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THE HEARING EXAMINER OF THE CITY OF EDMONDS

IN RE:

Robert Bernhoft
DNS Appeal
PLN2024-0020

Findings of Fact, Conclusions of Law and
Final Decision

Overview

The Bernhoft appeal of DNS PLN2024-0020 is sustained in part. The DNS is remanded for the purpose of assessing whether an alleged joint defect in a ductile iron pipe (DIP) underneath a BNSF railroad bed serves as a potential safety hazard that could jeopardize the structural integrity of the railroad line located above the DIP. The remand shall assess whether the defect is at a location that could jeopardize the railroad line and/or whether the defect constitutes a risk of pipe failure or leakage that could undermine the integrity of the railroad lines.

As limited by prehearing rulings, this appeal addressed three alleged impacts caused by the City’s proposed maintenance of the Perrinville Creek overflow structure: (1) alleged catastrophic structural failure of BNSF railroad tracks; (2) alleged adverse impacts to fish spawning; and (3) alleged adverse impacts to sediment deposition at the mouth of the Perrinville River.

As discussed in more detail below, the Appellants have established a small risk of railroad structural failure from the expert testimony of engineer Bill Lider. A remand is required to ensure that the proposed maintenance will not jeopardize railroad safety. Alleged impacts to fish were highly speculative and remote. The Appellants had to establish that without maintenance the overflow structure would clog and that resultant sheet flow across the backyards of some private property owners would serve as an adequate channel for fish spawning. The City’s fish biologist soundly refuted this position. As to sediment

1 deposition, a City geomorphologist and hydrologist established that maintenance would
2 likely result in greater sediment deposition than what would result from a clogged
3 overflow structure. No adverse impacts are associated with this altered sediment
4 deposition.

5 Mr. Bernhoft initiated his appeal with the hopes of challenging all of the City's decision
6 making in its control of the lower reach of Perrinville Creek. He challenged the
7 installation of the overflow device in 1995, the City's diversion of additional flows from
8 outside the creek into the structure, and the City's subsequent actions in using the
9 structure to completely dewater the previously existing lower reach of the creek. As noted
10 in a prehearing ruling, this was a very small tail wagging a very large dog. The only
11 Perrinville Creek action under active decision making is the proposal for maintenance for
12 another three years. As assessed in that proper context, the issues have been limited to
13 the three previously identified issues.

14 On railroad safety this appeal has involved the expert opinions of two highly qualified
15 pipe safety experts who disagree on nearly every pertinent point. The City's expert, Mr.
16 DeLilla, may very well have a greater practice focus on pipe safety than Mr. Lider. Mr.
17 DeLilla also based part of his opinion upon an inspection conducted by a qualified third-
18 party pipe inspection company. However, the company's inspection report didn't
19 recognize a joint defect that on its face appears to be substantial. Figure 1 below shows
20 the defect. The photo shows a hole or joint separation with rocks protruding through the
21 defect¹. Mr. Lider testified that the defect creates a substantial risk of pipe failure where
22 high pressure water could escape through the joint and wash away ballast located over
23 the pipe that serves as the bed for railroad tracks.

24 Mr. DeLilla testified that the report did not identify the joint separation because minor
25 joint separations are harmless and not indicative of any potential pipe failure. Mr.
26 DeLilla's testimony on this point was highly credible. However, it was undermined by
27 the fact that the authors of the inspection report did not testify at the appeal hearing. In
28 this regard, Mr. DeLilla's explanation for the omission of the defect was limited to well-
29 informed conjecture.

30 Mr. DeLilla also identified that the joint defect was located at a place in the pipe that
would not lead to any railroad damage if the joint were breached. Mr. Lider countered
that this opinion was based upon aerial photographs that do not provide accurate
references for measurement. The surveys of the pipe location in the record do not contain
any clear indication of where the defect is located. Mr. DeLilla's testimony also did not
provide sufficient detail to assess its accuracy. The location of the defect as depicted in

¹ It is recognized that a pipe separation may not constitute a fault that could lead to pipe failure. The opening identified in Figure 1 below is characterized as a "defect" in this decision for ease of reference. It is assumed that ideally pipe joints would not exhibit any such separation, even if harmless.

1 Mr. DeLilla's photographic depiction is immediately adjacent to the railroad bed and
2 leaves little room for error.

3 As the parties are well aware, resolution of this appeal depends upon whether proposed
4 maintenance of the City's Perrinville Creek overflow bypass structure will create any
5 probable significant adverse impacts. State Environmental Policy Act (SEPA)
6 regulations provide that severe impacts require less risk to qualify as "probable." The
7 railroad impacts alleged by the Appellant is catastrophic. That is the only reason why the
8 small risk of impact is found sufficient to warrant a remand. The risk is found small
9 because the record only establishes a small chance that Mr. DeLilla's opinion may be
10 incorrect. Mr. DeLilla's career appears to be more focused on pipe safety than Mr. Lider
11 Mr. DeLilla displayed an impressive knowledge about pipe safety at the appeal hearing.
12 His conclusions were corroborated by a third-party inspection. However, Mr. Lider's
13 extensive experience with pipe engineering cannot be discounted. His concerns with the
14 joint defect were high. He had a compelling reason to refute every one of Mr. DeLilla's
15 conclusions pertinent to assessing the safety of the defect.

16 Overall, as framed by Mr. Lider the consequences of being wrong on the defect issue are
17 human lives. The costs of making an iron clad safety assessment are relatively modest in
18 comparison. Upon remand the City likely can provide the detail necessary to establish
19 no probable safety impacts by either establishing that the joint defect is not at a location
20 that could jeopardize the train tracks or that the defect has no probable chance of
21 breaching as opined by Mr. Lider.



22 Figure 1, alleged joint defect of City DIP pipe.

1 **ORAL TESTIMONY**

2 A computer-generated transcript of the hearing has been prepared to provide an overview
3 of the hearing testimony. The transcript is provided for informational purposes only as
4 Appendix A. References to the transcript are made in this decision by transcript page
5 number as “Tr. x.”

