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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CITY OF PUYALLUP,

Appellant,

v.

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

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE CHRISTOPHER LANESE

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REPLY BRIEF OF APPELLANT CITY OF PUYALLUP

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## I. INTRODUCTION

Pierce County approved a 100-acre development of seven warehouses, totaling over 2.6 million square feet, and attendant parking lots and other facilities, by Developer Knutson Farms, Inc. and Running Bear Development, LLC, without requiring an EIS. Adjacent to the Puyallup River that forms much of the City of Puyallup's northern border, the Knutson development also will extend for over half a mile along the City's mile-long eastern boundary. Appendix A (CP 21) puts in context the consequence of this massive development to the City.

Puyallup has a legal obligation to plan to annex and serve the project site because the County and Puyallup agreed that it is within the City of Puyallup's Growth Management Act Urban Growth Area. Puyallup's existing roads must accommodate an additional 5,600 vehicles per day (25% of them heavy trucks) to serve the project, which also envisions that Puyallup will construct a new street and make substantial improvements to several others. The proposal envisions that Puyallup will extend water and sanitary sewer utilities to serve the massive project. Indeed, the County conditioned its approval of the Knutson development on the Developer's construction or "contribution" to fund substantial road improvements within

Puyallup for the express purpose of “mitigat[ing] impacts” (CP 155), and assumed that Puyallup will issue the necessary permits for these infrastructure improvements, regardless whether the Developer’s contributions are sufficient to fund them.

The trial court erred in holding that “the water, sewer and roads are not a sufficient jurisdictional hook to give Puyallup the authority it is seeking to assert in this case.” (RP 58) The plain language of SEPA’s regulations and the law’s clear policy grant Puyallup, as a local agency with jurisdiction over all or a portion of the Knutson proposal, authority to make threshold determinations of environmental significance because it was dissatisfied with the County’s determination as initial lead agency that 1,400 heavy truck trips per day on Puyallup streets and other impacts would have no environmental significance.

## II. REPLY ARGUMENT

### A. **The plain language of SEPA regulations establish the City’s authority to assume lead agency status.**

The City of Puyallup had the right to assume lead agency status because it is “an agency with jurisdiction” over the Knutson proposal. The City is not bound by the County’s determination as the initial lead agency that the mitigation measures required by the County’s MDNS are sufficient to negate any of the significant environmental impacts arising from the Knutson development proposal. Once the County

made that determination of non-significance, the City, as “an agency with jurisdiction,” had the express authority under SEPA regulations to assume lead agency status and make its own determination of the Knutson proposal’s significance:

(1) 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.’ This notice shall be substantially similar to the form in WAC 197-11-985. Assumption of lead agency status shall occur only within the fourteen-day comment period on a DNS issued under WAC 197-11-340 (2)(a) . . . .

(2) The DS by the new lead agency shall be based only upon information contained in the environmental checklist attached to the DNS transmitted by the first lead agency . . . , and any other information the new lead agency has on the matters contained in the environmental checklist.

(3) Upon transmitting the DS and notice of assumption of lead agency status, the consulted agency with jurisdiction shall become the ‘new’ lead agency and shall expeditiously prepare an EIS. In addition, all other responsibilities and authority of a lead agency under this chapter shall be transferred to the new lead agency.

WAC 197-11-948.<sup>1</sup> See also WAC 197-11-600(3)(a) (agency “dissatisfied with the DNS . . . may assume lead agency status” under WAC 197-11-948).

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<sup>1</sup> The omitted text addresses assumption of lead agency status when the optional DNS process in WAC 197-11-355 is used. That expedited process was not used here, but is briefly discussed *infra* at 16.

This case is controlled by the maxim that 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). This Court looks 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).

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.

Under this clear and unambiguous language 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). Respondents concede that the City has permitting authority over necessary water, sewer and road improvements for the Knutson development proposal. Any one of these provides all the “jurisdictional hook” that SEPA requires.

