion, which modified footnote 2 on page 7 of the Published Opinion. The Reconsideration Order is Appendix A-10 through A-20.[1]

III. ISSUES PRESENTED FOR REVIEW

[1] The Reconsideration Order attaches a copy of the Published Opinion but with different pagination than in the original. To avoid confusion, citations to the Published Opinion herein will be as "Op. at __" with the page number corresponding to the original Published Opinion.

Did the Court of Appeals panel err in not according full force and effect to the earlier decision in the same matter of a different Court of Appeals panel under the State Environmental Policy Act, and, in doing so, burden Puyallup and the superior court with premature and wasteful litigation.

IV. STATEMENT OF THE CASE

The underlying matter here concerns review under the State Environmental Policy Act (SEPA)[2] of a proposal by Knutson Farms, Inc. and Running Bear Development Partners, LLC's (collectively "Knutson" or "Knutson Farms") to develop a 2.6 million square foot, seven warehouse distribution and truck/freight movement complex on 162-acres of farmland in unincorporated Pierce County. The site is within Puyallup's Growth Management Act (GMA)[3] urban growth area, and immediately adjacent to the Puyallup River.

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[2] RCW Ch. 43.21C.

[3] RCW Ch. 36.70A.

The City had given notice pursuant to SEPA WAC 197-11-948 of its assumption of SEPA lead agency status in response to Pierce County's adoption of a SEPA mitigated Determination of Nonsignificance (DNS). The DNS had dispensed with an environmental impact statement (EIS) because, supposedly, the proposal would have no significant adverse environmental effects.

Pierce County refused to comply with Puyallup's assumption of SEPA "lead agency" status for project review. The City challenged that refusal in a Thurston County Superior Court action. That court, on cross motions, entered a summary judgment in favor of Pierce County. Puyallup appealed the Thurston County summary judgment to the Court of Appeals. The City explicitly warned the County that, unless and until the County was upheld on appeal, it should not defy the City's lead agency assumption and proceed without preparation of an EIS. Pierce County nonetheless processed the project proposal

without an EIS and placed it before its Hearing Examiner for decision.

The City participated in the Hearing Examiner process, while explicitly continuing its objection to it. When the Hearing Examiner issued decisions approving the project, again without benefit of an EIS, the City on March 19, 2019 appealed the Hearing Examiner's decisions in Pierce County Superior Court under the Land Use Petition Act (LUPA), Ch. 36.70C RCW.[4] In doing so, the City again asserted that the County's actions, including those of its Hearing Examiner, were void and invalid because they had been reached without the EIS required by City assumption of SEPA lead agency status. The parties then agreed that the LUPA case should be stayed pending a decision by the Court of Appeals on the City's appeal of the Thurston County Superior Court summary judgment rejecting the City's authority

[4] Pierce County Cause No. 19-2-06362-4.

to assume SEPA lead agency status. *See* CP 47; CP 51-139; CP 141-57; Op. at 2.

On April 3, 2019, a panel of the Court of Appeals unanimously reversed the Thurston County Superior Court superior court summary judgment and granted the City's appeal. The published decision holds that the City was authorized to assume SEPA lead agency status and issue a Determination of Significance (DS) requiring preparation of an EIS for the proposal: "Accordingly, we reverse and remand for action consistent with this opinion." *City of Puyallup v. Pierce Cty.*, 8 Wn. App. 2d 323, 351-52, 438 P.3d 174, 188 (2019).

Respondents sought review of that decision by this Court. The Supreme Court denied review on September 4, 2019. *See City of Puyallup v. Pierce Cty.*, 193 Wn.2d 1030, 447 P.3d 164 (2019). The Court of Appeals subsequently issued its mandate on September 12, 2019, returning the matter to Thurston County Superior Court "from which the appeal was taken for further proceedings in accordance with the attached true copy of the

opinion." CP 38.

The parties were unable to reach agreement on the Order following the remand and mandate. A motion practice ensued in Thurston County Superior Court before Judge Lanese who had issued the summary judgment reversed by the Court of Appeals.[5] The parties agreed on three provisions, paragraphs 1, 2 and 4, below, that were included in both the City's and Respondents' proposed orders and in the January 10, 2020 Order on remand ultimately entered by Judge Lanese:[6]

> 1. The City's Assumption of Lead Agency Status and SEPA Determination of Significance (DS) were authorized under SEPA.
>
> 2. Preparation of an Environmental Impact Statement (EIS) for the Knutson Farms warehouse project under the auspices of the City of Puyallup and in compliance with applicable regulations is required before review and decisions on the project may proceed.
>
> 4. This summary judgment order is dispositive of all of the parties' claims and counterclaims in the

[5] *See generally* CP 1-195.
[6] *Compare* CP 43 to CP 198.

> above-captioned action and constitutes the final order for this matter.

However, the parties disagreed regarding a key provision concerning the effect and status of County reviews, decisions, permits and approvals for the Knutson Farms project, which the County had processed and granted over the City's objections, despite the lack of an EIS required by the City. Specifically, the City proposed that paragraph 3 of the Order read as follows:

> 3. All County reviews, decisions, permits, and approvals related to the Knutson Farms project are null and void *ab initio*. The underlying review processes may be recommenced once the Final EIS is issued by the City of Puyallup. Until then, all County reviews, decisions, permits, and approvals for the Knutson Farms warehouse project are on hold.

