NO. 331946-III

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

CONSERVATION NORTHWEST; and METHOW VALLEY CITIZENS' COUNCIL,

Appellants,

v.

OKANOGAN COUNTY

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In 2013 the State of Washington enacted a new law regulating the use of off-road vehicles. Engrossed Substitute House Bill 1632 ("ESHB 1632") established a new licensing system for a category of off-road vehicles called "wheeled all-terrain vehicles" ("ATVs"). The law required ATVs to have specific safety equipment and prominently display a license tag. ESHB 1632 also granted certain counties, including Okanogan County, the authority to open to ATV use county roads with speed limits of 35 mph or less. Operation of ATVs on any county road was not authorized, however, unless a county affirmatively acted to open it to ATVs.

Two fundamental legislative goals of this law were to: (a) "increase opportunities for safe, legal, and *environmentally acceptable* motorized recreation;" and (b) "*decrease* the amount of *unlawful or environmentally harmful* motorized recreation." ESHB 1632, Section 1 (emphasis added). Okanogan County responded immediately to the passage of this law by simply opening to ATVs all county roads and road segments with speed limits at or below 35 mph -- a total of 597.2 miles -- without any safety analysis or environmental review. After appellants

challenged the County's hasty, sweeping action, the County repealed its initial ordinance, prepared a meaningless "environmental checklist," and issued itself a "determination of non-significance" ("DNS"), finding that no more environmental analysis was called for because the action would have only insignificant environmental impacts. The DNS was quickly followed by adoption of Ordinance 2014-7, which, once again, simply opened to ATVs all county roads and road segments with speed limits of 35 mph or less.

While the County's action certainly met the legislative goal of increasing opportunities for ATV use, it utterly ignored the parallel goals of increasing environmentally acceptable recreation and decreasing environmentally harmful recreation. Instead, without the benefit of any meaningful environmental review or analysis, and ignoring abundant evidence in the record of the likelihood of increased environmental damage from its action, the County created a confusing patchwork of open and closed road segments *based entirely on speed limits*, without regard to location, length, or connectivity of open road segments; road surface; ownership or habitat values of adjacent land; or whether a particular road segment could even be safely be shared by motor vehicles and ATVs.

The evidence in the record demonstrating probable significant environmental impacts of this action to both the natural environment and the built environment, including public services, is overwhelming. Consequently, the conclusions in the County's SEPA checklist were based on unfounded and incorrect assumptions. Its issuance of a DNS was clearly erroneous.

To allow the County's unfounded assumptions and formulaic responses to the environmental checklist to stand would be to render SEPA meaningless. If ever there were a case where a governmental entity ignored all evidence in the record and barely gave lip service to SEPA, this is it. The Superior Court erred in granting summary judgment in favor of Okanogan County.

The Court should declare Ordinance 2014-7 null and void and remand to Okanogan County directing the County to: 1) carefully consider and document the effects of its decision, as required by SEPA; and 2) after becoming informed of the likely environmental effects of its action through SEPA review, comply with the legislative intent behind ESHB 1632 by creating a network of County roads open to ATV use that will

increase recreational opportunities while decreasing confusion and environmental harm.

II. ASSIGNMENT OF ERROR

The superior court erred in granting Okanogan County's Motion to Dismiss and denying Conservation Northwest and Methow Valley Citizens' Council's Cross-Motion for Summary Judgment.

III. ISSUES FOR REVIEW

1. Was Okanogan County's issuance of a SEPA threshold Determination of Non-significance clearly erroneous, where the overwhelming evidence before the County demonstrated that the opening of over 450 miles of county roads to ATV use would result in a significant increase in environmental harm from illegal off-road riding and place an added burden on public services?

2. Where the County failed to comply with SEPA prior to adopting Ordinance 2014-7, should the Court declare the ordinance null and void?

3. Where the legislative intent behind ESHB 1632 was, in part, to eliminate confusion over the use of public roads by ATVs as well as decrease the amount of unlawful and environmentally harmful ATV

use, was Okanogan County's adoption of Ordinance 2014-7 contrary to the legislative intent and consequently *ultra vires*?

IV. STATEMENT OF THE CASE

On July 3, 2013, the Governor approved ESHB 1632, an act relating to regulating the use of off-road vehicles ("ORVs") and creating a system for licensing and identifying a category of ORVs called "wheeled all-terrain vehicles" ("ATVs"). Section 6 of the law, codified at RCW 46.09.455, granted certain counties the authority to allow operation of ATVs on public roads, as long as the road's speed limit does not exceed 35 mph. In order to authorize ATV operation on any public roads a county must adopt an ordinance listing individual roads or road segments open to ATVs and publish the list on its web site. RCW 46.09.455.1(c)(i), (iii).

