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**PEND OREILLE COUNTY  
HEARING EXAMINER**

**IN RE:**

DETERMINATION OF  
NONSIGNIFICANCE AND  
ENVIRONMENTAL CHECKLIST FOR  
COMPREHENSIVE PLAN  
AMENDMENT CPU-18-001

APPELLANT RESPONSIBLE  
GROWTH \* NE WASHINGTON  
POST-HEARING RESPONSE BRIEF

This post-hearing brief is submitted on behalf of Appellant, Responsible Growth \* NE Washington.

**I. INTRODUCTION**

The County in this case repeatedly invokes the possibility of subsequent, project-specific SEPA review as a defense to claims that the Checklist and DNS fails to address issues in sufficient detail. This argument suffers multiple flaws. First and foremost, site by site SEPA review, to the extent that it may occur later, will be too little, too late to inform the consequential and largely irreversible decisions to be made now. Indeed, state law precludes local governments from re-examining fundamental land use decisions, like a comprehensive plan’s establishment of allowed uses, when reviewing individual project applications. RCW 36.70B.030. Second, deferring review runs counter to SEPA’s repeated exhortations to complete review as early in the process as possible.<sup>1</sup> Third, for a variety of

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<sup>1</sup> Twenty-five years ago, the Supreme Court made clear SEPA review must be completed as early as possible, not at the last moment, when key decisions have already been made. The purpose of SEPA is “to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences.” *King County v. Boundary Review Board*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993).

1 reasons, an EIS will not be prepared for most individual projects and, in the very few  
2 instances in which an EIS might be prepared, that EIS will not include an assessment of the  
3 cumulative impacts of the decisions being made now. For all of these reasons, the County's  
4 reliance on later SEPA to salvage this process should fail.  
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6 At the hearing, Appellant presented evidence and testimony that supports that: (1) the SEPA  
7 checklist for CPU-18-001 prepared by the Community Development Director and the County  
8 attorney lacked basic information about the proposal, including parcels, a map, and other essential  
9 information and instead simply stated "non-project action" for most of the questions; (2) the passage  
10 of CPU-18-001 will allow the development of a smelter and allow development of a variety of new  
11 uses on approximately 2/3 of the County; (3) substantial environmental impacts will occur if the  
12 smelter is built; (4) substantial environmental impacts will occur if other uses, previously prohibited,  
13 will occur; (5) other concurrent amendments are being considered by the County; (6) the smelter and  
14 other amendments are not speculative; (7) the County was well aware of the smelter and its impacts  
15 and commented to the Department of Ecology on its impacts; (8) the impacts and other amendments  
16 were not considered in the Checklist or DNS; (9) no evidence exists to support the County's decision  
17 to disregard impacts; and (10) the Planning Commission erroneously disregarded consideration of  
18 environmental impacts at its hearing on CPU-18-001 by prohibiting use of the word "smelter."  
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21 At the hearing, the County presented no evidence that would contradict Appellant's argument  
22 regarding impacts of the smelter or impacts of other changes associated with CPU-18-001. Instead,  
23 the County argued: (1) that the smelter is speculative; (2) that comments about concerns of the  
24 smelter were not presented to Greg Snow; and (3) that the public was afforded an opportunity to  
25 present written comments to the Planning Commission.  
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1 As discussed below and as discussed at the hearing on July 25, 2019, the County’s arguments  
2 fail and the evidence and testimony support that the County failed to comply with the requirements  
3 of SEPA.

4 **II. ARGUMENT**

5 **A. THE HEARING EXAMINER MAY CONSIDER EVIDENCE PRESENTED AT THE**  
6 **HEARING TO DETERMINE WHETHER THE COUNTY COMPLIED WITH SEPA**  
7 **WHETHER OR NOT THE INFORMATION WAS PRESENTED TO GREG SNOW PRIOR**  
8 **TO THE ISSUANCE OF THE DNS.**

9 At the hearing, the County suggested only evidence that should be considered, in regard to  
10 impacts necessary for consideration, is information sent directly to Greg Snow as part of the  
11 Planning Commission’s consideration of the amendment. However, this assertion is emphatically  
12 incorrect and ignores the very purpose of the open record hearing.

