NO. 97155-2

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals, Division II No. 51501-6-II

PIERCE COUNTY, KNUTSON FARMS, INC., and RUNNING BEAR DEVELOPMENT PARTNERS, LLC,

Petitioners,

v.

CITY OF PUYALLUP,

Respondent.

RESPONDENT CITY OF PUYALLUP'S ANSWER TO PIERCE COUNTY AND KNUTSON FARMS, INC. AND RUNNING BEAR DEVELOPMENT PARTNERS, LLC's PETITIONS FOR REVIEW

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

and

Joseph N. Beck
City of Puyallup City Attorney
333 S. Meridian, 4th Floor
Puyallup, WA 98371
(253) 864-4196

Attorneys for Respondent City of Puyallup

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

PUYALLUP MUNICIPAL CODE

I. INTRODUCTION

The Court of Appeals Decision upholding the City's invocation of WAC 197-11-948, a SEPA regulation in effect for over three decades, does not conflict with any Supreme Court or Court of Appeals decision. No constitutional issues have been raised. Neither the County nor the developer have raised an issue of substantial public – as opposed to parochial – interest. There is no basis for discretionary review under RAP 13.4(b).

This case concerns a specific State Environmental Policy Act (SEPA) regulation adopted by the Washington State Department of Ecology and the City's decision to avail itself of the remedy it provides to ensure that a massive development proposal undergoes adequate environmental review.

Specifically, WAC 197-11-948 authorizes an "agency with jurisdiction" to assume "lead agency status" and order preparation of an environmental impact statement (EIS) when the original lead agency fails to do so. WAC 197-11-948. WAC 197-11-948 has been in effect for over three decades.

II. RESTATEMENT OF THE CASE

The Knutson Farms, Inc./Running Bear Development Partners,

LLC (collectively, "Applicant") proposal underlying this case, and on which Pierce County refused despite requests, to prepare an environmental impact statement (EIS), is extraordinary.[1] It would redevelop farmland into an enormous warehouse, distribution, and freight movement complex, Knutson Farms Industrial Park (KFIP), on an acknowledged "environmentally sensitive" site immediately adjacent to the Puyallup River and each weekday would impose on already strained roads an additional 5600 vehicle trips, many of them heavy trucks. *See generally* CP 130-52. KFIP would include seven warehouses totaling 2.6 million square feet[2] in addition to parking lots, and ancillary facilities, for a total impervious surface/structure coverage of over 100 acres. CP 131, 148-49. Site development would require grading, paving (for truck and vehicle parking and maneuvering areas), substantial road construction and other road improvements, stormwater conveyances and outfalls, and water and sewer facility construction. CP 148, 597. Approximately 450,000 cubic yards of on-site material would be excavated and filled to prepare the

---

[1] The Knutson proposal for 2.6 million square feet of warehouse space, with additional impervious development on a 162 acre site, is six times larger than the nearby Schnitzer project – 447,000 square feet of warehouse on 24.3 acres within the City's boundaries. CP 583.

[2] Petitioners assert that, in response to public comments, the proposal's size was "voluntarily" reduced from 3 million to 2.6 million square feet. *See* County Petition at 4, Applicant Petition at 7-8. This is emblematic of the absence of rigor in County review. The original proposal included significant unlawful development in the Puyallup River floodplain, which the County had entertained.

building pads, paved areas and open space areas for development. CP 133.

The site is within Puyallup's Growth Management Act (GMA) Urban Growth Area and immediately adjacent to current City limits. *See* CP 10, 55. The City's Urban Growth Area will ultimately be part of the City. *See* RCW 35A.14.460; RCW 35A.14.470; CP 582.

Traffic to and from the proposed development would depend exclusively on the City's road network and on construction and improvements on City streets subject to City approval authority. *See* CP 597. The SEPA Environmental Checklist for KFIP, prepared by the Applicant and approved by the County, states that the project will include construction "along 5th *Avenue S.E., 80th Street East* and the portion of 134th Avenue East which will not to [sic] be vacated."[3] CP 144 (emphasis in original). These are City roads. CP 585. The project transportation impact analysis describes alterations to and construction of City roads, intersections, and sidewalks, including construction of an entirely new City road and an entirely new City traffic signal. CP 595-605.