ESHB 1632 took effect on July 28, 2013. One day later, the Okanogan County Board of County Commissioners adopted Ordinance 2013-10, which purported to open to ATVs all public roadways and rights of way, or sections thereof, with speed limits of 35 mph or less. CP 192, ¶ 3; CP 194-95. Prior to adopting Ordinance 2013-10, Okanogan County made no effort to determine whether this action would create a confusing

patchwork of open segments interrupted by segments with a speed limit greater than 35 mph, nor did it determine whether opened roads were managed by another public agency and thus not subject to County jurisdiction, or otherwise not within the County's authority to open. Okanogan County also did not conduct environmental review pursuant to the State Environmental Policy Act, Chapter 43.21C RCW ("SEPA") prior to adopting Ordinance 2013-10. CP 192, ¶ 3; CP 194-95.

On August 14, 2013, appellants Conservation Northwest ("CNW") and Methow Valley Citizens' Council ("MVCC") filed a complaint for declaratory and injunctive relief challenging Ordinance 2013-10. Okanogan County answered the complaint and admitted that this court had jurisdiction under the Declaratory Judgments Act. CP 192, ¶ 4; CP 198, ¶¶ 10-11. On January 13, 2014, plaintiffs filed a Motion for Summary Judgment asserting that Ordinance 2013-10 violated SEPA, as well as Chapter 46.09 RCW as amended. In response, on March 4, 2014, Okanogan County repealed Ordinance 2013-10. CP 192, ¶ 5; CP 204.

On May 14, 2014, Okanogan County published a SEPA determination of non-significance ("DNS") concluding that there would be no significant environmental impacts from opening 597.23 miles of public

roads and rights-of-way to use by ATVs. CP 240, ¶ 5; CP 282-83. Appellants filed extensive and detailed comments on the DNS, including reference to studies and eyewitness accounts documenting widespread illegal ATV riding and consequent environmental damage. CP 325-368.

Without stating a basis for its conclusion, and contrary to evidence in the record before it, the County assumed that all ATV use would be confined to roads and that there would be no increase in off-road use by opening up an additional 597.23 miles of roads for use by ATVs. It also found -- again, with no basis in the record -- that there would be no impact on the adjacent soils, water, or other environmental resources, or on public services such as emergency response services, from allowing ATV traffic on hundreds of miles of roads, including dirt and gravel roads. *See generally*, CP 253-266 (Environmental Checklist).

On May 29, 2014, plaintiffs filed an administrative appeal of Okanogan County's SEPA DNS. CP 285-313. County Staff confirmed that plaintiffs had standing to appeal the County's DNS, having submitted timely comments. CP 315. On June 16, 2014, the Okanogan County Commissioners considered – and denied -- plaintiffs' SEPA appeal and conducted a public hearing on the proposed ordinance. On June 23, 2015,

the Commissioners adopted Ordinance 2014-7, opening 421.22 miles of public roads for use by ATVs, later amended to include 453 miles.[1] CP 244-251; CP 267 (Map); CP 409-412.

Appellants CNW and MVCC filed a complaint for declaratory and injunctive relief challenging Ordinance 2014-7 within 20 days of the Commissioners' adoption of the ordinance. CP 415-431. CNW and MVCC raised two challenges in their complaint: (1) the County failed to comply with SEPA; and (2) the County failed to comply with the intent and requirements of ESHB 1632. *Id.*

Okanogan County filed a motion to dismiss and for summary judgment on August 26, 2014.[2] CP 413-414; CP 432-449. Okanogan County sought dismissal on both procedural and substantive grounds, asserting that CNW and MVCC lacked standing and failed to provide evidence that Ordinance 2014-7 would result in significant environmental impacts. *Id.* CNW and MVCC filed their response, along with a cross-

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[1] The County dropped many roads on Colville Tribal land after the Tribes filed an administrative appeal of the SEPA determination. The Tribes then withdrew their appeal. On Feb. 3, 2015, Resolution 9-2015 corrected the list of open roads to include 453 miles of roads, rather than 421. The list that accompanied Ordinance 2014-7 had incorrectly omitted some roads on the Colville Reservation that were in fact opened. See http://okanogancounty.org/PW/Recreation_Information_Items/Ord%202014-7%20+%20Res%209-2015.pdf

[2] Okanogan County's motion was based on and supported by the Declaration of Perry Huston, the County's planner. CP 240-412.

motion for summary judgment, on October 1, 2014. CP 207-239. After briefing and oral argument, on December 26, 2014, Okanogan County Superior Court Judge Henry Rawson entered a Memorandum Decision upholding Okanogan County's adoption of Ordinance 2014-7, including the County's SEPA determination. CP 13-28. The Court did not address CNW or MVCC's standing. *Id.* A final order was issued January 12, 2015. CP 8-11. This appeal followed. CP 1-7.

V. STANDARD OF REVIEW

This Court reviews summary judgment orders de novo. The Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The Court "must view all facts and reasonable inferences in the light most favorable to the nonmoving party." *Id.*

VI. ARGUMENT

A. Okanagan County's SEPA Threshold Determination Was Clearly Erroneous

1. SEPA mandates the disclosure and full consideration of environmental impacts in governmental decision-making.

As Division 2 recently summarized:

> Over 40 years ago with the adoption of SEPA, we first read in Washington law that each generation is trustee of the environment for succeeding generations. We read also that it is the "continuing responsibility" of the state and its agencies to act so we may carry out that trust. SEPA demands that this trust be more than merely a stirring maxim or artful slogan. Instead it is the quickening principle in the application of the statute.

