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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF PUYALLUP,

APPELLANT,

v.

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

RESPONDENTS.

JOINT BRIEF OF RESPONDENTS

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INTRODUCTION

This appeal presents a jurisdictional dispute between Pierce County and the City of Puyallup for exclusive authority to conduct the required State Environmental Policy Act (“SEPA”), chapter 43.21C RCW, review of a commercial warehouse development proposed by Knutson Farms, Inc. and Running Bear Development Partners, LLC (collectively “Knutson”).¹ The proposed development, known as the Knutson Farms Industrial Park, is wholly located within unincorporated Pierce County, and the County is the sole permitting authority for the proposed development. While the project will impact the City, no portion of the proposed development will be located within the Puyallup city limits.

Puyallup attempted to assume control of the SEPA review after the project had already been the subject of an intensive collaborative environmental review that Pierce County, as the Lead Agency under SEPA, conducted over a period in excess of a year. That extensive, iterative review process resulted in significant project revisions to reduce impacts; and, ultimately, the County issued a Mitigated Determination of Non-Significance (“MDNS”) for the revised project imposing further

¹ Knutson Farms, Inc. currently owns the property upon which the proposed development will be located and submitted the original development applications. Running Bear Development Partners, LLC has contracted to purchase the property and has joined Knutson Farms, Inc. as the project applicant. (CP 352-53.) Unless otherwise noted, these two respondents will collectively be referred to as “Knutson.”

mitigation measures so that the project will not likely have probable significant adverse environmental impacts. This is not a case in which the Lead Agency (Pierce County) refused to acknowledge, study and address potential impacts. It is a case in which substantial study was completed and applied to successfully revise and condition the project to avoid significant environmental impacts. It is also a case in which another jurisdiction (Puyallup) disagrees with the Lead Agency's decisions following environmental study.

To assume control of the SEPA review for this project Puyallup attempted to invoke WAC 197-11-948, which provides in relevant part:

(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.' ...
(Emphasis added.)

This is an extraordinary remedy. If applicable, it allows one jurisdiction to summarily and unilaterally usurp control of another jurisdiction with little more than the issuance of a notice.

But WAC 197-11-948 has no application to the SEPA review of the proposed Knutson Farms Industrial Park because the provision is only applicable when the Lead Agency issues an unconditioned Determination of Non-Significance – when it refuses to acknowledge any likely significant adverse environmental impact or the need for any impact

mitigation. It is not applicable when the Lead Agency, as in the case here, issues an MDNS expressly requiring impact mitigation. Moreover, Puyallup does not qualify as an “Agency with Jurisdiction” as defined by SEPA because it lacks permitting authority over this proposed development that is wholly located in unincorporated Pierce County.

The trial court correctly concluded that Puyallup was without authority to assume the status of Lead Agency and that its action was ultra vires and without effect.

OVERVIEW ON STATE ENVIRONMENTAL POLICY ACT

Because resolution of the presented jurisdictional dispute requires interpretation of SEPA’s regulatory provisions to determine the environmental review processes authorized for the Knutson Farms Industrial Park, an overview on SEPA’s purpose and process is provided before presentation of the facts to provide context necessary to evaluate the SEPA procedural history of this specific case. This overview will also aid interpretation and application of WAC 197-11-948 in a manner that is consistent with SEPA’s purpose and intent.

The Legislature enacted SEPA in 1971 with the intent to infuse every governmental exercise of discretion with consideration of environmental amenities and values. *Bellevue Farm Owners Ass’n v. Washington Shoreline Hrgs Bd.*, 100 Wn. App. 341, 354, 997 P.2d 380

(2000); RCW 43.21C.030(2). It is essentially a procedural statute, intended to ensure that environmental impacts, alternatives and mitigation measures are properly considered by the decision makers for a particular project – the permitting authorities. *Save Our Rural Environment (SORE) v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983). But SEPA is not intended or “designed to usurp local decision making or to dictate a particular substantive result.” *Id.* See also, *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001). Because SEPA is written in broad terms, it is largely implemented through regulations promulgated pursuant to RCW 43.21C.110. These regulations, commonly referred to as the SEPA Rules, are codified in Chapter 197-11 WAC.

SEPA review is conducted by a “Lead Agency,” which is responsible for demonstrating compliance with the Act’s procedural requirements, including gathering information on and assessing the environmental impacts from the proposal. WAC 197-11-050. Typically, only one agency acts as the SEPA Lead Agency; and the government agency to assume Lead Agency status is usually the first government agency to receive a development application. WAC 197-11-924. For private projects that require permits from more than one jurisdiction, and for which at least one of the jurisdictions is a county or city, the SEPA Rules provide that “the lead agency shall be the county/city within whose

jurisdiction is located the greatest portion of the proposed project area as measured in square feet.” WAC 197-11-932.

The Lead Agency, through a designated “Responsible Official,” begins SEPA review by conducting a preliminary investigation into the foreseeable and probable environmental impacts from the proposed development in order to make a “threshold determination” as to whether the proposal “is likely to have a probable significant adverse environmental impact.” RCW 43.21C.033; WAC 197-11-310, -330. An impact is significant under SEPA if it is established that there is “a reasonable likelihood of more than a moderate impact on environmental quality.” WAC 197-11-794(1). This preliminary investigation is conducted by reviewing an Environmental Checklist prepared by the applicant that provides specified detailed information about the proposed development. WAC 197-11-315. If the lead agency determines that the Environmental Checklist does not provide sufficient information to make a threshold determination, it may request the applicant to provide additional information or studies, obtain information of its own volition, or seek information from other agencies with environmental expertise. WAC 197-11-335, -714(2), -920.

If, based on independent review of all relevant information and analysis gathered, the responsible official determines that the proposal is

“likely to have a probable significant adverse environmental impact,” he will issue a “Determination of Significance” (“DS”). WAC 197–11–330, -360. If he concludes that the proposal is not likely to have a probable significant adverse environmental impact, he will issue a “Determination of Non-Significance” (“DNS”). WAC 197-11-330, -340. A DS mandates intensified environmental review of impacts and means to mitigate impacts through preparation of an Environmental Impact Statement (“EIS”). WAC 197–11–360. Conversely, a DNS means that no EIS will be required. WAC 197–11–340.

Again, SEPA’s purpose is to ensure that the permitting authorities are informed of environmental impacts during the permit review process. The EIS process is thus intended to be a tool to identify and analyze probable adverse environmental impacts, reasonable alternatives and possible mitigation. WAC 197-11-408. It must present a reasonably thorough discussion of the significant aspects of a proposal’s probable environmental consequences, but SEPA does not require that every remote and speculative consequence of a proposal be included in the EIS. *Kiewit Construction Group, Inc. v. Clark County*, 83 Wn. App. 133, 140, 920 P.2d 1207 (1996); *West 514, Inc. v. Spokane County*, 53 Wn. App. 838, 846, 770 P.2d 1065 (1989); *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

SEPA review is not conducted in a vacuum, but conducted with consideration of other local and state laws that provide environmental protections. SEPA standards and policies are not elevated above specific zoning ordinances. *Victoria Tower Partnership v. City of Seattle*, 59 Wn. App. 592, 600, 800 P.2d 380 (1990). Rather, SEPA is an overlay of law that supplements – fills gaps in – existing regulatory and statutory law as necessary to ensure deliberate consideration of environmental review in the land use permitting process. *Id.*; *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 615, 744 P.2d 1101 (1987); *Bellevue Farm, supra*, 100 Wn. App. at 353. The scope and detail of an EIS should thus be established with consideration of such regulatory schemes and be appropriately tailored so as not to create duplicative environmental review. RCW 43.21C.240.²

The SEPA rules direct that the EIS shall be concise and written in plain language and the text of the EIS generally may not exceed 75 pages. WAC 197-11-425. Under SEPA, the level of detail in an EIS must be commensurate with the importance of the environmental impact and the

² Existing environmental regulations and associated permit requirements may even serve to eliminate the need for an EIS. An EIS will not be required, despite a proposal's probable impacts, where the local jurisdiction reviewing the project determines that the requirements for environmental analysis, protection and mitigation measures in its own development regulations and plans adequately address the specific adverse environmental impacts of the project action. 24 Butler & King, *Washington Practice, Environmental and Law Practice*, § 16.16 at p. 204 (2007); (CP 450-51.).

plausibility of alternatives. *Kiewit*, 83 Wn. App. at 140; WAC 197-11-402. The Responsible Official has ultimate responsibility for the content and accuracy of the EIS, but SEPA nonetheless provides that an EIS may be prepared by the applicant or the applicant's consultants, or may include information and studies obtained and provided by the applicant. RCW 43.21C.031; WAC 197-11-420.