The entire site is within the City's sewer service area. A substantial portion is in the City's water service area. CP 11, 55. The SEPA Checklist lists "Sewer and Water Utility Permits by City of Puyallup" among the

[3] The "to" is a typographical error. There is a portion of 134th Ave East which will not be vacated. CP 143.

"government approvals or permits that will be needed for . . . [the] proposal." CP 131; *see also* CP 145 (listing Puyallup as a provider of both water and sanitary sewer service for the project).

The City, through experts and counsel, submitted numerous comments to the County pointing out the need for an EIS. *E.g.*, CP 164-81, 589. The City formally offered on June 22, 2016 to participate with the County as a SEPA "co-lead agency" under WAC 197-11-944.[4] CP 170, 183. The City also cautioned the County that it would assume SEPA lead agency status under WAC 197-11-948 if necessary to ensure that the impacts of the proposal, mitigation, and alternatives were fully explored. CP 175, 178-79. The County rebuffed the City's requests for cooperation. CP 183.[5]

Subsequently, on April 26, 2017, the County issued a SEPA threshold determination titled "Mitigated Determination of Nonsignificance (MDNS)." CP 154-59. The MDNS stated that it was

---

[4] WAC 197-11-944 states in relevant part: "Two or more agencies may by agreement share or divide the responsibilities of lead agency through any arrangement agreed upon."

[5] Petitioners' unfairly demonize the City with descriptions and characterizations ("usurp," "unilateral," etc.). County Petition at 6, 11; Applicant Petition at 2, 10-11, 15, 18. As noted, the City early on volunteered to work with Pierce County as a co-lead agency to prepare an EIS for the proposal. The County rejected that. The City asked that assessment of impacts and determination of mitigation occur using an EIS, rather than engage in the County's auction bidding approach. The County refused. The City invoked the Ecology Regulation for lead agency assumption and to avoid delay immediately started the process to get an EIS prepared. The County balked.

issued "under WAC 197-11-340(2)" and that the County "has determined that the proposal will not have a probable significant impact on the environment, and an Environmental Impact Statement (EIS) will not be required under RCW 43.21C.030(2)(c), only if the following conditions are met." CP 154, 156 (emphasis in original).

The MDNS conditions pertain to traffic and to City roads and depend on approval and permits from the City. At least four of the conditions require changes to City roads and traffic signals, including construction of a new street and a new traffic signal; all require City approval and in some instances funding. CP 154-55. Other "mitigation" conditions depend on big ticket improvements on City roads, but only require the Applicant to contribute relatively small sums. *Id*. None of these conditions were approved by the City.

Pursuant to WAC 197-11-948, the issuance of the MDNS triggered a 14 day period in which another agency with SEPA jurisdiction could assume lead agency status over the proposal and require an EIS. On May 10, 2017, Puyallup therefore issued a "Notice of Assumption of Lead Agency Status." CP 186-88. The City also issued a SEPA "Determination of Significance and Request for Comments on Scope of EIS." CP 190-91.

On May 16, 2017, the Pierce County Executive wrote the City that the "County clearly has jurisdiction and will not recognize the City's

extrajudicial action." CP 193. Ignoring the EIS requirement, the County then issued a May 22, 2017 "Written Order" purporting to approve the KFIP application. CP 202-10. The County Order requires road improvements, including ones within City, not County jurisdiction. *Id.*

The City filed two administrative appeals, of the MDNS and of the Order, to the Pierce County Hearing Examiner. *See* CP 15, 58, 97. Both appeals included a reservation to the effect that the City's assumption of SEPA lead agency status meant that, per the SEPA regulations, the County's MDNS had been superseded by the requirement for preparation of an EIS.

Meanwhile, the County and the Applicant appealed Puyallup's SEPA Assumption and DS to the City's Hearing Examiner. Those appeals were deferred. CP 58, 73. *See* CP 214-15, 217.

The City filed this action on May 25, 2017 in Thurston County Superior Court. CP 7-19. As relief, the City requested a declaratory judgment, an injunction, and a writ of prohibition ruling that Pierce County was not entitled to disregard the City's assumption of SEPA lead agency status. CP 9; *see also* CP 17-18 (detailing requests for relief).