6 **EXHIBITS**

7 The exhibits in the City and Appellant witness and exhibit lists as well as the rebuttal
8 witness and exhibit lists are deemed admitted except for the following

9 **Uncontested Findings of Fact**

- 10
- 11 1. Perrinville Creek discharges into Puget Sound along the northern part of the City.
12 The shoreline in that area is also developed with BNSF railroad tracks. The City of
13 Edmonds installed a high-flow bypass to Perrinville Creek at 8229 Talbot Road in
14 approximately 1994 to prevent flooding of downstream properties. The bypass
15 diverted the overflow waters to another point along the Puget Sound shoreline a few
16 hundred feet north of the preexisting discharge point. The discharge points for the
17 bypass and the original creek bed ran underneath the railroad tracks. The original bed
18 ran under the tracks via a 30-inch culvert and the bypass ran under via a 42-inch DIP².
 - 19 2. In December 2020 a storm event resulted in deposition of sediments into the original
20 creek bed downstream from the overflow structure. As a result the creek flows in this
21 area were no longer confined to the original creek bed and resulted in flooding of
22 adjoining private property. Consequently the City has blocked off a weir at the bypass
23 structure that used to enable flows to pass through to the original creek bed. The City
24 also added some cuts into the bypass structure to facilitate creek flows into that
25 structure. Currently, Perrinville Creek now flows entirely into the bypass structure
26 into Puget Sound through the DIP pipe. City Ex. 1 at 6, Ex. B79 and B88. The former
27 creek bed downstream from the bypass structure has been dewatered except for
28 approximately three flood events that have occurred since the December 20, 2020
29 storm event.
 - 30 3. To City has to remove sediment from the bypass structure and creek bed leading up
to the structure to prevent it from getting clogged. The City is required to obtain a
hydraulic permit approval (HPA) every few years to do the maintenance work. The
last HPA authorizing maintenance expired on February 14, 2024. The city has applied
for another HPA permit for another three years of maintenance.

² There are some minor discrepancies in the record on the diameters of the DIP and culvert pipes. Those
discrepancies are not found critical to resolution of this appeal. A more accurate identification of
diameter may be necessary for the remand.

- 1 4. The City issued a DNS for the HPA maintenance application on May 14, 2024.
2 Robert Bernhoft, Appellant, filed an appeal to the DNS on June 3, 2024. The appeal
3 asserts that the City's actions in altering Perrinville Creek waters over the years has
4 resulted in adverse impacts to fish and railroad safety and seeks to have the bypass
5 structure and other culverts and pipes removed and replaced with a creek that enables
6 successful fish passage and spawning.
7 5. Mr. Bernhoft's appeal was initially denied by summary judgment ruling on
8 September 3, 2024 on the basis that maintenance by itself was not attributable to the
9 impacts alleged by Mr. Bernhoft. Upon reconsideration decision dated September
10 26, 2024 Mr. Bernhoft was authorized to pursue three appeal issues as follows:
11
12 (1) alleged adverse impacts to ductile iron (DIP) pipe under railroad tracks;
13 (2) alleged adverse impacts to fish passage downstream from the flow
14 splitter, both the flow-splitter channel and downstream from the flow
15 splitter along the former stream channel; and (3) alleged adverse impacts
16 to sediment deposition at the mouth of the Perrinville River.
17
18 6. The City is working with BNSF, Washinton State Department of Fish and Wildlife
19 (WDFW), some tribes and neighboring property owners to develop a proposal to
20 construct a bridge or box culvert under the BNSF railroad tracks, which would allow
21 the entirety of Perrinville Creek to pass under the tracks and allow fish to pass
22 upstream. BNSF has applied for a grant to get some funding for the project. Tr. 241.
23 The grant is still pending. The City has also entered into a nonbinding Memorandum
24 of Understanding on April 10, 2024 with several property owners along the original
25 creek bed to work on re-opening something along the lines of the original flow path
26 through those properties. See Ex. MOU Lower Perrinville Creek.

Contested Findings of Fact

- 21 7. No Significant Adverse Impacts to Fish. As identified in Conclusion of Law No. 3
22 below, the extent of environmental impacts in this case is dependent upon what
23 baseline of conditions is used to assess impact. Under either the current condition or
24 no action baselines identified in Conclusion of Law No. 3, the proposal will not create
25 any significant adverse impacts to fish.

26 The current condition baseline is the easiest to apply. Under that baseline there would
27 be no water in the natural channel and diversion channel would be unchanged. It is
28 undisputed that under the current condition the diversion path is unpassable to
29 spawning fish. Ironically, the current baseline was best summarized by the
30 Appellant's fish biologist, Paul Scordino:

*...The baseline condition is a changed environment that blocked access
to fish from Puget Sound, as well as washes out juvenile fish into*

1 *saltwater when there may not be the timing for them to be washed out.*
2 *And so starting off with an adverse impact, the baseline is an adverse*
3 *impact, thus this maintenance project is perpetuating an adverse*
4 *environmental impact...*

5 Tr. 95.

6 Mr. Scordino doesn't allege that the maintenance project will make the situation
7 worse. In his own testimony it just perpetuates it. That is to be expected from a
8 project labelled a "maintenance" project, designed to maintain the status quo of
9 continued maintenance. The decision to install the bypass structure and to use it as
10 the sole down reach channel for Perrinville Creek has already been made. The
11 impacts of the current creek configuration quite possibly should have been subject to
12 more environmental review when the bypass was constructed and/or modified to
13 serve as the exclusive down reach channel. However, those aren't the actions subject
14 to this SEPA review.

15 There is nothing in the record to suggest that the proposed three-year maintenance
16 project will result in more adverse impacts to fish than current conditions as
17 characterized by Mr. Scordino already exist. Under the "current conditions" baseline,
18 the project will not create any adverse impacts to fish.

19 The "no action" baseline is more challenging to assess. It is uncontested that without
20 maintenance the bypass structure will clog sometime "much sooner", Tr. 414. than
21 10 years with sediment and that the creek will generally run along its prior course
22 back to the BNSF culvert. The purpose of the maintenance proposal is to prevent the
23 flooding that will occur from this altered (over current conditions) creek course.

24 The difficulties with the "no action" baseline is that the evidence is somewhat
25 debatable as to whether altered creek course would be any more beneficial than
26 current conditions. Substantial evidence establishes that it would not.

27 The key factor in applying the "no action" baseline is whether or not the altered creek
28 course will enable any fish spawning. As previously noted, fish spawning is not
29 possible under current conditions. The parties have differing opinions as to whether
30 fish spawning will be possible if maintenance ceases and the bypass structure is left
to clog and become inoperable. As a primary point, the City maintains that upon
clogging of the bypass structure the downstream portions of the creek will be
composed of sheet flow that is too shallow for fish passage. The Appellant asserts
that eventually the stream will cut a channel that will be conducive to fish habitat and
apparently also create viable habitat for fish spawning.