The Lands Council v. Washington State Parks Recreation Comm'n, 176 Wn. App. 787, 807-08, 309 P.3d 734 (2013).

SEPA mandates environmental review for any local agency decision that is not categorically exempt, including proposals to adopt legislation. WAC 197-11-704(a). "Under SEPA, a county must include an environmental impact statement with any proposal the lead agency's responsible official decides would 'significantly affect[ ] the quality of the environment.' RCW 43.21C.030(2)(c); WAC 197–11–330(1)." *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 578, 309 P.3d 673, 684 (2013). This means that if a proposal, such as the proposal to open additional County roads to ATV is "likely to have probable significant adverse environmental impacts," SEPA mandates that the responsible official "shall issue a determination

of significance requiring that an EIS be prepared." RCW 43.21C.030(2)(c); RCW 43.21C.031; WAC 197-11-360.

Where there is doubt whether a "probable significant adverse effect" exists, the SEPA threshold determination must be in favor of preparing an environmental impact statement:

> The policy of the Act, which is simply to assure via "a detailed statement" a full disclosure of environmental information, so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect "threshold determination" is made."

Norway Hill Preservation and Protection Association v. King County Council, 87 Wn.2d 267, 273, 552 P.2d 674 (1976).

A "probable significant adverse effect" exists whenever more than "a moderate effect on the quality of the environment is a reasonable probability." *Id.* at 278; WAC 197-11-794(1). Further,

> Significance involves context and intensity. ... The context may vary with the physical setting. Intensity depends on the magnitude and duration of the impact. The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.

WAC 197-11-794(2). The SEPA rules also define "probable:"

> "Probable" means likely or reasonably likely to occur, ... Probable is used to distinguish likely impacts from those that merely have a possibility of occurring but are remote or speculative."

WAC 197-11-782.

SEPA requires the disclosure and full consideration of environmental impacts in governmental decision-making. The purpose of SEPA is to function "as an environmental full disclosure law...." *Moss v. City of Bellingham*, 109 Wn. App. 6, 16, 31 P.3d 703, 709 (2001) *review denied*, 146 Wn.2d 1017, 51 P.3d 86 (2002). Agency decisions must consider more than the narrow, limited environmental impact of the immediate, pending action and cannot close their eyes to the ultimate probable environmental consequences. *Cheney v. Mountlake Terrace,* 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

2. While deference is accorded the responsible official's threshold SEPA decision, the court must examine the record to determine whether the official has made a mistake.

SEPA specifically requires that the County conduct a detailed and comprehensive review, rather than take a "lackadaisical approach." *Eastlake Cmty. Council v. Roanoke Assocs., Inc.,* 82 Wn.2d 475, 494

(1973); *see also Norway Hill Pres. & Prot. Ass'n,* 87 Wn.2d at 273 (SEPA requires a "detailed statement"). While SEPA provides that the agency's threshold determination is entitled to deference, RCW 43.21C.090, "the agency must make a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Wenatchee Sportsmen Association v. Chelan County, et al.,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The agency must also demonstrate "that the decision to issue an MDNS was based on information sufficient to evaluate the proposal's environmental impact." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997); *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wash. App. 408, 422-23, 225 P.3d 448, 455-56 (2010).

In other words, on appeal this Court should not turn a blind eye to the facts in the record or simply rubber stamp the responsible official's determination. Instead, the Court reviews the decision under the "clearly erroneous" standard of review. A decision is "clearly erroneous" even where there is evidence to support the decision, if the reviewing body is "left with the definite and firm conviction that a mistake has been committed." *Id.; Hayden v. Port Townsend*, 93 Wn.2d 870, 880, 613 P.2d

1164 (1980); *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 747, 755 P.2d 264 (1988).

3. Okanogan County's SEPA checklist and DNS did not take into account information sufficient to evaluate the proposal's environmental impact.

The County's SEPA checklist failed to contain sufficient information to evaluate (1) the likelihood of significant impacts on sensitive lands and waters, including fish and wildlife habitat, from illegal off-road riding facilitated by opening certain roads to ATVs, and from increased legal traffic on dirt and gravel roads; 2) the impacts on traffic of ATVs traveling on roads with speed limits over 35 mph, either because of confusion over where ATVs are and are not allowed, or because the operator wants to traverse an unauthorized road segment with a higher speed limit to access an isolated authorized road segment; or (3) the impacts on public services from the need for additional traffic patrol and enforcement to keep ATVs from riding off-road, and the need for increased emergency response to accidents. CP 253-280 (Checklist); CP 282-283 (DNS).

a. The County ignored the overwhelming evidence in the record of extensive damage to lands, water, vegetation, and fish and wildlife habitat from widespread illegal off-road ATV riding.