The parties subsequently cross-moved for summary judgment. *See* CP 101-23, 473-95, 496-98. The two primary legal issues presented were whether, as required in WAC 197-11-948, the City is an agency with

SEPA jurisdiction under WAC 197-11-714(3), and whether an agency with jurisdiction over a proposal can assume SEPA lead agency status under WAC 197-11-948 after an MDNS is issued for the proposal.

On October 6, 2017, the trial court granted the Applicant and County's cross-motion for summary judgment. CP 849-54. As a result the Pierce County Hearing Examiner proceeding went forward, resulting in decisions on November 21, 2018 and, on reconsideration, on February 27, 2019. The City has challenged those decisions in a Land Use Petition Act (LUPA) appeal pending in Pierce County Superior Court. Pierce County Superior Court Case No. 19-2-06362-4. By stipulation of all parties, that case was recently stayed pending the outcome here.

Meanwhile, the City had timely appealed the Thurston County superior court's grant of summary judgment to the Applicant and the County. CP 907-917. The Court of Appeals ultimately reversed the superior court's decision:

> In conclusion, we hold that the City is an "agency with jurisdiction" under WAC 197-11-948 because it has approval and permitting authority over the roadwork and water and sewer services that are part of the proposal. Based on the plain meaning of the regulations, we also hold that WAC 197-11-948 authorizes an "agency with jurisdiction" to assume lead agency status following the initial lead agency's issuance of an MDNS. Accordingly, we reverse and remand for action consistent with this opinion.

Decision at 28-29. That Decision is now before this court.

III. ARGUMENT

A. SEPA Overview.

The State Environmental Policy Act declares that "each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." RCW 43.21C.020(3). In protecting that right, SEPA mandates procedures for review of environmental impacts by a "lead agency." *See* WAC 197-11-050.[6] Among these procedures is a requirement that the lead agency make a "threshold determination" on whether a "proposal which meets the definition of action" will have probable significant adverse environmental impacts.[7] *See* WAC 197-11-310; WAC 197-11-330. Even "proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts." WAC 197-11-330(5).

---

[6] SEPA is implemented through regulations adopted by the Department of Ecology, per authorization by the Legislature. RCW 43.21C.110.

[7] Proposal means a "proposed action," including "any actions proposed by applicants." WAC 197-11-784. An "action" is broadly defined under SEPA and includes any private activities "that will directly modify the environment." WAC 197-11-704(2)(a)(i).

A lead agency's threshold determination is documented in either a determination of nonsignificance (DNS) or a determination of significance (DS). WAC 197-11-310(5). Per WAC 197-11-350, mitigation measures may be imposed to reduce impacts so as to support issuance of a DNS instead of a DS. A DNS containing mitigation measures is referred to as a "mitigated DNS" or "MDNS." WAC 197-11-350; WAC 197-11-766.

The requirements for a mitigated DNS are in WAC 197-11-350. In issuing a mitigated DNS, an agency need only state that with the mitigation measures it has chosen there are no longer any probable significant adverse impacts. No public hearing or published responses to public and agency comments are required for a mitigated DNS.

In contrast, an EIS must inform decision makers and the public by impartially discussing significant environmental impacts. WAC 197-11-400(2). It further must examine reasonable alternatives, which is not part required for an MDNS. WAC 197-11-402(1); WAC 197-11-408(1); WAC 197-11-440(5), (6). Preparation of an EIS through this process is required before an agency can exercise full SEPA substantive authority. *See, e.g.*, WAC 197-11-660(1)(f)(i).

The process for preparation of an EIS after agency issuance of a DS is robust and interactive. WAC 197-11-360. There are prescribed scoping procedures to determine what should be addressed in the EIS and

there are specific EIS content requirements. WAC 197-11-408; WAC 197-11-440. There are requirements for wide public circulation of an EIS[8]; for public access to the data underlying the draft EIS; for a public hearing; for formal comments on the draft EIS by the public as well as local, state, and federal agencies and tribes; for lead agency consideration of the comments, with the lead agency required to respond to the public and agency comments and publish the responses in the final EIS. *See, e.g.*, WAC 197-11-440(2)(k); WAC197-11-440(7); WAC 197-11-455; WAC 197-11-500; WAC197-11-502(5); WAC197-11-502(6); WAC197-11-502(7); WAC 197-11-535(2)(b); WAC 197-11-560; *see generally* WAC 197-11-455.

