BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

In the Matter of the Appeal of the Determination of Non- Significance (DNS) for the stormwater diversion structure at 8229 Talbot Road: ROBERT BERNHOFT, Appellant, v. CITY OF EDMONDS, Respondent.	File No. PLN 2024-0020 APPELLANT'S CLOSING BRIEF

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I. INTRODUCTION

The subject of this appeal is the latest example in a string of erroneous taxpayer funded decisions/actions by the City of Edmonds (City) regarding the mismanagement of stormwater and infrastructure to the detriment of Perrinville Creek, fish, and adjacent tidelands. For the past 30 years, the City has gone to great lengths, at taxpayer expense, to prevent flooding on two residential properties that built houses in a coastal floodplain. Meanwhile, these homeowners never constructed the flood mitigation berm required by the 1984/1985 plat conditions of approval. The great lengths taken by the City include constructing two concrete basin flow splitters and an undersized 42 inch ductile iron pipe to handle excess flow, modifying that structure to handle the entirety of the Perrinville Creek flow and thus prohibiting fish passage, placing obstructions or failing to remove obstructions that would allow the creek channel to re-establish, and regularly sending in crews to remove large quantities of sediment from the diversion structure and creek bed—often in the middle of significant storm events—to divert the creek and prohibit fish passage into Perrinville Creek. The City took most of these actions without reviewing the environmental impacts or producing design drawings sealed by a professional civil engineer. Now, the City seeks to repeat this pattern of hoping no one will notice the glaring lack of analysis or consideration of the significant adverse environmental impacts of their proposed action.

The City applied to the Washington Department of Fish and Wildlife (WDFW) for a 3-year Hydraulic Project Approval (HPA) to remove sediment in and around a flow splitter/diversion structure that diverts the entirety of Perrinville Creek and prohibits anadromous fish passage. The proposed activity at this diversion structure creates an impassable fish barrier that dewaters salmonid spawning and rearing habitat and blocks anadromous fish from accessing essential habitat

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to which the fish historically had access. Further, the flow splitter/diversion structure directs Perrinville Creek into an undersized and rapidly deteriorating pipe that runs beneath the railroad tracks toward the Puget Sound—raising serious concerns about safety, derailment, and hazardous spills along the adjacent coastal tidelands.

To receive an HPA, WDFW requires documentation that the proposed project complies with the State Environmental Policy Act (SEPA). In this case, the City was the applicant and SEPA reviewer that erroneously determined that the project would not have a significant impact on the environment and issued a Determination of Nonsignificance (DNS).

Neighbor, adjacent property owner, and concerned citizen Robert Bernhoft appealed the City's determination. Following three and a half days of testimony and evidence before the Examiner, it is apparent that the City's determination violates SEPA for the following reasons: (1) the City relied on an improper baseline against which to assess impacts; (2) the City engaged in improper balancing of impacts to reach its predetermined decision; (3) the SEPA responsible official lacked understanding of the proposal and site necessary to make a determination; (4) the City provided inaccurate, incomplete, or rote answers in the environmental checklist; (4) the City failed to provide or request adequate information necessary to analyze the impacts of the proposal; and (5) the limited information demonstrates that the proposal will have significant impacts on the environment that should be mitigated or addressed in an Environmental Impact Statement.

Based on this and for the reasons described in more detail below, we request that the Examiner reverse or remand the City's DNS for the 3-year HPA requested by the City and not yet issued by WDFW.

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II. STATEMENT OF FACTS

A. Perrinville Creek and Fish Habitat

Perrinville Creek is a fish-bearing stream located in a 2.94 square mile drainage basin within both Edmonds and Lynwood. Ex. B7. Due to undersized culverts and development in the drainage basin, the creek struggles with high flows, flooding, and sediment deposition, even in 6-month storm events. Despite these challenges, the creek provides good fish habitat that supports a variety of species. Electrofishing surveys in the lower reach between Talbot Road and the outfall reveal that the creek is habitat for multiple fish species, including cutthroat trout, sculpin, steelhead, and coho salmon. Scordino Test.; B97. Anadromous chum salmon have also been found in the creek outside of the electrofishing survey timeframe. Scordino Test.

Figure 1 Photo of Coho Salmon found in Perrinville Creek in 2019. Ex. B97 at 38.

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Figure 2 Photos of Cutthroat Trout in 2019. Ex. B97 at 37.

In 2023 and 2024, the Edmonds Stream Team and Sound Salmon Solutions placed approximately 4,000 juvenile coho salmon in the upper reaches of Perrinville Creek. Scordino Test.; Ex. B3. These coho will spend their first year in the stream, go out to the ocean, and after two years in the ocean, can be expected to (attempt to) return to Perrinville Creek in 2026 and 2027. Scordino Test.; Ex. B3 at 4.

B. Project History

In order to understand the magnitude of the City's failures related to its mismanagement of Perrinville Creek and its SEPA review, it is necessary to first understand the history of this site and the mistakes that have led us to this appeal.

Circa 1984, the City conducted an environmental assessment for the Mae Bergman short plat for the platting and construction of the house that is located at 8235 Talbot Road. Ex.B67;

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Lider Test. As a part of the plat approval, the environmental assessment for the Bergman house stated in part:

> In order to reduce the potential for hydraulic flow damage, a berm should be constructed along the southern edge of the stream on the eastern one-half of the property. The berm would cause the overtopping to occur on the northern side of the stream away from the house and into the present ponding area. The elevation of the berm should be at or above 21.5 feet above MLLW.

Exhibit B67, at pdf 8. The construction of the berm described above was a condition of preliminary approval. Ex. B67 at 47 ("Provide berm to protect Lot A per attachment to environmental checklist, item B.3 water."). The plat was issued and the homes were constructed, but the required 21.5-foot Mean Lower Low Water (MLLW) elevation berm was never installed. Lider Test; McCullough Test.

Figure 3 Ex B67 at 27

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Sometime between 1985 and the mid-1990's, the property owners at 8235 and 8307 Talbot Road filled in parts of the floodplain, created ornamental landscaped gardens, and appear to have modified or rerouted the lower 300-feet of Perrinville Creek to have artificial bends around the homes and through the yards. Lider Test. In short, the property owners modified the area that was previously an intertidal estuary that provided storage for floodwaters. The property owners constructed homes in an area mapped as a FEMA flood zone. Lider Test; Ex. B53. Both 8235 and 8307 Talbot Road are located in FEMA flood zone AE, which is designated as a high risk 100-year flood area. Unsurprisingly, high flows and flooding in the lower Perrinville Creek was an issue.

In the mid-1990's, in a misguided attempt to remedy the flooding situation created by the lack of the 21.5 MLLW berm and unauthorized stream channel relocation, the City was somehow persuaded to construct high flow bypass structure[1] in Perrinville Creek on the adjacent upstream property at 8235 Talbot Road. Lider Test. This high flow bypass structure consisted of two large concrete basins on either side of the creek, connected by a 36 inch pipe and discharging into the Puget Sound via a 42-inch ductile iron pipe (DIP).[2] The intent of the high flow bypass structure was to control or meter the Perrinville Creek stream water flow onto the two downstream properties, with the high flows diverted into a 42-inch DIP under the BNSF railroad tracks. Lider Test. The flow splitting structure was intended to prevent flooding of two residences in a low-lying coastal floodplain. Below is a photo of the flow splitter taken in March of 2010. Ex. B37.