- 1. The City is an “agency with jurisdiction” because it must issue permits for the road improvements required by the Knutson development proposal.**

The Knutson proposal is entirely dependent on the City’s issuance of permits to improve the City’s road network to accommodate the development’s significant truck and vehicular traffic within the City. Under its municipal code, the City “must issue permits or approvals for the project.” *Bellevue Farms Owners Ass’n.*, 100 Wn. App. at 352 n.26. *See* 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 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) Respondents nonetheless assert that the City lacks SEPA jurisdiction because the road improvements are not "part of [the] proposal" and should not be considered in determining the City's right to assume lead agency status. (Resp. Br. 26-28) But these road improvements were both proposed by the Developer in its application and required by the County in its mitigated DNS. (CP 155) They 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."

In arguing that the required improvements within the City are not part of the Knutson proposal respondents ignore that the Developer's initial SEPA checklist and transportation impact analysis itself required alteration and construction along "5<sup>th</sup> Avenue S.E., 80<sup>th</sup> Street East and the portion of 134<sup>th</sup> avenue East which will not be vacated" as part of its development plan. (CP 144) The Developer submitted these documents as part of its application *before* the County issued its DNS with mitigation conditions that specifically required the street improvements necessary to handle a

massive increase of over 5,600 vehicle trips per day, much in the form of heavy truck traffic. (CP 585, 595-605)

Respondents then contend that the road improvements in the City are not “part of the proposal” because they were required as conditions in the mitigated DNS “to mitigate traffic impacts.” (Resp. Br. 26) But neither an initial lead agency such as the County nor an applicant can defeat another agency’s regulatory jurisdiction under SEPA simply by characterizing as “mitigation” significant and necessary portions of a proposal. Here, City permits are still necessary for the extensive City roadwork that the development requires. Indeed, the conditions attached to the County’s mitigated determination of non-significance are themselves “proposals” that directly affect and require the approval of the City, demonstrating why the City is entitled to assume lead agency status to itself determine under SEPA the environmental significance of the proposal.

Respondents’ contention that a portion of the road construction in Puyallup “will inevitably occur anyway” (Resp. Br. 27) reflects indifference to impacts on Puyallup while confirming that major roadwork in Puyallup is necessary to serve the Knutson proposal. Whether some road improvements were reviewed as part of

the significantly smaller Schnitzer West development,<sup>2</sup> does not negate Puyallup's permitting authority over, and the need for SEPA review of, the significant additional City road improvements required for the much larger Knutson project.

Respondents assure that "those impacts are being addressed through the County's SEPA process." (Resp. Br. 27) However, SEPA gives Puyallup the legal right to assume lead agency precisely because Puyallup was dissatisfied with the manner in which "those impacts were addressed" in the County's MDNS. Puyallup, as an "agency with jurisdiction," is entitled to make a fresh threshold determination under the plain language of WAC 197-11-948.

**2. The City is an "agency with jurisdiction" because the Knutson development proposal requires the City's sewer and water service, for which permits are required.**

The City is also an "agency with jurisdiction" because it has authority to grant or refuse approval of the water and sewer service and improvements that are undisputedly part of the Knutson

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<sup>2</sup> The Knutson proposal for 2.6 million square feet of warehouse space, with ancillary development on a 162 acre site, is six times larger than the Schnitzer project – 447,000 square feet of warehouse on 24.3 acres within the City's boundaries. (CP 583) While the City has zoning authority over the Schnitzer development, it has no control over the type of industrial user that may occupy the Knutson proposed development under the County's independent zoning regulations. (CP 583-84)

proposal. Respondents' arguments that the City is a mere "service provider" excluded from the definition of "agency with jurisdiction," that the permits are "ministerial," or that utility service is "proprietary" (Resp. Br. 28-33; CP 494-95), ignore the language of the SEPA regulations. Even assuming these labels were correct, 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. 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).

Respondents concede that the City has permitting authority over Knutson's proposed development, which is located "within the City's service area for sanitary sewer and is partially within the City's service area for water." (Resp. Br. 28, citing CP 272, 328-51) The Developer's own SEPA checklist acknowledges that the City must provide "government approvals or permits" for water and sewer improvements upon which its proposal depends (CP 131, 145),<sup>3</sup>

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<sup>3</sup> Respondents do not contend that the significant water and sewer improvements for this massive development proposal fall within the scope of SEPA's narrow categorical exemption for the extension of water and sewer lines of 12 inches or less in diameter. WAC 197-11-800(23)(b), cited in Resp. Br. 30 n.9.

which include extending sanitary sewer service from the City. The Puyallup Municipal Code gives the City 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. Because the City can impose reasonable conditions when issuing necessary water and sewer permits, it has authority “to approve, veto, or finance” part of the project, and is an “agency with jurisdiction” under the plan language of WAC 197-11-714(3).