In all relevant responses in the SEPA Checklist, the County presumes that ATVs are exactly like all other vehicles that are already allowed on the roads and considers only the impacts to the road itself from opening it to ATVs. To the contrary, the very name "all-terrain vehicles" means that these vehicles are designed, marketed, and intended for off-road use. Unfortunately, not all recreational ATV operators stay on the road when they are riding in a vehicle that was designed and intended for off-road use, even when off-road use is prohibited. This statement is not speculation; it is established fact and well documented in the literature provided to Okanogan County from sources as wide-ranging as Backcountry Hunters and Anglers, to academia, the Bureau of Land Management, Government Accounting Office (GAO), and Forest Service. *See, e.g.,* CP 66-162.[3]

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[3] As the GAO noted in 2009: "The environmental impacts of OHV use, both direct and indirect, have been studied and documented over the past several decades. In fact, in 2004, the Forest Service Chief identified unmanaged motorized recreation as one of the top four threats to national forests, estimating that there were more than 4,000 miles of user-created trails, which can lead to long-lasting damage." ("User-created trails" are off-road trails that users have created by leaving the road.) CP 141. The GAO report continues: "Potential environmental impacts associated with OHV use include damage to soil, vegetation, riparian areas or wetlands, water quality, and air quality, as well as noise, wildlife habitat fragmentation, and the spread of invasive species." *Id.* .

But the evidence goes far beyond the literature. Okanogan County also received multiple eye-witness statements from citizens describing,and documenting illegal off-road ATV use, including increased use after adoption of ESHB 1632 and Ordinance 2013-10. *See, e.g.,* CP 152-172. Concerns and observations of illegal off-road ATV use are shared also by the Washington Department of Fish and Wildlife ("WDFW"), CP 367-368, and at least one former manager of WDFW wildlife areas. CP 363.[4] It is unreasonable and contrary to SEPA to ignore the extensive evidence that illegal off-road riding is widespread, and instead to assume that all ATV operators will confine themselves to riding on-road in a rural county with substantial public lands.

Appellants do not argue that, in a SEPA analysis for most land or road use proposals, the responsible official must assume that illegal activity and associated environmental harm will occur. For the vast majority of proposals subject to

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[4] As explained by Tom McCoy:

> As the former manager of the WDFW Methow Wildlife Area I witnessed first-hand the result of your prior decree to open county roads to ORV's. In the first three weeks following that declaration I received more calls about ORVs on non-county roads, reckless driving on all roads, driving off-road, and driving on closed roads than in the previous three years.
> ***
> Opening roads to ORV users, without due consideration of non-compliance and impacts to critical fish and wildlife habitat, will have more than "speculative impacts." In fact, non-complying ORV use is currently having impact critical habitat. CP 363.

SEPA review, the proponent could reasonably assume that laws will be obeyed and he or she would not be required to assess the impacts of illegal activities. However, this case is unusual in that the evidence unequivocally shows that illegal off-road ATV riding and its consequent environmental harm has plagued land managers for decades and is to be expected. Requiring Okanogan County to consider the likely environmental effects of off-road ATV riding when opening hundreds of miles of County roads to ATV use does not in any way imply that the effects of illegal activity generally should be considered when conducting environmental analysis of common land or road use proposals.

Nor do appellants argue that the County should have declined to open any additional county roads to ATV use because of the likelihood of illegal off-road riding. Instead, had the County done a proper SEPA analysis and considered where the environmental harm of off-road riding would be greatest, it may well have revised the proposal to exclude certain roads.

The SEPA checklist is designed to highlight the resources to which the responsible official should pay particular attention in evaluating reasonably probable environmental effects of a proposed action. In this case, however, the County's refusal to consider that widespread illegal off-road ATV use is prevalent throughout its SEPA checklist and made the

exercise meaningless. CP 253-280. For example, under the topic of "Earth," the checklist asks about steepness of slopes, kinds of soils affected, history of unstable soils, likelihood of erosion, and measures to control erosion. Every response asserts that only "already existing roadways" will be affected. CP 255. To the contrary, the evidence demonstrates that increased off-road riding is likely and that it will cause erosion, particularly in areas of steep slopes or unstable soils. The County must therefore assume some amount of increase in illegal riding and assess impacts on soils adjacent to roads that would be opened to ATVs, especially in areas of steep slopes or unstable soils. Such an analysis might lead the County to consider limiting ATV use to roads that are not adjacent to steep slopes or unstable soils.

Similarly, under the topic of "Water," the SEPA checklist questions whether the proposal is adjacent to or within 200 feet of surface water bodies, including "year-round and seasonal streams, saltwater, lakes, ponds, wetlands." The County's stock answer is the same as for the element of "Earth:" only "existing county roadways" will be affected. CP 256-257. Again, this answer ignores the fact that off-road riding can adversely affect water bodies, either by ATVs riding directly through streams or by causing erosion

that can end up in streams. Were the County to assess the impacts of off-road ATV use on water bodies, it might consider limiting ATV operation on roads above sensitive water bodies, especially those adjacent to steep slopes or unstable soils.