1 The City position is supported by the history of the dewatered creek bed since the
2 creek was dewatered in 2020. One of the property owners along the dewatered bed,
3 Charles McLaughlin, testified about the stream channel across his property. Mr.
4 McLaughlin owns the last private parcel along the former creek route just upstream
5 from the BNSF culvert. He testified that he's observed three storm events since 2021
6 that resulted in the clogging of the bypass structure. Those incidents resulted in sheet
7 flow across property as well as the other properties downstream from the bypass
8 structure. Tr. 164. A photograph depicting the sheet flow corroborated his testimony.
9 Ex. 6372SD79. The sheet flow was comprised of shallow water flowing across Mr.
McLaughlin's lawn. The creek flows downstream from the bypass structure were
composed entirely of these flows as opposed to any stream flow of greater depth as
would be associated with a stream running in defined channel.

10 Jonathan Ambrose, a city witness and geomorphologist and hydrologist, testified it
11 was unlikely that a stream channel would ever form from the sheet flow. As
12 confirmed by the Appellant's engineer witness, Mr. Lider, the channel prior to 2021
13 was artificial with unnatural 90 degree turns. Tr. 76-77. Mr. Lider testified that
14 adjoining property owners appear to have modified or rerouted the lower 300-feet of
15 Perrinville Creek to have artificial bends around the homes and through the yards. Tr.
16 77, Appellant closing brief p. 7. There is no evidence³ in the record of any well-
17 defined natural stream channel downstream from the bypass structure. Mr. Ambrose
18 identified that Perrinville Creek is considered to be a flashy system, which means it
goes from very low flows to high flows and back down to low flows. 272. He noted
that future channel formation in such systems is difficult to predict, but that for
downstream from the bypass structure a stable channel formation was unlikely:

19 *...it's difficult to predict the rated which and the type of channel formation*
20 *that will occur in these systems and in this location in particular, the*
21 *historical condition is likely an alluvial fan here. And alluvial fans are*
22 *characterized by shifting channel locations over a broad fan of sediment*
23 *deposition. Right. And they tend not to be places where reliable channel*
patterns form.

24 Tr. 274.

25 The Appellants did not provided no compelling evidence that a channel would form
26 anytime in the near future. Mr. Scordino, the Appellant's fish biologist, provided the
27 only evidence on this issue. He is not a geomorphologist and has no training on
28 channel formation. He testified that he believed that a channel would eventually form.

29 ³ Mr. Scordino testified that he could tell where the former channel used to be, but the remnants of this
30 channel have not proved sufficiently defined to channel the sheet flows resulting from the clogging of the
overflow structure.

1 When asked when he expected such a channel to form, his response was “no idea.”
2 Tr. 127-128.

3 It is unfortunate that no one asked Mr. Ambrose whether he believed that a channel
4 could form in the three-year period of the proposed maintenance. Mr. Ambrose’s
5 testimony that it’s unlikely that a channel would form is by itself not sufficient that a
6 channel will not form. However, the City is only proposing maintenance for three
7 years. Under the substantial weight standard of SEPA review, it is reasonable to
8 conclude that the sheet flow identified by Mr. McLaughlin will not result in a channel
9 in three years. Given the absence of any currently defined channel as shown in Ex.
10 6372, the “flashy” nature of Perrinville Creek and Mr. Ambrose’s testimony of the
alluvial fan condition of the downstream, it is too remote and speculative to find that
a channel could ever form in such a short period of time.

11 In coming to the determination above it is important to recognize that this conclusion
12 encompasses cumulative impacts as well. The current condition only arose in 2020
13 when the storm of that year permanently dewatered the lower reach of Perrinville
14 Creek. As testified by Mr. McLaughlin and Mr. Ambrose, the City , BNSF and the
15 Tribes are currently working on an engineered solution to this portion of Perrinville
16 Creek that involves placing a 15-25 foot wide railroad bridge over the creek. Tr 275.
17 These facts suggest that the City will not be making multiple additional maintenance
18 proposals in which time a well defined and passable creek channel could have formed.
19 If that proves not to be the case, the cumulative impacts can be assessed as necessary
20 when additional maintenance extensions are requested.

21 It is recognized that the City is taking responsibility for the current problems with the
22 overflow structure while at the same time avoiding allegations of piecemealing its
23 decision making by noting that its more global efforts are too premature to be
24 considered part of the maintenance proposal. It is a fine line that the City walks but
25 fits well with the periodic review WDFW requires HPA maintenance periods. Other
26 than the MOU with the neighbors, Ex. MOU Lower Perrinville Creek, the City has
27 not in fact undertaken any concrete action that commits it to any formal decision
28 making. The City’s consideration of alternatives is still highly preliminary. Once the
29 City gets to the point of considering the adoption of formal plans or making permit
30 applications for a particular remedy that will be the time as it is for any other
developer to consider the environmental consequences of a proposed action. In the
meantime the periodic nature of HPA review ensures that the City’s temporary
maintenance does not become a permanent status quo.

Resolving whether a channel will form is a prerequisite to assessing the competing
testimony of the City and Applicant fish biologists. Mr. Scordino finds that ceasing
maintenance will result in successful spawning. Mr. Schlenger concludes as follows
with sheet flow as the current condition downstream of the bypass structure:

1
2 *So the existing condition is a sheet flow of water across a backyard. It's a*
3 *flow path, not habitat. I don't think either system sets up well salmon in*
4 *either scenario. So I think in what you're describing is a severely*
5 *compromised existing condition [bypass structure with maintenance] and*
6 *then you're asking about a modified condition [ceasing maintenance] off of*
7 *that. So I don't think there's a significantly adverse change to conditions for*
8 *salmon in those settings, which is unfortunate, which is why the city's trying*
9 *to do so much to get the restoration implemented.*

10 Tr 232.

11 Mr. Schlenger's conclusion above is well-supported by his testimony regarding the
12 consequences of a no action baseline. He testified that fish passage is not possible
13 given the shallow nature of sheet flow. Mr. Schlenger noted that fish would have to
14 swim upright to propel themselves across the shallow depths of sheet water and that
15 they wouldn't have the energy to do that across the approximate 200 foot sheet flow
16 to get to the creek channel located at the bypass structure. Tr 222-23. He noted that
17 WDFW standards provide that one-foot depth is necessary for fish passage. Tr. 223.
18 Mr. Schlenger noted that flooding of the lower reach could occur when creek waters
19 back up from the BNSF culvert. Under those circumstances during high tides fish
20 could potentially get through the BNSF culvert and migrate up to the creek bed and
21 pool at the bypass structure. Tr. 223-226. Mr. Schlenger noted that storms necessary
22 to provide this hydrology happen less than yearly and that it would last just for hours
23 or a small number of days, "*which is only a small fraction of the time in which salmon*
24 *returned to their spawning grounds.*" Tr. 226. Mr. Schlenger noted that WDFW
25 classifies the Talbot Road crossing as impassable for fish. Tr 215. The Talbot Road
26 crossing therefore, serves as the upper limit for what any fish who succeeded in
27 migrating the sheet flow could attain.