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 framework established by the Department of Ecology's long standing regulations address this possibility and provide a failsafe remedy for situations in which a lead agency has issued a threshold determination

[8] In contrast, for example, the MDNS process utilized here by Pierce County required the public to search out documents on various obscure "portals" on its complex website.

dispensing with an EIS, but another "agency with jurisdiction" disagrees. The same Ecology regulations that establish the possibility of a mitigated DNS simultaneously authorize another agency, dissatisfied with the mitigated DNS, to assume lead agency status and make its own threshold determination, requiring preparation of an EIS. WAC 197-11-948. That is what the City did here.

Petitioners nonetheless extol the virtues of mitigated DNSs and of the County's use of one here as if this case is about whether a mitigated DNS can sometimes be an appropriate means of avoiding the need for full, public EIS environmental review. It is not. Nor is it about the rigor – or lack thereof -- and bulk of the background to the County's issuance of a mitigated DNS. [9] The longstanding Department of Ecology regulations do not qualify based on these factors agencies' right per the express remedy in WAC 197-11-948 to assume SEPA lead agency.

B. The Court of Appeals Decision is Consistent with the Plain Language of the SEPA Regulations and Existing Case Law.

1. The City is an "agency with jurisdiction."

[9] In any event, if relevant, the City's position, consistently delivered to Petitioners, is that the piecemeal environmental review to date has been subpar and incomplete -- in some instances even presented by Applicant "experts" who lack a college degree and/or an engineering license. See Pierce County Superior Court Case No. 19-2-06362-4, LUPA Petition at 12-13. Nonetheless, preparation of an EIS does not mean that qualified prior work will not be reviewed.

Regulations "are to be interpreted and applied in accordance with their plain language." *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 349, ¶ 11, 172 P.3d 688 (2007). Courts look to an unambiguous regulation's "language alone, and . . . will not look beyond the plain meaning of the words of the regulation." *Mader v. Health Care Auth.*, 149 Wn. 2d 458, 473, 70 P.3d 931 (2003). Here, the Court of Appeals correctly concluded that based on the plain language of the SEPA regulations, the City is an "agency with jurisdiction."

WAC 197-11-948 provides that "*an agency with jurisdiction over a proposal, upon review of a DNS* (WAC 197-11-340) may transmit to the initial lead agency a completed 'Notice of assumption of lead agency status.'" WAC 197-11-948(1) (emphasis added). An "agency with jurisdiction" is "an agency with authority to approve, veto, or finance *all or part* of a nonexempt proposal (or part of a proposal)." WAC 197-11-714(3) (emphasis added). "A proposal" is broadly defined to include "both actions and regulatory decisions of agencies as well as any actions proposed by applicants." WAC 197-11-784.

The City is an "agency with jurisdiction" because it has authority "to approve [the] . . . part of [the] proposal" that requires City water, sewer and road improvements. *Bellevue Farms Owners Ass'n v. State of Wn. Shorelines Hearings Bd.*, 100 Wn. App. 341, 352 n.26, 997 P.2d 380 ("An

agency has jurisdiction if it must issue permits or approvals for the project."), *rev. denied*, 142 Wn.2d 1014 (2000). Permitting authority for any one of these improvements alone provides all that is needed to qualify the City as an "agency with jurisdiction" under the WAC 197-11-948.

The County's determination of non-significance is expressly conditioned on design and construction of an entirely new City road, design and construction of City roadway improvements, including sidewalks, pavement, paved shoulders on three existing unimproved streets, and a new signalized intersection, all within the City and to the City's standards. CP 155. These road improvements are an integral part of the Knutson "proposal," defined under WAC 197-11-784 to "mean[] a proposed action . . . includ[ing] . . . regulatory decisions of agencies." Court of Appeals Decision at 16.