The checklist continues in the same vein. In responses to questions regarding "Plants" and "Animals," the County repeatedly asserts that there is no vegetation affected and no animals affected because ATV travel will take place on "existing county roadways." CP 257-258. There is no consideration of impacts to vegetation or wildlife adjacent to, or made accessible by, existing roads. Once again, it is incumbent on the County to acknowledge that ATVs are not like most other vehicles in that they are designed and intended for off-road travel. The literature is replete with examples of serious damage to vegetation and wildlife habitat -including spawning streams for endangered fish - from illegal off-road riding. *See* CP 71-106 (Backcountry Hunters and Anglers).

Other responses in the checklist similarly fail to consider the likelihood of damage from off-road riding. For example, the SEPA checklist asks: "Has any part of the site been classified as an 'environmentally sensitive' area? If so, specify." The County's answer is: "No

roadways in this proposal have been classified as sensitive areas." CP 260. Similarly, in response to the question asking how the proposal is likely to use or affect environmentally sensitive areas, including parks, wilderness and habitat, the County acknowledges that the roads to be opened to ATV traffic "are in some cases located next to areas under regulatory protection or eligible for regulatory protection," but that this is not an issue because "the proposal involves existing county roads currently open to vehicle traffic." Off-road damage is not mentioned. CP 265-66. Finally, in response to the SEPA checklist question asking how the proposal is likely to affect plants, animals, and fish, the County states that "the proposal involves existing county roads already open to vehicle travel. There will be no impacts to plants, fish, or marine life. The proposal does not create any new roads or open any roads not currently open to vehicle travel." CP 265.

Many miles of roadways opened to ATVs by the ordinance travel through, or give access to, WDFW Wildlife Areas or state parklands. *See* CP 354-359 (highlighting open road segments that access public lands in the Methow Valley). The County has failed to ascertain the extent to which the environmentally sensitive areas on these public lands may be adversely affected by off-road riding facilitated by this ordinance. WDFW and State Parks prohibit

ATVs both on and off road, yet the ordinance provides ATV access to and through these lands, thus adding to the agencies' enforcement burden.

Many miles of opened roads likely are adjacent to spawning streams of at least one of the County's three federally listed threatened or endangered fish species, but the County has failed to do any surveying or mapping to determine what protected species or their habitat may be made vulnerable to ATV access by this ordinance.[5] The SEPA checklist asks: "How would the proposal be likely to affect land and shoreline use, including whether it would allow or encourage land or shoreline uses incompatible with existing plans?" The County response is: "The county roads are in some cases located next to areas under shoreline protection." CP 266. This is another example of sensitive areas that may be affected by the ordinance.

In sum, there is no rational basis for assuming that there will be no damage to adjacent or accessed lands from increased illegal off-road riding. Okanogan County cannot ignore the impacts of its ordinance on sensitive resources and on State and Federal lands. The SEPA rules mandate that "in assessing the significance of an impact, the lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its

[5] For example, the table at CP 354-359 shows roads accessing sharp-tailed grouse habitat or lakes in the Tunk Valley. The County should determine where other protected species could be adversely affected by particular roads included in the proposal.

jurisdiction." WAC 197-11-060(4)(b). The failure to consider impacts on State and Federal land managers and on towns that do not allow ATVs is not only a violation of SEPA, but an abdication of intergovernmental responsibility.

There is ample evidence that the only reasonable assumption in conducting a SEPA analysis on this proposal is that there will be an increase in illegal riding and consequent damage to soils, water bodies, shorelines, vegetation, wildlife, protected species, governmentally protected sensitive areas and tribal resources. Were the County to accept this assumption, instead of opening every single road segment in the county with a speed limit of 35 mph or less, it might well design a thoughtful network of roads open to ATV use that would both provide increased on-road opportunities for ATV riders and avoid allowing access to the most environmentally sensitive lands. In this way, the County's SEPA analysis would have achieved its intended goal of educating decision makers so that they may make a more environmentally responsible decision.

b. The checklist and DNS fail to consider the impacts on traffic from ATVs traveling on roads with speed limits over 35 mph.

SEPA's definition of environmental impacts extends beyond protecting the natural environment and includes also the "built environment." WAC 197-11-444(2). This includes impacts to the transportation system. WAC 197-11-444(2)(c).

Ordinance 2014-7 opens numerous isolated short county road segments that allow longer rides only if the operator illegally rides on roads that have speed limits over 35 mph. Indeed, in the Methow Valley alone, appellants identified at least twenty-six (26) road segments less than one mile long and ten (10) between one and two miles long. CP 267 (Vicinity Map); CP 354-59. In addition, appellants identified other road segments longer than two miles that offer no realistic opportunity for ATV travel due to being loop roads that begin and end at roads closed to ATVs, and no parking for trailers is available. CP 354-59.