[1] Also referred to during the hearing as flow splitter and diversion structure.

[2] The precise details regarding design, construction, or environmental review of this structure are not clear. To date, the City has not produced any of the following: documentation for the flow splitter's design; documentation as to when they were designed or by whom: any hydraulic calculations for the piping: or any environmental documentation in response to numerous public records requests by Lider Engineering prior to Mr. Bernhoft's appeal or as a part of the record hearing. Lider Test.

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Figure 4 Ex. B37

In 2011, the City routed a new 30-inch culvert pipe toward the flow splitter on the 8229 Talbot Road property (now the Flynn property), adding additional flow to the structure. Ex. B40 at 1–5. Despite numerous public records requests by Lider Engineering, the City did not provide any documentation for its 2011 construction design or As-Built drawings; nor were any documents of the City's design to re-route the 30-inch pipe submitted for the hearing record. Lider Test. It remains undocumented who the engineer of record was, as there is no documentation for the environmental assessment, hydraulic calculations, or As-Built drawings for this project that introduced an additional 100-year storm flow of 30.5-cfs to the undersized 42-inch DIP that was already incapable of conveying the estimated 225-cfs flow in the RW Beck report. Lider Test.; Ex. B5 at 48.

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In December of 2020, a major storm event clogged the flow splitters, flooded the area, and deposited sediment in the lower Perrinville Creek channel across the McLaughlin and Robinson properties (8235 and 8307 Talbot Road). Photos of the event are pictured below. Ex. B51.

Figure 5 Ex B51

In January of 2021, the City "places sign blanks in the dried keyway to prevent continued flooding of downstream properties." City Ex. 1 at 6.

Below is a photo of the flow splitter and sediment deposition in front of the weir/keyway in November 2021. Ex. B55.

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Figure 6 Ex B55

Following the 2020/2021 storms, the City modified the flow splitter by cutting an opening that directs the creek into the diversion structure instead of through the weir. The cut-outs can be seen on the following photographs below. Ex. B88; Ex. B79.

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Figure 7 Ex. B88

Figure 8 Ex. B79

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Below are before and after photos of the downstream creekbed following the 2020/21 storms, weir obstruction, and flow splitter modifications to divert 100% of the Perrinville Creek.

Figure 9 Ex B54

To our knowledge, this modification was done without a permit, public comment, or environmental review. In February of 2021, WDFW requested that the City return the creek to the stream bed. City Ex. 1 at 7. From 2020 to 2024, the City did not remove the obstruction in front of the weir or restore surface flow to the lower 300 feet of Perrinville Creek, downstream of the flow splitter/diversion structure. Lider Test.; Scordino Test.

The diversion structure requires regular sediment removal from the creek bed and structure to continue to divert Perrinville Creek and block fish passage. Sometimes it takes just weeks for the sediment to return and plug the structure, sometimes it happens multiple times in a single day. Scordino Test.; Ex.B88 (showing sediment redeposited within one month); City Ex. 1 at 6 ("Twice throughout the day, half of the diversion structure plugs *again*, reducing the only flow route to one half of the diversion structure; crews have to dig out the diversion structure again with a backhoe to keep flow moving."). The structure requires constant intervention to maintain the diversion of Perrinville Creek.

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C. HPA Proposal

A previous HPA was issued to the City for diversion structure sediment removal on February 14, 2019. Ex. B57. That HPA expired on February 13, 2024. Ex. B57. The previous HPA was issued prior to the 2020/21 storm events, weir obstructions, and flow splitter modifications that resulted in a 100% bypass of Perrinville Creek and 100% fish passage blockage. City Ex. 1. Shortly after the flow splitter modifications and 100% diversion of the Creek, WDFW informed the City that it needed to return the Creek to a surface channel. City Ex. 1 at 7. To this date, the City has not yet done so.

In February 2024, the City submitted an application for a new HPA to maintain the diversion/fish blockage for another three years. Ex. B81. The record does not contain the HPA application materials so the specifics of the proposal provided to WDFW are not available for purposes of this appeal. The project description in the City's May 14, 2024 DNS states:

> This proposal covers maintenance of a stormwater diversion structure at 8229 Talbot Road by the City of Edmonds Public Works Department for the next three years. The work will consist of a variety of actions to maintain flow including trimming vegetation in and around the structure, cleaning of trash racks, and removing accumulated sediments and debris. The maintenance is needed to reduce the potential for flooding within the City.

Bernhoft Notice of Appeal, Attachment A. The HPA has not been issued by WDFW so the terms of the permit are unknown.

III. STANDARD OF REVIEW

The City code provides, "[a]ll relevant evidence shall be received during the hearing of the appeal. The procedural determination by the City's responsible official shall carry substantial weight in any appeal proceeding." EMC § 20.15A.240.E.

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IV. ARGUMENT

A. Washington State Environmental Policy Act (SEPA)

1. SEPA's Purpose

The State Environmental Policy Act (SEPA), chapter 43.21C RCW, was adopted to protect our "safe, healthful, productive, and aesthetically and culturally pleasing surroundings" against the economic pressures of development. RCW 43.21C.020. The legislature recognized that "each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." *Id*. The central purpose of SEPA is to protect those fundamental and inalienable rights. *Id.* State and local governments are assigned the full responsibility to protect these fundamental rights. RCW 43.21C.020; *The Lands Council v. Washington State Parks & Recreation*, 176 Wn. App. 787, 807–808 (2013). To implement the goal of protecting these rights, SEPA requires that for every decision on a major action significantly affecting the quality of the environment, the lead agency must prepare an "environmental impact statement" or "EIS." RCW 43.21C.030; WAC 197-11-400.

2. SEPA's Threshold Determination Process Requires Adequate Information.

The first step of the SEPA process is the "threshold determination." RCW 43.21C.033; EMC§ 20.15A.060 and 130. After evaluating the proposal and identifying the probable adverse impacts, the lead agency must issue a formal decision as to whether the proposal may cause significant adverse environmental impacts. All threshold determinations must be documented in one of two ways: either a determination of non-significance (DNS) or a determination of significance (DS). WAC 197-11-310(5). If the responsible official determines that the proposal will have no significant adverse environmental impacts, the lead agency shall prepare and issue a

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DNS per WAC 197-11-340. *Id*. If the responsible official determines that a proposal may have significant adverse environmental impacts, the lead agency shall prepare and issue a DS. WAC 197-11-360. The question for the threshold determination is whether adverse impacts may be probable—not that they are probable. WAC 197-11-360(1). *See also* WAC 197-11-330(4) ("If . . . the lead agency reasonably believes that a proposal may have a significant adverse impact, an EIS is required.") (emphasis added).