The KFIP proposal is entirely dependent on the City's issuance of permits to construct/improve roads within the City. Under its municipal code, the City is responsible for "permits or approvals for the project." *Bellevue Farms Owners Ass'n.*, 100 Wn. App. at 352 n.26. *See* Puyallup Municipal Code (PMC) 11.04.010 (requiring permits for grading, paving, altering, constructing or repairing sidewalks, curbs, or other improvements upon any public street); PMC 11.16.010-.020 (vehicular use of City curbs and sidewalks); PMC ch. 21.14 (clearing and grading for street

construction). The City therefore is "an agency with jurisdiction over [the] proposal" under WAC 197-11-948.

The City is also an "agency with jurisdiction" because it has authority to grant, condition or refuse approval of the water and sewer service and improvements that are undisputedly part of the Knutson proposal. Puyallup has Code authority to grant or deny an application to provide "water or sewer service from the city outside Puyallup's city limits, but within the city's service area," PMC 14.22.020, and to impose reasonable service conditions. PMC 14.22.050. Petitioners' arguments that the City is a mere service or utility provider that should somehow be excluded from the definition of "agency with jurisdiction," that the permits are effectively ministerial, or that utility service is proprietary ignore the language of the SEPA regulations. The SEPA regulations do not define an "agency with jurisdiction" to mean only an agency acting in a regulatory but not in a proprietary or services capacity.[10] Instead, an "agency with jurisdiction" is any "agency with authority to approve, veto, or *finance* all *or part* of a nonexempt proposal (or part of a proposal)." WAC 197-11-714(3) (emphasis added).

---

[10] It is axiomatic that courts "cannot read into a statute words which are not there." *Coughlin v. City of Seattle*, 18 Wn. App. 285, 289, 567 P.2d 262 (1977), *rev. denied*, 89 Wn.2d 1015 (1978).

As noted by the Court of Appeals, the Petitioners have never cited "any case law or authority to say that an agency that has approval authority over permits and also serves as a service provider cannot be an 'agency with jurisdiction' under WAC 197-11-948." Decision at 19.

2. The City may assume lead agency status on issuance of any DNS, including a mitigated DNS.

This Court has explained in no uncertain terms:

> SEPA Rules allow an agency which is "dissatisfied" with a lead agency's DNS to assume lead agency status and make its own threshold determination. WAC 197-11-600(3)(a); WAC 197-11-948. Under the SEPA Rules, therefore, nonlead agencies are not constrained to accept a lead agency DNS but instead may make an independent determination as to whether they are "dissatisfied" with the lead agency's decision. Boundary review boards and other agencies subject to SEPA requirements should use this authority to ensure proper compliance with SEPA.

King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 661 n.7, 860 P.2d 1024 (1993); *see also Bellevue Farm Owners*, 100 Wn. App. at 352 n.26 (2000).

Petitioners' argument that WAC 197-11-948 does not allow for assumption when a mitigated DNS is issued because that regulation does not specifically reference WAC 197-11-350 depends on a tortured reading that ignores the overall SEPA regulatory framework, including its definitions. A mitigated DNS, also known as an MDNS is a type of DNS. The SEPA regulations define an MDNS: "'Mitigated DNS'" means a DNS

that includes mitigation measures and is issued as a result of the process specified in WAC 197-11-350." WAC 197-11-766. (emphasis added).[11] The definition is unambiguous and conclusive.

Additional SEPA regulations confirm that an MDNS is simply a type of DNS.[12] WAC 197-11-340, twice cited in the assumption regulation, WAC 197-11-948, explicitly identifies a "DNS under WAC 197-11-350," *i.e.*, an MDNS, as a type of DNS. *See* WAC 197-11-340(2)(a)(iv).

WAC 197-11-310(5) states that "[a]ll threshold determinations shall be documented in" a DNS or a DS—it does not list an MDNS as an option or cite WAC 197-11-350. *See also Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001) ("WAC 197-11-310(5) mandates that '[a]ll threshold determinations shall be documented in: (a) a determination of nonsignificance (DNS) or (b) a determination of significance (DS).'").

Similarly, WAC 197-11-508, which requires the Department of

---

[11] *Accord City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 40, 252 P.3d 382 (2011) ("SEPA administrative rules define an 'MDNS' as 'a DNS that includes mitigation measures.' WAC 197–11–766. When Town & Country appealed Tacoma's issuance of the MDNS, it was contesting a particular type of DNS, namely a 'mitigated' DNS.") (alterations removed).

[12] As acknowledged by the Court of Appeals, "In order to determine a regulation's plain meaning, we may look to the context in which the regulation appears, related regulations and statutes, and the statutory scheme of which the regulation is a part, which may disclose legislative intent about the provisions." Decision at 14, 23 (citing *Bravern Residential II, LLC v. Dept. of Revenue*, 183 Wn. App. 769, 777, 334 P.3d 1182 (2014)). Contrary to Petitioners' suggestion, the reference to the context of other provisions in the same regulatory scheme does not mean that WAC 197-11-948 was ambiguous.

Ecology to prepare a SEPA Register for "notice of all environmental documents," does not distinguish between mitigated DNSs and DNSs, referring only to "DNSs under WAC 197-11-340(2)." The DNS form in WAC 197-11-970 similarly does not distinguish between DNSs and mitigated DNSs, stating that when a "DNS is issued under WAC 197-11-340(2)" the notice and comment period is fourteen days.

Petitioners' contrived distinction between a mitigated DNS, and a DNS issued pursuant to WAC 197-11-340(2), which even under their contrivance is assumption eligible, is also undercut by the County's April 26, 2017 MDNS. It does not refer to WAC 197-11-350 at all. Instead it states, twice, that it is "issued under WAC 197-11-340(2)"—the same regulation explicitly called out in WAC 197-11-948 that the Petitioners acknowledge is associated with a DNS eligible for assumption. *See* CP 156.

WAC 197-11-948's citation to WAC 197-11-340, but not WAC 197-11-350, is not meant to exempt from lead agency assumption proposals for which a mitigated DNS has issued. Instead, the citation recognizes that the process that triggers the fourteen-day period for assuming lead agency status—"review of a DNS"—occurs under WAC 197-11-340, which encompasses mitigated DNSs.

Courts addressing DNSs and mitigated DNSs have never suggested

that a distinction exists between the two for purposes of lead agency assumption.[13]

Decisions from state adjudicatory boards expert in SEPA likewise confirm that an agency can assume lead agency status upon review of a mitigated DNS.[14]

The Court of Appeals correctly concluded that these cases and decisions are persuasive. The authority of an agency with jurisdiction to assume lead agency status upon issuance of an MDNS is supported by the plain meaning of WAC 197-11-948, the context of related regulations, and the regulatory scheme as a whole.

C. There is No Issue of Substantial Public Interest That Would Warrant Discretionary Review.

---

[13] To the contrary, in a case involving a mitigated DNS, the Court of Appeals declared that "the City was authorized to impose conditions on the project to mitigate environmental impacts. Upon reviewing the City's DNS designation, the Department had the option to assume lead agency status. WAC 197–11–948(1)." *Nw. Steelhead & Salmon Council of Trout Unlimited v. Washington State Dep't of Fisheries*, 78 Wn. App. 778, 787, 896 P.2d 1292 (1995) (emphasis removed).

[14] *Town of Concrete v. Skagit County*, SHB No. 96-18, Order Granting Summary Judgment (October 4, 1996), 1996 WA ENV LEXIS 253, at *23 ("As the environmental review in this case resulted in one DNS and two MDNS documents, [the Town of] Concrete had three separate opportunities to file the requisite notice of assumption of lead agency status . . . ."); *Repar v. DNR*, FPAB case no. 05-001, Order Granting Summary Judgment (June 28, 2005), 2005 WA ENV LEXIS 54, at *21 (stating in case involving MDNS that other agencies "had legal option[] . . . to assume lead agency status and make an independent environmental review within the context of the project review process. WAC 197-11-948"); *City of Bellingham v. DNR*, PCHB Nos. 11-125 & 11-130, Order Granting Summary Judgment (April 9, 2012), 2012 WA ENV LEXIS 11 at *14 (explaining in case involving MDNS that "[o]ther agencies with jurisdiction have the opportunity to comment on the threshold determination, and can assume lead agency status during the 14 day comment period.").

The Court of Appeals correctly applies the plain language of the SEPA regulations. There are no conflicting decisions or constitutional issues that would warrant discretionary review under RAP 13.4(b)(1) – (3). It has been long understood, as illustrated by the cases cited, that an MDNS is a DNS subject to assumption and that an "agency with jurisdiction," dissatisfied with a mitigated DNS can assume lead agency status to obtain preparation of an EIS.

This leaves Petitioners with misplaced policy arguments. One complains that the assumption regulation would allow a different agency with jurisdiction to assume lead agency status from an agency with jurisdiction that had "more" permitting authority (since it was the initial lead agency). There are good reasons for the regulation's approach particularly here where the KIFP cannot function without, *e.g.*, City roads, permits, and approvals. Regardless, such a policy argument should be directed to Ecology and/or the Legislature, not this Court.

The County's theory that there is substantial public interest because the cities of Shoreline and Ellensburg submitted amicus briefs below in support of Puyallup is also misguided. Those cities submitted amicus briefs because the superior court had adopted a novel interpretation of the SEPA regulations. Their involvement below does not demonstrate that there is substantial interest in revisiting the Court of Appeals decision

which applies the regulations as they have always been understood consistent with their plain language. Further, Pierce County's claim to advocacy for the public interest is anomalous, perhaps explained by its unyielding opposition to an EIS prepared by any authority. It is anomalous because the assumption regulation allows a county (including of course Pierce County), if an agency with jurisdiction, an opportunity to assume lead agency status and require an EIS, including for example where a county may be dissatisfied with a city decision failing to require needed environmental review.[15]

Petitioners' concerns are highly parochial, involving one county and one applicant who want one extraordinary project to avoid the scrutiny of an EIS. This does not add up to substantial public interest.

IV. CONCLUSION

For all of the foregoing reasons, the City respectfully requests that the petitions for review be denied.

[15] The amicus brief filed below by a handful of industry groups unfortunately focused largely on issues irrelevant to the actual questions presented and again are more suited to a (misguided) policy argument to Ecology.

Dated this 2nd day of July, 2019.

EGLICK & WHITED PLLC

By _____
Peter J. Eglick, WSBA No. 8809
Joshua A. Whited, WSBA No. 30509
Attorneys for City of Puyallup

and

CITY OF PUYALLUP CITY ATTORNEY

By _____
Joseph N. Beck, WSBA #26789

CERTIFICATE OF SERVICE

I, Fred Schmidt, certify 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 2, 2019, I caused true and correct copies of the foregoing document to be delivered to the parties listed below via the Court's electronic filing system:

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
lblakeney@gth-law.com

Todd A. Campbell
Cort O'Connor
Pierce County Prosecuting Attorney's Office
955 Tacoma Avenue S
Suite 301
Tacoma, WA 98402-2160
tcampbe@co.pierce.wa.us
coconno@co.pierce.wa.us
dwillin@co.pierce.wa.us

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

DATED this 2 day of July, 2019, at Seattle, Washington.

Fred Schmidt, Paralegal
Eglick & Whited PLLC

EGLICK & WHITED, PLLC

July 02, 2019 - 4:37 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97155-2
Appellate Court Case Title:	City of Puyallup v. Pierce County, et al.
Superior Court Case Number:	17-2-03180-9

The following documents have been uploaded:

- 971552_Answer_Reply_20190702163536SC298614_4237.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Response to Knutson and County PFRs 070219.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- cort.oconnor@piercecountywa.gov
- howard@washingtonappeals.com
- ian@washingtonappeals.com
- jbeck@ci.puyallup.wa.us
- lblakeney@gth-law.com
- marcher@gth-law.com
- pcpatvecf@co.pierce.wa.us
- schmidt@ewlaw.net
- tcampbe@co.pierce.wa.us
- whited@ewlaw.net
- wlynn@gth-law.com

Comments:

Sender Name: Fred Schmidt - Email: schmidt@ewlaw.net
Filing on Behalf of: Peter J. Eglick - Email: eglick@ewlaw.net (Alternate Email:)

Address:
1000 Second Ave
Ste. 3130
Seattle, WA, 98104
Phone: (206) 441-1069 EXT 11

Note: The Filing Id is 20190702163536SC298614