It is more than likely that some riders will ride on segments or roads with higher speed limits, either because of confusion over where ATVs are and are not allowed, or because the operator wants to traverse an unauthorized segment with a higher speed limit to access another authorized road or segment. The County

assumed that despite the disconnected patchwork of short segments connected only by roads or segments with higher speed limits, all ATV riders would both 1) understand where they may and may not ride, and 2) stay only on roads on which ATVs are allowed. This is an unsupported and unrealistic assumption.

The County's DNS was not based on information sufficient to evaluate Ordinance 2014-7's environmental impact on traffic and traffic safety.

c. The checklist and DNS fail to consider impacts on public services.

SEPA's definition of environmental impacts extends also to addressing impacts on public services, including fire, police and other governmental services. WAC 197-11-444(2)(d). Okanogan County's SEPA checklist and DNS utterly ignored these impacts.

Already thin local police and sheriff resources will be needed to enforce the laws governing ATVs. These include: licensing, safety equipment, underage riders, speeding, and most especially, responding to complaints about riding either on closed roads or riding off-road.

The same holds true for emergency response. The Specialty Vehicle Institute of America (ATV manufacturers' lobby), Consumer

Product Safety Commission, and the Insurance Institute for Highway Safety all state that ATVs are especially vulnerable to accidents on paved roads and should not be allowed on paved roads. CP 173-175; 179-181. Two reasons are cited. First, ATVs do not fare well against cars in collisions. Second, ATVs are designed for off-road use only. Most ATVs have low pressure tires and a solid rear axle, where both wheels turn at the same speed. When making a turn, the ATV's inside rear wheel is intended to skid because its path length is less than the path length of the outside wheel. ATVs on paved surfaces have much better traction, which prevents the necessary skidding. This can make turning an ATV on paved surfaces unpredictable and unstable. These concerns were further backed up by a letter from fifteen (15) medical and consumer professionals to the Board of County Commissioners. CP 176-178.

Once again, the County's DNS was not supported by information sufficient to evaluate Ordinance 2014-7's environmental impact on scarce public resources. Had they done so, a reasonable alternative would be to eliminate heavily traveled paved roads from the list.

B. The Court Should Declare that the County Violated SEPA and Ordinance 2014-7 is therefore Null and Void.

Based on the evidence presented to Okanogan County during the SEPA public comment period and plaintiffs' administrative appeal, as well as the argument above, the Court should declare that the County's DNS is not supported by information sufficient to evaluate Ordinance 2014-7's environmental impacts and therefore is clearly erroneous.

The appropriate remedy for failing to comply with SEPA is to declare Ordinance 2014-7 null and void. Our courts have uniformly set aside agency action rendered in violation of the statute's requirements, including action taken on an inadequate EIS.

For example, in *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 47, 873 P.2d 498 (1994), the court found an environmental impact statement to be legally inadequate. As a result, the court also reversed the decisions rendered in reliance upon the inadequate EIS. In *Barrie v. Kitsap County*, 93 Wn.2d 843, 861, 613 P.2d 1148 (1980), the court declared invalid a rezone ordinance based upon an EIS found to be inadequate. *See also*, *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 632, 860 P.2d 390 (1993) ("If the decision to build a regional landfill was not based on an adequate EIS,

then the County must revisit that planning process .."); *State v. Grays Harbor County*, 122 Wn.2d 244, 256, fn 12, 857 P.2d 1039 (1993) ("agency action which does not comply with SEPA is unlawful and outside the agency's authority").

These holdings follow earlier decisions that have invalidated agency action for lack of compliance with SEPA. *See Eastlake Community Council v. Roanoke Assocs., Inc.,* 82 Wn.2d 475, 487, 513 P.2d 36 (1973) (failure to file an EIS prior to renewal of a building permit rendered the permit void); *Lassila v. City of Wenatchee,* 89 Wn.2d 804, 816-17, 576 P.2d 54 (1978) (vacating amendment of city's comprehensive plan which contained environmental assessment but not an EIS); *Noel v. Cole,* 98 Wn.2d 375, 655 P.2d 245 (1982) (failure to prepare EIS prior to entering contract permitting logging on public land rendered contract *ultra vires*), superseded by statute on other grounds, *Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.,* 131 Wn.2d 345, 932 P.2d 158 (1997).

C. Ordinance 2014-7 Violates the Intent of ESHB 1632.

In enacting ESHB 1632, the legislature implicitly acknowledged the history of illegal and environmentally harmful off-road vehicle (ORV)

use. First, as noted at the beginning of this brief, an express legislative intent behind ESHB 1632 was to "decrease the amount of unlawful or environmentally harmful motorized recreation." ESHB 1632, Section 1. Second, a primary feature of ESHB 1632 is the adoption of a separate, rigorous system to license ATVs (as distinguished from other ORVs) and require prominent display of license tags on each vehicle. Prior to 2013, there was no specific licensing requirement for ATVs in Washington.[6] It is clear from the legislation that a major reason for adoption of this licensing system was to improve the ability to identify individual vehicles for enforcement purposes.[7]

While the legislature stated a *goal* of reducing illegal off-road riding and its consequent environmental damage, it did not – and could not – expect that the goal would be accomplished simply by enactment of the law. In particular, in giving counties and towns the authority to open roads with speed limits of 35 mph or less to ATVs, it is reasonable to

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[6] While there was a general licensing requirement for ORVs prior to 2013, ESHB 1632 defined "wheeled all-terrain vehicles" as a separate category of ORVs and adopted equipment requirements and a licensing system specifically for ATVs. RCW 46.09.310(19), 46.09.442.

[7] RCW 46.09.442 provides: "Any wheeled all-terrain vehicle operated within this state must display a metal tag to be affixed to the rear of the wheeled all-terrain vehicle." The tag must be the same size as a motorcycle registration tag, it must include the words "RESTRICTED VEHICLE" at the top of the tag, and it must include "the appropriate on-road tab, which must be of a bright color that can be seen from a reasonable distance."

assume the legislature was aware that these governmental entities would be required to perform the environmental analysis required by SEPA prior to opening their roads to ATVs, and that the results of their analysis would inform their decisions. In this way, opportunities for increased legal ATV operation could, in fact, be accompanied by decreased environmental harm. This goal could be realized, however, only if governmental entities followed other state law – namely, SEPA – and paid heed to the legislature's clearly stated intention to "increase opportunities for *safe, legal, and environmentally acceptable* motorized recreation" ESBH 1632, Section 1 (emphasis added).

Okanogan County has completely ignored these goals. Due in significant part to its failure to conduct adequate SEPA review, as discussed above, the County's action adopting Ordinance 2014-7 has increased confusion for ATV riders, decreased public safety, and increased the opportunities for illegal and environmentally damaging motorized recreation, particularly harm to adjacent soils, water, vegetation, fish, and wildlife. Had the County performed any thoughtful analysis with the intent to increase recreational opportunities for ATV

riders while decreasing environmental harm, it likely would have designed a very different ATV road system.

Instead, the County has created a confusing patchwork of open and closed road segments *based entirely on speed limits*, without regard to location, length, or connectivity of open road segments; ownership or habitat values of adjacent land; whether a particular road segment can safely be shared by motor vehicles and ATVs; availability of parking areas that do not present a safety hazard to offload ATVs from flatbeds; and other important factors.

It is clear that the County did not consider the suitability or safety of a single road or road segment when issuing its blanket authorization, *despite public comments directing the County's attention to particular roads and road segments that present environmental or safety concerns. See* CP 354-359. Surely the legislature did not intend to allow this sort of sweeping and thoughtless action in disregard of both SEPA and the law's stated purposes. This Court should declare that Ordinance 2014-7 violates the intent of ESHB 1632, is *ultra vires*, and is null and void.

VII. CONCLUSION

For the foregoing reasons, appellants CNW and MVCC respectfully request this Court declare that Ordinance 2014-7 was adopted in violation of the State Environmental Policy Act and violates the intent of ESHB 1632. The Court should declare Ordinance 2014-7 null and void and remand this matter to Okanogan County and remand to Okanogan County directing the County to: 1) carefully consider and document the effects of its decision, as required by SEPA; and 2) after becoming informed of the likely environmental effects of its action through SEPA review, comply with the legislative intent behind ESHB 1632 by creating a network of County roads open to ATV use that will increase recreational opportunities while decreasing confusion and environmental harm.

Respectfully submitted this 22nd day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I caused this document to be served on the following individuals in the manner listed below:

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DATED this 22nd day of May, 2015, at Seattle, Washington.

David S. Mann

ENGROSSED SUBSTITUTE HOUSE BILL 1632

Passed Legislature - 2013 2nd Special Session

State of Washington 63rd Legislature 2013 2nd Special Session

By House Transportation (originally sponsored by Representatives Shea, Blake, Kristiansen, Sells, Warnick, Upthegrove, Wilcox, Scott, Moscoso, Fagan, and Condotta)

READ FIRST TIME 03/01/13.

AN ACT Relating to regulating the use of off-road vehicles in certain areas; amending RCW 46.09.310, 46.09.310, 46.09.360, 46.09.400, 46.09.410, 46.09.420, 46.09.450, 46.09.460, 46.09.530, 46.17.350, 46.30.020, 46.63.020, 79A.80.010, 46.63.030, 43.84.092, and 43.84.092; reenacting and amending RCW 46.09.470; adding new sections to chapter 46.09 RCW; creating a new section; prescribing penalties; providing effective dates; providing a contingent effective date; providing an expiration date; providing a contingent expiration date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** (1) The legislature finds that off-road vehicle users have been overwhelmed with varied confusing rules, regulations, and ordinances from federal, state, county, and city land managers throughout the state to the extent standardization statewide is needed to maintain public safety and good order.