In making threshold determinations, an agency may consider mitigation measures (additional conditions that it can require via its substantive authority) that the agency or applicant will implement. WAC 197-11-350. If the lead agency identifies mitigation measures on an applicant's proposal that would allow it to issue a DNS, and the proposal is clarified, changed, or conditioned to include those measures, the lead agency can issue a "mitigated" DNS (MDNS) per WAC 197-11-350.

The threshold determination is probably the most important single step in the SEPA process. The public policy of SEPA is thwarted if an EIS is not prepared for a project with significant impacts. *Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d 267, 273, 552 P.2d 674 (1976).

When making a threshold determination, the lead agency may determine that the requirements for environmental analysis, protection, and mitigation measures in its regulations provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project. RCW 43.21C.240; WAC 197-11-158. There are three steps that the responsible official must take towards this end: (1) the responsible official must review information about the project, (2) the responsible official must identify the specific probable adverse environmental impacts of the project, and (3) the responsible official must determine whether the

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specific impacts of the proposal have been identified and adequately addressed in the City's development regulations or other policies and laws. WAC 197-11-158. Significant adverse impacts that were identified in step two, but that are not identified or adequately addressed by the code must be addressed in an EIS or otherwise mitigated with issuance of an MDNS.

B. Hydraulic Project Approval

Hydraulic Project Approval (HPA) is required for work in or near state waters. Chapter 77.55 RCW. The purpose of the HPA is to ensure that construction or performance of work is done in a manner that protects fish life. WAC 220-660-010. The HPA addresses the protection of fish and their habitats and is administered by the Washington Department of Fish and Wildlife (WDFW). Accordingly, a complete HPA application must include proof that the project complies with SEPA. Because the project fails to comply with SEPA, as detailed below, the City cannot apply for, nor can WDFW issue an HPA for the proposed project.

C. SEPA Violations

1. The City failed to use the appropriate baseline for its environmental review.

One of the most glaring flaws in the City's environmental review was their failure to utilize the appropriate baseline to assess the impacts of the proposal. A baseline is a term that Washington State Courts have borrowed from National Environmental Policy Act (NEPA) jurisprudence. *Wild Fish Conservancy v. Washington Dept. of Fish and Wildlife*, 198 Wn.2d 846, 869, 502 P.3d 359 (2022). *See also* 42 U.S.C. §4321. It is a practical tool employed to identify the environmental consequences of a proposed agency action. "Without establishing…baseline conditions…there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." *American Rivers v. F.E.R.C.*, 201 F.3d 1186, 1195 n. 15 (9th

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Cir.1999). Washington courts have adopted this tool for SEPA analysis. In *Wild Fish Conservancy,* the state supreme court determined that it is useful to establish a baseline environmental condition to compare the proposal's impact. *Wild Fish Conservancy,* 198 Wn.2d at 869, 502 P.3d 359 (2022). Furthermore, the court held that illegal or unpermitted uses must be rejected as part of the environmental baseline. *Id.* at 871. In *King County v. Friends of Sammamish Valley,* the state supreme court found that the appropriate baseline to compare environmental impacts of the proposed action was the condition of the existing environment rather than the current uses of the land. *King Co. v. Friends of Sammamish Valley,* 3 Wn.3d 793, 556 P.3d 132 (2024).

In this case, City witness and SEPA responsible official Mike Clugston testified that his impacts analysis was based on the erroneous assumption that the baseline was a functional and regularly maintained diversion structure. Clugston Test. (February 13, 2025).[3] Mr. Clugston admitted that he measured the impacts of the proposed action against the very action for which the City is seeking approval—which is currently illegal. It is illegal to remove sediment from the diversion structure and Perrinville Creek bed around the structure without environmental review and a permit. Mr. Clugston did not consider that the existing environment is an unmaintained diversion structure. Mr. Clugston did not consider that the existing environment in this case is a creek that quickly fills the fish-killing diversion structure with sediment and water will flow across

[3] Clugston Test. (Feb. 13, 2025) at 00:10:3–00:11:00.

Audrey Clungeon: And when you conducted your analysis here, you characterized it as maintaining the structure. Did I get that right?

Mike Clugston: That's correct.

Audrey Clungeon: Okay. So when you were reviewing this project, did you consider the baseline for your review to be the functional flow splitter in its existing form?

Mike Clugston: Yes.

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the proximate land toward the Puget Sound. Mr. Clugston did not consider that the existing environment is a clogged structure and restoration of surface flow for lower Perrinville Creek. Mr. Clugston did not consider that a clogged diversion structure and the resulting restoration of surface flow would improve fish passage in Perrinville Creek. While it may take time for the creek to re-establish a channel, the proposed action actively prevents the re-establishment of a surface channel and fish passage.

When presented with the appropriate baseline that does not rely on illegal uses (sediment removal without an HPA) and considers the condition of the existing environment, Mr. Clugston agreed that it might have changed his analysis of the impacts for the threshold determination.

> Audrey Clungeon: So now our hypothetical is sort of the existing condition. So let's say now the hypothetical is we have this sediment and signs that are blocking the weir, so there's no downstream flow at the moment. But we have this diversion structure where it gets plugged up regularly, and if the sediment is not removed from the structure, the water will choose a different path right.
>
> Mike Clugston: Okay.
>
> Audrey Clungeon: Okay. So our baseline now is currently no surface flow, but if the structure is not maintained, the possible restoration of surface flow.
> If you consider that to be the baseline, would that have changed your analysis?
>
> Mike Clugston: Possibly. Yeah.

Clugston Test. (Feb 13, 2025) at 01:13:09–01:14:19.

The City's checklist and environmental review impermissibly included unallowed uses as a baseline condition and so failed to address the full range of probable impacts, both short-term and long-term, of the proposed action as required by WAC 197-11-060(4). The SEPA official's failure to utilize the appropriate baseline—an unmaintained and quickly clogged flow splitter/diversion

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structure and the restoration of surface flow and potential fish passage—requires that the threshold determination be reversed or remanded.

2. The City's threshold determination relied upon improper balancing of the impacts.

The City improperly balanced the good impacts against the bad impacts in reaching its DNS threshold determination. The City record and testimony repeatedly referenced the need to control flooding as the reason for the proposed action, as though that single benefit to two property owners living in a floodplain allows the City to ignore the adverse impacts of the proposal.[4] The project description in the DNS states that "The maintenance is needed to reduce the potential for flooding within the City." Bernhoft Notice of Appeal, Attachment A. This balancing of impacts is explicitly prohibited by law. The code states,

> A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section. For example, proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.

WAC 197-11-330(5). The City's focus on flood mitigation without consideration of the impacts of blocking fish passage and diverting 100% of Perrinville Creek into an inadequately sized, partially clogged, and rapidly deteriorating pipe beneath the railroad tracks is inconsistent with the law and thus, the City's threshold determination should be reversed.

[4] At the hearing, Mr. McLaughlin testified under cross examination that he has never filed a claim for flood damage on his property. McLaughlin Test. (Jan. 30, 2025) at 03:29:10–19.