CP 43. This wording recognized that, per Washington SEPA case law, the County's actions approving the Knutson Farms project were invalid in their entirety as a matter of law because the County's review and decision-making was not preceded or informed by the required SEPA EIS. CP 3-6.

Respondents, on the other hand, proposed a paragraph 3 that was subtly, but significantly, narrower in scope:

> 3. Decisions by Pierce County based upon the MDNS issued for the Knutson Farm warehouse project are null and void, and the applications are returned to the status of pending applications. Pierce County shall issue no final decision on the Knutson Farms warehouse project until an EIS is completed.

CP 198 (emphasis added). Respondents argued that this narrower formulation was appropriate because, within the County's decisions approving the Knutson Farms project,[7] there were a handful of sub-issues that they contended would not be effected by the subsequent environmental review and EIS. This subset of a handful of issues, Respondents argued, should be litigated in the LUPA appeal that the City had filed as a precaution prior to the confirmation by the Court of Appeals of the City's authority

[7] The Pierce County Hearing Examiner's land use/environmental decisions approving the Knutson Farms project, issued prior to the Court of Appeals decision and as a precaution appealed by the City under LUPA, comprise nearly ninety (90) pages of the Clerk's Papers. *See* CP 51-139.

to assume lead SEPA agency status and require an EIS. CP 46-47, 159, 161. In other words, Respondents wanted the LUPA appeal, which the parties had agreed to stay pending the appellate decision, to become the vehicle for piecemeal litigation concerning an ill-defined subset of a handful of issues – and for that to occur before an EIS had ever been prepared and the outcome of EIS review and subsequent decisions was known. The City disagreed. CP 187-94.

A hearing to resolve this was scheduled for January 10, 2020 before Judge Lanese. Counsel appeared in person in court on that date. However, no hearing took place. Instead, when the case was called, Judge Lanese announced: "Okay. I'm going to sign the Farm's order, so you can bring it up and I'll sign the Farm's order, and that's what we're going to do." VRP at 3.

The Order thereupon handed to and signed by the judge contained obvious facial mistakes. It is erroneously titled "Order on Remand and Mandate from the Court of Appeals **Denying** Plaintiff City of Puyallup's Motion for Summary Judgment…" (emphasis added). It also indicates that it was entered "[a]fter hearing argument. . ." CP 196.

But most importantly, the Order signed included Respondents' fundamentally problematic paragraph 3 language. The City therefore appealed. *See* CP 198.

The matter was assigned to a Division II panel of three judges different than those who had signed the 2019 Original Decision. On December 14, 2021, that panel issued the Published Opinion that is the subject of this petition. The Opinion upholds the disputed language in paragraph 3 of the superior court Order.[8] The new panel's bottom line was that the absence of SEPA

[8] The Opinion also concludes that the Order should have affirmatively re-stated that the mitigated DNS itself was invalid, although that had not been disputed or requested by any party. See Op. at 8-9.

compliance in the form of an EIS did not render the County's reviews and consequent Hearing Examiner approvals null and void, apparently rejecting the SEPA principle that agency decisions and actions taken without SEPA compliance are without exception void. Instead, the Opinion left the parties to parse, through litigation in superior court of the City's precautionary LUPA appeal, what subsidiary County project reviews and approvals could be prospectively deemed unaffected by the absence of an EIS.[9]

Under the Opinion, the LUPA court would have to review the 11,000-page County administrative record, the 2000 pages of

[9] Respondents had argued in briefing to Judge Lanese that there were some sub-issues within the decisions challenged in the LUPA action that they contended would not be affected by the subsequent environmental review and EIS, and that those should be litigated separately. CP 46-47, 159, 161. They also made this argument in the Court of Appeals. *See* Joint Brief of Respondents at 5, 7-8. The Court of Appeals apparently accepted this proposition, *i.e.* that within the primary decision documents challenged there are certain subsidiary "non-SEPA related decisions" that should be ferreted out and litigated prospectively before preparation of an EIS. Op. at 6. However, the Court of Appeals Opinion does not identify such issues.

transcripts for the nine-day Hearing Examiner hearing, and the 90 pages of Hearing Examiner decisions, as well as parties' briefing, to determine whether there were subsidiary project decisions that supposedly would not be affected or informed by EIS project review. The LUPA superior court would then issue a decision on those subsidiary elements only – while the project approval as a whole, already vacated per the Court of Appeals decisions, would have gone back before the County for new reviews and decisions informed by the EIS. Op. at 7, 9.

V. ARGUMENT

This Court should grant review under RAP 13.4(b)(1), (3) & (4) because the published decision of the Court of Appeals is in conflict with decisions of this Court as well as with preexisting, published precedent from the Court of Appeals. This petition should also be granted, as an independent matter, because it involves issues of substantial public interest and importance, not just with regard to SEPA, but also involving the orderly, efficient, and nonduplicative use of judicial resources.

A. The Opinion is in Conflict with Decisions of this Court and the Court of Appeals.

A keystone SEPA tenet, recognized in Washington case law, is that agency actions taken in violation of SEPA are *ultra vires*, invalid and void *ab initio*. *See Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 42, 873 P.2d 498, (1994) ("The trial court's invalidation of the conditional use permit must be upheld in light of the inadequate EIS."); *see also Noel v. Cole*, 98 Wn. 2d 375, 378-80, 655 P.2d 245 (1982); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73-74, 510 P.2d 1140 (1973).