13 As acknowledged by the Hearing Examiner, this proceeding is an “open record hearing.” By  
14 definition, an “open record hearing” is a hearing that “creates the local government's record through  
15 testimony and submission of **evidence** and information, under procedures prescribed by the local  
16 government by ordinance or resolution.” RCW 36.70B.020(3)(emphasis added); *see Ellensburg*  
17 *Cement Products, Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 747 (2014). Furthermore, an agency  
18 providing a SEPA appeal *must* “provide for the preparation of a record for use in any subsequent  
19 appeal proceedings and shall provide for any subsequent appeal proceedings to be conducted on the  
20 record, consistent with other applicable law.” RCW 43.21C.075(3)(c); *Ellensburg Cement Products,*  
21 *Inc.*, 179 Wn.2d at 749. Moreover, an “adequate record consists of findings and conclusions,  
22 testimony under oath, and taped or written transcript.” *Id.*  
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1 Finally, the Spokane County Hearing Examiner Rules of Procedure<sup>2</sup>, section 12(B) provides:

2 All reasonably probative evidence is admissible by the hearing examiner. The hearing  
3 examiner may exclude all evidence that is irrelevant, immaterial, or unduly  
4 repetitious.

5 As a result, all of the evidence presented at the hearing is relevant and must be considered in  
6 determining whether the County met its obligations under SEPA.

7 Regardless, the record of this matter contradicts the argument of the County.

8 Witness Phyllis Kardos testified, and Greg Snow confirmed, that conversations had  
9 occurred where Ms. Kardos had shared environmental concerns about the smelter. Witness  
10 Mike Lithgow testified that meetings had occurred between the Tribe and the County to  
11 discuss concerns about the environmental impacts of the smelter. Moreover, County Exhibit  
12 4, which are the comments that were provided to Mr. Snow on CUP-18-001, contains  
13 extensive comments from Witness Dr. Renata Moon about the health and environmental  
14 impact of the smelter, comments from the Kalispel Tribe (attorney Zach Welcker)  
15 expressing concern that the impacts of the smelter were not addressed in the Checklist, and  
16 comments of Phyllis Kardos, submitted on behalf on Responsible Growth \* NE  
17 Washington, that outline environmental impacts of the smelter, including a discussion of the  
18 air emissions.  
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21 **B. EVIDENCE AND TESTIMONY SUPPORTS THAT THE SMELTER IS NOT**  
22 **SPECULATIVE AND THE COUNTY IGNORED ITS OBLIGATION TO CONSIDER ITS**  
23 **IMPACTS.**

24 At the hearing, the County also suggested that it need not consider the impacts of the smelter  
25 because it is supposed, uncertain, and speculative. This is far from the case. The County relies  
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<sup>2</sup> Spokane County Hearing Examiner Rules of Procedure, Resolution No. 96-0294, March 26, 1996,  
available at <https://www.spokanecounty.org/DocumentCenter/View/227/Rules-of-Procedure-96-0294-PDF>.

1 heavily on WAC 197-11-055. In its prehearing brief, the County states “[i]n order for the County to  
2 conduct current consideration and review of a proposal, the proposed future activities must be  
3 ‘specific enough to allow some evaluation of their probable environmental impacts.’” WAC 197-11-  
4 055(2)(a)(i). Appellant **agrees** – evidence and testimony presented at the hearing support that the  
5 proposal is specific – in fact, specific enough for the Department of Ecology to begin an  
6 Environmental Impact Statement. Exhibits 6-7.

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8 The County further contends that “Courts have determined that SEPA review cannot be  
9 based upon a ‘categorical approach focusing on whether a proposed action will directly effect a  
10 change in land use,’ but must instead use a ‘fact-sensitive approach’ as to whether the action will  
11 have a significant adverse effect upon the environment.” *King Cty. v. Washington State Boundary*  
12 *Review Bd.*, 122 Wn.2d 648, 662-663 (1993). Appellant **whole-heartedly agrees** with this statement.  
13 As the Court further explained in *King County*, “RCW 43.21C.031 mandates that an EIS should be  
14 prepared when significant adverse impacts on the environment are ‘probable’, not when they are  
15 ‘inevitable’”. *Id.* at 663. “The absence of specific development plans should not be conclusive of  
16 whether an adverse environmental impact is likely.” *Id.* As a result, the Court held “that a proposed  
17 land-use related action is not insulated from full environmental review simply because there are no  
18 existing specific proposals to develop the land in question or because there are no immediate land-  
19 use changes which will flow from the proposed action.” *Id.* at 664.