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3. The City's DNS should be reversed because the SEPA responsible official misunderstood the scope and details of the proposed action.

The lack of information and analysis related to this proposal, detailed further below in Section IV.C.4, resulted in a crucial misunderstanding of the scope of the proposal by the SEPA responsible official. During his testimony, Mr. Clugston revealed that it was his understanding that the HPA would only remove sediment from inside the flow splitter/diverter structure. He was unaware that the HPA would allow the City to remove sediment from the Creek bed. Clugston Test. (Feb. 13, 2025) at 00:19:51–20:19.[5]

During Mr. Clugston's testimony, it became clear that there were numerous knowledge gaps related to the site, history, and proposal which prevented him from adequately considering the impacts of the proposal. For example, he admitted that he does not know how the maintenance of the structure works. Clugston Test. (Feb. 13, 2025) at 00:22:36. He admitted that he was unfamiliar with the details and conditions of the previous HPA. Clugston Test, (Feb. 13, 2025) at 00:23:27–43. He was unaware one of the conditions of the previous HPA was restoration of surface flow to the creek. Clugston Test, (Feb. 13, 2025) at 00:23:48–24:00. He was not aware that there was a surface channel of Perrinville Creek downstream of the flow splitter/diversion structure prior to

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[5] Clugston Test. (Feb. 13, 2025) at 00:19:51–00:20:19

> Audrey Clungeon: You mentioned the sediment removal from the diversion structure, but in this case the project also involves removal of sediment from the stream bed, so that it doesn't enter the diversion structure, correct?
>
> Mike Clugston: I'm not aware of that.
>
> Audrey Clungeon: Okay. So you are not aware of this HPA removing any sediment from the creek bed? It's only from the diversion structure?
>
> Mike Clugston: That was not yeah. That was my understanding.

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December 2020/Jan 2021, Clugston Test. (Feb. 13, 2025) at 35:38–35:59. He was not aware of a blockage of the creek. Clugston Test. (Feb. 13, 2025) at 00:41:57. He was "not aware of past activities on the site, past flooding events or those sorts at all." Clugston Test. (Feb. 13, 2025) at 36:09. He did not know how frequently the City would likely need to remove sediment to keep the diversion structure working. Clugston Test. (Feb. 13, 2025) at 00:59:03–59:30. He has not visited the site nor seen any design drawings or reports related to the proposal—nor did he request any. SEPA is an information gathering statute, and the SEPA official clearly lacked the information to make a threshold determination for this proposal. Accordingly, the City's threshold determination should be reversed or remanded.

4. The City failed to provide, request, or consider adequate information on the environmental impacts of the proposed action.

Throughout the multi-day hearing, it was abundantly clear that the City failed to disclose, request, or consider adequate information on the environmental impacts of the proposed action to make a threshold determination.

For a DNS to withstand judicial review, the record must show prima facie compliance with SEPA's procedural requirements and a sufficient basis for evaluating environmental impacts. The threshold determination must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335; WAC 197-11-330; *Anderson v. Pierce County*, 86 Wn. App. 290, 301, 936 P.2d 432, 438 (1997). *See also Norway Hill Preservation and Protection Ass'n*, 87 Wn.2d at 276; *Spokane County v. E. Wash. Growth Management Hr'gs Bd*., 176 Wn. App. 555, 579, 309 P.3d 673 (2013), *review denied* 179 Wn. 2d 1015, 318 P.3d 279 (2014).

Washington courts have repeatedly articulated what this standard requires:

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> For the MDNS to survive judicial scrutiny, the record must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal's environmental impact.

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123, 126 (2000) (citations omitted). Ultimately, the threshold determination "must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns." *Conservation Nw. v. Okanogan County*, 194 Wn. App. 1034, 2016 WL 3453666, *32 (2016). (unpublished nonbinding authority per GR 14.1). "SEPA seeks to ensure that environmental impacts are considered and that decisions to proceed, even those completed with knowledge of likely adverse environmental impacts, are 'rational and well documented.'" *Columbia Riverkeeper v. Port of Vancouver, USA*, 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192). This information must be adequate to demonstrate that the agency has taken the requisite "hard look" at environmental impacts. *Pub. Util. Dist. No. 1 of Clark County*, 137 Wn. App 150, 158, 151 P.3d 1067 (2007).

For the purpose of deciding whether an EIS is required, the relevant information necessary to assess the project impacts must be specified in an environmental checklist that is prepared and submitted with the application. EMC § 20.15A.120; *see also* EMC § 20.15A.060 (adopting WAC 197-11-315). A threshold determination must ultimately be based on the information that is provided in the environmental checklist and any additional information that is requested by the responsible official. EMC § 20.15A.130; *see also* EMC § 21.15A.060 (adopting WAC 197-11-335). The purpose of the checklist is to ensure that the agency fully discloses and carefully

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considers a proposal's environmental impact before adopting it. *Spokane County,* 176 Wn. App at 579. For that purpose, the information provided in the checklist must be detailed and complete. *Id. See also Conservation Nw,* 2016 WL 3453666 *32 (2016). (unpublished nonbinding authority per GR 14.1). Broad generalizations and rote answers in a checklist are condemned as improper. *Id.*

A threshold determination based on inadequate or incomplete information about a project's impacts violates SEPA requirements and must be reversed and remanded for further review. *Conservation Nw,* 2016 WL 3453666 at *31.

The City failed to meet its duty to comply with SEPA's procedural requirements or provide a sufficient basis for evaluating environmental impacts. Here, the City's environmental review is virtually nonexistent. The record contains no substantive evidence of any meaningful SEPA analysis. Beyond the threshold determination itself, the only SEPA-related document that we are aware of is an inadequate SEPA Checklist—yet that document is missing from the record. In fact, when Appellant's counsel attempted to introduce the SEPA Checklist during the hearing, the City objected to its admission.

The City's SEPA record is astonishingly deficient. There are no requests for additional information, no technical reports or assessments, no maps or diagrams – nothing. It is no surprise, then, that the City's determination is flawed. This utter lack of documentation and analysis is directly contrary to SEPA's core purpose as an informational disclosure statute—it is a blatant violation of law.

The City's SEPA Checklist contained inaccurate, misleading, or rote responses to prompts that demanded far more thorough disclosure and analysis. For example, the proposal was for the maintenance of a diversion structure, yet the checklist claimed the proposal will not require diversions and does not alter or affect drainage patterns in the vicinity. The proposal is located in

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a known salmon bearing stream where an additional 8,000 coho salmon were placed, yet the checklist says there are no salmon present.

When presented with hypotheticals that were similar to the proposed action, the SEPA official found that additional information or analysis would be required.