These ordinances refute respondents’ assertion that the City is not an “agency with jurisdiction” because it has no discretion to refuse or condition a permit, that its decisions “cannot be influenced by environmental information,” and that its authority is purely “ministerial.” Their argument ignores the Supreme Court’s holding, in the very case respondents cite, that a municipality may include any reasonable condition before agreeing to provide service. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381-82, 858 P.2d 245 (1993) (Resp. Br. 31). Those conditions may address legitimate “environmental concerns,” just as SEPA envisions. See *Brookens v. City of Yakima*, 15 Wn. App. 464, 465-67, 550 P.2d 30 (city may refuse to provide service outside of city limits where user’s

demands far exceeded use anticipated in its General Plan), *rev. denied*, 87 Wn.2d 1011 (1976); RCW 43.21C.060 (authority to impose conditions to mitigate adverse environmental impacts of proposal).

Neither SEPA itself, the Department of Ecology's regulations, nor any case law, supports respondents' novel assertion that an "agency with jurisdiction" does not include "service providers" or jurisdictions acting in a "proprietary capacity as opposed to a regulatory capacity." (Resp. Br. 29) The cases cited by respondents do not even address SEPA, let alone hold that an agency providing services to a developer's project, or acting in a "proprietary" capacity, is not an "agency with jurisdiction" under SEPA.<sup>4</sup>

Respondents ignore that all sorts of environmental interests can be characterized as "proprietary," including the State's interest to protect fish and wildlife located within its boundaries. *See Vail v.*

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<sup>4</sup> *People for Preservation and Development of Five Mile Prairie v. City of Spokane*, 51 Wn. App. 816, 821, 755 P.2d 836 (1988) (Resp. Br. 29), held that a previous landowner's covenant to support a petition for annexation at the time it entered into a water service agreement was enforceable, because the "City was acting in its proprietary capacity when it entered into these water service contracts . . . [and] was free to bargain for and include in the contracts the covenant" binding landowners to sign the annexation petition. 51 Wn. App. at 822. *Hite v. Public Utility Dist. No. 2*, 112 Wn.2d 456, 772 P.2d 481, *rev. denied*, 111 Wn.2d 1018 (1988) (Resp. Br. 29) held that a utility district had a valid lien for unpaid charges on its customers' property based on a lien provision included in a recorded contract to provide electrical service because the utility was organized as a municipal corporation, with the same "right and power to contract . . . that a private corporation or an individual would have under like circumstances." 112 Wn. 2d at 460.

*Seaborg*, 120 Wash. 126, 131, 207 P. 15 (1922) (“The food fish in the waters of the state belong to the people of the whole state, and the state through its legislature has the same right of regulation and control of this property that it has of any other state property.”). Their assertion that SEPA does not include an “agency with jurisdiction” over “proprietary” interests would eliminate from the SEPA process state agencies with highly specialized expertise over a host of critical environmental concerns. *See, e.g., NW. Steelhead & Salmon Council of Trout Unlimited v. Washington State Dep’t of Fisheries*, 78 Wn. App. 778, 787, 896 P.2d 1292, 1297 (1995) (Dept. of Fisheries had concurrent SEPA authority to determine significance of proposed construction abutting creek located within City limits).

This court “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). The respondents’ attempt to rewrite the definition of “agency with jurisdiction” finds no support in any provision of SEPA, in the plain language of WAC 197-11-714, or in SEPA case law. The City is an “agency with jurisdiction” with the authority to assume lead agency status under WAC 197-11-948 because of its approval and permitting authority

over significant infrastructure improvements required by the Knutson development.