Notably, SEPA requires only that impacts be analyzed and alternatives and mitigation measures be considered through the EIS process; but it does not require or direct that any particular alternative be selected or any particular mitigation be imposed. SEPA does empower a government decision making body – a permitting authority – to deny or condition a project on environmental grounds, provided certain requirements are satisfied. RCW 43.21C.060; *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 615, 744 P.2d 1101 (1987). But it does not mandate such result. *Anderson v. Pierce County*, 86 Wn. App. 290, 305, 936 P.2d 432, 440 (1997).

Courts and SEPA experts have thus indicated that an alternative to the DS provided in the SEPA Rules – a Mitigated Determination of Nonsignificance (“MDNS”) – may provide more effective environmental protection than promulgation of an EIS. *See Anderson*, 86 Wn. App. at 305; *see also* CP 448-49 (Declaration of Professor Richard Settle (“Settle

Dec.”)).³ The MDNS alternative involves changing or conditioning a project to eliminate its significant adverse environmental impacts. WAC 197-11-350. With an MDNS, a formal EIS is not required, but environmental studies and analysis may be and often are quite comprehensive in the MDNS process. *Anderson*, 86 Wn. App. at 301; (CP 448 (Settle Dec)). Issuance of an MDNS necessarily requires the Responsible Official to determine, based on sufficient information and environmental analysis, both that the proposal will likely result in probable significant adverse impacts and that mitigation measures imposed through an MDNS will sufficiently reduce adverse environmental impacts to bring them below the level of significance. WAC 197-11-350; *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 54, 252 P.3d 382 (2011); CP 448 (Settle Dec.). Such a determination often requires support by detailed environmental study and analyses that, while not in the form of an EIS, provides the Responsible Official with substantively equivalent information. (CP 448 (Settle Dec.).)

The process of mitigating a significant adverse impact to avoid a determination of significance was initially not addressed in the SEPA Rules, but was nonetheless discussed and approved by Washington courts,

³ Richard Settle has been described as “a preeminent authority on SEPA.” *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 661, 291 P.3d 2785 (2013). Respondents answer the City’s objection to his declaration later in this brief.

and deemed by our Supreme Court in *Hayden v. City of Port Townsend* as “eminently sensible.” 93 Wn.2d 870, 880-81, 613 P.2d 1164 (1980) *overruled on other grds, SANE v. City of Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984). *See also, Brown v. City of Tacoma*, 30 Wn. App. 762, 766-68, 637 P.2d 1005 (1981); *Richland Homeowner’s Preservation Ass’n. v. Young*, 18 Wn. App. 405, 416-18, 568 P.2d 818 (1977).

The MDNS process was formally incorporated into the SEPA Rules in 1984 (WAC 197-11-350) as part of an extensive effort spearheaded by the Commission on Environmental Policy. The SEPA MDNS rule specifically embraces the propriety of bringing a proposal below the significance threshold by informally negotiating project modifications. WAC 197-11-350. It has thus been favorably viewed by both the Washington courts and the Department of Ecology as a means to encourage agencies and applicants to work together efficiently to bring a project into compliance with SEPA without preparation of an EIS. *Anderson*, 86 Wn. App. at 303; CP 448-49 (Settle Dec.). *See also, Moss v. City of Bellingham*, 109 Wn. App. 6, 20, 31 P.3d 703 (2001), *quoting Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 13(d)(vi) at 137 (1995).

The MDNS process has become a powerful tool for reviewing agencies, and it has been successfully employed on large-scale projects,

with the approval of the courts,⁴ to adequately mitigate significant adverse impacts without invoking the time-consuming EIS process. In addition to increased efficiency, the MDNS process arguably provides better and more effective environmental protection than the EIS process, since an EIS does not automatically result in substantive mitigation, and the permitting authority may still approve a project without requiring mitigation. In contrast, mitigation measures imposed by the Responsible Official through the MDNS process become binding project conditions, and provide certainty that mitigation measures will be implemented if the project is approved. *Anderson*, 86 Wn. App. at 305; CP 449 (Settle Dec.). Use of the substantive authority provided through the MDNS process by Lead Agencies has thus been increasingly common. CP 449 (Settle Dec.).

STATEMENT OF THE CASE

A. The Proposed Knutson Farms Industrial Park And Initial SEPA Review

On November 26, 2014, Knutson submitted to Pierce County applications to develop commercial warehouses on approximately 187 acres located at 6719 134th Ave. in unincorporated Pierce County. Knutson's applications, including an Environmental Checklist, sought a

⁴ See *Moss*, 109 Wn. App. at 20-21 (sustaining MDNS for 172-lot residential subdivision on 76 acres and refusing to hold that MDNS may not be applied to large projects). See also, *West 514, Inc. v. Spokane County*, 53 Wn. App 838, 770 P.2d 1065 (1989).

commercial short plat, a shoreline substantial development permit and environmental review pursuant to SEPA. As originally proposed, Knutson sought to develop the property as a seven lot commercial short plat to be improved with warehouse space totaling more than 3,000,000 square feet. The application also proposed a 5,300 lineal-foot (12-foot wide) trail amenity within the project to connect the Puyallup Trail to the northwest of the Property to the Pierce County Trail Head to the southeast of the Property. (CP 221 229-45.)

Though the Knutson property borders the Puyallup city limits, no portion of the property is situated within the City. Development of the Knutson property is thus governed by the Pierce County Code. Pierce County designated the property under the Growth Management Act as an urban area in 1994 and it is zoned Employment Center (“EC”).⁵ The EC zoning designation allows concentrations of office parks, manufacturing and other industrial development and is intended to promote development of regional job centers. Thus, the proposed development is in harmony with the County’s applicable development plan and zoning. (CP 221.) It is also consistent with other proposed and existing commercial and industrial developments in the area, including an adjacent development known as the

⁵ In multiple comprehensive planning cycles, the City of Puyallup has urged Pierce County to retain the urban designation for the Knutson property. (CP 221.)

Schnitzer West warehouse development, located south and west of the Knutson property, which warehouse development has been approved by the City of Puyallup. (CP 221. See *also*, CP 356-57, 422-44.)

After issuing notices describing the project, Pierce County received critical comments from the Washington State Department of Fish & Wildlife (“WDFW”), the Muckleshoot and Puyallup Tribes, and the County’s Public Works and Surface Water Management Departments expressing concern that the project was situated too close to the Puyallup River and within a flood prone area. The Cities of Puyallup and Sumner expressed similar concerns, along with concerns regarding traffic volumes that will be generated by the project. (CP 221-22, 353.)