> Audrey Clungeon: For example, if an applicant wanted to install a diversion structure that would block fish passage, would you request a critical area report?
>
> Mike Clugston: Yes.
>
> Audrey Clungeon: Okay.
>
> Audrey Clungeon: If an applicant wanted to install a diversion structure that entirely blocks fish passage, and the creek was known to have fish in it previously, would you request information about fish presence in habitat?
>
> Mike Clugston: Yes.
>
> Audrey Clungeon: If the project was, if somebody submitted an application for a project to divert the flow of a creek would you request any analysis about the flow diversion?
> …
> If you received an application to divert the flow of a creek, would you request additional analysis from the applicant on the diversion of water? Any sort of hydrological analysis, flow analysis, hydrology, report, something along those lines.
>
> Mike Clugston: Yes.
>
> Audrey Clungeon: Okay.
>
> Audrey Clungeon: If you received an application where somebody wanted to dispose of a large amount of sediment in a tidal area, in tidal habitat, would you request information and details on that?
>
> Jeff Taraday: Objection. Incomplete Hypothetical.
>
> Examiner Olbrechts: Oh, again, I think I'll allow it, I mean, I think, although, Miss Clungeon, I think the presumption in your question right is, they're not supplying the info. That added information that

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> they're just saying we're going to dump a bunch of sediment here without any accompanying description of what impacts that would have correct.
>
> Audrey Clungeon: Correct.
>
> Examiner Olbrechts: Okay. Yeah.
>
> Mike Clugston: Yes.

Clugston Test. (Feb 13, 2025) at 00:07:30–00:10:23.

Members of the public commented on the gross deficiencies in the SEPA Checklist, yet the City took no action to reconsider, revise, or request additional information in response to public comments. Scordino Test.; Ex. B69. With the exception of Mr. DeLilla, the author of the City's inadequate checklist, the City's expert witnesses played no part in the City's SEPA analysis. They did not prepare any reports or materials for Mr. Clugston's review.

a. Soils and Sediment

The City did not assess or collect any information about soil or sediment. The City lacked adequate information to reach a threshold determination. For example, the SEPA Checklist asks which types of soils are found on the site and the City's response was a list of types of soils found across the City. There was no information about soils found on the specific site. No soil samples were requested. Further, the proposal concerns removal and relocation of large amounts of sediment, but there is no analysis about where the sediment will go, potential adverse impacts at the deposition site, how sediment will be transported, nor how the sediment removal will impact the creek, fish, invertebrates, vegetation, beach nourishment, or tidelands. In short, a proposal about sediment removal simply failed to consider or analyze the impacts of removing or disposing of the sediment.

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Audrey Clungeon: But you agree, this project is effectively the removal of sediment from an area, correct?

Mike Clugston: From the diversion structure, correct.

Audrey Clungeon: Okay.

Audrey Clungeon: And there was no soil sampling or analysis or sediment analysis done in this case, correct?

Mike Clugston: Correct.

Audrey Clungeon: And this checklist has no information about where or how the sediment will be deposited, correct?

Mike Clugston: I believe that is correct. As far as the ultimate end location for the sediment.

Mike Clugston: My understanding, and you know I probably could have inquired a little bit about that more, but was because it was cleaning out the existing structure. With, you know, trees and other, you know. Items in there is that they would treat that stormwater clean out just like they would any other clean out and they would take it to the public works depot and manage it from there.

Audrey Clungeon: Okay.

Audrey Clungeon: Okay, so, but you made those assumptions right? We don't have any real details from the checklist. Right?

Mike Clugston: That that's correct.

Clugston Test. (Feb 13, 2025) at 00:16:49–00:18:38.

Audrey Clungeon: Okay, would you agree that decreasing stream sediment deposition in the sound and removing access to fish is a significant impact?

Mike Clugston, City of Edmonds: I don't know that it's a significant impact, but it is an impact.

Audrey Clungeon: Is it an impact where you might request additional information to analyze the impact, or one where you might need additional information to come up with some mitigation measures as part of the DNS? Or in that case, case, an MDNS?

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> Mike Clugston, City of Edmonds: Hypothetically. Yes, that could be possible.
>
> Audrey Clungeon: Okay. I'm asking as the SEPA responsible official–if you received a SEPA checklist that said it was going to decrease sediment deposition into the sound and remove fish access to 300 feet of a of a creek, wouldn't you require additional information or analysis.
>
> Mike Clugston, City of Edmonds: I, likely, yes.

Clugston Test. (Feb. 13, 2025) at 01:00:50–01:02:02.

The City's failure to consider or analyze the impacts of sediment removal is a violation of SEPA.

b. Diversions and Flow

The City's review failed to provide adequate information about the impacts regarding the impacts of diverting surface water and altering natural drainage patterns in the area. Without this critical analysis, the full extent of potential environmental harm remains unknown, making the City's review incomplete and legally deficient under SEPA.

> Audrey Clungeon: Okay. In another section of the of the SEPA checklist, it asks a question about whether the proposal alters or otherwise affects the drainage pattern in the vicinity.
>
> Audrey Clungeon: You're familiar with that section of the checklist?
>
> Mike Clugston: Yep.
>
> …
>
> Audrey Clungeon: If the city didn't obtain an HPA Permit, so they could not remove the sediment from the diversion structure, wouldn't you agree that the path of the creek would be different from a functional diversion structure?
>
> …

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> Mike Clugston: I would agree that it would be different without maintenance.
>
> Audrey Clungeon: Okay, so if we think about the baseline, just hypothetical here—I know this isn't how you analyzed it—but if you were to consider the baseline is no maintenance and a clogged diversion structure, wouldn't you agree that the proposal would alter or otherwise affect the drainage patterns in the vicinity.
>
> Mike Clugston: I would agree with that.
>
> Audrey Clungeon: Okay.
>
> Audrey Clungeon: And this is again hypothetical–if a proposal alters or otherwise affects the drainage patterns of the vicinity of a site, would you, as the SEPA official, request, additional information or analysis on those impacts?
>
> Mike Clugston: Yes, I guess if this request was for something different than maintenance of the existing structure, then I likely would have requested some additional information. About the stream. But in this case, because it was maintenance of the existing structure. That did not seem germane to the proposal.
>
> Audrey Clungeon: And that's because you consider the baseline a functional existing structure?
>
> Mike Clugston: Correct.

Clugston Test. (Feb. 13, 2025) at 00:24:14–29:14. As discussed in Section IV.C.1, Mr. Clugston utilized an improper baseline for his analysis. And when asked to utilize the correct baseline, he concedes that additional information and analysis would be required.

If the City does not receive approval to maintain the diversion structure, experts on both sides agree that the water will likely make its way to the BNSF culvert under the railroad tracks. If sediment builds up at the BNSF culvert because it is undersized, it will be the railroad's responsibility—not the City of Edmonds taxpayers—to remove the sediment or improve the

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culvert (bridge, bottomless culvert, or trestle similar to Lund's Gulch) so that regular sediment removal is not required.

It is unclear why the City refuses to consider the impacts and unnecessary costs of this diversion. Regardless, the utter lack of information or analysis is inconsistent with SEPA.

c. Fish and Fish Habitat

The City lacked adequate information regarding the proposal's impacts on fish presence and habitat. Mr. Scordino testified regarding fish and fish habitat in Perrinville Creek, the inadequacy of the City's review, and recent efforts to increase coho salmon populations in Perrinville Creek. Scordino Test.; Ex. B3 (Scordino Declaration); Ex. B69 (DNS comments). It is undisputed that anadromous fish were present in Perrinville Creek prior to the city's 2021 diversion structure modifications, obstruction[6] of the weir/keyhole/creek bed path, and 100% diversion of the creek into a concrete structure that prevents fish passage. Ex. B97 (Fish Exclusion Memos). In 2023 and 2024, the Edmonds Stream Team and Sound Salmon Solutions placed 4,000 juvenile coho salmon in upper Perrinville Creek. Scordino Test.; Ex. B3 at 4. These salmon will spend their first year in the stream, go out to sea the following year, and are expected to return to Perrinville Creek as adult spawners in 2026 and 2027. *Id.* The Edmonds Stream Team, in cooperation with WDFW, expected that the illegal blockage would have been removed by then. *Id.* Instead, the HPA would allow the City to maintain the fish-killing diversion structure for three years—during the very period these coho salmon are projected to return. Yet there is nothing in the record to suggest the City considered these salmon recovery efforts in Perrinville Creek or how the proposed action would adversely impact these returning fish. In fact, the SEPA checklist failed to consider fish at

[6] Placing sign blanks, piling rocks/sediment against the opening, and failing to remove the obstruction to return surface flow to the lower portion of the creek.

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all. Mr. Scordino stated that he "found the SEPA checklist to be grossly deficient for making any kind of determination, let alone a determination of non-significance." Scordino Test. (Jan. 24, 2024) at 05:07:21.

The SEPA Checklist has a section where the preparer—in this case Mr. DeLilla—must indicate whether fish are present in the project area. WAC 197-11-960. The Checklist failed to identify that fish or salmon are present in the project area. Scordino Test.; Clugston Test. Mr. Clugston asserted that he added a comment[7] that Perrinville Creek is a known anadromous fish bearing stream, but he did not request any additional information regarding fish populations, fish habitat, or fish impacts. Clugston Test. (Feb. 13, 2025) at 00:29:44–31:29. Mr. Clugston was unaware of the placement of 8,000 juvenile coho salmon in the Creek, and thus did not consider it in his analysis. When faced with a hypothetical on this issue, he provided the following testimony:

> Audrey Clungeon: Going to a little bit of a hypothetical–If you were reviewing a project where there was a creek that had fish, had salmon. and you knew about a proposal to release even more additional salmon into this creek.
> And then the proposal sought to install or maintain a structure which would prohibit the return of those 4,000 salmon from the creek, wouldn't you consider that to be a significant impact on fish.
>
> Mike Clugston, City of Edmonds: So let me see if I understand correctly. They're in this hypothetical world. There is no barrier to fish passage currently, and they're installing a new one.
>
> Audrey Clungeon: Sure.
>
> Mike Clugston, City of Edmonds: If that's the case, then whatever the applicable code would be for that new proposal. you know. Obviously an HPA permit would be

[7] The alleged comment by Mr. Clugston about anadromous fish is nowhere in the record for this proceeding.

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> required for that. Critical information would be required as well, for the new structure, yes.

Clugston Test. (Feb 13 2025) at 00:33:19–35:54.

Furthermore, when asked another hypothetical related to blocking and diverting an entire creek, he testified that environmental review would require "a stream report of some sort describing that system, possibly other reports as well, but certainly that would be the place to start." Clugston Test. (Feb. 13, 2025) at 00:42:10–43:31.

d. Pipe, Infrastructure, Transportation, and Safety

The City lacked adequate information regarding the proposal's impacts on pipes, infrastructure, transportation, and safety. The maintenance and functioning of the City-owned DIP must be considered as a part of the City's proposal to continue maintaining and operating its flow splitter. The flow splitter cannot function without the conveyance piping. The City's SEPA determination must consider this as they cannot have one without the other.

i. Hydraulically Deficient Conveyance Piping

There is no disagreement that all conveyance piping under the BNSF railroad tracks are under sized, however there is disagreement on the pipe sizes due to ambiguities between various record documents produced by the City. For instance:

- Some documents call out the pipe size for the BNSF concrete culvert as 30-inch, while other documents call out the pipe size as 32-inch;
- Some documents call out the pipe size between the flow splitter and the Manhole 2-205 (manhole immediately east of the BNSF tracks) as 36-inch, while other documents call it out as 42-inch; and

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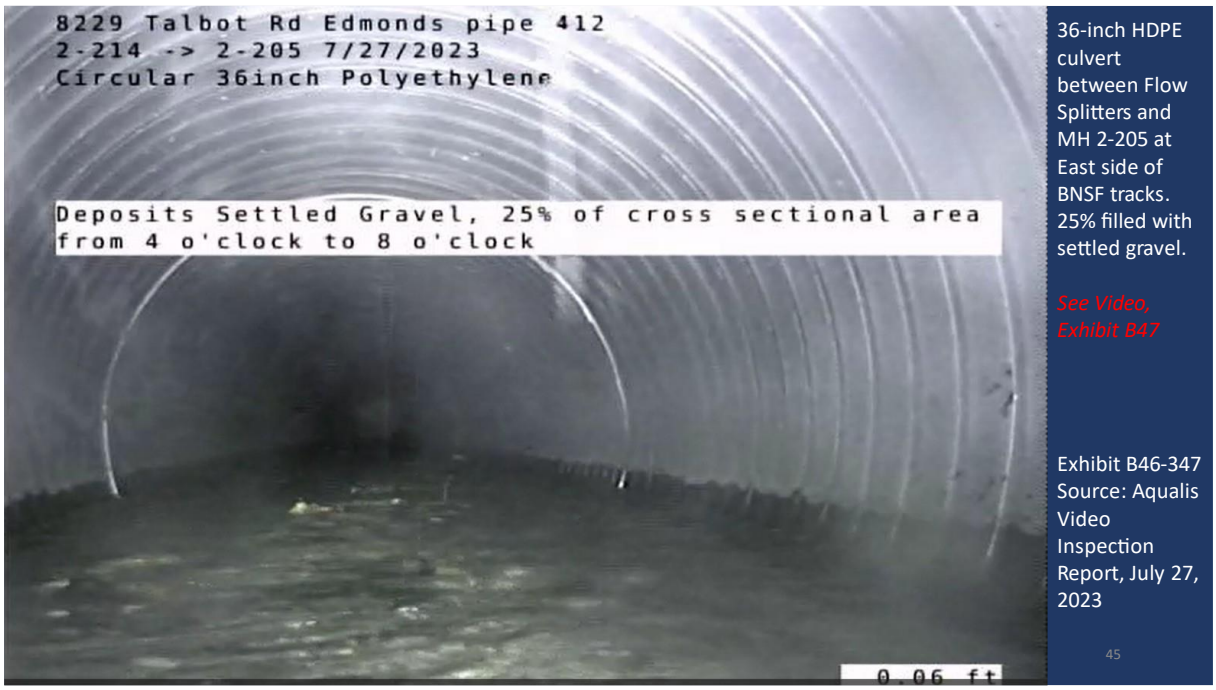
- Some documents call out the pipe size for the City-owned ductile iron pipe under the BNSF railroad tracks as 40-inch, while other documents call out as 42-inch.