3. **As an “agency with jurisdiction,” the City may assume lead agency status upon issuance of any DNS, including one that is conditioned on agreed or mandated mitigating measures.**

Respondents erroneously argue that the City may not assert lead agency status following issuance of the County’s MDNS because an agency with jurisdiction may only assume lead agency status following “review of a DNS (WAC 197-11-340).” WAC 197-11-948(1). The County’s *mitigated* DNS is a DNS within the plain language of the regulation and the policy of SEPA.

The regulations that define a DNS and MDNS confirm that an MDNS is a subspecies of a DNS. “All threshold determinations shall be documented in: (a) A determination of nonsignificance (DNS) (WAC 197-11-340); or (b) A determination of significance (DS) (WAC 197-11-360).” WAC 197-11-310(5); *Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001), *rev. denied*, 146 Wn.2d 1017 (2002). A “[d]etermination of non-significance” (DNS) is “the written decision by the responsible official of the lead agency that a proposal is not likely to have a significant adverse environmental impact, and therefore an EIS is not required (WAC 197-11-310 and WAC 197-11-340).” WCA 197-11-734. “A determination of non-significance ...”

(DNS) is issued when . . . the proposal is unlikely to have significant adverse environmental impacts, or . . . mitigation . . . will reduce impacts to a non-significant level.” *SEPA Online Handbook, Department of Ecology*, at § 2.8.<sup>5</sup>

An MDNS is thus “a particular type of DNS” – one that includes mitigation measures. *City of Federal Way v. Town & Country Real Estate, LLC.*, 161 Wn. App. 17, 40, ¶ 36, 252 P.3d 382 (2011). “A mitigated DNS also serves as a determination that the proposal will not cause significant environmental impacts.” Keith H. Hirokawa, *The Prima Facie Burden and the Vanishing Sepa Threshold: Washington’s Emerging Preference for Efficiency over Accuracy*, 37 Gonz. L. Rev. 403, 430 (2002).

Respondents rely heavily on the fact that WAC 197-11-948, governing assumption of lead agency status, references WAC 197-11-340, which governs the DNS process. (Resp. Br. 34-35) But Section 948 does not say that an agency may assume lead agency status upon issuance “of a DNS under WAC 197-11-340, but not an MDNS under WAC 197-11-350.” Neither section 340 nor 350 defines a DNS or an MDNS. Instead, the sections are two procedural provisions that

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<sup>5</sup> <https://fortress.wa.gov/ecy/publications/documents/98114.pdf> (last visited June 21, 2018)

work in tandem, further confirming that an MDNS is a form of DNS that mandates mitigating measures to avoid significant environmental impact. The procedural nature of Section 350 is reflected in the separate regulation defining a mitigated determination of non-significance (MDNS) as a “DNS that includes mitigation measures and is issued as a result of the process in WAC 197-11-350.” WAC 197-11-766.

Section 340 specifies the process required in making an agency’s determination of non-significance – notice to, and an opportunity to comment by other interested agencies with jurisdiction, which can result in modifications or withdrawal of the DNS. WAC 197-11-340(2), (3). That process is the same whether the determination of non-significance ultimately includes mitigating measures required under 197-11-350. That regulation provides the process by which the applicant may propose, or the agency may mandate, “mitigation measures in their DNSs, as a result of comments by other agencies or the public or as a result of additional agency planning.” WAC 197-11-350(5). Thus WAC 197-11-340(2)(a)(iv)

specifically lists “[a] DNS under WAC 197-11-350(2), (3),” as subject to its notice and comment requirements.<sup>6</sup>

Respondents also ignore that an agency with jurisdiction may also assume lead agency status after issuance of an MDNS under WAC 197-11-355(2)(b)’s optional DNS process, designed to expedite scoping of proposals subject to both SEPA and the GMA. (App. Br. 32) Respondents fail to address this and other SEPA regulations that refute the distinction between an MDNS and a DNS they propose. *See, e.g.*, WAC 197-11-508 (requiring the Department to maintain a SEPA register to provide “notice of all environmental documents” but referring only to a DNS under WAC 197-11-340(2)).