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22 Furthermore, the Court references cases such as *City of Bellevue v. King Cty. Boundary*  
23 *Review Bd.*, 90 Wn.2d 856, 868 (1978) and *Cheney v. Mountain Lake Terrace*, 87 Wn.2d 338, 344  
24 (1976) explaining:

25 Under these cases, the fact that a proposed action will not cause an immediate land-  
26 use change or that there is no specific proposal for development does not vitiate the  
need for an EIS. Instead, an EIS is required if, based on the totality of the

1 circumstances, future development is probable following the action and if that  
2 development will have a significant adverse effect upon the environment.

3 *Id.* For example, in *City of Bellevue*, the Court noted “particularly the complete absence of any  
4 suggestion in the record that the board made the slightest serious inquiry into the effect which the  
5 alternatives before it might have upon the scope and nature of the Evergreen East development.” *City*  
6 *of Bellevue*, 90 Wn.2d at 867-868.

7 Evidence presented at the hearing indicated: (1) the smelter company owns specific parcels  
8 of land within the public lands designation that will be impacted by this proposal, Exhibits 4-5; (2)  
9 the County has been aware of the smelter proposal since 2016 and that the Community Development  
10 Department received a grant to assist in environmental review of the smelter, Exhibits 8-14; (3) that  
11 the Department of Ecology has received a proposal and is currently in the process of developing an  
12 Environmental Impact Statement for the smelter, Exhibit 6-7, 12-14; (4) that the County expressed  
13 concern about significant environmental impacts of the proposal, Exhibit 13-14; (5) that the  
14 Community Development Director, Greg Snow, has provided information to the public about the  
15 permitting that is required for the smelter, Testimony of Phyllis Kardos, County Exhibit 4; and (6)  
16 that the smelter will present significant environmental impacts, Testimony of Phyllis Kardos, Dr.  
17 Renata Moon, Ken Merrill, Testimony of Greg Snow (acknowledging conversation with Phyllis  
18 Kardos), County Exhibit 4, Exhibits 19, 28.

21 First, Exhibits 4 and 5 show a map of the proposed smelter location and a map of each of the  
22 4 parcels owned by the smelter company. The smelter company purchased these parcels on  
23 September 14, 2017.

24 Second, Exhibits 8 and 9 contain the Pend Oreille County Department of Commerce Grant  
25 Application and Amendment to such Application. The application was completed by Greg Dohrn, a  
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1 consultant for the County. Exhibit 10. The County itself was the applicant which received the grant  
2 of \$250,000 to fund the SEPA review of the proposed smelter.

3 Third, the Department of Ecology (“Ecology”) is in the process of developing an  
4 Environmental Impact Statement (“EIS”) for the smelter. Exhibits 6 and 7 are letters exchanged  
5 between the smelter and Ecology confirming the desire to commence the EIS process. Additionally,  
6 Exhibit 15 is a copy of the Inlander article in which the proponent of the smelter publicly stated:  
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8 While working with the state on its options, the company has also been coordinating  
9 with Pend Oreille County, as the site purchased for the smelter is currently zoned as  
10 public land. That needs to change before the other work can move forward, Tymco  
says.

11 Fourth, Exhibits 13 and 14 are EIS scoping comment letters dated October 23, 2018, from the  
12 County to DOE. These letters describe the environmental concerns the County has about the  
13 proposed smelter. The County admitted some of their concerns mirrored comments already  
14 received, but felt it was important to include in its letter.

15 Fifth, although at the hearing the County alluded that it was unaware of the proposed smelter,  
16 the above Exhibits 13 and 14 clearly show this is not the case. Furthermore, Exhibit 28 is a series of  
17 emails between the Community Development Director, Greg Snow and Phyllis Kardos of  
18 Responsible Growth. These emails indicate Mr. Snow is clearly aware of the proposed smelter, as he  
19 provided information about the permitting that is required. In addition, Phyllis testified at the hearing  
20 that she and several other members of Responsible Growth were in frequent communication with  
21 Mr. Snow and had on multiple occasions discussed the proposed amendment and smelter. Mr. Snow  
22 confirmed this in his testimony. Moreover, County Exhibit 4 contains numerous comments  
23 expressing concerns about the failure of the checklist to consider the smelter.  
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1 Sixth, Appellant’s witnesses all stated their conclusion that the smelter will present  
2 **significant** environmental impacts.

3 Ken Merrill from the Kalispel Tribe of Indians testified as to the significant environmental  
4 effects of the proposed Amendment. Exhibit 24. He pointed out the DNS failed to address  
5 environmental impacts including air pollution, water usage, and transportation and material storage  
6 and handling impacts. He explained the preliminary project emission increases, Exhibit 25, as  
7 depicted by the PacWest Statewide Emission Table. Estimate for carbon dioxide, sulfur dioxide,  
8 nitrogen oxides, and greenhouse gases are expected to exceed the Prevention of Significant  
9 Deterioration (“PSD”) threshold.  
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11 Dr. Renata Moon, a pediatrician, provided testimony regarding the adverse health impacts on  
12 the local community. These health risks include but are not limited to: pollution from the transport  
13 of materials to and from the smelter site, air and water pollution, soil contamination, occupational  
14 hazards to workers and stress to community members. Exhibits 18, 19, and 20. Her conclusion was  
15 that a smelter or any similar industrial facility would have extremely significant health impacts on  
16 the local community. The injury to babies and children especially could have disastrous  
17 consequences such as premature births, SIDS, and increased risk for asthma and other respiratory  
18 illnesses.  
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20 Greg Snow testified that he and the County attorney prepared the Checklist and that he was  
21 unaware of any impacts and that the smelter was not a concrete proposal. No scientist or credentialed  
22 expert reviewed any conclusion. He also admitted that there was no written documentation to  
23 support any of his conclusions. In short, he affirmed his belief that all impacts of the adoptions of  
24 CPU-18-001 can be punted down the road. No testimony or evidence was presented by the County  
25 that dispute that a smelter is, indeed, planned for the County, that the County has been involved, that  
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1 the County has commented on significant environmental impacts, or that the smelter will be allowed  
2 to proceed with the passage of CUP-18-001. Indeed, what is apparent is that the County was simply  
3 unwilling to open its eyes to this proposal and its significant action.

4 This is nearly a repeat of the McGlades situation in *Spokane County*, 176 Wn. App. 555  
5 (2013). There, the Court of Appeals stated, “[F]or a non-project action, such as a comprehensive  
6 plan amendment or rezone, the agency must address the probable impacts of any future project action  
7 the proposal would allow.” *Id.* at 684. As a result, “the hearings board found the County’s checklist  
8 ignored the probable impacts of any future commercial development amendment 07–CPA–05 would  
9 allow and improperly postponed environmental analysis to the project review stage.” *Id.* at 685. The  
10 County cannot stick its head in the sand regarding the inevitability of the smelter and the resulting  
11 impacts if it approves this amendment.  
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14 **C. THE COUNTY PRESENTED NO EVIDENCE OR ARGUMENT THAT THE CHECKLIST  
15 WAS INADEQUATE.**

16 It is beyond dispute that the SEPA Checklist is inadequate – no acreage, map, or  
17 parcel information was provided. A majority of the questions have a formulaic answer –  
18 “non-project answer.” While Greg Snow testified regarding a map, included as County  
19 Exhibit 12, it is clear that the map was not included with the Comprehensive Plan  
20 Amendment Application, Checklist, or DNS. County Exhibits 3, 6.

21 SEPA requires agencies to take a “hard look” at environmental issues. *PUD No. 1*  
22 *of Clark County v. PCHB*, 151 P.3d 1067 (2007). This simply did not occur here. No  
23 testimony, evidence, or argument has been provided to excuse the lack of basic information.  
24 Accordingly, the Hearing Examiner must find that the Checklist is inadequate.  
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1           **D. EVIDENCE AND TESTIMONY INDICATE THAT THE COUNTY FAILED TO CONSIDER**  
2           **“MAXIMUM POTENTIAL DEVELOPMENT” OF THE AMENDMENT.**

3           Pend Oreille County is threatened by “death by a thousand cuts.” Most often, impacts  
4 occur over time, through a progression of development. Analyzing impacts at the project level  
5 precludes consideration of the “big picture,” cumulative impacts wrought by county-wide  
6 comprehensive plan amendments. That is what is threatened here.