As explained in the Settle SEPA treatise, which relies on the preceding authorities and others:

> Since state and local agency authority to act is qualified by the requirements of SEPA, agency action attended by SEPA noncompliance is unlawful, outside the agency's authority, *ultra vires.* The usual remedial result of a judicial determination of SEPA violation is simply invalidation of the agency action. Thus, action which was not preceded by a proper threshold determination process is invalid and the agency must begin the decision- making process anew; and action for which a required EIS was inadequate or not

> prepared is rendered a nullity and remanded for reprocessing in light of an EIS.

Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, Ch. 20, §20.09[1] at 20-38 (Matthew Bender 2019) (emphasis added) (internal citations omitted).[10]

Another bedrock SEPA tenet is that judicial review of all SEPA and non-SEPA challenges to government action must occur simultaneously so that there are not multiple SEPA and non-SEPA lawsuits contesting various aspects of the same agency decision. SEPA expressly mandates this unified review of SEPA and non-SEPA issues: "[j]udicial review under this chapter shall **without exception** be of the governmental action together with its accompanying environmental determinations." RCW 43.21C.075(6)(c) (emphasis added).

This Court's decision in *State ex rel. Friend & Rikalo*

[10] The omitted footnotes provide authorities and additional discussion which provide robust support for this principle.

Contractor v. Grays Harbor Cty., which considered how to resolve contradictory county review ordinances in light of this bedrock SEPA requirement, quotes Settle extensively and holds in the clearest terms that SEPA and non-SEPA issues cannot be segmented and separately litigated in the courts:

> Professor Settle discusses this linkage requirement as follows:
>
> > SEPA unequivocally declares that its right of judicial review "shall without exception be of the governmental action together with its accompanying environmental determinations." This provision precludes judicial review of SEPA compliance until final agency action on the proposal. Then, and only then, are the agency's earlier SEPA determinations (concerning categorical exemption, threshold review, scoping, EIS preparation and adequacy) subject to judicial review. Even though administrative review of threshold determinations may be allowed prior to final agency action, interlocutory judicial review of SEPA compliance never is permitted. This limitation on SEPA's right of judicial review serves obvious, laudable purposes. Potential delay and costly litigation are greatly reduced. SEPA compliance is not subject to piecemeal, isolated adjudication but must be evaluated as an integrated element of government decisionmaking. . . .

> *SEPA's absolute insistence upon simultaneous judicial review of all SEPA and any non-SEPA challenges of government action precludes multiple SEPA and non-SEPA lawsuits contesting various aspects of the same agency decision and the process by which it was reached*.

(Footnotes omitted. Italics ours.) R. Settle, *The Washington State Environmental Policy Act* § 20, at 244-45 (1993).[11] As Professor Settle makes clear, the purposes of the linkage requirement are to: preclude judicial review of SEPA compliance before an agency has taken final action on a proposal, foreclose multiple lawsuits challenging a single agency action and deny the existence of "orphan" SEPA claims unrelated to any government action.[12]

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[11] *[footnote in original] See also* R. Settle, app. B, at 301 ("Section-by-Section Summary of S.S.B. 3006", prepared by Kenneth S. Weiner) (SEPA's purpose is to combine environmental considerations with public decisions, and these two elements should be integrated not only in the environmental review process itself, but also in the appeals process); *Ten Years' Experience With SEPA*, Final Report of the Commission on Environmental Policy on the State Environmental Policy Act of 1971, at 75 (June 1983) (For purposes of judicial review, SEPA determinations and substantive agency action must always be reviewed together.).

[12] *[footnote in original]* R. Settle § 20, at 244.

State ex rel. Friend & Rikalo Contractor v. Grays Harbor Cty., 122 Wn.2d 244, 251, 857 P.2d 1039, 1043 (1993) (internal footnotes in original).

This Court went on to emphasize the impropriety of forcing parties to litigate decisions piecemeal when SEPA compliance is still pending:

> The simultaneous use of both ordinances would also violate SEPA's exhaustion requirement. The only way such a procedure could work would be for a party to appeal the permit decision to the court, ask the court to stay the action pending exhaustion of the administrative review of the SEPA issue and then return to court to appeal the later agency decision. Even this awkward procedure violates the SEPA exhaustion requirement as no judicial review can be "initiated" until administrative review is exhausted. It is also cumbersome and forces a litigant to draft pleadings to challenge a nonfinal administrative decision. If the administrative appeal decision changed anything in the previous administrative decision, the pleadings would have to be amended to reflect the later decision. In cases where the party seeking review of the SEPA issue prevailed in the administrative appeal, the court action may have been totally unnecessary. We conclude that for the County to force a party to seek judicial review of a nonfinal administrative decision would be unfair and wasteful of judicial resources.

> Another related problem results from forcing a party to seek judicial review of the grant of the permit prior to completing available administrative review of the threshold determination of nonsignificance. The determination of nonsignificance is a legal prerequisite to the proper issuance of the mining permit. Therefore, it is not possible for a court to review the legality of the granting of the permit without considering the propriety of the SEPA determination of nonsignificance.
>
> We conclude that the neighbors should not have been forced to initiate judicial review of a decision when the SEPA component of that decision was not yet final in that it was still subject to further administrative review. Since the SEPA statute requires exhaustion of any available administrative review, and the GHC SEPA appeal ordinance provides for the DNS decision to be appealed to the Commissioners, the neighbors should have been allowed to complete the appeal to the Commissioners before their time to seek judicial review began to run.

Id. at 255-56.

The Court of Appeals Opinion here acknowledges the existence of these bedrock SEPA principles generally. *See* Op. at 5, 7, 8. However, it then directs an outcome that cannot be

squared with them and sets, in a published decision, a pernicious precedent.