(2) It is the intent of the legislature to: (a) Increase opportunities for safe, legal, and environmentally acceptable motorized recreation; (b) decrease the amount of unlawful or environmentally harmful motorized recreation; (c) generate funds for use in

maintenance, signage, education, and enforcement of motorized recreation opportunities; (d) advance a culture of self-policing and abuse intolerance among motorized recreationists; (e) cause no change in the policies of any governmental agency with respect to public land; (f) not change any current ORV usage routes as authorized in chapter 213, Laws of 2005; (g) stimulate rural economies by opening certain roadways to use by motorized recreationists which will in turn stimulate economic activity through expenditures on gasoline, lodging, food and drink, and other entertainment purposes; and (h) require all wheeled all-terrain vehicles to obtain a metal tag.

Sec. 2. RCW 46.09.310 and 2010 c 161 s 213 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Advisory committee" means the nonhighway and off-road vehicle activities advisory committee established in RCW 46.09.340.

(2) "Board" means the recreation and conservation funding board established in RCW 79A.25.110.

(3) "Dealer" means a person, partnership, association, or corporation engaged in the business of selling off-road vehicles at wholesale or retail in this state.

(4) "Highway," for the purpose of this chapter only, means the entire width between the boundary lines of every roadway publicly maintained by the state department of transportation or any county or city with funding from the motor vehicle fund. A highway is generally capable of travel by a conventional two-wheel drive passenger automobile during most of the year and in use by such vehicles.

(5) "Nonhighway road" means any road owned or managed by a public agency, a primitive road, or any private road for which the owner has granted an easement for public use for which appropriations from the motor vehicle fund were not used for (a) original construction or reconstruction in the last twenty-five years; or (b) maintenance in the last four years.

(6) "Nonhighway road recreation facilities" means recreational facilities that are adjacent to, or accessed by, a nonhighway road and intended primarily for nonhighway road recreational users.

RCW 46.09.455
Authorized and prohibited uses for wheeled all-terrain vehicles.

(1) A person may operate a wheeled all-terrain vehicle upon any public roadway of this state, not including nonhighway roads and trails, having a speed limit of thirty-five miles per hour or less subject to the following restrictions and requirements:

(a) A person may not operate a wheeled all-terrain vehicle upon state highways that are listed in chapter 47.17 RCW; however, a person may operate a wheeled all-terrain vehicle upon a segment of a state highway listed in chapter 47.17 RCW if the segment is within the limits of a city or town and the speed limit on the segment is thirty-five miles per hour or less;

(b) A person operating a wheeled all-terrain vehicle may not cross a public roadway, not including nonhighway roads and trails, with a speed limit in excess of thirty-five miles per hour, unless the crossing begins and ends on a public roadway, not including nonhighway roads and trails, or an ORV trail, with a speed limit of thirty-five miles per hour or less and occurs at an intersection of approximately ninety degrees, except that the operator of a wheeled all-terrain vehicle may not cross at an uncontrolled intersection of a public highway listed under chapter 47.17 RCW;

(c)(i) A person may not operate a wheeled all-terrain vehicle on a public roadway within the boundaries of a county, not including nonhighway roads and trails, with a population of fifteen thousand or more unless the county by ordinance has approved the operation of wheeled all-terrain vehicles on county roadways, not including nonhighway roads and trails.

(ii) The legislative body of a county with a population of fewer than fifteen thousand may, by ordinance, designate roadways or highways within its boundaries to be unsuitable for use by wheeled all-terrain vehicles.

(iii) Any public roadways, not including nonhighway roads and trails, authorized by a legislative body of a county under (c)(i) of this subsection or designated as unsuitable under (c)(ii) of this subsection must be listed publicly and made accessible from the main page of the county web site.

(iv) This subsection (1)(c) does not affect any roadway that was designated as open or closed as of January 1, 2013;

(d)(i) A person may not operate a wheeled all-terrain vehicle on a public roadway within the boundaries of a city or town, not including nonhighway roads and trails, unless the city or town by ordinance has approved the operation of wheeled all-terrain vehicles on city or town roadways, not including nonhighway roads and trails.

(ii) Any public roadways, not including nonhighway roads and trails, authorized by a legislative body of a city or town under (d)(i) of this subsection must be listed publicly and made accessible from the main page of the city or town web site.

(iii) This subsection (1)(d) does not affect any roadway that was designated as open or closed as of January 1, 2013;

(e) Any person who violates this subsection commits a traffic infraction.

(2) Local authorities may not establish requirements for the registration of wheeled all-terrain vehicles.

(3) A person may operate a wheeled all-terrain vehicle upon any public roadway, trail, nonhighway road, or highway within the state while being used under the authority or direction of an appropriate agency that engages in emergency management, as defined in RCW 46.09.310, or search and rescue, as defined in RCW 38.52.010, or a law enforcement agency, as defined in RCW 16.52.011, within the scope of the agency's official duties.

(4) A wheeled all-terrain vehicle is an off-road vehicle for the purposes of chapter 4.24 RCW.