28 Mr. Schlenger testified that the creek reach between the Talbot Road crossing pool
29 and the bypass structure could serve as spawning grounds. Tr. 227. He testified that
30 the sheet flow areas do not provide such habitat Tr. 151. However, the small pool
size and armoring along the downstream portions of the creek from the pool limited
the potential for successful spawning. Further, creek storm events with the creek's
high sediment deliveries had a high potential for either washing away eggs or burying
them in sediment. Tr. 227. Finally, Mr. Schlenger also identified that the BNSF
culvert area served as a partial fish barrier because fish traversing the upstream side
of the culvert had to jump a slope exceeding 3.3 feet in height. Tr. 215. Due to these
types of factors Mr. Schlenger concluded that the chances of any offspring production
from fish spawning was very low to zero. Tr. 262.

1 The number of anadromous fish expected to successfully spawn in the creek is further
2 diminished by the fact that there are few if no fish that would be biologically
3 programmed to return to the creek. As testified by Mr. Schlenger, anadromous fish
4 instinctually return to the grounds from which they were hatched to spawn. Mr.
5 Schlenger noted that a small percentage end up in other spawning grounds, but most
6 fish return from where they were hatched. He noted that since the lower creek was
dewatered by the 2021 storm it's possible that no fish currently in Puget Sound are
programmed to return. Tr 232-233.

7 The issue of returning fish also implicates the issue of spawning fish dying as they
8 attempt to migrate up the bypass structure. Mr. Scordino testified that any fish
9 attempting that would be killed. It's unclear how many of those fish would be killed
10 in comparison if they tried to traverse the sheet flow of the creek course created under
11 the no action baseline. Mr. Schlenger's testimony on returning fish shows that the
number of returning fish would likely be nominal.

12 Overall, Mr. Schlenger's testimony is highly compelling as it is consistent with what
13 one would expect for such a "flashy" creek system operating over a relatively short
14 three year period. Mr. Scordino certainly painted a compelling portrait of some
15 successful fish spawning with a healthy natural Perrinville Creek located below the
16 bypass structure. That is not the current or no action baseline condition of the creek.
17 Mr. Schlenger's testimony established that the chances of any improvement in fish
18 conditions if the maintenance application is denied is highly remote. For these
reasons, continued maintenance of the bypass structure for an additional three years
is not found to create any probable significant adverse impacts to fish.

19 Related to the impact of preventing spawning, it is also uncontested that the overflow
20 structure will kill any fish attempting to pass through it upstream. Mr. Schlenger
21 testified there likely are no fish currently in Puget Sound that are programmed to come
22 back up the overflow channel to spawn. Tr 232-233. It appears Mr. Schlenger was
23 limiting his response to fish that were hatched from fish that had spawned in the river.
24 Mr. Scordino testified that the Edmonds Stream Team and Sound Salmon Solutions
25 had introduced 4,000 coho salmon into the upper reaches of the creek in 2023, 2024
26 and he expects to do so again in April of 2025. Tr. 96-97. He testified that these fish
27 will go out to sea about a year after introduction and try to return two years later.
Consequently it does appear that some fish will be attempting to spawn by going up
the overflow channel and will get killed in the process.

28 Under the existing baseline the mortality of the fish will not change as a result of the
29 project. Under the no action alternative, as discussed above the sheet flow created by
30 the proposal is not hospitable to fish survival either. As testified by Mr. Schlenger,
the conditions necessary for a fish to even make it to the sheet flow will be

1 exceeding rare, lasting only a few hours or days during a storm event occurring
2 under “perfect storm” conditions. Tr. 224. Giving substantial weight to the
3 determination of the SEPA responsible official, it is determined that fish mortality
4 will not significantly differ from going up the overflow channel, if returning fish even
try to go up the sheet flow pathway and don’t decide to simply return to sea.

5 8. The proposal will result in No Probable Significant Impacts in Sediment Deposition.
6 The proposal will not significantly reduce the amount of sediment deposition in Puget
7 Sound. Mr. Ambrose provided the most detailed and compelling testimony on this
8 issue because his credentials as a geomorphologist and hydrogeologist make him the
9 most qualified of all the witnesses to address the subject. Mr. Ambrose testified that
10 continued maintenance would result in more sediment deposition to the Puget Sound
11 shoreline than the no action alternative. This is because in his opinion the DIP pipe
12 has a much larger diameter and associated carrying capacity than the BNSF culvert.
13 Due to the limited BNSF conveyance capacity, the no action alternative would likely
14 result in impoundment of sediment on the upstream side of the pipe. He noted that
15 the stream doesn’t have the energy to move all the sediment to the shoreline. Tr 277-
16 278. He noted that even though City staff remove sediment from the bypass structure,
17 in the absence of that removal sediment would continue to accrue at that site due to
18 the bend in the creek at that location. Tr. 295.

19 The Appellant asserts that the impacts of sediment removal from the creek have not
20 been adequately studied. However, they identify no impacts that result from the
21 sediment removal and relocation. As determined above, the proposal will not result
22 in any material decrease in sediment deposition. Given the absence of any potential
23 for adverse impacts discernable from the record related to sediment removal, there is
24 not basis to find that additional environmental review was necessary.

25 9. Minor Risk of Railroad Track Failure. The proposal is found to create a minor risk
26 of catastrophic impact to the BNSF railroad line due to a potential joint defect in the
27 DIP pipe underlying the railroad tracks. This finding is based upon the conflicting
28 opinions of two highly qualified experts on pipe safety.

29 The Appellant claims that the DIP pipe is not of sufficient size to handle the water
30 pressure and volumes that the pipe must accommodate to discharge Perrinville Creek
into Puget Sound. Mr. Lider, the Appellants’ engineer, has presented engineering
calculations to argue that the pipe is undersized for this purpose. He is particularly
concerned with a hole 93 feet into the pipe that has several rocks jutting into it. Mr.
Lider claims the rocks are from railroad bed ballast located on top of the DIP pipe.
Mr. Lider testified that pressurized water going through the pipe could wash away the
ballast overlaying the pipe and thereby cause catastrophic damage to the railroad
tracks on top of the ballast. Tr. 41.

1 The City’s expert pipe witness, Mr. DeLilla, disagrees strongly with Mr. Lider’s
2 conclusions on pipe safety. Mr. DeLilla is a civil engineer and the senior utilities
3 engineer with the City of Edmonds. He has been responsible for numerous utility
4 pipe design projects since he became licensed as a professional engineer in 1998. His
5 projects include serving as the lead designer for Alta Storm Pipe designs for I-405
6 and northeast eighth in Bellevue all the way to S.E. 8th, which involved a significant
7 amount of creek culvert work. Tr. 296. His most recent work prior to Edmonds in
2010 was to serve as a reviewer for Seattle Public Utilities. In that role he reviewed
pipe condition and made recommendations for addressing deficiencies.