Respondents’ contrary interpretation would eliminate WAC 197-11-948’s long-standing failsafe and facilitate evasion of the review mandated by SEPA. An applicant and an initial lead agency that is supportive (perhaps because the initial lead agency will reap tax benefits, but will itself have no responsibility to deal with the consequences of the development proposal) would be free to settle on meager mitigating conditions regardless of the impacts identified by other agencies with jurisdiction to approve or reject those very

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<sup>6</sup> Consistent with Section 340, in issuing its MDNS the County used the form DNS provided by the Department in WAC 197-11-970 mandating WAC 197-11-340’s 14-day notice and comment period. (CP 156)

portions of the proposal. *See Moss*, 109 Wn. App. at 20-21 (MDNS process has “the potential for abuse” as it “permits agencies to dispense with EIS preparation on the basis of ‘illusory commitments.’”); *Hirokawa*, 37 Gonz. L. Rev. at 428-29 (explaining how negotiated MDNS allows development proposals to avoid detailed SEPA review). Indeed, that is precisely what occurred here, where the County and Knutson agreed, over the City’s objection, that mitigation measures negated the significant impacts the City had identified.

A mitigated DNS is a DNS. As an agency with jurisdiction, the City was entitled under WAC 197-11-948 to assume lead agency status upon issuance of the County’s MDNS for the Knutson project.

**B. The City’s right to assume lead agency status furthers SEPA’s policy and purpose to grant local government meaningful environmental review of projects that directly affect their constituents.**

The plain mandate of these SEPA regulations, to “allow an agency which is ‘dissatisfied’ with a lead agency’s DNS to assume lead agency status and make its own threshold determination,” furthers SEPA’s policies. *King Cty. v. Washington State Boundary Review Bd. for King Cty.*, 122 Wn.2d 648, 661 n.7, 860 P.2d 1024 (1993), quoting WAC 197-11-600. Under WAC 197-11-948, the City has the right to “review the underlying materials and reverse the first lead

agency's DNS . . . [and] order preparation of an EIS." *Bellevue Farm Owners*, 100 Wn. App. at 353 n.26.

Respondents' contention that recognizing the City's right to engage in its own threshold environmental determination is an "extreme remedy" (Resp. Br. 31) finds no support in the language or policy of SEPA, or with decades of practice under this long-standing regulation. *See Baker v. Snohomish Cty. Dep't of Planning & Cmty. Dev.*, 68 Wn. App. 581, 589, 841 P.2d 1321 (1992) (agency interpretation strengthened by legislature's acquiescence to long-standing administrative practice), *rev. denied*, 121 Wn.2d 1027 (1993). Respondents' characterization of this remedy as "extreme" is also directly at odds with the Supreme Court's directive that this authority to assume lead agency status "ensure[s] proper compliance with SEPA." *King County*, 122 Wn.2d at 661 n.7. "[N]on-lead agencies are not constrained to accept a lead agency DNS but instead may make an independent determination." *King County*, 122 Wn.2d at 661 n.7. Thus, the respondents characterization of Puyallup as "vociferous" in its concerns about the impacts of the project, and "critical" in its comments (Resp. Br. 16-17), in comparison with the approach undertaken by the City of Sumner (Resp. Br. 17), do not undermine but illustrate the SEPA policy that gives the City a right

to assume lead agency status and make its own determination of environmental significance.<sup>7</sup>

As respondents recognize in their “overview on state environmental policy act” (Resp. Br. 3-11), SEPA furthers local decision-making by vesting in those agencies whose constituents are directly affected by a proposal the authority to make threshold determinations. *See Kitsap Cty. v. State Dep’t of Nat. Res.*, 99 Wn.2d 386, 391, 662 P.2d 381 (1983) (“The SEPA guidelines were structured in such a way as to require consulted agencies to participate in the SEPA process at a time when their participation is meaningful”).<sup>8</sup> Their contention that the City’s role was limited to offering comments to the County’s *threshold* determination nullifies WAC

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<sup>7</sup> Respondents’ complaints, though irrelevant to the City’s right to assume lead agency status, are also erroneous, particularly when viewed in the light most favorable to the City. Though the City in fact *did* meet with the County and the developer to attempt to work through the issues, they could not agree because the County had accepted the Developer’s analyses of impacts, would not agree to a *public* EIS process, and pushed Puyallup to just accept a check and stand down. (CP 586-88)

<sup>8</sup> *See* WAC 197-11-340(2)(a)(i) (requiring agencies to delay acting on a proposal for fourteen days after issuing a DNS “if the proposal involves . . . [a]nother agency with jurisdiction”); 197-11-924(5) (before asserting initial lead agency status, agency “must determine . . . the other agencies with jurisdiction over some or all of the proposal.”); *Brown v. City of Tacoma*, 30 Wn. App. 762, 766, 637 P.2d 1005 (1981) (under WAC 197-10-330, the lead agency may consult with other agencies with jurisdiction over the proposal, requesting substantive information as to potential environmental impacts of the proposal which lie within the area of expertise of the particular agency so consulted).