Puyallup was particularly vocal in its opposition. Its City Council adopted a Resolution to formally announce its opposition to the project, express a desire to annex the Knutson property and also express a desire to serve as a Co-Lead Agency in the SEPA review, indicating the City’s predisposition to issue a DS and require an EIS. The City Manager forwarded the Resolution on September 2, 2016 to the County Executive, Council and Planning Director, as well as to City of Sumner officials. (CP 247-51.) The County’s Planning Director responded, declining the request for co-lead, but assuring Puyallup that the County was aware of its obligations under SEPA and that it will conduct a thorough and robust

environmental review that will include ample opportunities for other jurisdictions and the public to provide comments. (CP 253-54.)

B. Knutson's Reduced Development Plan And Efforts To Address And Mitigate Impacts

In September 2016, to address the critical comments, Knutson voluntarily reduced the project development to a 162-acre site and reduced the building area from over 3,000,000 to approximately 2,600,000 square feet. Knutson also located the project further away from the Puyallup River to address flood plain, wetland and habitat impact concerns. This significant revision also served to reduce the traffic volumes that will be generated by the project. (CP 223, 353-54.)

As required by the Pierce County Code, and as part of the County's environmental review under SEPA, Knutson obtained and submitted professionally prepared studies analyzing potential impacts from the project as well as potential mitigation measures to resolve impacts. The studies submitted include

- A Traffic Impact Analysis, originally prepared by a licensed traffic engineer on February 2, 2016, and updated and revised on September 15, 2016, to reflect the applicant's voluntary reduction of project and, further to incorporate and address comments from the County's engineer, as well as comments from the City of Puyallup and the City of Sumner, and updated again on February 10, 2017, to address additional comments submitted by the City of Puyallup and Sumner;
- A Critical Areas Assessment Report prepared by a licensed biologist in March 2016, which study included a Wetland

Analysis Report and Critical Fish & Wildlife Review, and was revised in September 2016 to reflect the reduced project and address agency comments;

- A Flood Boundary Delineation Survey, Conceptual Flood Plain Compensatory Storage Plan, Compensatory Flood Plain Volume Table and Flood Plain Cross Sections;
- A Preliminary Storm Drainage Report; and
- A Geotechnical Engineering Report.

(CP 223-24, 353.)

Puyallup and Sumner both continued to express concerns regarding traffic and other impacts after the project was reduced. Puyallup had retained a traffic engineer, David Markley, to critique the Traffic Impact Analyses prepared by Knutson's traffic engineer, Jeff Schramm, and his critiques were submitted to the County through the environmental review process. Puyallup also submitted critical comments prepared by its Public Works Director, Development Services Director, Engineering Director and private attorney. Pierce County's planning officials instructed Knutson to provide responses to the comments and work directly with City officials to address their concerns. (CP 224, 354-55, 419-20.)

Knutson instructed its traffic engineer to respond and provide additional study as necessary to address the concerns and critiques presented by Sumner and Puyallup. Schramm prepared memoranda to separately address Sumner and Puyallup's comments. He also subsequently prepared a matrix for the County providing an inventory of

the transportation comments by the County, Washington Department of Transportation, Sumner and Puyallup and his responsive comments so that the County could use the matrix in its planned efforts to meet with Puyallup and discuss traffic concerns. (355, 359-400.)

Because Puyallup had been particularly vociferous with its traffic concerns and, further, because Puyallup had not identified or requested in its comments any specific mitigation, Knutson also instructed Schramm to request a meeting with Markley. The purpose of the proposed meeting was to allow more direct discussions that might facilitate a better understanding of Puyallup's traffic concerns and elicit potential mitigation measures to address their concerns. Schramm requested a meeting by email dated September 23, 2016. Unfortunately, though Markley was receptive and represented that he would encourage his client to authorize such a meeting, he was not able to obtain authorization from Puyallup. Mr. Markley emailed Mr. Schramm on September 29, 2016:

I got word back from the City. They are not comfortable with my talking or meeting with you (I am not sure why). They suggested that if you could outline your questions, concerns and/or clarification needs in an email that I might then be able to help the process move forward. This may be a bit awkward but I trust we can accomplish the same objective.

(CP 355, 419-20.)

Ultimately, Knutson was able to work directly with the City of

Sumner to address their traffic impact concerns. Sumner presented measures they believed necessary to adequately mitigate traffic impacts and Knutson agreed to the mitigation measures. Sumner notified the County of its requested mitigation and the County, through a subsequently issued MDNS, expressly conditioned the project on satisfaction of Sumner's requested mitigation. (CP 224, 274-80.)

The City of Puyallup, on the other hand, was unwilling to meet with Knutson or its consultants to discuss their concerns and potential mitigation. The City likewise was unwilling to engage in meaningful dialogue with the County to discuss potential impact mitigation measures. (CP 224-25, 356, 652-53.) Though the City continued to present critical comments, it proposed no mitigation to address traffic impacts. Knutson's traffic engineer thus continued to address Puyallup's comments with the County and prepared and submitted to the County yet another Updated and Revised Traffic Impact Analysis on February 10, 2017. (CP 356.)

C. The County's MDNS

Following extensive review of Knutson's revised SEPA Environmental Checklist, applications and supplemented professional studies and the collective comments from County reviewing staff, Puyallup, Sumner, state agencies, tribes and citizens, the County Responsible Official issued an MDNS for the project on April 26, 2017.

The Responsible Official concluded the proposal will not have a probable significant environmental impact, and an EIS is not required, provided that certain specific conditions imposing mitigation measures were met. The conditions are set forth in the MDNS and include without limitation:

- Payment of \$1 million in impact fees to mitigate traffic impacts to the SR-410
- Payment of \$600,000 to Puyallup in impact fees to mitigate queues along Shaw Road East
- Payment of \$500,000 in impact fees to Puyallup to mitigate impact to queues along East Main
- Payment of \$75,000 to Puyallup for trail crossing improvements at the intersection of East Pioneer and 134th Avenue East
- Construct specified road improvements
- Restrict truck traffic to certain corridors
- Additional traffic impact study if the land use types and sizes change from what is presented in the February 10, 2017, traffic impact analysis, following which the County may require additional traffic mitigation measures.

(CP 225-56, 278-80.)

D. Puyallup's Notices of Assumption of Lead Agency Status

On May 10, 2017, the Puyallup unilaterally issued a Notice of Assumption of Lead Agency Status through which it purported to assert itself as the Lead SEPA Agency for the Knutson Farms project. On the same day, the City of Puyallup issued a Determination of Significance and Request for Comments on Scope of EIS. (CP 282-87.) County Executive

Bruce Dammeier responded to the Notices by letter dated May 16, 2017, stating that the City issued the notices without authority and the County will not recognize the City's extrajudicial action. (CP 289.)

On May 23, 2017, Puyallup filed a notice of appeal of Pierce County's MDNS to the Pierce County Hearing Examiner without waiving any right to assume Lead Agency status. (CP 15, 58.) Puyallup commenced this lawsuit on May 25, 2017 (CP 7); and all of the parties affirmatively requested the trial court to resolve the jurisdictional dispute. The SEPA appeal to the Examiner was stayed pending resolution of this lawsuit by the trial court. (CP 226.) That stay has been lifted and the City's appeal is scheduled for hearing in July 2018. Puyallup asserts without corroboration that it could have completed an EIS for the project by July 2018. (City's Brief at p. 10, n. 6.) That the Legislature recently found it necessary to adopt RCW 43.21C.0311, which calls Lead Agencies to "aspire" to complete EISs within 24 months, seems to belie the City's unsupported assertion, as does Knutson's experience with the City. In any event, the trial court held that Puyallup did not have authority to assume Lead Agency status and declared the City's actions void and without effect. (CP 849-54.)