Specifically, the Opinion holds that Puyallup "properly challenged the County's subsequent reviews, decisions, permits and approvals before the superior court in its LUPA appeal, and must await that court's decision." Op. at 9. However, it overlooks that the LUPA appeal was precautionary, filed in case the 2019 Court of Appeals decision had gone the other way and not upheld the City's assumption of SEPA lead agency status and EIS preparation requirement.

The required EIS has not yet been issued. Once issued, and as paragraphs 2 & 3 of Judge Lanese's Order on remand state, the County will have to consider it before issuing new, final decisions. *See* CP 198 ("Preparation of an Environmental Impact Statement (EIS) for the Knutson Farms warehouse project under the auspices of the City of Puyallup and in compliance with applicable regulations is required before review and decisions on the project may proceed."); *id.* ("Decisions based upon the

MDNS issued for the Knutson Farm warehouse project are null and void and, and the applications are returned to the status of pending applications. Pierce County shall issue no final decision on the Knutson Farms warehouse project until an EIS is completed.") (emphasis added). The newly issued EIS and decisions could then themselves be subject to challenge in a subsequent LUPA appeal.

The effect of the Opinion under review here is to authorize a multiplicity of lawsuits concerning the very same project permit applications, *i.e.* litigating certain undisclosed issues now in the precautionary LUPA action that was filed before the mitigated DNS was rendered invalid, and then later litigating in a new LUPA new County decisions informed by the EIS. However, as SEPA caselaw, including *State ex rel. Friend & Rikalo Contractor v. Grays Harbor Cty.,* emphasizes, all SEPA and non-SEPA issues must be litigated concurrently in one action concerning a final County decision.

The Opinion creates a patchwork in which some (unspecified) aspects of the subsidiary decisions the County previously issued should be considered still in effect and litigated now in a LUPA appeal *even though* the required EIS has not yet been issued and reviewed and there is no final agency action on the project. In the absence of a final County action on the project permit application here, which must abide preparation and review of an EIS, it is not clear how the Pierce County LUPA action could now ever appropriately proceed. *See* RCW 36.70c.020(2)(a). When Puyallup's precautionary LUPA appeal was filed there was a County decision that purported to be final. As a result of the 2019 Court of Appeals decision, that County decision has been voided and there is no longer a final County decision.

The Opinion would convert the City's precautionary LUPA appeal, filed in case the 2019 Court of Appeals case had gone the other way, into a search for items buried within the Hearing Examiner's decisions that are supposedly "non-SEPA

related" and that would not at all be informed or affected by an EIS.[13] But piecemeal litigation based on the pretense that parties can pry apart line by line and paragraph by paragraph County decisions to ferret out items that are supposedly "non-SEPA related" is completely contraindicated by the SEPA statute and this Court's precedents.

The Opinion cites *Weyerhauser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994) and *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993) for the propositions that the application process need not start over completely and that it makes sense to rely on decisions and reviews "like those Puyallup wants voided." Op. at 5, 7. However, this misapprehends these cases and misunderstands the City's argument.

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[13] The scope of an EIS is exceptionally broad. SEPA regulations prescribe approximately fifty elements of the environment specified in various categories that are to be considered within an EIS. Everything from relationships to land use plans, police and fire services, erosion and accretion, and water movements are included. WAC 197-11-444.

In *Weyerhauser*, an EIS had been prepared, but this court held it inadequate in one key respect and therefore upheld invalidation in its entirety of the conditional use permit issued by Pierce County. *Weyerhauser*, 124 Wn.2d at 42. Specifically, the EIS failed to discuss any offsite alternatives. *Id.* Accordingly, this court explained that "[t]he EIS must be revised to contain a discussion of alternative sites" because that was the only aspect of the EIS that was inadequate. *Id.*

In *Klickitat County,* the issue was whether the lead agency violated SEPA and a prior court order when it unusually quickly completed an EIS for updating its Solid Waste Management Plan. *Klickitat County*, 122 Wn.2d at 646-47. This court concluded that the County had, permissibly, completed the EIS quickly because, despite its earlier DNS, it had already started work on an EIS anticipating the court's DNS invalidation. So, the County could draw on information already gathered to assemble an EIS "more quickly than under different circumstances." *Id.* at 647. Notably, the lower court's underlying

order invalidating the DNS had also invalidated in their entirety all of the permits issued as a result of the update based on a SEPA noncompliant DNS. *Id.* at 625-26.

Here, unlike in *Weyerhauser,* there was no EIS. Unlike in *Klickitat County*, preparation of an EIS was not already underway so that an EIS could be prepared unusually quickly. Neither case supports the outcome reached by the Court of Appeals in its decision here, *i.e.* that some aspects of the decisions issued by the County should remain valid and be litigated now in a LUPA action ahead of later, final decisions on the project proposal informed by the required EIS.

The City's proposed order language, rejected by Judge Lanese and the Opinion under review here, confirmed, as SEPA law requires, that prior reviews, decisions, permits and approvals are invalid and put new ones on hold pending consideration of the Final EIS. CP 43. Nothing precludes the County as part (but not all) of that process, from examining the work that was done before. If there are questions that are truly unrelated to SEPA,

the County can in its post-EIS review reach the same conclusions on them as it did before. Those conclusions can then be reviewed along with all other issues in one unified proceeding, if there is any further litigation challenging the County's new decision.