197-11-948, and strips from jurisdictions that may be severely impacted by a proposal the ability to engage in the procedural review of environmental impacts required by SEPA. This relegates agencies with jurisdiction under the plain language of SEPA to the status of any non-agency party challenging a DNS.<sup>9</sup>

Respondents' argument that only the jurisdiction "most" affected by a proposal may serve as lead agency would render WAC 197-11-948, and its provisions for another agency to *assume* lead agency status, a nullity. While *initial* lead agency status is resolved by weighing the relative interests of the affected jurisdictions, Section 948 governs where, as here, an agency with jurisdiction over all or part of a proposal is dissatisfied with the initial lead agency's determination that a proposal, whether mitigated by conditions or not, will not have a significant environmental impact. The City's notice to its residents to provide comments to the County because the County was the initial agency with jurisdiction over the project at the *outset* has no bearing, and is certainly not, as respondents assert,

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<sup>9</sup> The standard of review on a citizen challenge to an MDNS overwhelmingly favors the initial lead agency. "A decision to issue an MDNS may be reviewed under the clearly erroneous standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed." *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (internal citation omitted).

an “admission” that the City *now* lacks the ability to assume lead agency status under WAC 197-11-948 once the County issued a determination of non-significance. (Resp. Br. 25, citing CP 754)

Respondents fail to address the reasoning of courts that have rejected their interpretation that nullifies the right of a dissatisfied agency to assume lead agency status following issuance of a DNS. In *Bellevue Farm Owners*, a homeowners association challenged the Shorelines Hearing Board’s refusal to issue a permit for a dock, arguing that the Board was bound by the County’s DNS. The Court of Appeals rejected that argument, noting that SEPA is intended to allow other affected agencies the opportunity to make independent judgments in evaluating environmental issues:

[SEPA determinations] are not binding on other decision-making bodies. To hold otherwise would allow one decision-making body to preempt the authority of any other decision-making body considering a related question to evaluate a particular environmental issue, and would foreclose independent analysis and deliberation. Such a result could contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values.

*Bellevue Farm Owners*, 100 Wn. App at 354 (quoted source omitted).

Similarly, in *NW Steelhead & Fisheries*, 78 Wn. App. 778, 787, 896 P.2d 1292 (1995), the City of Seattle initially entered a DNS to allow a homeowner's development along Thornton Creek. After the Department of Fisheries commented on the development's potential impact on salmon, Seattle modified its DNS by attaching several mitigating conditions that the Department then accepted as adequate. The Court of Appeals rejected environmental groups' challenges to the mitigated DNS, holding that SEPA gave the Department the discretion to confer with Seattle to impose mitigating conditions in issuing a DNS or, at its option, to "assume lead agency status" under WAC 197-11-948(1) if dissatisfied with the DNS. 78 Wn. App. at 787.

SEPA thus provides no support for respondents' contention that authorizing another interested agency to challenge an initial agency's determination of non-significance is an "extreme remedy" that expands the narrow scope of SEPA. The respondents' assertion, and the trial court's conclusion, that only the agency with jurisdiction over *all* or the *majority* of a proposal may conduct SEPA review contravenes the plain language of Section 948, the cases interpreting the Department of Ecology's SEPA regulations, as well as the law's intent to require local governments with permitting authority to consider the project's "environmental impacts, alternatives and

mitigation measures.” (Resp. Br. 4, citing *Save Our Rural Environment (SORE) v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983). This Court should reject that interpretation as fundamentally at odds with the “continuing responsibility’ of the State and its agencies” under SEPA to serve as “trustee of the environment for succeeding generations.” *Lands Council v. Washington State Parks Recreation Comm’n.*, 176 Wn. App. 787, 807-08, ¶ 49, 309 P.3d 734 (2013), quoting RCW 43.21C.020(2).