The City video inspection calls out the pipe between the flow splitters and Manhole 2-205 as, "Deposits Settled Gravel, 25% of cross sectional area from 4 o'clock to 8 o'clock".



Clip from Exhibit B46, Aqualis video inspection, July 27, 2023. The City has not verified that this gravel has been scoured out by high storms as suggested by Mr. DeLilla.

Mr. DeLilla, without any evidence or foundation, claims that this rock will simply wash away, yet the City has done no follow-up inspections to confirm Mr. DeLilla's hypothesis that the pipe has been self-cleaned.

The City has not even surveyed the DIP's outfall invert elevation as noted in Mr. Lider's rebuttal testimony and shown on Exhibit B15. Without knowing the elevation of the outfall and actual length of the pipe, it is impossible to determine the slope of the pipe to determine its flow

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capacity or if it has sufficient cover under the railroad track ties to provide an adequate factor of safety.

All of this is important because in order to calculate how much flow the conveyance piping can accommodate, it is first necessary to know the pipe diameter and its slope. Neither of which can be determined with any assurance from the documents provided by the City and that are currently in record for this hearing.

Mr. Lider has provided calculations based on the assumptions for a 36-inch pipe that is 25% blocked by sediment. Exhibit B49. The City provided no calculations or testimony contradicting Mr. Lider's calculations, other than vague opinions, that were not substantiated by engineering calculations; nor did the City point out any errors in Mr. Lider's calculations or assumptions. As Mr. Lider pointed out in his testimony, his calculations were the "best case" scenario and did not account for winter high tides that will create a tailwater condition at the outfall further reducing the pipe's flow capacity. Extreme high tides (a.k.a. king tides) are likely during winter storm events, such as the December 2020 storm. High tides during storm or flood events will further decrease pipe flow capacity due to a tailwater condition. Mr. Lider has demonstrated that the City's DIP is undersized and cannot safely convey a 6-month storm event (approximately 1-inch of rainfall in 24 hours). This must be addressed and discussed in any SEPA determination.

Furthermore, there have been no calculations prepared by the City demonstrating that that its pipes can convey the storm sediment and bedload flow safely, without completely clogging the pipe. The City did retain Herrerra Consultants to do a design that would meet the requirements to convey the 100-year storm flow plus bedload for the Talbot Road culvert immediately upstream of the flow splitter. A similar, albeit slightly larger structure is required here.

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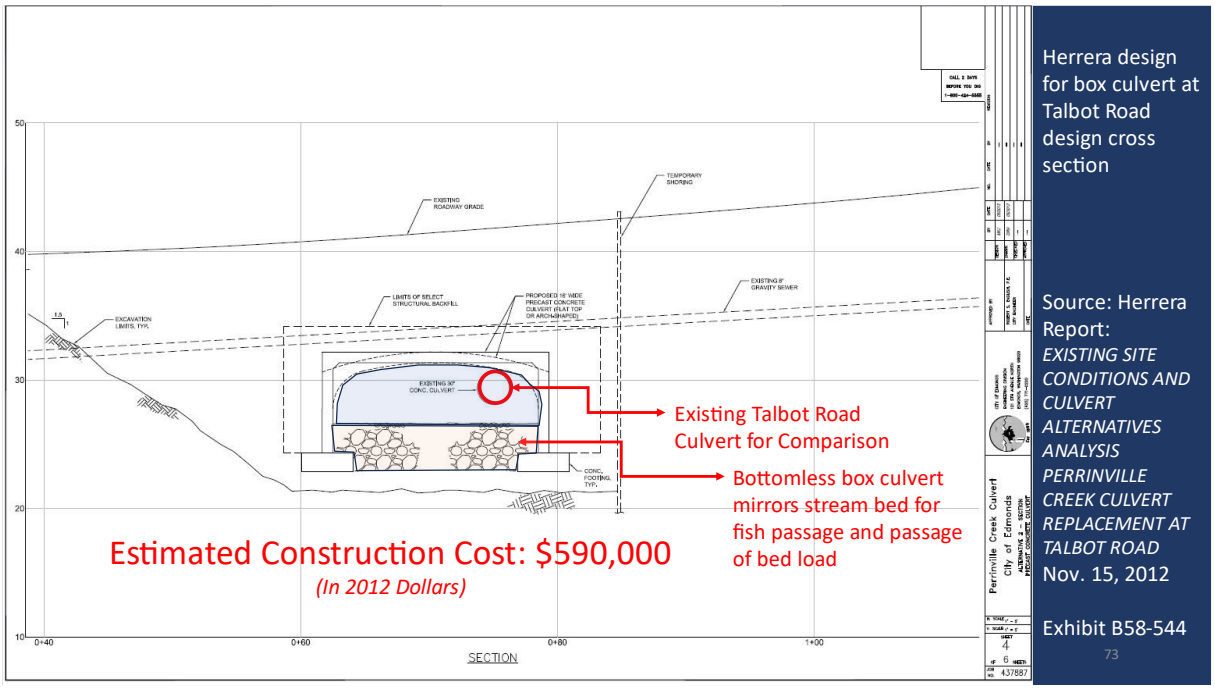

Exhibit B58 (Bates Page No. 544), annotated Herrera design drawing showing a bottomless culvert design proposed for Perrinville Creek at Talbot Road. Because the creek bed at the railroad undercrossing is nearly flat, a larger cross section would be required. The creek undercrossing could by in a bottomless culvert or a trestle similar to the one constructed at Lunds Gulch.

Federal drainage regulation states, "Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned." 49 CFR § 213.33. Clearly, even with both pipes fully functioning under the railroad tracks, the requirements of 49 CFR § 213.33 are not met; yet only one pipe has been functional since 2020. This fact has been conveniently omitted from the DNS decision.

ii. Structurally Deficient DIP Conveyance Piping

Stormwater expert Mr. Lider review of the City's July 2023 video inspection of the City's ductile iron pipe revealed a disturbing, unreported condition when compared to the January 2013 video inspection of the same pipe. A hole large enough to allow ballast rock from the track bed

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above had opened up, and at least two angular rocks that appear to be railroad ballast rock were entering the pipe.

Annotated screen clip from Exhibit B31, July 27, 2023 Aqualis video inspection showing several rocks entering the DIP through a rusted hole in the pipe joint at approximately 93-feet west of Manhole 2-205.

The City seeks to dismiss this significant structural defect as unreportable, using methodology NASSCO-PACP, claiming that because the hole shown above is at a joint. However, the documentation provided by Mr. DeLilla's PowerPoint is clearly intended for evaluating PVC pipe where the spigot end of the PVC pipe has not been properly seated in the bell end of the PVC pipe up to the insertion line during installation. City Exhibit Pipe assessment & Tide gate upstream of High Flow Bypass at slide 2. According to NASSCO's methodology for evaluating PVC pipe, a gap or separation between the spigot end and bell end of the pipe must be greater than the wall thickness of the pipe in order to be classified as a large separation.