8 Mr. DeLilla has found the DIP to be in a safe condition since he had it inspected by a
9 third-party contractor to ensure that it meets national pipe safety standards. In 2014
10 Mr. DeLilla lead the effort in Edmonds to adopt pipe safety standards adopted by the
11 National Association of Sewer Service Companies (NASCO). Tr. 298. NASCO has
12 adopted the pipe assessment certification program (PACP). PACP is a certification
13 program that standardizes the assessment of pipe defects so that pipes can be assessed
14 objectively and uniformly throughout the United States and Canada. Tr. 297.

15 Mr. DeLilla hired Aqualis, a pipe inspection company, to apply the NASCO standards
16 to the DIP in 2023. Aqualis did an interior inspection of the pipe identifying pipe
17 defects by distance from the east end of the pipe. Only two faults were found by
18 Aqualis. Those two faults were located at the western end of the pipe at 113.4 and
168, well away from the railroad tracks and underlying railroad bed. The defect
identified by Mr. Lider at 93 feet is not recognized in the Aqualis inspection report.
Ex. Pipe 411.

19 Mr. DeLilla testified that Aqualis did not annotate the 93 joint defect as a fault because
20 it didn’t meet the PACP criteria for a pipe fault. He noted that separation at a pipe
21 joint is often not a cause for concern because limited separation at pipe joints does
22 not affect pipe safety. He identified that PACP standards only recognize separation
23 as a fault if you can see through to the other side of the pipe from the inside and that
24 the separation must involve the entire circumference of the pipe. Tr. 417. He
25 identified that according to PACP standards for joint separation, a joint also only
26 qualifies as a fault if the separation is more than the thickness of the pipe wall. Ex.
Pipe Assessment ppt, Slide 3; Tr. 393. Mr. DeLilla found the separation to be “way
less” than that standard. Tr. 393.

27 A factual issue that has been particularly difficult to unravel in this proceeding is the
28 City’s contention that the 93 alleged joint defect is not located underneath the railroad
29 bed and thus would not cause track damage even if it did fail. The City’s makes that
30 assertion in its witness and exhibit list on behalf of Mr. DeLilla. However, it’s very
unclear whether Mr. Dellia actually testified to this effect during the appeal hearing.
The City’s written closing asserts that Mr. DeLilla compared the stationing data from

1 the aquilas inspection report and as-built drawings for the DIP manhole to determine
2 the location of the joint defect in relation to the railroad bed. The closing brief
3 references the 00:13:05.580 timestamp mark of the zoom transcripts as support for
4 this statement. Mr. DeLilla actually makes no mention of the location of the joint
5 defect in relation to the railroad bed at 00:13:05.580 or apparently anywhere else in
6 his testimony. The closest that he arguable does address the issue is in response to a
7 question from Mr. Taraday, as follows from the Zoom transcript:

8 *00:22:24.350 --> 00:22:32.560*

9 *Jeff Taraday: I mean all all of the the holes that we've been talking about are*
10 *well beyond the the railroad ballast area, right.*

11 *132*

12 *00:22:33.960 --> 00:22:36.370*

13 *Michele (Mike) De Lilla, PE: Yeah, definitely beyond that.*

14 The problem with the above testimony is that it's unclear if the "holes" to which Mr.
15 Taraday refers includes the joint defect. Mr. DeLilla could well not have considered
16 the separation at the pipe joint to be a hole. As testified by Mr. DeLilla regarding the
17 rocks jutting into the joint defect, "*for all we know, these could be wedged in mainly*
18 *because this could be a bell and spigot pipe.*" Tr. 305. In point of fact, all of the
19 testimony immediately before and after the quoted response above was about the
20 holes recognized as faults in the Aqualis report located at the western end of the pipe.
21 Given this context it's highly questionable whether Mr. DeLilla was including the
22 joint defect in this quoted response or that he ever addressed its location in relation to
23 the railroad bed anywhere in his testimony.

24 Although Mr. DeLilla may not have addressed the joint defect location issue in his
25 testimony, it was identified in his "pipe assessment" PowerPoint exhibit. Slide 13 of
26 that exhibit shows the 93-foot joint defect location as situated just outside of the
27 railroad bed.

28 As previously noted, Mr. Lider disagrees with all the pertinent conclusions made by
29 Mr. DeLilla regarding the safety impacts of the joint defect. Mr. Lider, like Mr.
30 DeLilla, has extensive experience dealing with pipe engineering. Mr. Lider has been
a professional engineer for over 40 years and a great part of his practice is focused
upon stormwater facilities. He has designed 36-inch sanitary sewer ductile iron pipe
under BNSF railroad tracks in the City of Vancouver and provided consultant services
on other BNSF railroad projects.

Mr. Lider testified that the joint defect should have been identified as a pipe fault in
the Aqualis investigation report. He claims that Aqualis "obviously" missed the joint
defect in its investigation. Tr. 435. He testified that rocks embedded in the joint
defect are railroad ballast rocks from the overlaying railroad bed. He found these

1 rocks to exhibit a significant defect. Tr. 430-431. Mr. Lider opined that the aerial
2 photograph depicting the location of the “pipe assessment” exhibit cannot be relied
3 upon to accurately set distances because of parallax. Tr. 434. He noted that from his
4 observations the joint defect isn’t associated with a joint but rather is a hole caused
5 by thinning metal that had rusted out. Id. He also asserted that the PACP joint
6 standards relied upon by Mr. DeLilla don’t apply to ductile iron pipes but rather are
7 designed to address PVC pipe joints. Tr 430. He identified that separation in PVC
8 piping can be expected due to the manner in which pipe segments are connected by
9 “push on” joints but that ductile iron pipes are welded together thereby eliminating a
10 chance for separation. Id.

11 Mr. DeLilla has reasonably relied upon the work of Aqualis to conclude that the DIP
12 pipe is safe. However, the absence of someone from Aqualis to answer questions and
13 defend the inspection are problematical given Mr. Lider’s opinion that Aqualis
14 “obviously” missed the joint defect and that NASCO joint standards don’t apply well
15 to ductile iron pipe joints. Confirmation from Aqualis that the omission of the joint
16 defect was intentional and consistent with NASCO standards would have been very
17 helpful in verifying the accuracy of the inspection. Without that confirmation the
18 record just leaves Mr. DeLilla’s speculation (albeit well-informed) that the omission
19 was intentional and based upon a finding of no fault in the separation. Given the
20 uncertainties of the Aqualis inspection the risk of failure at the joint defect cannot be
21 ruled out as de minimis.