**C. The Superior Court erred in considering an “expert’s” declaration of the law.**

Respondents offered the declaration of a law professor on whether “an MDNS may . . . be equated to a DNS when invoking WAC 197-11-948.” (Resp. Br. 45; see CP 452-53). Expert opinions are admissible under ER 702 only if they “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Judges – not paid experts, no matter how “preeminent” they may be (Resp. Br. 45) – decide the law. *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655 (affirming striking of expert declaration because “[e]xperts may not offer opinions of law in the guise of expert testimony.”), *rev. denied*, 144 Wn.2d 1006 (2001). See also ER 704 cmt.

It is no answer to the trial court’s error in considering Professor Settle’s legal conclusion to laud him as a “preeminent”

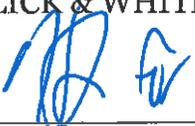
legal authority or to point out that his declaration was silent on the “agency with jurisdiction issue.” (Resp. Br. 45). And characterizing his “opinion” as one based on the “historical implementation” of a regulation by agencies and courts (Resp. Br. 46), is no different than telling a judge how a statute should be interpreted. The trial court erred in refusing to strike Settle’s declaration, and this Court should disregard it on review.

### III. CONCLUSION

The City is “an agency with jurisdiction” and was entitled to assert lead agency status under SEPA following the County’s issuance of a mitigated DNS. This Court should reverse and remand for proceedings consistent with that holding.

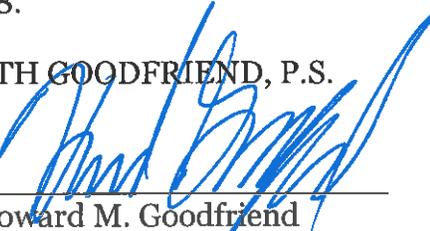
Dated this 21<sup>st</sup> day of June, 2018.

EGLICK & WHITED PLLC

By:  \_\_\_\_\_

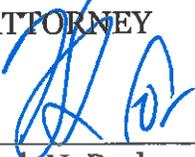
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### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 21, 2018, I arranged for service of the foregoing Reply Brief of Appellant City of Puyallup, to the court and to the parties to this action as follows:

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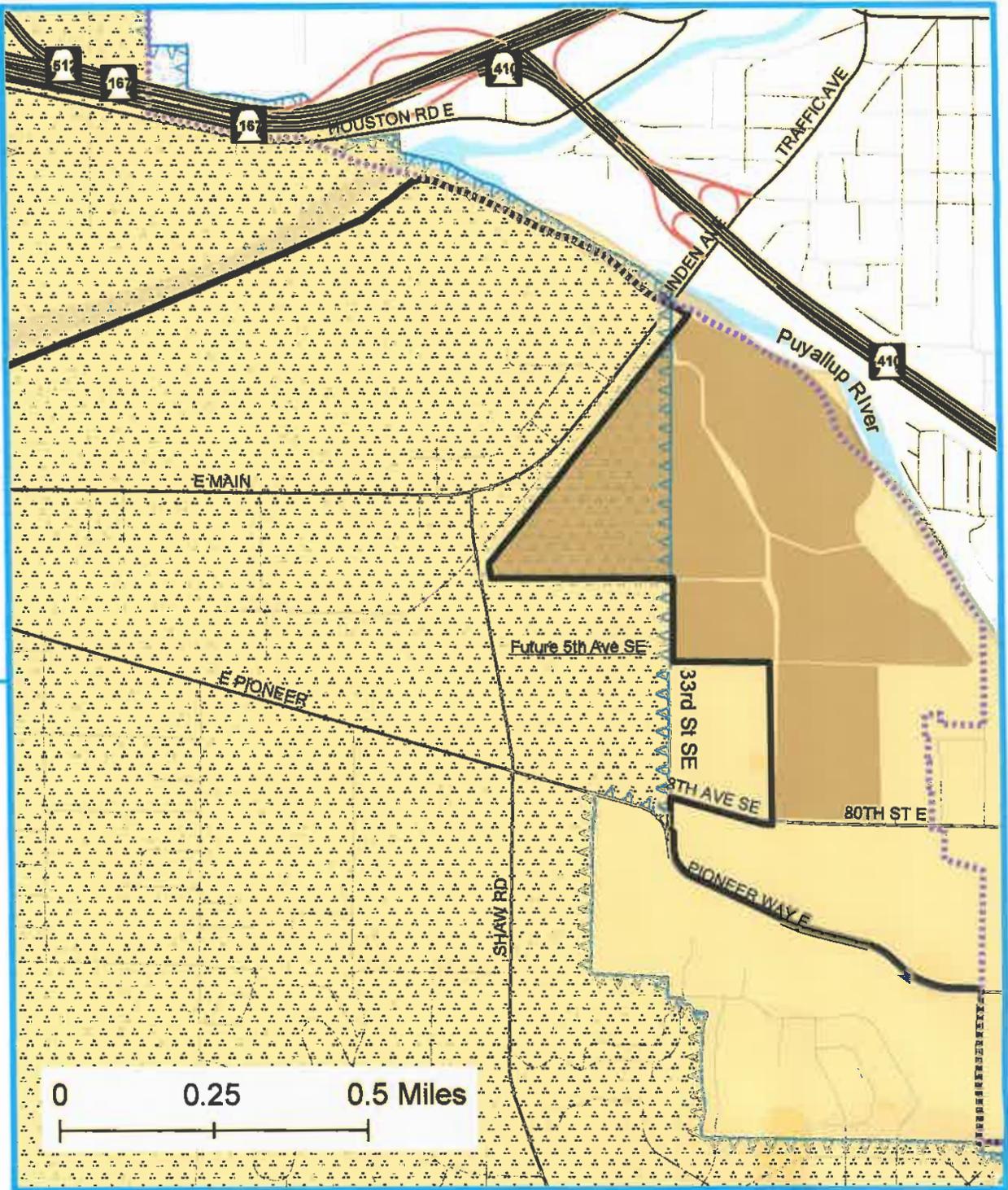
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**DATED** at Seattle, Washington this 21<sup>st</sup> day of June, 2018.

  
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Andrienne E. Bilapil

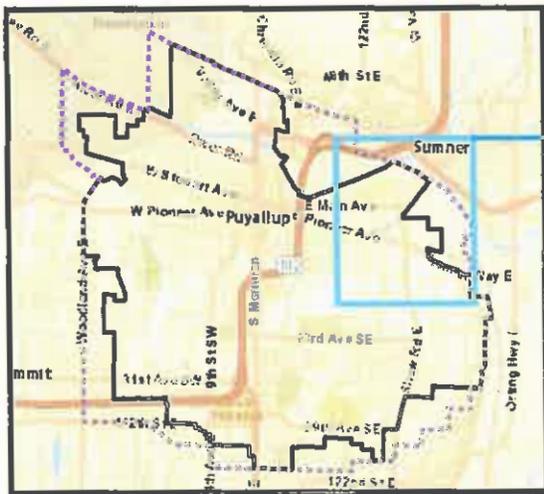
# Knutson Farms Industrial Park Proposal

-  Proposed Development Property
-  Urban Growth Area Boundary (UGA)
-  City Corporate Limits
-  Road
-  State Highway
-  Highway Ramp
-  Water body
-  City of Puyallup Water Service Area
-  City of Puyallup Sanitary Sewer Service Area



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App. A



City of Puyallup  
Development Services  
Department

Date: 5/24/2017



0 0.25 0.5 Miles

Disclaimer: The map features are approximate and are intended only to provide an indication of said feature. Additional areas that have not been mapped may be present. This is not a survey. Orthophotos and other data may not align. The City of Puyallup and Pierce County assume no liability for variations ascertained by actual survey. ALL DATA IS EXPRESSLY PROVIDED 'AS IS' AND 'WITH ALL FAULTS'. The City and County make no warranty of fitness for a particular purpose.

**SMITH GOODFRIEND, PS**

**June 21, 2018 - 12:12 PM**

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**Comments:**

Please note Appendix A of the Reply Brief of Appellant City of Puyallup is to be printed in color.

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