The rock entering the DIP is not because of a separation at a joint, rather it is because a hole has rusted completely through the pipe allowing ballast rock from the rail grade above to enter

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the pipe. However, even if rock entering the pipe was due to a pipe separation (which it is not), the hole is still greater than the wall thickness for the highest class DIP at 0.63-inches.

The City and Aqualis were not consistent with its reporting of holes in pipe. For instance, in the Aqualis report, the holes at the end of the pipe that are not structurally significant and are outside of the railroad track load prism, are categorized as S4, or most significant; while there is no mention of the rock entering the pipe within the load prism of the track at 92.14-feet west of MH 2-205. Exhibit B33-241. For whatever reason, both the City and Aqualis failed to report this obvious significant structural defect.

It has now been 589-days (July 27, 2023—March 7, 2025) since the City last inspected the DIP. In that time, the iron pipe has been immersed in saltwater and cycling in air twice a day, or 1,178 times which is the absolute worst case for iron corrosion. The ongoing corrosion and structural decay of the pipe under the BNSF tracks continues to worsen with time. Yet the City sees no urgency to remedy the problem that it has created.

Again, the SEPA determination must include the structural condition of the DIP under the BNSF mainline tracks as a part of its environmental review to keep maintaining and operating its fish-killing flow splitter.

iii. Safety Concerns

The City's SEPA review failed to consider safety impacts in its analysis. In an August 25, 2023 email, City Public Works Director Oscar Antillon stated that:

> Even with a permit, I am reluctant to continue maintenance of the structure, you probably remember this was a concern for me from the start, during our update in Dec I said that if the conditions were too hazardous I was going to pull our crews out. And that is still my plan, if I believe the conditions are too hazardous or unsafe I am not putting my crews there, this is both at the Talbot rd. structure and at the diversion structure.

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Ex. B35 at 1. Mr. Antillon was correct to set policy not to place his maintenance crews in a dangerous situation to maintain the diversion boxes and under sized Talbot Road culvert during flood events, due to the extreme risk to City personnel by injury or even death during a flood. So, when the next major storm event occurs the sediment will not be removed until *after* the flood. In short, the downstream properties will flood during the next major storm event, regardless of any maintenance by the City. Yet the non-functional flow splitters will remain indefinitely as an impediment to fish passage or until there is a major railroad disaster forcing its removal.

The City has no legal obligation to prevent flooding in a FEMA mapped floodplain, on private property, where it does not even have an easement to perform this work, especially since the property owners contributed to the flooding problem by placing fill in the floodplain. There is absolutely nothing in the City's Municipal General Stormwater Permit or its Municipal Separate Storm Sewer System (MS4) under its NPDES permit that require it to continue operating its fish-killing flow structure.

5. The Proposal will have significant adverse impacts requiring a Determination of Significance under SEPA.

Based on the limited available information, it is clear that the project will have significant adverse impacts on the environment. It is apparent that a proposal that would enable a 3-year diversion of an entire creek in a manner that kills fish or prohibits entry to fish habitat is a significant impact under SEPA.

> One things about these fish when they're in a creek, their first behavioral tendency when they run into an obstacle is to try to jump, especially coho, to jump over it and around it, and we've watched in situations where these fish will beat themselves almost to a pulp trying to get past something that they can't. That's what likely would result in their mortality because they have limited time. Once they're entering the creeks, usually within a week or so of entering these lower creeks like we have here along the Puget Sound, they're

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> going to spawn. So their timing is based on getting in the creek and spawning quickly. If they waste all their energy trying to get past an obstacle that they can't get past, either they die or they lose their spawn.

Scordino Test. (Jan 24, 2025) at 05:04:56–06:01.

Mr. Clugston agreed that installation of a diversion structure could have a significant impact on the environment. Clugston Test. (Feb 13, 2025) at 00:05:56–00:06:41.

> Audrey Clungeon: If there was a proposal to basically put debris or any sort of structure or feature in the middle of a creek that would prevent water from moving through an area that water previously ran through, wouldn't you consider that to be blocking the path of the water?
>
> Mike Clugston: Hypothetically. I guess so. In this case, I don't know where the water was going before.
>
> Audrey Clungeon: Gotcha. Okay. But hypothetically, say there was an area where a creek that ran through it, and then some sediment built up, and then the city comes in, and they put things in front of the weir so that the sediment, so that the water can't go through where it previously went, That would be considered blocking the creek, right?
>
> Mike Clugston: I suppose so, yes.

Clugston Test. (Feb 13, 2025) at 00:46:36–47:44.

> Audrey Clungeon: Would you agree that the longer the length of time that this diversion structure is maintained, the greater the impact on, on fish in the creek?
>
> Mike Clugston: I would say, the longer that it's there, the longer that we have impacts to the entire system that we're not getting to….

Clugston Test. (Feb 13, 2025) at 00:50:39–51:10.

Not only will this proposal have significant impacts, but it is also an unnecessary undertaking by the City and its taxpayers. The downstream private properties are the ones responsible for maintaining the creek in their yards and addressing flooding issues. Further, the

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plat documents release the city from all responsibility or claims for damages related to flooding on properties that opted to build homes in a floodplain. Ex. B67 at 17. Edmonds Community Development Code (ECDC) provides that property owners who occupy flood hazard areas assume responsibility for their actions. ECDC 19.07.000.H. It is unclear why the City is so eager to assume responsibility. The City HPA harms the creek, harms the fish, and harms the taxpayers so that two ill-sited properties avoid responsibility.

Additionally, the proposal will delay finding a proper, long-term, and less environmentally damaging solution to restoring Perrinville Creek. The proposal enables the City to kick the can down the road on fixing a problem it created. *See* Ex. B34 ("I don't want to highlight the fact that we created this problem and have struggled to fix it."). During the hearing, the City witnesses tried to argue that there are plans or intentions to restore the creek, but unfortunately, that is not the proposal before us. What is before us is the exact opposite of those goals. The proposed action serves to only delay restoration and fish passage in Perrinville Creek.

V. CONCLUSION

The City's threshold determination was based on an inaccurate baseline, serious misconceptions about the proposal, and inadequate information or analysis. The minimal information we do have related to the proposal demonstrates that it will have significant impacts on the environment. The City's failure to consider, investigate, assess, or mitigate environmental impacts of a proposed action that prevents anadromous fish from entering Perrinville Creek constituted a breach of its responsibility under SEPA. We request that the Examiner reverse the City's SEPA threshold determination of nonsignificance or remand it back to the City.

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Dated this 7th day of March, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned declares and certifies under penalty of perjury under the laws of the State of Washington that a true and correct copy of the Appellants Closing Brief was served as follows:

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Dated this 7th day of March 2025 at Seattle, King County, Washington.

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