22 Uncertainties in the location of the joint defect in relation to the railroad bed are also
23 problematical. As outlined above, the only evidence that the joint defect is located
24 outside the railroad bed is an aerial photograph showing the location of the joint defect
25 as immediately adjacent to the railroad bed. Mr. Lider doesn’t offer an opinion that
26 the defect is located under the bed. He limits his testimony to asserting that the
27 location of the defect is “difficult” to ascertain without running a tape to the defect
28 location. As previously noted, he questioned the accuracy of the location because it
29 was based upon an aerial photograph. Unfortunately, the location as depicted in he
30 aerial photograph doesn’t leave much room for error. The defect appears to be
immediately adjacent to the railroad bed. Given the absence of testimony from Mr.
DeLilla as to how he derived the location, the proximity of the depicted location to
the railroad bed and Mr. Lider’s testimony on parallax issues, it must also be
concluded that there is a greater than de minimis chance that the defect is located
underneath the railroad bed.

Conclusions of Law

1. Authority of Hearing Examiner. The Examiner has jurisdiction over the subject
appeal. ECDC 20.15A.240C authorizes the Director of Community Services to file

1 appeals of threshold determinations with the City’s Hearing Examiner for consideration
2 of the appeal and a final decision.

3 2. SEPA Appeal Review Criteria. The primary criteria for assessing the validity of
4 the SEPA threshold under appeal is whether the proposal has a probable significant
5 environmental impact. See WAC 197-11-330(1)(b). WAC 197-11-782 defines
6 “probable” as follows:

7 *‘Probable’ means likely or reasonably likely to occur, as in ‘a reasonable*
8 *probability of more than a moderate effect on the quality of the environment’*
9 *(see WAC 197-11-794). Probable is used to distinguish likely impacts from*
10 *those that merely have a possibility of occurring, but are remote or*
11 *speculative. This is not meant as a strict statistical probability test.*

12 If such impacts are created, conditions will have to be added to the DNS to reduce impacts
13 so there are no probable significant adverse environmental impacts. In the alternative, an
14 environmental impact statement would be required for the project. In assessing the
15 validity of a DNS, the determination made by the City’s SEPA responsible official shall
16 be entitled to substantial weight. WAC 197-11-680(3)(a)(viii).

17 Section C4 of the Appellant’s closing brief suggests that the City had to establish a
18 sufficient level of SEPA review prior to issuance of a threshold determination. Based
19 upon that apparent presumption the closing brief focuses extensively upon testimony
20 from the SEPA responsible official, Mr. Clugston, about what information he assessed to
21 make his threshold determination. Mr. Clugston’s thought process for his SEPA
22 threshold determination is not found to be highly pertinent to whether the proposal creates
23 probable significant adverse impacts. The entire record must be assessed to determine
24 whether such impacts occurred. That record includes the information presented in the
25 appeal hearing.

26 As noted in Section C4, the record “*must indicate that the agency has taken a searching,*
27 *realistic look at the potential hazards and, with reasoned thought and analysis, candidly*
28 *and methodically addressed those concerns.”* *Conservation Nw. v. Okanogan Cnty.*, 2016
29 WL 3453666 at 31 (June 16, 2016) (quoting *Found. on Econ. Trends v. Weinberger*, 610
30 F. Supp. 829, 841 (D.D.C May 31, 1985)). However, cases such as *Conservation Nw* do
not stand for the proposition that those impacts can only be addressed prior to issuance
of a threshold determination. The lead SEPA agency in *Conservation Nw* argued that
certain impacts did not have to be assessed at all and the court disagreed.

Cases such as *Conservation Nw* are distinguishable from this case, where all impacts the
Appellants allege should be assessed ultimately have been addressed during this
administrative appeal review, if not prior to issuance of a threshold determination. The
standard for SEPA review is the clearly erroneous standard in light of the entire record:

1 “[r]ather, we review the entire record and determine whether, based on the entirety of
2 the evidence, we are ‘left with the definite and firm conviction that a mistake has been
3 committed.’” *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d
4 846, 866, 502 P.3d 359 (2022), citing *PT Air Watchers*, 179 Wn.2d 919, 926 (emphasis
5 added). This standard is applied to the whole City review process, which includes the
6 appeal hearing.

6 Supporting the position that the “entire record” includes the appeal is *Moss v. City of*
7 *Bellingham*, 109 Wn. App. 6, 15, 31 P.3d 703 (2001). In that case the court found that a
8 DNS had been issued prematurely before all SEPA mitigation measures had been
9 imposed. The court still found no deficiency in SEPA review because all impacts had
10 been thoroughly addressed during the SEPA review process:

10 *it is difficult to see how the appellants were prejudiced.... the record*
11 *indicates that the project received a considerable degree of scrutiny. ...*
12 *While all of the required mitigation measures should have been imposed*
13 *before the DNS was issued, the appellants still have not shown that the*
14 *approved project, as it was mitigated, remains above the significance*
15 *threshold.*

15 *Moss*, 109 Wn. App. At 25.

16 In this case all of the Appellant’s alleged appeal issues have been thoroughly assessed
17 either by the SEPA responsible official during the threshold determination process or in
18 the course of this SEPA appeal. Mr. Clugston, the City’s SEPA responsible official,
19 listened to the appeal hearing testimony and from that testimony still concluded that a
20 DNS was warranted for the proposal. Tr. 344. Given the record developed through the
21 SEPA appeal and considered by Mr. Clugston, it is concluded that Mr. Clugston has taken
22 a “*searching, realistic look at the potential hazards and, with reasoned thought and*
23 *analysis, candidly and methodically addressed those concerns.*”

23 3. Baseline. The most challenging legal issue of this appeal is what baseline should be
24 used for assessment of environmental impacts. The parties agree in principle on what in
25 general defines a baseline but disagree as to how the baselines should be defined for this
26 proposal. There are very compelling arguments for either interpretation and it’s very
27 difficult to speculate as to which position would prevail in a judicial appeal. Given the
28 parameters of current case law its fairly clear that one of the two parties is correct (as
29 opposed to some alternative third theory). Ultimately, however, under either baseline the
30 facts of this appeal lead to the same result, specifically that the only probable significant
impacts of the project are potential collapse of the DIP pipe.