The Court of Appeals concluded that RCW 43.21C.075(6)(c), which mandates that "judicial review under this chapter shall without exception be of the governmental action with its accompanying environmental determinations," is "inapplicable here and that Puyallup's LUPA claims are not properly before us." Op. at 9. However, the City did not request a LUPA ruling from the Court of Appeals and presented no LUPA claims to the Court for resolution. The issue presented was and is: what is the effect of the 2019 Court of Appeals decision under SEPA and under this Court's binding precedent? On one hand the new Division II Opinion acknowledges that the mitigated DNS issued by the County is invalid, that therefore there is no final decision on the warehouse complex project and that one cannot be issued absent completion of the SEPA

process. *See* CP 198. But it dismisses as "a scorched earth approach" the basic SEPA concept that all agency actions on a proposal are void absent SEPA compliance. It instead endorses one lawsuit now on subsidiary issues within decisions that are not valid or final and another lawsuit potentially later when an EIS and final decisions on the project are validly issued. This is in direct conflict with *State ex rel. Friend & Rikalo Contractor v. Grays Harbor Cty.*

B. This Petition Involves Issues of Substantial Public Interest and Importance.

SEPA's policy is to ensure "full disclosure of environmental information so that environmental matters can be given proper consideration during decision making . . . ." *Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 700, 601 P.2d 501, 512 (1979). This policy "is thwarted whenever an incorrect 'threshold determination' is made." *Id.* "The point of an EIS is not to evaluate agency decisions after they are made, but rather to provide environmental information to assist with *making* those

decisions.") *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 666, 860 P.2d 1024 (1993) (emphasis in original). The Court of Appeals decision here fails to advance SEPA's fundamental policy by giving force and legal effect to parts of decisions that were advanced based on an invalid environmental determination.

Further, even if the underlying concept of "non-SEPA" relatedness was valid here, it would be the epitome of inefficiency and fractured confusion to have courts adjudicate piecemeal supposed non-SEPA related issues. Litigated separately and out of context of the overarching County EIS review and final decisions to come, such parsed issues would wind their way through one path in the Washington courts – even while the merits of the County's eventual decisions were decided separately in another one. The resources of a judicial system that is already substantially overtaxed would be wasted, as would the parties' resources.

Moreover, if by virtue of a Knutson or County decision (*e.g.* by the Hearing Examiner), the proposal was modified or an alternative adopted, the piecemeal litigation of supposed "non-SEPA" subsidiary issues could end up as futile and irrelevant. The approach adopted in the recent Court of Appeals decision erroneously assumes that, before an EIS has been issued and considered by the County and the applicant (Knutson), determinations made previously by the County will arise exactly in the same form and context again after an EIS is issued and considered.[14]

VI. CONCLUSION

The Court of Appeals decision here directly conflicts with caselaw concerning the effect of agency actions in violation of SEPA. It contravenes SEPA's statutory and caselaw requirement for unified judicial review. It authorizes in this case, and fosters

[14] For example, a denial of the proposal based on SEPA considerations would moot the need to litigate supposed non-SEPA issues. *See* RCW 43.21C.060, WAC 197-11-660, and Pierce County Code 18D.40.060.

for others, wasteful and potentially futile use of judicial (and litigant) resources.

Puyallup therefore respectfully requests that the Court grant review.

We certify that this Motion is in 14-point Times New Roman font and contains 4,813 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 1st day of July, 2022.

EGLICK & WHITED PLLC

By _____
Peter J. Eglick,
WSBA No. 8809
Joshua A. Whited,
WSBA No. 30509

CITY OF PUYALLUP
CITY ATTORNEY

By */s/ Joseph N. Beck*
Joseph N. Beck,
WSBA No. 26789

Attorneys for Petitioners City of Puyallup

CERTIFICATE OF SERVICE

I, Leona Phelan, an employee of Eglick & Whited PLLC, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On July 1, 2022, I filed the foregoing PETITION FOR REVIEW PURSUANT TO RAP 13.4 with the Court of Appeals, Division II, of the State of Washington, and served a copy of said document via the Washington State Appellate Courts' Portal and via email on the following parties:

Margaret Y. Archer William T. Lynn Gordon Thomas Honeywell LLP 1201 Pacific Avenue, Suite 2100 Tacoma, WA 98402 marcher@gth-law.com BLynn@gth-law.com hcoplin@gth-law.com jalexander@gth-law.com sweger@gth-law.com	Todd A. Campbell Cort O'Connor Pierce County Prosecuting Attorney's Office 955 Tacoma Avenue South, Suite 301 Tacoma, WA 98402-2160 tcampbe@co.pierce.wa.us coconno@co.pierce.wa.us

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

DATED: July 1, 2022, at Marysville, Washington.

Leona Phelan, Paralegal

Filed
Washington State
Court of Appeals
Division Two

December 14, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF PUYALLUP, Appellant, v. PIERCE COUNTY, a Washington governmental unit; KNUTSON FARMS, INC.; and RUNNING BEAR DEVELOPMENT PARTNERS, LLC, Respondents.	No. 54474-1-II PUBLISHED OPINION

VELJACIC, J. — Pierce County issued a mitigated determination of nonsignificance (MDNS) under the State Environmental Policy Act (SEPA) for a warehouse distribution project bordering the City of Puyallup. Puyallup attempted to assume lead agency status so it could issue a determination of significance (DS) and prepare an environmental impact statement (EIS). The County refused to accept Puyallup's jurisdiction, and Puyallup sued. In *City of Puyallup v. Pierce County*, 8 Wn. App. 2d 323, 326-27, 438 P.3d 174 (2019), this court held that Puyallup had jurisdiction under SEPA regulation WAC 197-11-948, to assume lead agency status, issue a DS, and complete an EIS. On remand, the superior court adopted the County's proposed order and ruled that this court's opinion, consistent with WAC 197-11-948, rendered decisions that were based on the County's MDNS void, but allowed other County decisions related to this project to remain effective.