ARGUMENT

The City seeks to assert Lead Agency Status and assume control of

the SEPA review for the Knutson project under WAC 197-11-948, which provides in relevant part:

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), or during the comment period on a notice of application when the optional DNS process in WAC 197-11-355 is used. (Emphasis added.)

But WAC 197-11-948 has no application in the context of SEPA review for the proposed Knutson Farms Industrial Park.

This SEPA Rule only has application when the Lead Agency issues an unconditioned DNS. It does not apply when the Lead Agency issues an MDNS, as is the case here. Independently, Puyallup cannot invoke WAC 197-11-948 because it does not qualify as an Agency with Jurisdiction over the Knutson proposal because Puyallup has no permitting authority over the actual development proposal, which is wholly located in unincorporated Pierce County.

“The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein.” *McGuire v. State*, 58 Wn. App. 195, 198, 791 P.2d 929 (1990); *see also McGovern v. Department of Social & Health Servs.*, 94 Wn.2d 448, 450,

617 P.2d 434 (1980). In the absence of legal authority, Puyallup's actions were *ultra vires*, extrajudicial actions that are void and without effect. *Metropolitan Park Dist. v. Department of Natural Resources*, 85 Wn.2d 821, 825, 539 P.2d 854 (1975); *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968).

A. Puyallup Is Not An Agency With Jurisdiction And Does Not Have Authority To Assume Lead Agency Status.

1. The role of the lead agency.

Only an “agency with jurisdiction” may assert WAC 197-11-948 to intervene with another lead agency’s SEPA review to assume for itself the status of lead agency. An understanding of the lead agency’s role in SEPA review as contemplated by the SEPA Rules provides helpful context to interpret the provisions governing “agency with jurisdiction.”

The lead agency plays an important role in SEPA review. It is the agency “with main responsibility for complying with SEPA’s procedural requirements” and “the only agency responsible for; (a) The threshold determination; and (b) Preparation and content of an environmental impact statement.” WAC 197-11-050. The lead agency should be situated and qualified to fulfill the primary purpose of SEPA, which is to inform the permitting decision makers of environmental impacts, alternatives and mitigation measures so they may use this information in their decisions to approve, deny or condition a project permit. *Save Our Rural Environment*

(SORE) v. Snohomish County, 99 Wn.2d 363, 371, 662 P.2d 816 (1983).

Since SEPA's primary purpose is to ensure that the permitting authority makes choices that are environmentally informed, it is not surprising that the SEPA Rules contemplate that the primary permitting authority, the agency with discretionary decision-making authority, will usually also serve the role of lead agency. The SEPA Rules direct that, unless another agency was previously determined to be lead for a particular project, the first government agency to receive a development application shall determine the lead agency. WAC 197-11-924. The SEPA Rules provide criteria for determining the lead agency. *See* WAC 197-11-926 through WAC 197-11-944.

The SEPA rules vest lead agency status in the agency with the most stake and expertise in the permitting process. For private projects, lead agency status is generally determined based upon the scope of agency permitting authority. Thus, for proposed private projects for which there is only one agency with jurisdiction, the lead agency shall be that agency. WAC 197-11-930. When a private project requires permits from more than one agency with permitting authority, the SEPA Rules direct that, if one of those agencies is a county or city, then the county or city shall serve as lead agency. WAC 197-11-932. If more than one county or city has permitting authority, "the lead agency shall be the county/city within

whose jurisdiction is located the greatest portion of the proposed project area as measured in square feet.” *Id.* Again, lead agency status is vested with the agency with the greatest permitting authority over the proposal, ensuring that this agency is environmentally informed.

In circumstances in which the various agencies are unable to determine which agency is the lead agency under the Rules, any agency with jurisdiction may elect to petition the Department of Ecology to make the determination. WAC 197-11-946(1). If Ecology is requested to make the determination, Ecology is required to consider the following factors, which are listed in order of descending importance:

- (a) Magnitude of agency involvement.
- (b) Approval/disapproval authority over the proposal.
- (c) Expertise concerning the proposal’s impacts.
- (d) Duration of agency’s involvement.
- (e) Sequence of agency involvement.

WAC 197-11-948.

The clear intent of the above-regulatory provisions is that SEPA review be conducted by the agency with the greatest decision-making authority over the project, but at least by an agency that actually has discretionary decision-making authority with regard to approving, disapproving or conditioning project permits. This, of course, is wholly

consistent with the ultimate purpose of SEPA, which is to inform the actual permit decision-makers so that they may apply their authority as decision-makers to implement project conditions or modification that will mitigate significant adverse environmental impacts. RCW 43.21C.060; *see also, Donwood v. Spokane County*, 90 Wn. App. 389, 398-99, 957 P.2d 775 (1998). This approach to lead agency also facilitates the SEPA policy to integrate the SEPA review process with the permitting review process. *See* WAC 197-11-030(2)(e); WAC 197-11-055(1).

2. Puyallup is not an “agency with jurisdiction” over the Knutson Farms Industrial Park project.

An “agency with jurisdiction” is “an agency with authority to approve, veto, or finance all ... or part of a proposal.” WAC 197-11-714(3). A proposal “means a proposed action” and “includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants” and it “exists at that stage in the development of an action when an agency is presented with an application.” WAC 197-11-784.⁶

Notably, prior to advancing its current position in litigation, Puyallup acknowledged that it did not have jurisdiction over the project. In 2016, the City posted “Comment Instructions” and informed its citizens:

⁶ WAC 197-11-055(a) confirms that “a proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the environmental effects can be meaningfully evaluated.”

Because the proposed warehouse development is not within city limits, the City of Puyallup does not have jurisdiction over the project. Thus, if you would like to submit comments about the proposed project, you should submit comments to Pierce County.⁷

(CP 746-47, 754.) The City frequently labels' respondents' interpretation of the SEPA Rules as "contrived." The label is remarkable in light of its own inconsistent positions regarding its jurisdiction here.

Puyallup claims it qualifies as an "agency with jurisdiction" because (1) it has approval authority, not for the proposal itself, but for road improvements that the County is requiring to mitigate the proposal's traffic impacts to Puyallup (*see* CP 279), and (2) it has elected to be the water and sewer service provider for properties outside the city limits, including the Knutson Farms property. Neither confers Puyallup the status of an "agency with jurisdiction."

- a. Permit authority derived from imposed environmental mitigation does not qualify Puyallup as an "agency with jurisdiction."**

There is no dispute that City roads will be used for access to the Knutson Farms property. Some of those roads have already been constructed and others are contemplated in the City's Comprehensive Plan, but yet to be constructed. There is also no dispute that Pierce County

⁷ The City thereafter provided contact information and instructions to ensure that its citizens could participate in the County's public process. (CP 754.)

conditioned the MDNS on the construction of certain road improvements in Puyallup to mitigate traffic impacts. (CP 279.) But the road relate to urban services that will be utilized by the users of this development located wholly within unincorporated Pierce County as opposed to being part of the proposed development.

Significantly, most of the road improvements contemplated for the Knutson Farms project will already be completed as part of the Schnitzer West project – which road construction was already reviewed and addressed in the City’s MDNS for the Schnitzer West project. As noted in the Traffic Analysis submitted for Knutson Farms:

Street Improvements. The Knutson industrial development would construct full street improvement to 134th Ave. E, half street improvements to 80th Street E, and 5th Ave SE connection to Shaw Road if it develops prior to the Van Lierop industrial project [aka Schnitzer West]. The specific street improvements are described in greater detail in the Mitigation section next. (Emphasis added)

(CP 596-97.)

The MDNSs issued by the City and the County for the Schnitzer West and Knutson Farms projects, respectively, confirm this fact. The MDNS issued by the City for Schnitzer West provides: “the project will be required to construct 5th Avenue SE (a ‘future roadway segment’ as sown in the City’s Comprehensive Plan) as a fully functioning two-way road

from Shaw Road to 33rd Street SE, including the Shaw Road intersection.” (CP 882.) The MDNS issued by the County for the Knutson Farms project provides: “If not already constructed, the applicant will design and construct 5th Avenue SE to City of Puyallup roadway standards between Shaw Road East and 33rd Street SE...” (CP 279.)

This fact demonstrates that the road construction itself is not part of the Knutson Farms proposal. Such construction will inevitably occur anyway, whether with the Schnitzer Development, the Knutson Farms Development or with some other development or on the City’s own initiative. But the roads themselves are not part of the proposed Knutson Farms project. Knutson’s participation in road construction is more akin to participation in traffic impact fees.

There may be impacts to City roads from the traffic that will be generated by the Knutson Farms project, but those impacts are being addressed through the County’s SEPA process. The City confuses impacts with permitting authority over the proposal itself. WAC 197-11-948 does not include agencies impacted by a proposal in the definition of “agency with jurisdiction.”

In this case, Pierce County was the jurisdiction to receive all applications for the Knutson Farms proposal and, the proposal is wholly within unincorporated Pierce County. Pierce County thus has exclusive

permitting authority over the proposal. As a result Pierce County appropriately became the lead agency for the Knutson Farms proposal.

Again, an “agency with jurisdiction” is “an agency with authority to approve, veto, or finance all ... or part of a **proposal**.” WAC 197-11-714(3). SEPA’s definition of an agency with jurisdiction is limited to agencies with permitting authority over the proposal itself. It does not extend to include agencies impacted by a proposal.

The limited approval authority conferred to Puyallup through the MDNS process did not elevate Puyallup to the status of an “agency with jurisdiction.” In the absence of such status, Puyallup was without authority to assume the status of lead agency under WAC 197-11-948.

b. Puyallup’s role as service provider does not qualify it as an “agency with jurisdiction.”

Though outside the City’s jurisdictional limits, the Knutson Farms property is within the City’s service area for sanitary sewer and is partially within the City’s service area for water as expressly stated in the Utilities chapter of Puyallup’s Comprehensive Plan. (CP 272, 328-51.) Notably, Puyallup is providing water for the Knutson proposal at its own insistence. The Knutson Farms property is partially within the City’s service area and partially within the Valley Water District. Knutson had hoped to deal with a single water provider; however, neither water provider was willing to

modify its service area to allow for a single provider. In fact, when asked to relinquish the Knutson property from its service area, Puyallup responded: “The City of Puyallup Water Division would not be interested [in] modifying its service area. We have the capacity and willingness to serve the Knutson properties.” (CP 675-76.) Other service providers for the Knutson Farms proposal include Puget Sound Energy for electricity and gas service, Century Link, for telephone service, Comcast for cable service and DM Disposal for refuse service. (CP 272.)

The status of “agency with jurisdiction” is not conferred upon services providers. Significantly, when a city elects to sell or furnish water or sewer services to anyone outside its corporate limits, it acts in a proprietary capacity as opposed to a regulatory capacity; and the relationship entered into between the city as supplier and such users is contractual. *People for Preservation and Development of Five Mile Prairie v. City of Spokane*, 51 Wn. App. 816, 821, 755 P.2d 836 (1988). To the extent to which Puyallup has the authority to condition its water and sewer services, it is not based upon regulatory authority over the proposed project, but rather its bargaining rights as a contracting party acting in its proprietary capacity. *See Hite v. Public Utility Dist. No. 2*, 112 Wn.2d 456, 462-63, 772 P.2d 481 (1989); *People for Preservation and Development of Five Mile Prairie*, 51 Wn. App. at 821.

The City invites the Court to conclude that it has authority to “approve, veto, or finance ... part of [the Knutson Farms] proposal”⁸ because it has authority under Puyallup Municipal Code (“PMC”) §14.22.040 to “administratively approve an application for service.” But Puyallup cites no legal authority that it has regulatory authority to condition its sewer or water service upon mitigation of environmental impacts, such as traffic impacts, identified in the SEPA process.⁹ Rather, the City’s approval/denial authority is limited to those set forth in PMC 14.22.050 (e.g. submission of application, payment of fee). Its decisions need not be “environmentally informed,” and cannot be influenced by environmental information unless provided in the stated standards.

Because Puyallup provides services in its proprietary capacity and holds itself out as the sole sewer and water provider, its ability to deny services will be confined to the limitations expressly stated in the Comprehensive Plan and applicable code. While a city generally has no duty to provide sewer service beyond its borders, a duty is created when either (a) the city “holds itself out” as willing to supply sewer service to an

⁸WAC 197-11- 714(3).

⁹ Notably, certain installations to extend utility services, including installation of water and sewer facilities, lines, equipment, hookups, or appurtenances, including utilizing or related to lines twelve inches or less in diameter, are exempt from SEPA review. WAC 197-11-800(23). SEPA expressly disallows application of its substantive authority to condition or deny such utility extension projects based upon environmental impacts. RCW 43.21C.110(1)(a).

area; or (b) the City is the exclusive supplier of sewer service in a region beyond the borders of the city. *Yakima County Fire Dist. No. 12 v. City of Yakima*, 122 Wn. 2d 371, 382, 858 P.2d 245 (1993); *Brookens v. City of Yakima*, 15 Wn. App. 464 (1976); RCW 36.70A.120. When such a duty arises, attempts to improperly or unreasonably condition services is impermissible under the law. *Id. See also, Stanzel v. City of Puyallup*, 150 Wn. App. 835, 853, 209 P.3d 534 (2009).

Here, Puyallup acknowledges that it has held itself out in its Comprehensive Plan as the sole sewer provider for the entirety of the Knutson Farms property and the sole water provider for a portion of the property. Knutson need only satisfy the stated service requirements to receive service. The SEPA review process will not influence the decision-making authority conferred to Puyallup; and, thus, SEPA policies and goals cannot be implemented through this decision-making process. The City's status as service provider is no different than Puget Sound Energy the Valley Water District's status. The status of a service provider does not confer the status of an "agency with jurisdiction" nor earn the power to unilaterally and summarily take control of the SEPA review process.

There are many contexts in which the wisdom of conferring the unique (and extreme) remedy to assume control of environmental review can be seen. For example, for a project proposed by a governmental

agency, SEPA provides that the agency proposing the project (e.g. a Port or School District) shall serve as the lead agency, even though the city or county where the project will be located may have permitting authority. WAC 197-11-926. In such circumstance, both agencies have discretionary authority over the project and both have a stake in the project review – one as the agency proponent and the other as the agency with authority over the geographic area.

Granting the municipality with geographic permitting powers authority to assume lead jurisdiction still ensures that the SEPA review is integrated with the permitting process. It also still ensures that SEPA review remains vested with an agency that has discretionary authority over the project and, with that, authority to condition to deny or condition the project as appropriate and authorized by SEPA. RCW 43.21C.060. Thus, it preserves the ultimate SEPA policy to environmentally inform an authority with discretionary authority over the proposal.

But if the Court accepts Puyallup's position, it will turn SEPA on its ear. Allowing a service provider to assume control of the SEPA review process would separate, rather than integrate environmental review with the permitting process. It certainly would not serve to better inform the actual decision-maker on the proposal – Pierce County – on environmental concerns. The approach would instead foster delay and disrupt the

process; and, ultimately, decrease the opportunity to effectively integrate environmental mitigation with the permit decision-making process.

B. WAC 197-11-948 Does Not Authorize An Agency With Jurisdiction To Unilaterally Assume Control Over SEPA Review Following Issuance Of An MDNS.

Judge Lanese did not rule on the issue of whether WAC 197-11-948 may be invoked following issuance of an MDNS. (RP 58-59.) But on this *de novo* review, the Court may nonetheless affirm the trial court's summary judgment order based on this issue of law that was presented and briefed below. *Weden v. San Juan County*, 135 Wn.2d 678, 695-96, 958 P.2d 273 (1998). The argument does, indeed, provide an independent basis to affirm the trial court's summary judgment order.

1. The plain language of WAC 197-11-948 supports this interpretation.

When interpreting the meaning and scope of a statute or regulation, the court's fundamental objective is to determine and give effect to the intent of the legislating body. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). The court should first look to the plain language of the regulation as "[t]he surest indication of legislative intent." *Id.*, *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). If the statute or regulation's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010). A court may

determine a statute or regulation's plain language by looking to “the text of the statutory provision in question, as well as ‘the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’ ” *Ervin*, 169 Wash.2d at 820, 239 P.3d 354 (quoting *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005)). Courts construe statutes assuming that the legislature meant exactly what it said. *In re Marriage of Herridge*, 169 Wn. App. 290, 297, 279 P.3d 956 (2012).

Through WAC 197-11-948, the SEPA Rules allow an Agency with Jurisdiction that is dissatisfied with a Lead Agency’s DNS determination to assume Lead Agency status, issue a DS and prepare an EIS. *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 661, n. 7, 860 P.2d 1024 (1993). But application of this provision must necessarily be limited to the authorization stated in the Rule.

WAC 197-11-948(1) sets forth the requisite conditions for an agency to issue a notice of assumption of lead agency status.¹⁰ It only

¹⁰ Subsection 1 of WAC 197-11-948 sets forth the conditions that must be present for an agency to issue a notice of lead agency status and provides in total:

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), or during the comment period on a notice of application when the optional DNS process in WAC 197-11-355 is used.

Subsections 2 and 3 of WAC 197-11-948 address the process after a notice of assumption of lead agency status is issued, so these sections are not quoted above.

authorizes an agency with jurisdiction to unilaterally and summarily assume the status of lead agency, “upon review of a DNS (WAC 197-11-340).” Of course, the SEPA Rules define an MDNS as “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). While the writers of WAC 197-11-948 selectively and specifically referenced other SEPA Rules, most notably WAC 197-11-340, nowhere in WAC 197-11-948 did they reference WAC 197-11-350, the SEPA Rule that authorizes and substantively governs the MDNS. The absence of any reference to WAC 197-11-350 has significance under basic rules of interpretation. When a legislating body elects to specifically include certain items in a statutory provision, those not so specified are presumed to be deliberately excluded. *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993); *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008). Put another way, “omissions are deemed exclusions.”¹¹ *Adams*, 164 Wn.2d at 650, quoting, *In re Det. Of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

The City relies on other provisions of the SEPA Rules to squeeze the MDNS into the scope of WAC 197-11-948. Referencing other SEPA

¹¹ This canon of statutory construction is sometimes referred to through the Latin phrase “*expressio unius est exclusio alterius*,” which means the expression of one thing is the exclusion of another.” *State v. Cromwell*, 157 Wn.2d 529, 540, 140 P.3d 593 (2006).

Rules, the City argues that an MDNS is surely intended to be included in 948 because an MDNS is a type of DNS. But regardless, that particular type of DNS (the MDNS under WAC 197-11-350) was not included or referenced in WAC 197-11-948, while other types (WAC 197-11-340) were. The decision not to reference an MDNS was a legislative decision to exclude an MDNS as a trigger that would authorize an agency to issue a notice of assumption of lead agency.

The City effectively asks the Court to re-write WAC 197-11-948 to add the following underlined language:

An agency with jurisdiction over a proposal, upon review of a DNS (WAC 197-11-340 or WAC 197-11-350) may transmit to the initial lead agency a completed 'Notice of assumption of lead agency status.' ...

But the law does not allow the construction the City advocates. Statutory or regulatory construction begins with the words written. Even though courts will look to the broader statutory context, they do not add words where the legislature has not included them. *Olympic Tug & Barge, Inc. v. Washington State Dep't of Revenue*, 163 Wn. App. 298, 306–07, 259 P.3d 338 (2011); *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Operation of WAC 197-11-948 does not, as the City argues, depend only on whether an 'agency with jurisdiction is dissatisfied with

another agency's SEPA threshold determination dispensing with preparation of an EIS. Rather, it explicitly depends on "review of a DNS (WAC 197-11-340)," not an MDNS (WAC 197-11-350). Application of the Rule's plain language to this case leads to a singular conclusion.

Finally, we are aware of no administrative court cases that have addressed the issue presented here. The absence of case law was noted by the trial court and acknowledged by the parties. *See* RP 6, 8,-9, 24-26. In none of the court and board cases cited by the City did the parties dispute whether WAC 197-11-948 may apply following issuance of an MDNS and none of the courts provided analysis on the issue. Reference to invocation of WAC 197-11-948 is done in passing comments (often in footnotes) and, at best, is dicta.

2. WAC 197-11-948's reference to WAC 197-11-340(2)(a) setting a deadline to assume lead agency status does not extend the scope of its authorization.

In the absence of any reference to WAC 197-11-350, the City argues that WAC 197-11-948's reference to WAC 197-11-340(2)(a) serves to extend the scope of the Rule's limited authorization to include an MDNS. The City misconstrues the Rule.

The first sentence of WAC 197-11-948(1) exclusively sets forth the two requisite conditions for an agency to issue a notice of assumption of lead agency status:

[1] An agency with jurisdiction over a proposal, [2] 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.'... (Numbering and underlining added).

The remainder of the paragraph, on the other hand, addresses only the process to assert lead status. It directs the form of the notice and the time frame in which the notice must be issued:

... 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), or during the comment period on a notice of application when the optional DNS process in WAC 197-11-355 is used. (Underlining added.)

WAC 197-11-340(2)(a) establishes procedural requirements, which also apply to an MDNS.¹² Relevant to this matter, this subsection precludes action on certain matters during a 14-day comment period following issuance of the threshold determination. Though WAC 197-11-340(2)(a)

¹² WAC 197-11-340(2)(a) provides:

(2) When a DNS is issued for any of the proposals listed in (2)(a), the requirements in this subsection shall be met. The requirements of this subsection do not apply to a DNS issued when the optional DNS process in WAC 197-11-355 is used.

(a) An agency shall not act upon a proposal for fourteen days after the date of issuance of a DNS if the proposal involves:

- (i) Another agency with jurisdiction;
- (ii) Demolition of any structure or facility not exempted by WAC 197-11-800 (2)(f) or 197-11-880;
- (iii) Issuance of clearing or grading permits not exempted in Part Nine of these rules;
- (iv) A DNS under WAC 197-11-350 (2), (3) or 197-11-360(4); or
- (v) A GMA action. (Underlining added.)

imposes this same procedural 14-day comment period upon an MDNS once issued, it is purely procedural; it provides no mechanism to issue an MDNS. An MDNS may only be issued under WAC 197-11-350.