7           Here, the County failed to address its obligation to consider the potential impacts of the  
8 comprehensive plan amendments on nearly 2/3 of the land in the County. The current designation for  
9 ‘Public Lands’ does not allow for a wide variety of uses, including Mining, Industrial, Master  
10 Planned Resorts, Multi-Family Housing, Recreational Vehicle Parks, or Single-Family Dwellings.  
11 Exhibits 1-2. CPU-18-001 would either permit these uses or make these uses permitted through the  
12 issuance of a conditional use permit by shifting “public lands” to “rural land” designations. Wide  
13 scale development consistent with a “rural land” designation is significantly more intensive than the  
14 current and restrictive “public lands” designation. Moreover, public and institutional uses are  
15 permitted across all uses – this is a significant departure from the previous “public lands”  
16 designation, which contained significant restrictions regardless of ownership. These changes were  
17 not disclosed or analyzed in the DNS or the Checklist.  
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20           At the hearing, Mike Lithgow testified that the Public Lands designation, which accounts for  
21 over 65% of all lands in the County, provides many benefits for the public such as certainty, revenue  
22 from logging, habitat for wildlife, trails for recreation. Exhibit 22. Lithgow stated that the broad-  
23 brush sweep of the County by doing away with the Public Lands designation “is like using a meat  
24 cleaver to do the job of a scalpel.” Lands that have been protected would allow widespread  
25 development and be open to uses such as mining, industrial, master planned resorts, multi-family  
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1 housing, recreational vehicle parks, or single-family dwellings. Exhibits 1 and 2 depict these changes  
2 by the current and proposed Table of Permitted Zoning Uses.

3 During his testimony, Greg Snow admitted that he did not conducted any analysis of these  
4 impacts and that there was no written documents in the record to support his conclusions. He also  
5 indicated that there was no analysis that indicates that the impacts of the concurrent amendments  
6 were considered cumulatively. He confirmed that at least half a dozen residents had personally  
7 approached him about a change of zoning to their respective properties, which would result in on-  
8 the-ground impacts that were not disclosed, discussed, or analyzed in the SEPA documents.

9  
10 Greg Snow testified that the County issued a DNS when it adopted the 2005 Comprehensive  
11 Plan. County Exhibits 9-10. However, that Plan either adopting existing land use designations or  
12 added restrictions to uses. This proposal adds numerous new allowable uses across 2/3 of the  
13 County. Exhibits 1-2. Moreover, as Mike Lithgow testified, the County spent nearly 15 years  
14 developing the plan prior to its adoption in 2005. The Future Land Map intentionally designated over  
15 65% of the County as public lands. Yet today, with a mere proposed Amendment, an inadequate  
16 checklist, and a virtually useless map, a DNS is approved by the County. Snow admitted that he had  
17 never handled a proposal of this scale during his time with the County.

18  
19 Given the failure of the County to consider the wide spread impacts of an amendment that  
20 impacts more than 2/3 of the County allowing significant new uses in those areas, the Hearing  
21 Examiner must determine that the Checklist and DNS is inadequate.

22  
23 **E. EVIDENCE AND TESTIMONY SUPPORTS THAT THE PLANNING COMMISSION VIOLATED**  
24 **THE REQUIREMENTS OF SEPA BY RESTRICTING CONSIDERATION OF ENVIRONMENTAL**  
25 **IMPACTS.**

26 Evidence and testimony presented at the hearing confirms that the Planning Commission  
Chair restricted testimony on the smelter at the January 9, 2019 Planning Commission hearing – “I

1 don't want to hear the word 'smelter' again." County Exhibit 11. Testimony from Phyllis Kardos  
2 confirmed that others, including members of Responsible Growth, were unable to testify regarding  
3 the environmental impacts of the smelter. Phyllis Kardos described how the Chairman's shocking  
4 display of anger towards the public made attendees fearful and wary to testify. Those who attempted  
5 to testify on the impacts of the smelter were immediately shut down from further testimony. Or if  
6 they did testify, they altered their testimony to not include the word "smelter."  
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8 The Country argues that some people were able testify and that anyone could submit written  
9 comments, but this misses the point. The SEPA regulation states that the "hearing *shall be open to*  
10 *consideration of the environmental impact of the proposal, together with any environmental*  
11 *document that is available.*" WAC § 197-11-535 (emphasis added). It does not say that only some  
12 people should be able to testify or that the requirement is excusable if written comments are taken.  
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14 Given the undisputed evidence, the Hearing Examiner must find that the County violated  
15 WAC § 197-11-535.

### 16 **III. CONCLUSION**

17 As discussed above, in the prehearing briefs, and as demonstrated in the hearing on this  
18 matter, the information and analysis in the DNS and Checklist is inadequate. Given the scope of this  
19 proposal, it is more than probable that there will be more than a moderate impact on the environment,  
20 justifying the completion of an EIS. It is also clear that the County Planning Commission Chair  
21 violated the requirements of WAC § 197-11-535. Accordingly, Appellant requests an order  
22 remanding the DNS and Checklist for CPU-18-001 with direction to complete a new hearing and that  
23 the staff to complete a full and adequate EIS.  
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DATED this 2<sup>nd</sup> day of August, 2019.

UNIVERSITY LEGAL ASSISTANCE



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