Puyallup appeals, arguing that the superior court's order is inconsistent with this court's opinion and asks us to hold that *all* County decisions on the project are void *ab initio*, and that the entire application process must start anew.

We conclude that neither the superior court's order, nor Puyallup's proposed order, correctly states the law. Accordingly, we reverse and remand for further proceedings.

FACTS

In 2014, Knutson Farms Inc. and Running Bear Development Partners LLC applied to Pierce County for approval of a warehouse and distribution facility bordering the City of Puyallup. *Pierce County*, 8 Wn. App. 2d 323. The project was within Puyallup's road and sewer infrastructure, and its approval was required for design elements pertaining to that infrastructure. *Id*. at 327. The County conducted its SEPA evaluation and issued an MDNS. *Id*. at 328.

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Puyallup appealed, and in its opinion, this court held that Puyallup had jurisdiction to assume lead agency status because the project application required approvals from Puyallup related to Puyallup's road and sewer infrastructure. *Id*. at 351-52. This court also held that an MDNS is equivalent to a DNS under WAC 197-11-948(1). *Id*. at 351. Before this court issued its opinion in that case, Puyallup separately appealed three decisions to the Pierce County Hearing Examiner under the County's administrative appeals procedure. First, Puyallup appealed the

approval of the project's short plat. Second, Puyallup appealed the County's MDNS requesting that the County instead issue a DS. Third, Puyallup appealed the issuance of a permit to allow the project to construct a stormwater outfall into the Puyallup River. Such appeals were denied, and Puyallup appealed to the superior court under the Land Use Petition Act (LUPA), challenging multiple decisions within the County's short plat approval.

While the LUPA appeal was pending in superior court, this court, issued its opinion in *Pierce County*, which held that Puyallup could assume lead agency status. *See* 8 Wn. App. 2d 323. On remand to the superior court, both the County and Puyallup submitted proposed language for the order in the interest of establishing the legal effect of Puyallup assuming lead agency status. Puyallup's proposed order states:

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The superior court adopted the County's order. Puyallup appeals the superior court's order.

ANALYSIS

I. STANDARD OF REVIEW

We review questions of law including statutory and regulatory interpretation de novo. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 90, 392 P.3d 1025 (2017).

II. LEGAL PRINCIPLES OF SEPA

SEPA requires agencies to examine the environmental impacts of public and private projects prior to authorizing such projects. *Pierce County*, 8 Wn. App. 2d at 331. SEPA's regulatory framework designates a "lead agency" for projects, and such agency must conduct review of every project that may have an adverse environmental impact to determine the level of environmental impact analysis required to approve the project. *Id.*; WAC 197-11-050.

The lead agency makes a threshold determination deciding whether the project requires an EIS and preparation of such statement, if required. WAC 197-11-050(2); WAC 197-11-797; WAC 197-11-330. The lead agency documents the threshold determination in a DNS, a DS, or a MDNS. WAC 197-11-310; WAC 197-11-350.

Issuing a DS recognizes that the project will have "a probable significant adverse environmental impact." WAC 197-11-360. By contrast, a DNS recognizes that the project will not have a probable significant adverse environmental impact. WAC 197-11-340. Similarly, an MDNS recognizes that due to mitigations identified in the determination, the project will not have a probable significant adverse environmental impact. WAC 197-11-350. Neither a DNS nor an MDNS requires an EIS, but a DS does. WAC 197-11-360; WAC 197-11-402(1).

After the lead agency issues a DNS or MDNS, an agency with jurisdiction may, upon review, assume lead agency status. WAC 197-11-948; *Pierce County*, 8 Wn. App. 2d at 345. Assuming lead agency status places the new agency into the same position as the former lead agency, and the regulation states in relevant part that "all other responsibilities and authority of a lead agency under this chapter shall be transferred to the new lead agency." WAC 197-11-948(3). Additionally, the regulations command the new lead agency to issue a DS and "expeditiously prepare an EIS." WAC 197-11-948(2)-(3). Additionally, under WAC 197-11-390(2)(b), "[t]he

responsible official's threshold determination: . . . Shall not apply if another agency with jurisdiction assumes lead agency status under WAC 197-11-948." Therefore, under the regulations, assuming lead agency status voids the prior lead agency's DNS or MDNS. WAC 197-11-390(2)(b); WAC 197-11-948(3).

A DNS or MDNS that fails to comply with SEPA is also void, and the lead agency that issued it must revisit the determination. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 42, 873 P.2d 498 (1994) (holding an EIS was inadequate as a matter of law and therefore invalid and must be revised). Decisions based on a void determination are also void. *See King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993).

However, the regulations and case law do not envision the application process starting over completely. *See Weyerhaeuser*, 124 Wn.2d at 42, 47; *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 647, 632, 860 P.2d 390 (1993). In *Weyerhaeuser*, the court merely ruled that the inadequate EIS "must be revised." 124 Wn.2d at 47. The court did not hold or even imply that the existing reviews conducted as part of an inadequate SEPA process are also void.

