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' REPLY BRIEF

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I. INTRODUCTION

As the Washington Supreme Court long ago confirmed,

> The SEPA policies of full disclosure and consideration of environmental values require **actual consideration of environmental factors before a determination of no environmental significance can be made**.

Norway Hill Pres. & Prot. Ass'n v. King County, 87 Wn.2d 267, 274-275, 552 P.2d 674 (1976) (emphasis added). In almost 40 years, that standard has not changed. As appellants Conservation Northwest ("CNW") and Methow Valley Citizens' Council ("MVCC") argued in their Opening Brief, the evidence in the administrative record more than demonstrates that the County opened to ATV use *every single county road and road segment* with a speed limit at or below 35 mph with virtually no "actual consideration of environmental factors."

The evidence leads to only one conclusion: that the County's action is likely to result in significant impacts to both the natural environment and the built environment. The County's SEPA checklist was based on key assumptions that were unfounded and contradicted by evidence before it, and thus its issuance of a SEPA DNS was clearly erroneous.

Appellants will not repeat their substantive arguments in this brief and will instead respond to claims raised by the County in its Response, which interestingly do not focus on the merits of appellants' SEPA argument. The County's brief is largely an effort to erect procedural and jurisdictional roadblocks in order to avoid this Court's review of the record and appellants' substantive claims. The County unsuccessfully made the same procedural and jurisdictional arguments below. The Court should reject the County's efforts to block substantive review and determine, on the merits, whether the County complied with SEPA and with the intent of ESHB 1632, based on the evidence before it at the time of its decision.

To allow the County's unfounded assumptions and formulaic responses to the environmental checklist to stand would be to render SEPA meaningless. The superior court erred in granting summary judgment in favor of Okanogan County. This Court should declare Ordinance 2014-7 null and void.

II. REPLY ARGUMENT

A. The Superior Court applied the Correct Standard of Review.

The County begins its response with a confusing narrative about the differences between appellate review and trial jurisdiction, implying

that the superior court erred in its review. To the contrary, the court's memorandum decision demonstrates that in reviewing the County's SEPA decision, the superior court correctly reviewed the administrative record in order to determine whether the DNS was clearly erroneous. CP 20-21.[1] The court then conducted a legal analysis of appellants' claim that Ordinance 2014-7 was arbitrary and capricious for violating the intent and mandate of ESHB 1632. CP 21-22. This is exactly what the court was supposed to do.

Whether the superior court conducted an appellate review or a "trial" review based on motions for summary judgment is irrelevant on appeal. This Court reviews the County's decision de novo, based on the same record that was before the superior court. *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *Residents Opposed to Kittitas Turbines v. EFSEC,* 165 Wn.2d 275, 295-96, 197 P.3d 1153 (2008).

[1] While a transcript of the administrative appeal hearing was not prepared or submitted to the superior court, the remainder of the County's administrative record was submitted through the Declarations of Perry Huston, CP 240-412, and Melanie Rowland, CP 66-69, ¶ 8; CP 69-181.

B. Because Okanogan County Did Not Cross-Appeal, its Arguments Concerning Standing and Jurisdiction Should be Disregarded.

The County argues that the trial court erred in reviewing Ordinance 2014-7 because (1) appellants do not have standing; and (2) review was not appropriate through declaratory judgment. Response at 11-19, 20-30. The County unsuccessfully made both of these arguments before the trial court. The superior court did not deny appellants' standing nor conclude that review under the declaratory judgment act was inappropriate. CP 413-414, CP 432-449, CP13-28. Had it done so, it never would have reached the merits of the case. Because the County did not file a timely cross-appeal its arguments are not properly before the Court and should be disregarded. RAP 5.1(d), 5.2(f). Appellants will, nonetheless, address both issues below.

C. Appellants Have Standing.

"SEPA grants an aggrieved party the right to judicial review of an agency's compliance with its terms." *Lands Council v. Washington State Parks Recreation Comm'n,* 176 Wn. App 787, 799, 309 P.3d 734 (2013).