Opposite a DNS issued under WAC 197-11-340, which requires a determination that “there will be no probable significant adverse environmental impacts from a proposal,”¹³ an MDNS may only be issued if the lead agency first determines that it is likely to issue a DS – it is anticipating that the proposal will likely result in significant adverse environmental impacts. WAC 197-11-350(2); *City of Federal Way v. Town & Country Real Estate*, 161 Wn. App. 17, 54, 252 P.3d 382 (2011). Only if a DS is likely, may the lead agency issue an MDNS, provided (1) the lead agency specifies mitigation measures on the applicant's proposal that would allow it to issue a DNS; and (2) the proposal is clarified, changed, or conditioned to include those measures. While both the DNS issued under WAC 197-11-340 and the MDNS issued under WAC 197-11-350 are subject to the same 14-day comment period set forth in WAC 197-11-340(2)(a), they are nonetheless fundamentally different determinations. WAC 197-11-948 only references WAC 197-11-340 and the authority to assume lead agency status does not extend to an MDNS issued under WAC 197-11-350.

¹³ WAC 197-11-340(1).

3. Knutson's interpretation is consistent with and furthers SEPA's policies.

Certainly, statutory interpretation begins with the statute's (regulation's) plain meaning; and courts will discern the plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole. *Olympic Tug*, 163 Wn. App. at 306–07; *Lake*, 169 Wn.2d at 526. If a court determines that the statute is unambiguous after reviewing its plain meaning, the court's inquiry ends. *Id.* But if the statute is ambiguous, a court will consider the legislative history and circumstances surrounding the statute to determine legislative intent. *Id.* at 527. Indeed, courts have considered the legislative history of SEPA when resolving questions regarding application of the MDNS in the SEPA review process. *See Moss v. City of Bellingham*, 109 Wn. App. 6, 20-21, 31 P.3d 703 (2001).

As demonstrated in the section above, this dispute may be resolved based upon the plain meaning of WAC 197-11-948 that legislatively excludes the MDNS. But if the Court concludes that WAC 197-11-948 is ambiguous, then the purpose and policies of SEPA, as evidenced by its regulatory scheme, court interpretation and the legislative history are helpful in construing the provision.

Knutson and Pierce County present an interpretation that is

consistent with the plain language of WAC 197-11-948, and also with SEPA's overarching policies – to ensure that environmental considerations are efficiently integrated into the permit decision-making process such that permitting decisions are environmentally informed, and ultimately, that significant environmental impacts may be avoided or mitigated through project modification and/or conditions. *Save Our Rural Environment (SORE) v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983); *Moss*, 109 Wn. App. at 20-21. When the policies of SEPA are considered, it is clear that the rule-makers had good reason to exclude the MDNS from the extreme and summary remedy afforded by WAC 197-11-948.

The primary remedy to challenge a lead agency's SEPA determination – the propriety of the threshold determination, the reasonableness of mitigation conditions or the adequacy of an EIS – is through an appeal. RCW 43.21C.075. Such appeals are resolved by a neutral hearing officer following an evidentiary hearing. *See* PCC 18D.10.080; Chapter 1.22 PCC. Thus, if there are disagreements regarding the conclusions drawn from environmental study or the efficacy of certain mitigation, those disputes are resolved through an evidence-based process. But, as noted and embraced by the City, WAC 197-11-948 is not evidence-based. In fact, its operation is not preceded by any inquiry into the merits of the SEPA determination. It was thus appropriate and prudent

for the rule-makers to limit WAC 197-11-948's application.

There are fundamental differences between the two threshold determinations that warrant different treatment as recognized in WAC 197-11-948. Again, a DNS issued under WAC 197-11-340 may only issue if the lead agency determines "there will be no probable significant adverse environmental impacts from a proposal." WAC 197-11-340(1). There is no mechanism within WAC 197-11-340 to condition a project to avoid or mitigate significant environmental impacts, nor should there be since a DNS under this SEPA Rule means there are no significant impacts to mitigate. The unmitigated DNS will likewise not be followed by further study of potential impacts, mitigation or alternatives to the proposal.

In stark contrast to a DNS, an MDNS acknowledges that significant adverse impacts are likely and requires imposition of mitigation measures that will reduce impacts below the level of significance. WAC 197-11-350; *Federal Way v. Town & Country Real Estate, LLC, supra*, 161 Wn. App. at 54. The MDNS, deemed by the courts as an "alternative threshold determination," is necessarily accompanied with sufficient environmental study or analysis to support the threshold determination that mitigation measures required are adequate to bring adverse environmental impacts below the level of significance. *Anderson, supra*, 86 Wn. App. at 301. The study may not come in the

specific form of an EIS, but comprehensive study is nonetheless required for the lead agency to determine that mitigation conditions or project alterations bring impacts below the level of significance. *Id.*; WAC 197-11-350. The Department of Ecology has noted its purpose:

The mitigated DNS provision in WAC 197-11-350 is intended to encourage applicants and agencies to work together early in the SEPA process to modify the project and eliminate significant adverse impacts. The mitigated DNS process is not intended to reduce the amount of environmental review done on a project, but reduce the paperwork needed to document the process.

Richard L. Settle, *DOE Interpretations of Determinations of Non-Significant Provisions*, at 466 app. (1988 SEPA Handbook G-1 to G-6), *quoted in Anderson*, 86 Wn. App at 304.¹⁴

The Legislature created the MDNS process to encourage agencies and applicants to work together to reduce the impacts of a project below the threshold level of significance. WAC 197-11-350. With an MDNS, promulgation of an EIS and intense public participation are rendered unnecessary because the mitigated project will no longer cause significant adverse environmental impacts.

Anderson, 86 Wn. App. at 303. The MDNS has “found favor with courts and decision-makers as ‘conducive to efficient, cooperative, reduction or

¹⁴ The court in *Anderson* cited Richard Settle, with approval, in forming these conclusions regarding the favorable qualities of the MDNS as an alternative to an EIS. The court quoted both his writings in his treatise, as well as his writings reporting on the Department of Ecology’s purpose in adopting provisions regarding the DNS and the MDNS. *See Anderson*, 86 Wn. App at 304. Knutson addresses the City’s specific objections to Professor Settle’s testimony later in this brief.

avoidance of adverse environmental impacts.” *Moss*, 109 Wn. App at 21, quoting *Anderson*, 86 Wn. App. at 303.

Providing a self-implementing process for an agency to intervene when an unmitigated DNS is issued under WAC 197-11-340 makes sense, as absolutely no potential significant environmental impacts have been acknowledged. But to allow an agency to unilaterally intervene following an MDNS process simply because it is “dissatisfied” with the conclusions a lead agency draws from its extensive study and review process would not only result in unnecessary duplicative review, but would also serve to discourage use of this powerful MDNS tool that has been argued as even more effective than the EIS process to avoid impacts and protect the environment. *Anderson*, 86 Wn. App. at 305. It could also lead to misuse of the SEPA review process for the improper purpose of obstructing or delaying the permit review process. (CP 453.)

Of course, SEPA seeks to achieve balance, restraint and control rather than to preclude all development whatsoever. *Cougar Mountain Associate v. King County*, 111 Wn.2d 742, 753-54, 765 P.2d 264 (1988) “SEPA should not be used to block construction of unpopular projects.” *Id.* at 749. *See also, Parkridge v. City of Seattle*, 89 Wn.2d 454, 466 (1978). The rule-makers’ decision to exclude the MDNS from the summary remedy provided in WAC 197-11-948 was consistent with and

advances SEPA's policy to integrate consideration of environmental concerns in the permit process.

C. The Trial Court's Consideration of Professor Richard Settle's Declaration Is Neither Error Nor Grounds For Reversal.

The City acknowledges that Judge Lanese did not reach the issue of whether an agency with jurisdiction may assume SEPA jurisdiction upon issuance of an MDNS. (RP at 57-58, City's Brief at p. 27, n.18.) Though Judge Lanese did state that he considered everything, including Professor Settle's declaration (RP 59), Settle only offered testimony regarding municipalities' use of the MDNS and whether an MDNS may, when considered in the context of its historical application, be equated to a DNS when invoking WAC 197-11-948. Indeed, the City commented below: "Notably, Mr. Settle's Declaration of legal opinions and arguments supporting his clients' positions is silent on this 'agency with jurisdiction' issue." (CP 517, n. 18.) Thus, while considered, Professor Settle's declaration could not be a basis of Judge Lanese's ruling.

Richard Settle has been described by at least one Washington appellate court as "a preeminent authority on SEPA." *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 661, 291 P.3d 2785 (2013). His written publications, including the treatise THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT, A LEGAL AND POLICY

ANALYSIS, have been quoted or cited in 31 Washington appellate court cases,¹⁵ providing many of these courts with SEPA's legislative and implementation history. (CP 445.) Even the City of Puyallup cited his treatise in its summary judgment motion. (CP 118.)

The City does not dispute Settle's qualifications, expertise and significant experience with SEPA. To the contrary, in their objection to the trial court, the City submitted Declaration provide in another case that only bolstered Professor Settle's substantial experience, and confirmed that he has consulted not only with the Legislature regarding the historical implementation of SEPA, but also with many agencies and municipalities, including the Washington State Department of Ecology, the Washington Environmental Hearings Office, the Cities of Tacoma, Bellevue, Kent, Auburn, Arlington, Yakima, Long Beach, Puyallup, Marysville, and Renton and King, Pierce, Clark, Skagit, Pacific, Klickitat and Skamania Counties. (CP 615-17. *See also* CP 445-46.)

Instead, Puyallup asserts that Professor Settle's declaration is comprised of pure legal opinion.¹⁶ But that is not true. The purpose of Professor Settle's declaration is to demonstrate, based upon his extensive

¹⁵ The 31 cases in which Professor Settle's writings have been cited are listed with citations at CP 778, n.1.

¹⁶ Below, the City cited the action of a trial court in an unrelated case (CP 644-45, 615-42), but that is not persuasive authority for this court. Moreover, in the case cited, the declaration was accepted for some purposes, not stricken in its entirety. (CP 644-45.)

significant experience and expertise, the fundamental difference between a DNS and an MDNS as born out in agency implementation of SEPA and, specifically WAC 197-11-350 since it was adopted in 1984. Likewise, it is to demonstrate that, as historically implemented, the MDNS has become a widely-used and powerful tool to identify, analyze and avoid significant adverse impacts, much as may be accomplished through an EIS, but more efficiently and, arguably more effectively.

Though his opinion necessarily discussed the SEPA Rules, (which implement SEPA), his ultimate opinions relate to how agencies have implemented the SEPA Rules over the past decades and the purposes that have been achieved through that implementation. There is no reason that Professor Settle's opinions should be excluded simply because he is a lawyer, especially in light of his undisputed significant experience. Such opinions regarding implementation have been deemed helpful to court's in evaluating and applying SEPA. *See e.g., Westmark Development Corp. v. City of Burien*, 140 Wn. App. 540, 554, 166 P.3d 813 (2007).

It is true that Settle's declaration includes statements regarding SEPA's purpose and legislative history. But such information has been deemed useful by courts in statutory construction to determine legislative intent where the court finds there are ambiguities in the provision being construed. *Olympic Tug & Barge, Inc., supra*, 163 Wn. App. at 306-07;

Lake, supra, 169 Wn.2d at 526. Courts have considered the legislative history of SEPA when resolving questions regarding application of the MDNS in the SEPA review process. *See Moss, supra*, 109 Wn. App. at 20-21. Indeed, the *Moss* court cited and quoted Settle in its discussion of the historical and evolutionary application of the MDNS process.¹⁷ *Id.* (“Four years after *Hayden*, the MDNS process was ‘embraced by the SEPA Rules and reined in by process requirements’ with the promulgation of WAC 197-11-350.”)

The City states, without corroboration, that Professor Settle’s treatises do not provide support for respondents’ arguments. (City’s Brief at p. 37.) The City seems to imply that Professor Settle’s opinions regarding agency implementation of SEPA over the past 3 plus decades are novel thoughts not previously expressed. Even if Professor Settle had not previously published his opinions regarding the legislative history, purpose and agency implementation of SEPA, it would not render them inadmissible. Again, the City does not challenge Settle’s qualifications or dispute his significant experience with SEPA’s implementation.

Moreover, Knutson cited case law that, in turn, relied upon Settle’s published materials for the court’s analysis. For example, in *Anderson*,

¹⁷ The *Moss* court also quoted Settle in its discussion of the reform amendments to SEPA to avoid duplicative environmental analysis and substantive mitigation of development projects. 109 Wn. App. at 15.

supra, the court relied on Settle's published materials to inform its understanding of agency implementation of the MDNS:

Similarly, the Washington Department of Ecology (DOE) has favorably characterized the MDNS process as conducive to efficient, cooperative reduction or avoidance of adverse environmental impacts:

The mitigated DNS provision in WAC 197-11-350 is intended to encourage applicants and agencies to work together early in the SEPA process to modify the project and eliminate significant adverse impacts. The mitigated DNS process is not intended to reduce the amount of environmental review done on a project, but to reduce the paperwork needed to document the process.

Richard L. Settle, *DOE Interpretations of Determination of Non-Significant Provisions*, at 466 app. (1988 SEPA Handbook G-1 to G-6).

86 Wn. App. at 304. The *Anderson* court further noted:

The propriety of bringing a proposal below the significance threshold by informally negotiating project modifications has been embraced by the SEPA Rules and reined in by the requirements of WAC 197-11-350. Settle, *The Washington State Environmental Policy Act—A Legal and Policy Analysis*, § 13(d)(vi), pg. 137-39.

Id.

Professor Settle's Declaration is not comprised of pure legal opinion. It provides the Court with relevant and useful information regarding the historical and evolutionary agency implementation of the SEPA Rules, specifically the Rules regarding the DNS, MDNS and EIS

processes that are relevant to this case. The trial court's consideration of Professor Settle's declaration was not error.

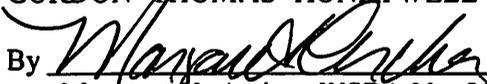
CONCLUSION

Puyallup was without authority under WAC 197-11-948 to assume SEPA jurisdiction of the Knutson Farms Project. This Court should affirm the trial court's summary judgment order.

Dated this 30th day of March, 2018.

Respectfully submitted,

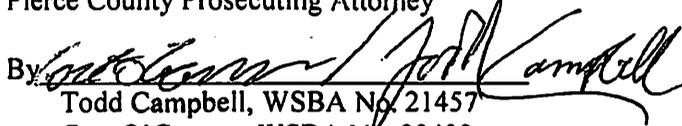
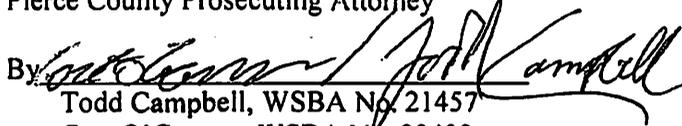
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