Similarly, in *Klickitat County*, the court evaluated whether the lead agency violated SEPA when, per a court order invalidating the prior SEPA determination, it completed a revised EIS unusually quickly. 122 Wn.2d at 646-47. That court reasoned that the EIS was completed so quickly because the agency relied on information gathered in a prior process. *Id.* at 647. The court went on to conclude that the agency's use of such documents and reviews was "logical." *Id.* at 647.

The regulations similarly do not envision voiding all prior work conducted on a SEPA evaluation that has been voided. *See* WAC 197-11-948(2); WAC 197-11-070. Under WAC 197-

11-948(2), upon an agency with jurisdiction assuming lead agency status, the regulation instructs that the new DS "shall be based only upon information contained in the environmental checklist attached to the DNS transmitted by the first lead agency." The entity empowered to issue a permit may make decisions throughout the application process so long as they do not "(a) Have an adverse environmental impact; or (b) Limit the choice of reasonable alternatives." WAC 197-11-070(1)(a)-(b).

By its nature, a DS overrides a prior MDNS and necessitates completing an EIS. *See* WAC 197-11-948(2). Therefore, when an agency assumes lead agency status and issues a DS, the prior agency's determination and decisions made in reliance on it are voided. But the regulations do not require courts to void non-SEPA related decisions, even if a court determines an EIS violates SEPA. *See Klickitat County*, 122 Wn.2d at 646-47. Nor does it prevent reliance on information gathered or reviews generated during the prior process. *Id.*

III. PARTIES' PROPOSED ORDERS ARE LEGALLY ERRONEOUS

Puyallup argues that the appealed superior court order fails to reflect this court's prior decision in the case. The County asserts that it does.

We conclude that the superior court's order (which was an adoption of the County's proposal) does not correctly state the legal effect of this court's prior holding, but that Puyallup's proposed order falls short as well because it is too broad. Puyallup argues that under WAC 197-11-390(2)(b), once it assumed lead agency status, the County's MDNS became void. It also argues that in *Pierce County*, 8 Wn. App. 2d 323, this court determined the County violated SEPA and that this necessarily voids *ab initio* all "reviews, decisions, permits, and approvals" made by the

County during the application process.[1] Br. of Appellant at 15. The County concedes that its MDNS is void, but argues that only its decisions that were made in reliance on the MDNS and implicate SEPA are void.

As asserted by the parties, and according to WAC 197-11-390(2)(b), the MDNS became void when Puyallup assumed lead agency status. *See* WAC 197-11-390(2)(b); WAC 197-11-948(2).[2] However, the authorities do not support Puyallup's broader claim that all of the County's "reviews, decisions, permits, and approvals" on the project are void *ab initio* upon it assuming lead agency status. Br. of Appellant at 15. Rather, the case law and regulations demonstrate that reliance on decisions and reviews from a prior SEPA process, like those Puyallup wants voided, is logical and even required. *See Weyerhaeuser*, 124 Wn.2d at 47; *Klickitat County*, 122 Wn.2d at 647; WAC 197-11-948(2); WAC 197-11-070. Neither the regulations nor the case law support the scorched earth approach Puyallup included in its proposed order. Because such order is contrary to law, we refuse to instruct the trial court to adopt it.

Still, the trial court erred in adopting the County's order. In their arguments, neither party identifies a core problem with the order: while stating that all decisions based on its MDNS are void, it fails to state that the MDNS itself is void. This failure renders the order deficient.

[1] Puyallup fails to define "reviews, decisions, permits, and approvals" in its proposed order, therefore it is unclear whether the language refers to specific actions identified in the regulations or whether it uses those words under their plain meaning. Likewise, its argument that the County's decisions are void *ab initio* is also unclear since its fails to identify which decisions will remain intact now that the MDNS is void.

[2] Puyallup also argues that the MDNS is void because this court held the County violated SEPA. Br. of Appellant at 12-14. However, the opinion of this court is narrower than Puyallup asserts. In *Pierce County*, this court ruled that Puyallup had jurisdiction to assume lead agency status after the County issued an MDNS. *See* 8 Wn. App. 2d at 351-52. The record and this court's prior decision do not support Puyallup's claims that the County violated SEPA.

IV. OUR DECISION DOES NOT IMPACT THE SEPARATE LUPA APPEAL

Puyallup argues that all county decisions made after the County issued the MDNS, even those unrelated to SEPA and those within its LUPA appeal, should be combined with this appeal and held void to avoid piecemeal litigation. Puyallup urges this result, arguing that under RCW 43.21C.075(6)(c), SEPA mandates such result. We disagree.

RCW 43.21C.075(6) applies to appeals of decisions made by an agency. It states in relevant part:

> (6)(a) Judicial review under subsection (5) of this section of an appeal decision made by an agency under subsection (3) of this section shall be on the record, consistent with other applicable law.
>
> . . . .
>
> (c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

RCW 43.21C.075(6).

In *Gray's Harbor*, the court examined the legality of a DS and the related government's grant of a permit based on that DS. 122 Wn.2d at 249. The court concluded that under RCW 43.21C.075(6)(c), both the DS and the government's action relying on such DS (the permit) should be considered together. *Id*. at 250-51.

Puyallup attempts to apply RCW 43.21C.075(6)(c) here by reframing the issues before us. Contrary to its claim, we are not analyzing the validity of an environmental determination or a government action. Puyallup attempts to combine this appeal with its ongoing LUPA case, but the subjects of that case—the County's reviews, decisions, permits, and approvals about the project—are not properly before us. This case was also not an appeal of the County's project

approval, or any other government action. Rather, the issue before us is whether the superior court's order complies with our prior mandate.