> A party wishing to challenge actions under SEPA must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interest SEPA protects,

> and (2) the party must allege an injury in fact.

Id, quoting, Kucera v. State Dep't of Transp., 140 Wn.2d 200, 212, 995 P.2d 63 (2000).[2] The County does not dispute that CNW and MVCC's interest in protecting the environment fall within the zone of interest protected by SEPA. Response at 12.

The "injury in fact" test is satisfied when the plaintiff alleges that the challenged action will cause "specific and perceptible harm." *Kucera,* 140 Wn.2d at 213. The injury may be speculative and undocumented. *Id.* When the injury is threatened instead of existing, the plaintiff "must show that the injury will be immediate, concrete, and specific." *Id.* The record shows that appellant organizations and their members satisfy this test.

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[2] While not a SEPA decision, the Washington Supreme Court has recently adopted a relaxed standing requirement "where the injury complained of is procedural." *Five Corners Family Farmers v. State*, 173 W.2d 296 303, 268 P.3d 892 (2011); *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794-95, 920 P.2d 581 (1996). The Court's opinion is based on a discussion by the U.S. Supreme Court recognizing a relaxed standing requirement for procedural challenges, **including the failure to prepare an Environmental Impact Statement**. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572, n. 7 112 S. Ct. 20130 (1992). Division 2 of the Court of Appeals has recently applied the relaxed standard for SEPA standing. *See Lands Council*, 176 Wn. App at 801-02.

1. CNW and MVCC have organizational standing.

Washington courts have long recognized the standing of a non-profit organization to represent its members in proceedings for judicial review.[3] Appellants are non-profit conservation organizations with offices in Okanogan County. CNW's mission is to protect and connect wildlife habitat from the Washington Coast to the Canadian Rockies. CNW was founded in 1989 and has members throughout the Pacific Northwest, including Okanogan County. CP 182-190 (Wooten dec.), ¶ 4.

CNW's interest in this matter stems from collaborative efforts over the last four years with a group of ORV (including ATV) users to reduce illegal and damaging ORV use in the backcountry and increase ORV access to certain roads. CNW is aware that inappropriate and unlawful ORV use has harmed wildlife through habitat degradation and harassment, displacement, and direct collision. CNW and other stakeholders envisioned that the collaborative spirit that culminated in legislative approval of ESHB 1632 would guide implementation of the law and would thus reduce environmental harm from ORV use. *Id.*, ¶ 5. CNW believes that Okanogan County has acted contrary to this vision.

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[3] *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 867-68, 576 P.2d 401 (1978).

MVCC is a private non-profit membership organization, established in 1977 to raise a strong community voice for protection of the Methow Valley's natural environment and rural character. CP 66-68, (Rowland dec.), ¶ 3. Most MVCC members reside full time in the Methow Valley or elsewhere in Okanogan County. *Id.* MVCC's interest in this matter is based on the risk that Ordinance 2014-7 will result in a dramatic increase in ATV traffic in the Methow Valley and elsewhere in Okanogan County, providing ATV access to sensitive off-road wildlife habitat, adding to air, water, and noise pollution, and endangering MVCC members traveling on county roads.

2. Appellants and their members are injured in fact.

Appellants' members' interests in protecting habitat, aesthetic values, and impacts to the built environment will be, and are already being, concretely and specifically harmed. The record shows that by opening roads to ATV traffic without adequate environmental review, Okanogan County substantially increased the likelihood of illegal and damaging ATV use by allowing significantly increased ATV access to sensitive wildlife habitat across large and remote areas of Okanogan County. CP 184, ¶ 7; CP 68, ¶ 6. For example, the record demonstrates the profound impacts that illegal

off-road ATV riding has on the landscape, habitat, and wildlife. *See, e.g.,* CP 342-347,[4] CP 367-368.[5] *See also*, CP 71-106;[6] CP 107-152.