1 Appellant’s closing brief provides a good overview on the role of a baseline in
2 environmental review. A baseline is a term that Washington State Courts have borrowed
3 from National Environmental Policy Act (NEPA) jurisprudence. *Wild Fish Conservancy*
4 *v. Washington Dept. of Fish and Wildlife*, 198 Wn.2d 846, 869, 502 P.3d 359 (2022). See
5 also 42 U.S.C. §4321. It is a practical tool employed to identify the environmental
6 consequences of a proposed agency action. “Without establishing...baseline
7 conditions...there is simply no way to determine what effect [an action] will have on the
8 environment and, consequently, no way to comply with NEPA.” *American Rivers v.*
9 *F.E.R.C.*, 201 F.3d 1186, 1195 n. 15 (9th Cir.1999). Washington courts have adopted this
10 tool for SEPA analysis. In *Wild Fish Conservancy*, the state supreme court determined
11 that it is useful to establish a baseline environmental condition to compare the proposal’s
12 impact. *Wild Fish Conservancy*, 198 Wn.2d at 869, 502 P.3d 359 (2022).

10 The parties agree that the most current Washington baseline decision sets the baseline
11 standard for this proceeding, specifically that the appropriate baseline to compare
12 environmental impacts of the proposed action was the condition of the existing
13 environment rather than the current uses of the land. *King Co. v. Friends of Sammamish*
14 *Valley*, 3 Wn.3d 793, 556 P.3d 132 (2024).

14 The parties diverge as to how the current condition of the land should be described. The
15 City defines the current condition as the entirety of Perrinville Creek flowing through the
16 City bypass except in rare high storm events. The Appellants define it as a nonfunctional
17 bypass structure that will eventually become fully clogged with creek waters returning to
18 the general area of their former outlet into Puget Sound.

18 The City position is supported by the most directly applicable case law, specifically the
19 *Wild Fish Conservancy* and *Friends of Sammamish Valley* cases that it uses to define the
20 parameters of establishing a baseline. The City’s position is the most directly supported
21 because the City’s baseline most correctly reflects current conditions of the land.
22 Perrinville Creek currently runs through the City’s bypass structure. None of it runs
23 through its old natural course except in rare storm events. In contrast, the Appellants
24 baseline is based upon some future events changing baseline conditions. Specifically, for
25 the Appellants’ baseline to apply there will have to be some storm events to clog the
26 bypass structure and the City will have to refrain from unclogging it with their proposed
27 maintenance activities.

26 The City correctly characterizes the Appellant’s baseline as similar to the “no action”
27 baseline that was rejected in the *Wild Fish Conservancy* case. The Appellant’s baseline
28 can be characterized as a “no action” baseline because it depends upon the consequences
29 that will arise if the City doesn’t continue to maintain its flow diverter. In the *Wild Fish*
30 case, the permit applicant ran Atlantic salmon farming operations in the Puget Sound over
the previous 30 years. After the state legislature enacted a statute prohibiting the state
from issuing new aquatic land leases for nonnative aquaculture (thus prohibiting the

1 farming of nonnative fish in Washington waters after the current leases expire), the permit
2 applicant submitted an aquaculture permit to the Washington Department of Fish and
3 Wildlife to transition his net-pen operations to native steelhead trout. This change
4 necessitated SEPA review. WDFW issued an MDNS determination for the cultivation
5 of steelhead trout based in part on the existing salmon farming that had operated for the
past several decades.

6 Opponents of the project appealed the MDNS, arguing that WDFW erred by not
7 establishing a “no action” baseline in which the historical salmon farming could not be
8 included. The opponents argued that the past farming could not be included because: (1)
9 the permit applicant only held valid leases for salmon farming in some of his pens, (2)
10 the new statute would phase out salmon farming after the expiration of the lease, and (3)
11 as a practical matter, Cooke could not continue farming salmon past his 2020 harvest.
12 198 Wn.2d at 867-868. The Court disagreed, holding that “*nothing in SEPA’s statute,*
13 *regulations, or cases requires a ‘no action’ baseline analysis in arriving at a threshold*
14 *determination.*” 198 Wn.2d at 871-872. Instead, the Court held that WDFW did not err
15 in looking to the condition of the existing environment in making its MDNS
determination, holding that WDFW’s threshold determination “was not clearly erroneous
when it compared the impacts of steelhead farming to the current, existing condition of
the environment of Puget Sound, which has been subject to commercial salmonid farming
for over three decades.” *Id.*

16 In short, the *Wild Fish* court prohibited the opponents from framing the baseline as to
17 how it would be in the future after years of no fish farming. The baseline was the current
18 condition, which had been altered by 30 years of fish farming. Similarly for this appeal,
19 the Appellants rely upon future conditions resulting from no maintenance activities. The
20 City takes the correct approach by relying upon existing conditions that result from years
of bypass maintenance.

21 Although not labelled as such, a similar “no action” baseline was also rejected in the
22 *Friends of Sammamish Valley* case. That case addressed the SEPA review of some
23 amendments to an ordinance regulating winery, brewery and distillery (WBD) operations
24 in the Sammamish Valley. The amendments were designed to enhance existing
25 regulations designed to prevent WBD nuisances. The SEPA responsible official found
26 no probable significant impacts by comparing WBD development under existing WBD
27 regulations with those proposed. In this regard he was essentially employing a no action
28 baseline as well. The no action under his analysis was comparing what would happen in
29 the future with the proposed amendment as opposed to what would happen with the
amendments. Since the amendments were designed to reduce nuisances, of course, the
impacts resulting from such an analysis would be positive.

30 The *Friends* court rejected the County’s baseline, holding that the baseline had to be the
existing condition of the land verses the future development of the land if the amendment

1 wasn't adopted. Using that standard as a baseline, the impacts of the proposed
2 amendments would be what could be developed under those amendments in the future
3 compared to what was currently developed:

4 *We agree that the Board made the proper comparison between the Ordinance*
5 *and the baseline condition of the environment within this rural and*
6 *agricultural zone. The Ordinance allows much of the agricultural and rural*
7 *land in Sammamish Valley and elsewhere in King County to serve as*
8 *semiretail event space, potentially impacting the environment. While some*
9 *businesses already exist and impact the condition of the land, under the*
10 *Ordinance, more structures will be built, land will be paved, and water usage*
11 *and sewage will inevitably increase, all having a very likely impact on the*
12 *condition of the land and a negative impact on the environment. Since under*
13 *the GMA conservation and enhancement of agriculturally designated land is*
14 *required, and this land is agricultural and rural, the proper baseline to*
15 *consider is that land designation or condition because such a designation*
16 *controls the planning decisions.*

17 *Friends*, 556 P.3d 132, 147-48.

18 In short, the *Friends* court required the baseline to be the current development of the land
19 as opposed to how it would develop under the ordinance in place. Similarly, the City
20 approach is correct because it is based upon the current condition of the land as opposed
21 to how it will change in response to no maintenance.