Puyallup has properly challenged the County's subsequent reviews, decisions, permits, and approvals before the superior court in its LUPA appeal, and it must await that court's decision. We conclude that RCW 43.21C.075(6)(c) is simply inapplicable here and that Puyallup's LUPA claims are not properly before us.

CONCLUSION

We conclude that neither party's order correctly states the law because the County's adopted order failed to state that the MDNS was void, and Puyallup's order was overly broad. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Veljacic, J.

We concur:

Glasgow, A.C.J.

Cruser, J.

Filed
Washington State
Court of Appeals
Division Two

June 1, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF PUYALLUP, Appellant, v. PIERCE COUNTY, a Washington governmental unit; KNUTSON FARMS, INC.; and RUNNING BEAR DEVELOPMENT PARTNERS, LLC, Respondents.	No. 54474-1-II ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND AMENDING OPINION

Appellant, City of Puyallup, moves for reconsideration of the Court's December 14, 2021 published opinion. After consideration, the Court grants the motion in part and amends the opinion as follows:

Footnote 2 on page 7, stating:

> Puyallup also argues that the MDNS is void because this court held the County violated SEPA. Br. of Appellant at 12-14. However, the opinion of this court is narrower than Puyallup asserts. In *Pierce County*, this court ruled that Puyallup had jurisdiction to assume lead agency status after the County issued an MDNS. *See* 8 Wn. App. 2d at 351-52. The record and this court's prior decision do not support Puyallup's claims that the County violated SEPA.

is deleted, and replaced with the following language:

> The opinion of this court is narrow. In *Pierce County*, this court ruled that Puyallup has jurisdiction to assume lead agency status after the County issued an MDNS, which rendered the MDNS void. *See* 8 Wn. App. 2d at 351-52. But the court did not opine that the County's SEPA review leading to the MDNS violated SEPA.

Accordingly, it is

SO ORDERED.

Velljacic, J.

We concur:

Glasgow, C.J.

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December 14, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF PUYALLUP, Appellant, v. PIERCE COUNTY, a Washington governmental unit; KNUTSON FARMS, INC.; and RUNNING BEAR DEVELOPMENT PARTNERS, LLC, Respondents.	No. 54474-1-II PUBLISHED OPINION

VELJACIC, J. — Pierce County issued a mitigated determination of nonsignificance (MDNS) under the State Environmental Policy Act (SEPA) for a warehouse distribution project bordering the City of Puyallup. Puyallup attempted to assume lead agency status so it could issue a determination of significance (DS) and prepare an environmental impact statement (EIS). The County refused to accept Puyallup's jurisdiction, and Puyallup sued. In *City of Puyallup v. Pierce County*, 8 Wn. App. 2d 323, 326-27, 438 P.3d 174 (2019), this court held that Puyallup had jurisdiction under SEPA regulation WAC 197-11-948, to assume lead agency status, issue a DS, and complete an EIS. On remand, the superior court adopted the County's proposed order and ruled that this court's opinion, consistent with WAC 197-11-948, rendered decisions that were based on the County's MDNS void, but allowed other County decisions related to this project to remain effective.

Puyallup appeals, arguing that the superior court's order is inconsistent with this court's opinion and asks us to hold that *all* County decisions on the project are void *ab initio*, and that the entire application process must start anew.

We conclude that neither the superior court's order, nor Puyallup's proposed order, correctly states the law. Accordingly, we reverse and remand for further proceedings.

FACTS

In 2014, Knutson Farms Inc. and Running Bear Development Partners LLC applied to Pierce County for approval of a warehouse and distribution facility bordering the City of Puyallup. *Pierce County*, 8 Wn. App. 2d 323. The project was within Puyallup's road and sewer infrastructure, and its approval was required for design elements pertaining to that infrastructure. *Id*. at 327. The County conducted its SEPA evaluation and issued an MDNS. *Id*. at 328.

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As asserted by the parties, and according to WAC 197-11-390(2)(b), the MDNS became void when Puyallup assumed lead agency status. *See* WAC 197-11-390(2)(b); WAC 197-11-948(2).[2] However, the authorities do not support Puyallup's broader claim that all of the County's "reviews, decisions, permits, and approvals" on the project are void *ab initio* upon it assuming lead agency status. Br. of Appellant at 15. Rather, the case law and regulations demonstrate that reliance on decisions and reviews from a prior SEPA process, like those Puyallup wants voided, is logical and even required. *See Weyerhaeuser*, 124 Wn.2d at 47; *Klickitat County*, 122 Wn.2d at 647; WAC 197-11-948(2); WAC 197-11-070. Neither the regulations nor the case law support the scorched earth approach Puyallup included in its proposed order. Because such order is contrary to law, we refuse to instruct the trial court to adopt it.

Still, the trial court erred in adopting the County's order. In their arguments, neither party identifies a core problem with the order: while stating that all decisions based on its MDNS are void, it fails to state that the MDNS itself is void. This failure renders the order deficient.

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CONCLUSION

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Veljacic, J.

We concur:

Glasgow, A.C.J.

Cruser, J.

EGLICK & WHITED PLLC

July 01, 2022 - 3:54 PM

Transmittal Information

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Appellate Court Case Number:	54474-1
Appellate Court Case Title:	City of Puyallup, Appellant v. Pierce County et al., Respondents
Superior Court Case Number:	17-2-03180-9

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