These impacts are not remote or speculative. Public comments submitted to the County document increased illegal off-road usage of ATVs and resulting impacts since the County began considering expanding ATV access to County roads. *See, e.g.,* CP 363;[7] CP 152-156;[8] CP 157;[9] CP 163-169;[10] CP 170-172,[11] CP 182, 187-192.[12]

The County argues at length, Response at 12-18, that appellants have not demonstrated precisely where, or how much additional harm would result from an increase in illegal off-road riding, and that consequently they have not suffered an injury in fact. It seems obvious that the inability to foresee exactly where and how much illegal riding and environmental harm will occur does not mean that injury to appellants'

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[4] Huston dec., Ex. 6F, App. B (Sampling of literature review)
[5] Letter from Washington Department of Fish and Wildlife.
[6] Literature review by Backcountry Hunters and Anglers.
[7] Email from former WDFW Methow Wildlife Area manager describing first hand encounters and impacts.
[8] Comments from Pearl Cherrington with photographs submitted to Okanogan County documenting illegal off road use.
[9] Comments of John and Debora Olson submitted to Okanogan County.
[10] Declaration of Lawrence Hooper submitted to Okanogan County.
[11] Declaration from MVCC member Philip G. Millam.
[12] Wooten dec., ¶ 8, Ex. 1 (Letter documenting illegal off road ATV use submitted to Okanogan County).

interests in conserving the natural environment and observing wildlife in the county where they live and recreate is speculative.

Appellants' injury differs sharply from those alleged in cases cited by the County, such as *Harris v. Pierce County*, 84 Wn. App. 222, 928 P.2d 1111 (1996). The plaintiffs in *Harris* sought judicial review of an EIS prepared for a proposed park trails system. Unlike here, where appellants' interests are within the zone of interests protected by SEPA, the *Harris* plaintiffs' only potential injuries were impacts to their property values. The courts have long held that economic interests are not within the zone of interest protected by SEPA. *Id.* at 231; *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52, 882 P.2d 807 (1994).

The *Harris* plaintiffs similarly failed to meet the injury test because their only actual injury would be having portions of their property condemned for the trail, were it to go through their properties. Because the County had not yet determined the trail route, the plaintiffs' claimed injuries were highly speculative. 84 Wn. App. at 232. In contrast, Okanogan County mapped the roads it opened to ATV use, and those maps show that opened roads pass directly through sensitive habitat areas.

Damage to sensitive lands is not speculative; it is real, concrete, ongoing, and highly likely to increase with the County's action.

Appellants have standing to pursue their SEPA challenge.

D. Declaratory Judgment is Appropriate for Review of the Validity of a Legislative Action.

This action challenges the validity of Ordinance 2014-7, specifically, whether it was adopted in compliance with SEPA, and whether it facially violates the intent of ESHB 1632. Declaratory judgment is the proper form of review to determine the validity of legislation, as distinguished from its application or administration. RCW 7.24.020; *Seattle–King Cy. Coun. of Camp Fire v. Dep't of Rev.,* 105 Wash.2d 55, 57–58, 711 P.2d 300 (1985); *Bainbridge Citizens United v. Washington State Dep't of Natural Res.*, 147 Wash. App. 365, 374-75, 198 P.3d 1033 (2008).

While the County agrees, Response at 21, it asserts that review is not available by declaratory judgment because there are other available remedies. According to the County, review should have been either through the Land Use Petition Act, Ch. 36.70C RCW ("LUPA"), or as a writ of review, Ch. 7.16 RCW. Response at 21-22. The County is

incorrect: neither LUPA nor the writ of review statute provides an available remedy in this case.

1. Review was not available under LUPA.

The County's argument that Ordinance 2014-7 was a "land use decision" and thus should have been appealed pursuant to LUPA fails for at least two reasons: (1) RCW 36.70C.020(2)(a) apples to a "land use decision" responding to an *application* for a project permit or other governmental approval; and (2) because the ordinance is an "approval" for ATVs to "use" County roads, it fits squarely within an express exception to LUPA.

RCW 36.70C.020(2)(a) defines a land use decision under LUPA as one based on "an *application* for a project permit or other government approval... ."(emphasis added)[13] The County's decision to open County

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[13] RCW 36.70C.020 provides that a:

> (2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:
>
> (a) *An application for a project permit or other governmental approval* required by law before real property may be improved, developed, modified, sold, transferred or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses . . . . (emphasis added).

Roads for ATV use was not a decision on an "application." Decisions on "project permits or other governmental approval" that are *not* in response to an application are simply not "land use decisions" under LUPA.[14]

Moreover, even if "land use decisions" included decisions that were not based on an application, the exception within RCW 36.70C.020(2)(a) applies to Ordinance 2014-7. RCW 36.70C.020(2)(a) expressly excludes from the definition of "land use decisions"

> applications for permits or approvals to *use*, vacate, or transfer *streets*, parks, and similar types of public property.

Id. (emphasis added). Because Ordinance 2014-7 grants county approval for the "use" of ATVs on County "streets" or "similar types of public property," it fits squarely within the exception.[15]

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[14] LUPA's focus on applications is also apparent in its standing requirement. LUPA confers standing on "[t]he applicant and the owner of property to which the land use decision is directed." RCW 36.70C.060(1). This express grant of standing to the "applicant to which the land use decision is directed" at least implicitly confirms that "land use decisions" are triggered by, and must be based on, applications.

[15] The County implied below that the exception for "use" of "streets" should be minimized and apply only to minor matters such as "a parade permit or street fair or similar event." The appellate court rejected a similar argument concerning use of public parks:

> The plain meaning of this statute [LUPA] is clear. It precludes judicial review of "applications for permits or approvals to use ... parks". RCW 36.70C.020(1)(a). The statute is constructed so that an application to "use" a "park" is in the same category as an application to vacate a street, or an application to "use, vacate or transfer" other types of public property that are similar to streets and parks.

Wescot Corp. v. City of Des Moines, 120 Wash. App. 764, 768-69, 86 P.3d 230 (2004).

Because Ordinance 2014-7 is not a "land use decision" as defined in LUPA, review under the Declaratory Judgments Act is appropriate.[16]

2. Legislative enactments are not reviewable under the writ of review statute.

This action challenges Okanogan County's adoption of Ordinance 2014-7 – a countywide action opening almost 400 miles of county roads for ATV use. Ordinance 2014-7 was not a quasi-judicial decision, but instead a purely legislative enactment. Legislative enactments are not subject to review through the writ of review process. *See Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-245, 821 P.2d 1204 (1992) (adoption of zoning); *Harris*, 84 Wn. App. at 228 (adoption of county master trail plan).

While the County emphasizes the quasi-judicial nature of the underlying SEPA appeal, it ignores the fact that SEPA itself does not provide for independent judicial review. SEPA appeals "shall be of the governmental action together with its accompanying environmental determination." RCW 43.21C.075(2)(a). Thus, the proper form for review

[16] In appellants' challenge to the County's initial attempt to open County roads for ATV use in 2013, the County conceded that review by declaratory judgment was appropriate. CP 192, ¶ 4; CP 198, ¶¶ 10-11.

is determined by the nature of the government action, not the underlying SEPA determination. As the *Harris* Court summarized:

> Our courts have held the following actions to be legislative in nature and therefore inappropriate for a statutory writ of certiorari: amendments to a zoning ordinance **and the dismissal of the related SEPA appeal**, *Raynes,* 118 Wash.2d at 249, 821 P.2d 1204; the determination of where to locate a highway interchange, *Harris v. Hornbaker,* 98 Wash.2d 650, 658, 658 P.2d 1219 (1983); adoption of county-wide planning policy **and related SEPA determinations,** *Snohomish County Property Rights Alliance v. Snohomish County,* 76 Wash.App. 44, 882 P.2d 807 (1994), *rev. denied,* 125 Wash.2d 1025, 890 P.2d 464 (1995); adoption of county zoning code, *Leavitt v. Jefferson County,* 74 Wash.App. 668, 875 P.2d 681 (1994).

Harris, 84 Wash. App. at 228-29 (emphasis added). Here, because the government action triggering appeal was the County's legislative adoption of Ordinance 2014-7, appeal of the SEPA determination accompanying that ordinance was not available through a writ of review.

The County's attempt to distinguish *Harris* and the line of cases it relies upon fails. For example, *Raynes v. City of Leavenworth* is squarely on point. It involved an amendment to the City's zoning ordinance and related SEPA review. 118 Wn.2d 237, 241, 821 P.2d 1204 (1992).

Opponents of the rezone appealed the City's SEPA DNS to the City Council, which heard and denied the SEPA appeal at the same time it approved the proposed zoning ordinance. *Id.* at 242. The opponents then filed a writ of review and declaratory judgment action challenging the denial of their SEPA appeal and the substantive rezone decision. The trial court denied the writ application after concluding that the rezone was a legislative action and not subject to review as a writ. The trial court instead heard the appeal as a declaratory judgment action based on cross motions. *Id.*

The supreme court agreed with the trial court's dismissal of the writ, concluding that "[t]he actions of the Leavenworth City Council in adopting the RV amendment to the zoning ordinance, *and dismissing the related SEPA appeal, can only be seen as legislative."* *Id.* at 249-50 (emphasis added).[17]

While the court did not discuss the merits of the SEPA claims, its conclusion that the SEPA appeal and underlying substantive decision were

[17] In *Snohomish County Property Rights Alliance,* 76 Wn. App. at 50, the court addressed whether a challenge to the County's compliance with SEPA for the adoption of county-wide planning policies was subject to review under the writ statute. Similar to *Rayne*, the court concluded that "[t]he action more clearly resembles a legislative act. Accordingly, the County's SEPA compliance for the county-wide planning policies is not subject to review pursuant to the writ statute."

addressed as a single type of action is consistent with SEPA's mandate that SEPA appeals be brought together with appeals of the underlying action. *Raynes* supports the superior court's reviewing both of appellants' challenges to Ordinance 2014-7. Appellants properly invoked the superior court's jurisdiction to review Okanogan County's adoption of Ordinance 2014-7 pursuant to the Declaratory Judgments Act.

E. Okanogan County's SEPA Threshold Determination Was Clearly Erroneous.

1. The "clearly erroneous" standard of review requires the court to consider the underlying policy of SEPA, *not* that of ESHB 1632.

The County incorrectly cites *Norway Hill,* 87 Wn.2d at 274-75, to assert that in applying the "clearly erroneous" standard of review of the SEPA determination, the Court should consider the underlying policy of the legislative act authorizing the decision or action. The County, however, incorrectly asserts that this means the Court should consider the policy behind ESHB 1632. Response at 31-32. But as the *Norway Hill* Court explained, when reviewing a SEPA decision, the reviewing court looks to *the public policy behind SEPA*, not the policy behind the legislation allowing the substantive action:

> [T]the public policy contained in SEPA is consideration of environmental values. To this end SEPA requires in appropriate cases a detailed environmental impact statement before decisions are made. The 'clearly erroneous' standard of review permits sufficient judicial scrutiny of 'negative threshold determinations' to prevent frustration of this policy. A determination of no significant environmental impact 'can be held to be 'clearly erroneous' if, despite supporting evidence, the reviewing court on the record can firmly conclude 'a mistake has been committed.'

87 Wn.2d at 275 (emphasis added, internal citations omitted).

The substantive action in *Norway Hill* was the County's approval of a subdivision. Rather than focus on the public policy behind the State Subdivision Act, the Court properly focused on the public policy behind SEPA. Here, the Court's review is guided by the public policy behind SEPA, not ESHB 1632. While the policy behind ESHB 1632 may be relevant to determining whether Ordinance 2014-7 is facially consistent with ESHB 1632, it is irrelevant to determining whether the County complied with SEPA in adopting the ordinance.

The "public policy" behind SEPA is found in the statute itself:

> SEPA recognizes the broad policy "that each person has a fundamental and inalienable right to a healthful environment . . ." RCW

> 43.21C.020(3). State agencies are required to use "all practicable means" to achieve the following goals:
>
> (a) Fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations;
>
> (b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
>
> (c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

RCW 43.21C.020(2)(a)-(c); *Kucera*, 140 Wn.2d at 213-14.

For the County's decision to issue a DNS to survive judicial scrutiny, the record must demonstrate that "environmental factors were adequately considered in a manner sufficient to establish prima facie compliance with SEPA," and that the decision to issue a DNS was based on information sufficient to evaluate the proposal's environmental impact. *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 302, 936 P.2d 432, 439 (1997). As explained in Appellants' Opening Brief, the County's DNS fails and its efforts to defend the decision by relying on policy statements within ESHB 1632 should be rejected.

2. The legislative policy expressed in ESHB 1632 does not promote access to public lands.

Appellants provided the County with a list of road segments the County proposed to open that would increase access to – and thus encourage increased illegal use of – sensitive lands, including WDFW lands and State parks. CP 354-359. The County takes issue with appellants' list and erroneously asserts that the legislature intended increased ATV access to – and perhaps on – public lands. Response at 32-35. This is simply incorrect.

While ESHB 1632 authorized counties and towns to increase road access for recreational use, there is no indication that the legislature intended counties to open roads that passed through public lands. The County quotes the definitions of "Nonhighway road recreation facilities" and "Nonhighway road recreational user" in support of its claim that the legislature intended to expand recreational use of public lands by ATV riders. Response at 33. The County ignores that these definitions pre-dated ESHB 1632, *see* RCW 46.09.310 (6) and (7), and the legislature made no changes to them in ESHB 1632. It is highly unlikely that the legislature focused at all on public lands when considering ESHB 1632.

Perhaps more important, ATV use is prohibited both on- and off-road on WDFW lands, *see* CP 367, and State Parks allows ATVs in certain

parks, but only in designated ATV areas, none of which are in Okanogan County. WAC 352-20-020(2). The legislature expressly stated that it intended to "cause no change in the policies of any government agency with respect to public land." ESHB 1632, § 1.

There is no evidence whatsoever that the legislature intended to affect ATV access to public land; and the statute itself states that there is no intent to affect policies *on* public land.

3. ATV safety and the impacts of Ordinance 2014-7 on public services are within the scope of the required SEPA analysis.

The County's claim that ATV safety is not a SEPA issue, Response at 37-40, fails for at least two reasons. First, contrary to the County's assertion, RCW 46.09.360 does not pre-empt the County from regulating ATV use within its jurisdiction based on safety considerations. The County is simply wrong when it asserts, Response at 37, that RCW 49.09.360 "specifically prohibited local governments from adopting regulations more stringent than the state requirements." In, fact, RCW 46.09.360 provides:

> Notwithstanding any of the provisions of this chapter, any city, town, county, or other political subdivision of this state, or any state agency, may regulate the operation of nonhighway vehicles . . . within its boundaries by adopting regulations or

> ordinances of its governing body, *provided such regulations are* ***not less stringent*** *than the provisions of this chapter.*

(emphasis added). Thus, there can be no question that the County may regulate ATVs so long as its regulations are either as stringent, or *more* stringent, than those adopted in Ch. 46.09 RCW and ESHB 1632.

Second, properly applied, SEPA provides the necessary tool that the County *should* have used to determine whether safety or public service considerations indicated a need to keep certain roads closed to ATV use. SEPA's definition of environmental impacts extends beyond protecting the natural environment and includes also protecting the "built environment." WAC 197-11-444(2). This includes addressing impacts to the transportation system, including traffic hazards, and public services, including fire, police, and other governmental services. WAC 197-11-444(2)(c)(vi) and (d). Okanogan County's SEPA checklist and DNS failed to acknowledge, much less address, impacts to these critical elements of the built environment.

As discussed in Appellant's Opening Brief at 24-25, these impacts unarguably include those on traffic hazards and emergency response capacity. The Specialty Vehicle Institute of America (ATV manufacturers'

lobby), Consumer Product Safety Commission, and 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. These concerns were further emphasized in a letter from fifteen (15) medical and consumer professionals to the Board of County Commissioners. CP 176-178.[18] This information was provided to the County through comments and appellants' administrative appeal, but the County chose to turn a blind eye to these very real issues.

By arguing it was pre-empted from addressing ATV safety, the County implicitly admits that it did not address impacts to the County's transportation system, public services, or emergency response. Once again, the County's DNS was not supported by information sufficient to evaluate Ordinance 2014-7's impact on scarce public resources. Had it done so, a reasonable alternative would be, for example, to eliminate heavily traveled

[18] 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.

paved roads from the County's list – an option well within the County's authority.[19]

4. Appellants have demonstrated that the County's SEPA DNS was clearly erroneous.

Rather than repeat the remainder of appellants' substantive arguments concerning the County's compliance with SEPA, Appellants incorporate by reference the arguments made in their Opening Brief at 14-22. The only point appellants would emphasize here is that a finding that the County's failure to consider the likelihood of environmentally damaging off-road riding violated SEPA does *not* mean that possible illegal activity generally should be considered in a SEPA analysis. It is only in a highly unusual case like this one, where the evidence is overwhelming that the proposed action is very likely to lead to illegal, environmentally harmful activity, that effects of illegal activity should be considered.

[19] The fact that ESHB 1632 did not prohibit local governments from opening paved roads to ATVs does not mean that the legislature gave the County carte blanche to ignore safety issues. The legislature was well aware that SEPA would require review of a broad spectrum of considerations by local governments when opening roads to ATVs, such as whether some heavily traveled, or narrow and windy, paved roads posed too great a risk and should remain closed.

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

By deciding to open all County roads with speed limits at or below 35 mph for ATV use, the County failed to heed the legislature's clearly stated intention to "increase opportunities for *safe, legal, and environmentally acceptable* motorized recreation" ESBH 1632, §1 (emphasis added). *See* Opening Brief at 27-30.

Due in significant part to its failure to conduct adequate SEPA review, the County's action adopting Ordinance 2014-7 fails to effectuate ESHB 1632's stated intent. Had the County performed any thoughtful analysis it likely would have designed a very different ATV road system. Instead, 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; ownership or habitat values of adjacent land; whether a particular road segment can safely be shared by ATVs and other motor vehicles; and other important factors.

Appellants submit that the record amply demonstrates the County's utter disregard for the safety and environmental issues carefully documented in numerous public comments, and that its action in adopting Ordinance 2014-7 is a classic case of "willful and unreasoning action in

disregard of facts and circumstances." *Wash. Waste Sys., Inc. v. Clark Cnty.*, 115 Wn2d 74, 81, 794 P.2d 508 (1990). This Court should declare Ordinance 2014-7 arbitrary and capricious and null and void.

III. CONCLUSION

For the foregoing reasons and the reasons stated in the Opening Brief, appellants request this Court declare Ordinance 2014-7 null and void and remand this matter to Okanogan County directing the County to: 1) carefully consider and document the likely 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 and open to ATV use only County roads that will increase safe recreational opportunities while decreasing confusion and environmental harm.

Respectfully submitted this 10th day of August, 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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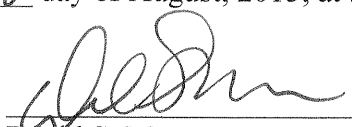
DATED this 10th day of August, 2015, at Seattle, Washington.



David S. Mann

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

CONSERVATION NORTHWEST; and METHOW VALLEY CITIZENS COUNCIL Appellants, v. OKANOGAN COUNTY, Respondent.	NO. 331946 - III AMENDED CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on August 10, 2015, I caused Appellants' Reply Brief to be served on the following individuals in the manner listed below:

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