22 Both *Friends* and *Wild Fish* rejected the idea of framing the baseline as what would
23 happen in the future if not action is taken, i.e. future development under the currently
24 existing WBD ordinance in *Friends* and finfish impacts if the fish pens were no longer
25 used in *Wild Fish*. As the courts noted in both cases, it is the current condition of the
26 environment that is dispositive, not how the environment may be affected in the face of
27 no action, i.e no change to the baseline by the applicant.

28 Under the *Friends* and *Wild Fish* cases as framed above, the Appellants' baseline is not
29 supportable. The Appellant is using a baseline based upon what will happen in the future
30 if the City doesn't act, i.e. doesn't continue to maintain the bypass structure. Under
Friends and *Wild Fish* the Appellant cannot rely upon the future consequences of failure
to maintain, it must use the current condition of the environment. The current condition
is a functioning bypass structure in which Perrinville is no longer using its natural course.

The alleged illegality of some previous City actions in creating the current baseline is also
irrelevant to the setting of the baseline. The Appellant's closing argument asserts that the
Supreme Court held that illegal and unpermitted uses must be rejected as part of the

1 baseline, citing *Wild Fish Conservancy v. Washington Dept. of Fish and Wildlife*, 198
2 Wn.2d 846, 871, 502 P.3d 359 (2022). It's not apparent how the Appellant was able to
3 interpret the *Wild Fish* opinion in this manner. The more recent appellate court decision
4 in *Friends of Sammamish Valley* dictates the opposite result. In that case at the Court of
5 Appeals level opponents to proposed zoning legislation argued that allegedly illegal
6 nonconforming uses could not serve as part of an environmental baseline. The appeals
7 court disagreed, holding as follows:

8 *Under both Chuckanut Conservancy and Quadrant Corp., the appropriate*
9 *baseline from which to gauge Ordinance 19030's impact was the existing uses*
10 *ongoing in the Sammamish Valley at the time Ordinance 19030 was enacted. It*
11 *would be speculative to attempt to evaluate the impact of Ordinance 19030*
12 *based on the possibility—which was never established—that the County could*
13 *have forced the cessation of one or more [allegedly illegal] businesses had*
14 *Ordinance 19030 never been enacted.*

15 *Friends of Sammamish Valley*, 530 P.3d at 1045.

16 The Appeals Court was reversed by the Supreme Court on the basis that it should have
17 used the existing condition of the land instead of projecting development under current
18 allowed uses as opposed to those regulated by the proposed ordinance. The current use
19 of the land in the baseline set by the Supreme Court included the alleged illegal uses.

20 Similar to the situation of *Friends of Sammamish Valley*, it would be speculative to
21 attempt to ascertain whether the City engaged in any unauthorized actions in its
22 maintenance and modification of the overflow structure. Mr. DeLilla identified several
23 reasons that legitimized the City's past actions, including conforming to NPDES standards
24 that required the City to prevent flooding. As in the *Friends of Sammamish Valley* case,
25 it would be unduly speculative to try to determine what City actions, if any, were
26 unauthorized to establish a baseline in this proceeding.

27 Although the Appellant's position doesn't do very well under *Friends* and *Wildfish*, it is
28 distinguishable on a key point. Specifically, the actions under review in those two cases
29 were proposed changes to baseline conditions -- in *Friends* the change was to tighten up
30 WBD regulations and in *Wildfish* the change was to farm steelhead instead of salmon. In
this case the decision is not whether to change the baseline but rather to maintain it. In
short, the two primary decision points involve are whether to engage in "no action" or to
maintain past practice. SEPA was enacted to "promote the policy of fully informed
decision making by government bodies when undertaking `major actions significantly
affecting the quality of the environment.'" *Norway Hill Preservation and Protection*
Ass'n. v. King County Council, 87 Wn.2d 267 (1976). Eliminating consideration of "no
action" impacts when whether or not to take no maintenance action is the primary focus
of the decision runs directly contrary to the purpose of informed decision making.

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2 In limiting HPA permits for the maintenance to only a few years at a time it strongly
3 appears that WDFW intended to take an incremental approach to assess the City's
4 diversion activities, taking the time to re-assess every few years whether use of the
5 diversion results in acceptable fish impacts. If that was indeed the reason for such short
6 lived HPA approvals time has proven WDFW correct in this approach. Conditions have
7 radically changed since the last HPA approval when Perrinville Creek ran a very different
8 course. The Appellant's focus upon what would happen if the City stopped maintenance
9 is directly in line with this incremental decision making process. Environmental
10 information on the consequences of no action is precisely what is needed to make
11 informed decisions in this regulatory context.

12
13 Fortunately for purposes of this appeal a decision doesn't have to be made as to which
14 baseline is applicable. The results are the same for both. The current condition of the
15 DIP pipe is a functioning pipe. With continued maintenance under "current condition"
16 baseline, there is a minor chance that the pipe can cause railroad track damage. The same
17 conclusion regarding impacts can be made under the "no action" baseline where flows
18 would no longer go through the pipe and thereby jeopardize its integrity if no action is
19 taken. As to sediment deposition and fish impacts, continued maintenance would not
20 change current impacts and the results of no action would result in the same no change in
21 impacts.

22 3. No Standing for City Work Danger. Section C4dii of Appellant's closing brief
23 asserts that the SEPA responsible official failed to adequately address safety impacts to
24 City workers when the maintain the overflow structure. As determined in the Examiner's
25 September 3, 2024 summary judgment ruling in this appeal, page 9, Mr. Bernhoft does
26 not have standing to litigate worker safety because that is not an impact that adversely
27 affects him.

28 4. DNS Sustained as To Fish and Sediment Impacts. As determined in Finding of
29 Fact 7 and 8 above, the proposed maintenance is not found to create any probable
30 significant adverse impacts to fish or resulting from altered sediment deposition. For
these reasons the DNS is sustained as to those impacts.

5. DNS Remanded as to Railroad Safety. The DNS is reversed as to impacts to
railroad safety. As determined in Finding of Fact No. 9, continued maintenance includes
a small risk of catastrophic failure of railroad tracks at the BNSF railroad line.

The small risk found of railroad track structural failure is still sufficient to qualify as a
"probable" impact because of WAC 197-11-794(2), which provides in pertinent part as
follows:

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Appeal Right and Valuation Notices

Pursuant to ECDC 20.15A.240C, hearing examiner decisions on SEPA appeals are final land use decisions of the City of Edmonds subject to judicial appeal. This land use decision is subject to appeal to Snohomish County Superior Court as governed by the Land Use Petition Act, Chapter 36.70C RCW. Appeals must be filed and served within 21 days of issuance of this hearing examiner decision as governed by RCW 36.70C.040.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation