PEND OREILLE COUNTY
HEARING EXAMINER

IN RE: DETERMINATION OF NONSIGNIFICANCE FOR COMPREHENSIVE PLAN UPDATE	APPELLANT'S POST-HEARING BRIEF

I. INTRODUCTION

Pend Oreille County proposes sweeping amendments to its Comprehensive Plan, Future Land Use Map, development regulations (including its sensitive areas code), zoning map, and Table of Permitted Uses. The programmatic decisions will affect more than one half million acres of land within the county. Through a variety of amendments, large swaths of land now off-limits to residential development will be newly authorized for such development. More dense development and more intense development will be newly authorized in large areas, too. Protections for critical areas will be reduced.

SEPA requires counties to "look before they leap." As applied here, SEPA requires Pend Oreille County to obtain adequate information on the proposed land use changes *before* they are adopted, not afterwards, when landowners can claim vested rights to develop in accord with the

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new regulations and when cumulative impacts of the changes are lost in the review of one project at a time.

Appellant's evidence demonstrates that the county has not obtained the information necessary to assess the impacts of the proposed changes. The county's SEPA threshold determination should be reversed. In the alternative, the threshold determination should be vacated and the matter remanded to the Responsible Official with directions to reconsider the decision after obtaining and utilizing adequate information for making the decision.

II. LEGAL REQUIREMENTS UNDER SEPA

A. SEPA is a Full Disclosure Law.

SEPA is the legislative pronouncement of Washington's policy regarding the environmental impacts of government decisions. *See, e.g., Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973) (describing purposes of SEPA); *ASARCO, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 707, 601 P.2d 501 (1979) (same). In essence, SEPA is an environmental full-disclosure law. *Norway Hill Pres. & Prot. Ass'n v. King County Council,* 87 Wn.2d 267, 272, 552 P.2d 674 (1976). It requires state agencies to assess potential impacts of their decisions up front and if those impacts might be significant, to undertake a thorough environmental study, known as an Environmental Impact Statement ("EIS"), where those impacts must be analyzed and disclosed and where alternatives and mitigation measures must be considered. *See generally* RCW 43.21C.030; WAC 197-11-400 to -440 (discussing contents of EIS). By requiring government actors to confront and explain the environmental impacts of their decisions, and to consider alternatives, SEPA aims to ensure that the future of our shared environment is shaped by "deliberation, not default." *Stempel, supra,* 82 Wn.2d at 118.

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B. The Threshold Determination is a Critical Step in the SEPA Disclosure Process.

To accomplish the goal of fully informed and transparent decision making, SEPA requires every government agency contemplating a decision that might affect the environment to issue a "threshold determination," the purpose of which is to determine whether an EIS is needed. If the agency determines that there "will be no probable significant adverse environmental impacts from a proposal," then the agency issues a Determination of Nonsignificance ("DNS"), avoiding the requirement for full environmental study and an EIS. WAC 197-11-340(1). The DNS may also take the form of a "Mitigated" Determination of Nonsignificance ("MDNS"), imposing conditions to reduce the proposal's impacts to a non-significant level. WAC 197-11-350.

In contrast, if the proposal "may have a probable significant adverse environmental impact" even after the imposition of mitigating conditions, then the agency must issue a Determination of Significance ("DS") and an EIS must be prepared—meaning, the agency must fully document and assess the adverse impacts likely to be caused and consider alternatives to avoid or mitigate those impacts. WAC 197-11-360(1); WAC 197-11-330(4). In that case, the agency must also respond to public comments, making it accountable to the public.

The threshold determination is likely the most important single step in the SEPA process. *Norway Hill*, *supra*, 87 Wn. 2d at 273. If a negative threshold determination is issued in error, the purposes of SEPA are thwarted by wrongfully avoiding the EIS requirement. In reviewing the validity of a threshold determination, SEPA requires a searching review: the agency "must demonstrate that it actually considered relevant environmental factors" before issuing a DNS and the record must demonstrate that the [agency] "adequately considered the environmental factors in a manner sufficient" to comply with SEPA. *Boehm v. City of Vancouver*, 111 Wn. App. 711 (2002)

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(internal citations and footnotes omitted). Further, the threshold determination "must be based on information sufficient to evaluate the proposal's environmental impact." *Id*. *See also* WAC 197-11-335 (threshold determination must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal").

C. The Threshold Decision Must be Based on Adequate Information.

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 Cty.*, 194 Wn. App. 1034, 2016 WL 3453666 at *31 (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 (2017) (internal quotation and citation omitted). When "information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies should obtain and include the information in their environmental documents." WAC 197-11-080(1). If the costs of obtaining such information is exorbitant, or the means of obtaining it are not known, the agency must prepare a worst-case analysis. WAC 197-11-080.

It is "clear that the legislature intended that environmental values be given full consideration in government decision making, and it implemented this policy through the procedural provisions of SEPA[.]" *Norway Hill*, *supra*, 87 Wn.2d at 277. An "agency action that does not comply with SEPA is unlawful." *Conservation Nw.*, *supra*, 2016 WL 3453666 at *34.

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D. Environmental Impacts Must be Analyzed as Early as Possible.

SEPA requires the environmental impacts of a proposal to be analyzed "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2). "The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts." WAC 197-11-055(2)(a)(i).

The courts have been very clear that even non-project actions must still undergo full SEPA review and cannot evade SEPA review by deferring analysis until later phases of the proposal, such as the project phase:

> "The fact that an action will not cause an immediate land use change or the fact that there is no specific proposal "on the table" does not automatically mean that no EIS is required. "**The absence of specific development plans should not be conclusive of whether an adverse environmental impact is likely**." *King County v. Boundary Review Bd*., 122 Wash.2d at 663, 860 P.2d 1024…An EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action, **even if there are no existing specific proposals to develop the land in question** or because there are no immediate land use changes that will flow from the proposed action.

Alpine Lakes Protection Society v. DNR, 102 Wn. App. 1, 16 (1999).

Similar reasoning pervades NEPA cases (which are to be considered when construing SEPA's parallel requirements):

> NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n. 9 (9th Cir.1984) ("Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry,'"

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> quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1092 (D.C.Cir.1973)).

Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002).

E. Amendments to Land Use Plans and Regulations—Not Just Site-Specific Proposals—Require Environmental Review.

Although zoning ordinances are, by definition, non-project actions, that does not mean their impacts cannot be "meaningfully analyzed." In a case involving the City of Olympia, the Hearings Board explained:

> [W]hen a city **amends its Comprehensive Plan or changes zoning**, a detailed and comprehensive SEPA environmental review is required. SEPA is to function 'as an environmental full disclosure law,' and the City must demonstrate environmental impacts were considered in a manner sufficient to show 'compliance with the procedural requirements of SEPA.' Although the City decision is afforded substantial weight, environmental documents prepared under SEPA require the consideration of environmental impacts with attention to impacts that are likely, not merely speculative, and 'shall carefully consider the range of probable impacts, including short-term and long-term effects.'

Assoc. of Citizens Concerned About Chambers Lake Basin v. City of Olympia, WWGMHB No. 13-20014, FDO (Aug. 7, 2013) at 9 (internal citations omitted) (emphasis supplied).

> The Hearings Board has been consistent in its decisions that agencies must **evaluate environmental impacts of non-project actions up-front and not wait until the project level.** 'SEPA does not require the County to evaluate a laundry list of **unrelated** environmental considerations, but it does require that the County evaluate probable significant environmental impacts. WAC 197-11-402(1). Simply providing, as Jefferson County has, **that any impacts will be addressed on a permit basis fails to assess the cumulative impacts and to fully inform the decision makers** of the potential consequences of the designations challenged here.'

Id. at 10 (internal citations omitted) (emphasis supplied).

In the zoning context specifically, the Board has found that: "**The impacts that must be considered for this non-project action are the impacts that are allowed by virtue of the**

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change in designation itself. While project level impacts may properly be deferred to the permitting stage, the County **must evaluate the impacts allowed under the changed designation at the time of that non-project action**." *Whidbey Environmental Action Council v. Island County*, WWGMHB No. 03-2-0008, FDO (Aug. 25, 2003) at 39 (emphasis supplied).

The Board does not hesitate to invalidate zoning regulations when the associated SEPA review fails to consider the impacts of whatever projects the regulation will allow. *See, e.g.*, *Olympians for Smart Dev. & Livable Neighborhoods v. City of Olympia*, WWGMHB No. 19-2-0002c, FDO (July 10, 2019) at 31–33 (invalidating ordinance because "City responded to the Checklist nearly 50 times with statements such as the question did not apply in that the proposal was a non-project action").

Under these holdings, the county's duty in this case is clear: to prepare an EIS or, at minimum, to reconsider the threshold determination based on an adequate factual investigation and a correct understanding of the legal requirements. RG * NEW respectfully requests the Hearing Examiner issue an order remanding the DNS with direction to the staff to do just that.

III. THE APPARENT LIMITED SCOPE OF THE HEARING

Resolution of this appeal should have addressed two issues: Did the county have adequate information for its threshold determination and, if so, did the county make the correct threshold decision. However, the Hearing Examiner appears to have limited the scope of the hearing to the adequacy of the information considered by the county. *See* July 20, 2021 Decision at 3:

> The issue before the Hearing Examiner will be limited to determining whether the record of a negative threshold determination by the Department demonstrates that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA, meaning that the determination was based upon information

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> reasonably sufficient to determine the environmental impact of a proposal.

Nonetheless, as explained in the county's July 9, 2021 brief, the Examiner has authority to address both issues. While we have focused on the adequacy of information issue, the evidence presented also demonstrates that the threshold decision was wrong and that an EIS should have been required. The Examiner should so rule. In any event, RG * NEW reserves the right to challenge the substance of the threshold determination on further appeal.

IV. FACTUAL EVIDENCE PRESENTED AT THE HEARING DEMONSTRATES THAT THE COUNTY LACKED AN ADEQUATE BASIS FOR THE DNS

The County was required to "carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer." WAC 197-11-060(4)(c). The county was also required to consider cumulative effects, WAC 197-11-060(4)(e). But the County did not even attempt to assess the landscape level changes under SEPA.

Development Director Greg Snow testified on cross that the proposed amendments will not result in an "environmental nightmare." But the threshold determination under SEPA does not turn on whether the action will result in an environmental nightmare; it turns on whether significant adverse environmental impacts are probable following the government action. The evidence presented by RG * NEW, summarized below, demonstrates that significant adverse environmental impacts are probable following the proposed amendments.

The SEPA Checklist provides no information about the impacts of the ordinance. Instead, the Checklist assumed that, as a non-project action, all impacts related to the ordinance would be analyzed later. Forty-nine times in Part B of the Checklist, the Checklist answers, in response to

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the standard environmental impact questions, "Not applicable, non-project action." BND_Doc28 at 6–16.

The SEPA Checklist "Supplemental sheet for nonproject actions" asks a series of seven questions about how the proposal is likely to affect aspects of the natural and built environment, and each such question has a follow-up question asking for an explanation of proposed measures to avoid or reduce those impacts. The county responds to questions 1–5 and 7 by simply asserting that the "Sensitive Areas code" ("SAC") will protect against any harmful impacts. BND_Doc28 at 18–19. Even if the SAC will offer some backstop protection, the county did not address or analyze the cumulative effects of denser land development. As demonstrated by RG * NEW's witnesses and evidence, there are many probable, significant, adverse environmental impacts that should have been analyzed by the county at the threshold determination stage. The probable, significant, adverse environmental impacts that should have been, but were not, analyzed by the county are described below.

A. The County Failed to Analyze Impacts to Wetlands and Riparian Habitat Areas.

Woody Myers is a former WDFW wildlife biologist with decades of experience in Eastern Washington. He testified about the wildlife impacts inherent in the county's proposal to convert large amounts of land from the no residential PL zone to the NR20 or NR40 zones, where single family residential developments would be permitted. He testified that the change would "likely result in impacts to wildlife species using those habitats." BND_Doc22; Testimony of Woody Myers. Mr. Myers testified that it is "important [for] Pend Oreille County [to] identify and consider the impacts these zoning changes will have on wildlife" in the areas proposed for redesignation. *Id*. To properly consider these impacts, the county should have engaged in a "two-step process:" First,

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"identifying and understanding the dynamics of what these zoning changes will bring to and how they can change the landscape." *Id*. Second, "determining what wildlife species are present and when, what habitats these species use, and how the zoning changes are likely to affect these species at various spatial levels." *Id*. There is no evidence that the county took either step.

Mr. Myers explained how the additional residential development that would be permitted by the proposed amendments would result in a "high level of disturbance and impacts to wildlife." *Id*. Exhibit BND_Doc22 describes the "impacts that can occur as a result of the proposed zoning changes and what these changes could bring to the landscape" including: removal of existing vegetation that provides food and habitat to animals; "new buildings, fences, and roads [that] can have both direct impacts by eliminating existing habitat or more insidious, [and] indirect impacts by blocking access to seasonal habitats[;]" impacts from domestic pets ("Recent field studies showed domestic dogs to be the second most common source of mortality to adult female white-tailed deer in northeast Washington"); and impacts from livestock. *Id*.

"Because the land sections proposed for rezoning are scattered across the landscapes of Pend Oreille County, habitat fragmentation is the ultimate result with all the described impacts coming under that heading. The impacts of habitat fragmentation can be disastrously large to wildlife species that are listed as Threatened or Endangered, have limited seasonal ranges, or have relatively small home ranges." *Id*. The land sections proposed for rezoning from PL to NR20 or NR40 do not follow any spatial pattern and all these lands lay within important wildlife and fish use areas as indicated by Priority Species and Habitats mapping prepared by WDFW. *Id*. The county's lack of analysis of impacts to wildlife habitats and species from the proposed amendments and the county's failure to obtain information that permits such an analysis led Mr. Myers to conclude: "the potential for impacts to various wildlife species is great" and "it is difficult to assume that Pend Oreille County

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pursued investigations into the potential impacts to wildlife species resulting from the proposed zoning changes." *Id*.

The county proposes to significantly reduce the minimum wetland buffer widths and the recommended widths of Riparian Habitat Areas throughout the county. *See* BND_Doc15; BND_Doc20; Testimony of Ed Styskel. For example, the existing minimum buffer width for Type I wetlands is 125 feet. Under the proposed zoning, the minimum buffer width for Type I wetlands would be 50 feet. (xx.36.040.G.3-Table 1 and following struck-through text). Ed Styskel gave unrefuted testimony that the proposed reductions in wetland buffer widths could have significant adverse environmental impacts and that these impacts were not analyzed by the county at all, let alone using best available science.

The county also proposes to reduce the widths of Riparian Habitat Areas by between 50 and 85 feet (xx.36.060.E.5(b-d)). As demonstrated in BND_Doc16: "An extensive survey and inventory of Pend Oreille County's 27,863 acres of shoreline shows the county has widespread problems with water pollution, sedimentation, invasive plants, erosion, flood damage, deforestation and high water temperature." Ed Styskel testified that reducing the widths of Riparian Habitat Areas could make these problems worse and that these impacts were not analyzed by the county at all, let alone using best available science. These proposed reduced widths of Riparian Habitat Areas are simply insufficient to protect water quality. *See* BND_Doc17. Futurewise commented on the proposed changes and addressed the reduced recommended widths of Riparian Habitat Areas in detail. BND_Doc17 at 4–6. Futurewise notified the County that the proposed reduction in riparian buffer widths would make the buffers too small to protect water quality. Futurewise's analysis was based on information from WDFW. The County knew or should have known that this information was available, but failed to consider or analyze it. BND_Doc18 at PDF 157/304.

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Most of Pend Oreille County is categorized as bull trout critical habitat. BND_Doc31; BND_Doc32. The buffers around waterways and bodies of water need special and detailed consideration to retain the characteristics needed for retention, spawning and where needed, reintroduction of bull trout. As explained by Tracy Morgan and BND_Doc31, the analysis needed for this includes consideration of stream temperature, woody debris, adjacent tree canopy height and turbidity in streams. There is no evidence that the county conducted this analysis, considered the cumulative impacts of the proposed amendments on bull trout and other aquatic species; or cross-referenced the stream and wetland GIS map layer in its possession with the parcels proposed for redesignation. There is no indication that the county used bull trout stream classification spatial data in designating new zoning categories or for planning.

B. The County Failed to Analyze Impacts to Wildlife.

Public records show that approximately 3,800 acres of County-owned land currently designated as Public Lands have been sold to private owners in the last six years. Styskel Testimony; BND Doc 20. Under the county's 2021 proposed text and map amendments, home businesses, recreation vehicle parks, resorts, and single-family dwellings all would be permitted where they are currently prohibited. These new uses bring permanent human occupancy, disturbance, and risks to natural resources into formerly undeveloped areas. The county failed to evaluate these probable, significant, and adverse environmental impacts in the DNS.

Mr. Styskel also testified to the adverse impacts of domestic cats and dogs that come with residential development. Hundreds of research studies from around the world report that free-roaming pet cats and dogs alarm, harass, injure, or kill wildlife as well as contaminate habitat with infectious pathogens that transmit to wildlife and humans. Pets that freely roam from home, or with their owners during outdoor walks, exercise, or work, expand the zone of disturbance exponentially

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on their own or adjoining property. Dogs roam hundreds or thousands of feet, while cats may range tens or hundreds of feet. Each private residence or place of human concentration reduces the quality and quantity of wildlife habitat. The wildlife functions expected from buffer widths are impaired by the sight, sound, or smell of free-roaming dogs and cats. Of the 153 wildlife species in Pend Oreille County that nest, forage, or shelter at ground-level, all are vulnerable to dog and cat predation or disruption of daily life behavior. The county failed to evaluate these probable, significant, and adverse environmental impacts in the DNS.

In addition, the county failed to consider the impacts of redesignating Public Lands as Natural Resource lands with respect to the U.S. Forest Service/Stimpson land swap. Approximately 30,000 acres of federal land are to be privatized in the proposed Stimson/USFS proposed land swap. BND_Doc27. This privatization in conjunction with the county's redesignation would allow housing in remote and previously undeveloped areas without the procedural safeguards that apply to federal public lands (*e.g.*, NEPA). Those regulations are in place to protect species and ecosystems that have enjoyed great protection to this point under the current Public Lands designation. The current SEPA evaluation should have utilized information that would have allowed the Responsible Official to determine how wildlife would be impacted by the proposed changes. There is no mention of this land swap or its potential impacts anywhere in the SEPA checklist and therefore no basis for a determination of nonsignificance.

C. The County Failed to Analyze Impacts to Critical Aquifer Recharge Areas.

The county's GIS specialist, Cesar Stoddard, told RG * NEW member Tracy Morgan in January 2021: "There is no aquifer recharge data for POC." BND_Doc21. But the county was wrong. The current code—in a section proposed to be deleted (BND_Doc15 at xx.36.080.A)—refers to aquifer recharge maps prepared by Eastern Washington University associated with EWU's

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"Evaluation of Groundwater Pollution Susceptibility in Pend Oreille County." BND_Doc48; BND_Doc49. These recharge maps, in conjunction with the Evaluation, provide a wealth of information regarding the vulnerabilities and recharge rates of aquifers within the county, as Ms. Morgan testified. But even though the county possessed the EWU aquifer recharge maps and proposes to delete the code language referring to those maps, the county never considered or analyzed them in considering the impacts of the proposed amendments under SEPA. The county apparently did not even realize that it possessed the EWU aquifer recharge maps until November 2021. BND_Doc47. Instead, Mr. Stoddard referred Ms. Morgan to a wellhead protection map, BND_Doc21; BND_Doc45 (wellhead protection map). Risks to aquifer quantity and quality are inherent in additional development. The county failed to analyze the probable impact on aquifers of landscape-level land use changes.

D. The County Failed to Analyze Impacts to Important Critical Areas and Irreplaceable Cultural Resources on the Former Papermill Site.

Michael Lithgow, an Information and Outreach/Policy Analyst in the Kalispel Tribe's ("Tribe") Natural Resources Department and the county's former Planning Director, testified to the county's inadequate analysis of the proposed land use designation changes on the site of the former Ponderay Newsprint Company papermill in the Cusick/Usk urban growth area. BND_Doc06; Lithgow Testimony. Mr. Lithgow submitted comments regarding the Tribe's concerns during the SEPA comment period, but never received a substantive response from the county; nor did the county consider any of the information or make any changes in the proposal amendments to address the issues raised by the Tribe. Lithgow Testimony.

Mr. Lithgow testified that harmful impacts are likely to result from the county's proposed action. The former papermill site is an archeological district, as recognized by the federal

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government, the State, and the Tribe, and is currently designated as Natural Resource land. The county identified cultural resources within the former papermill site and then proposed to designate almost all of it under the proposed new Industrial designation, without analyzing in any way the probable environmental impacts of this change and with no provision for the preservation of cultural resources.

Previously, the county had—at great expense—prepared a subarea plan for this area that included a conservation overlay and open space designation. BND_Doc06. But in considering the proposed amendments under SEPA, the county ignored this subarea plan and the research that informed it, without any explanation. Pertinent to this appeal, the county's SEPA threshold determination was invalid because it was not based on this important information. Substantively, as a result of ignoring this information, the county's proposed amendments are likely to harm important critical areas and irreplaceable culture resources. As Mr. Lithgow testified, the county used a sledgehammer when it should have used a scalpel.

E. The County Failed to Analyze Impacts of Sprawl in Rural Areas.

The county's proposed amendments are likely to cause sprawl in rural areas. In addition to the proposed redesignation of more than one half million acres of current Public Lands to Natural Resource lands (which allow far more intensive development, including single family residential development), the county proposes to create Industrial and Commercial land use designations. Those changes are virtually certain to result in urban type sprawl in rural areas. As Phyllis Kardos testified, the county clearly intends to create commercial sprawl development near Diamond Lake (outside any UGA), in a strip along Route 2 near Diamond Lake, and in the other clusters shown on the map exhibit BND_Doc11. As discussed further below, even if some commercial

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development exists in these areas already, it only exists as nonconforming uses that cannot be expanded, may be abandoned, and do not qualify for variances and reasonable use exemptions.

Moreover, the county proposes to allow dense residential planned unit developments for the first time. BND_Doc13 at xx.64.100 (Planned Unit Development). In addition to the sprawl that would result from permitting extensive commercial development around Diamond Lake and along Route 2, BND_Doc19 shows many parcels near Diamond Lake that the county proposes to change from Public Land to Rural 5. Under the proposed code at xx.64.100.1, "Planned unit developments (PUDs) are permitted in all zones except Natural Resource." For these currently PL lands near Diamond Lake and elsewhere, PUDs are not permitted under the existing zoning, first because PUDs are not provided for at all under the current zoning and, second, because single family development is prohibited in the PL zone.

Each of these proposed changes is likely to increase sprawl in rural areas, with all the adverse environmental impacts that follow. But even if any single change wrought by the proposed amendments, by itself, would result in a minor environmental impact, under WAC 197-11-330(3)(c) "several marginal impacts when considered together may result in significant impact." Here, the accumulation of impacts from the proposed text and map amendments would result in significant environmental impacts. The county should have analyzed the cumulative effect of these significant environmental impacts in an EIS. But the county failed to even consider them and lacked the information that would be required for a meaningful analysis of the issue.

F. The County Failed to Analyze Impacts of Increased Fire Hazards.

Carol Mack testified regarding the impacts of the proposed amendments on fire hazards in the county, referring to BND_Doc53. In 2018, Pend Oreille County updated its Community Wildfire Protection Plan ("CWPP") by including it as Chapter 13 in the Hazard Mitigation Plan

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(BND_Doc53 at PDF 260/381). Of all the hazards addressed in the county's Hazard Mitigation Plan, wildfire was rated highest priority (BND_Doc53 at Table 14-1, PDF 290/381).

There is no evidence that the county analyzed available information regarding the significant fire hazard impacts of increased development that are likely to flow from the land use designation changes, which allow single family residential development where it was formerly prohibited and which provide (for the first time) for dense residential PUDs.

G. The County Failed to Analyze how Climate Change would Exacerbate Impacts.

Not only did the county not incorporate climate change mitigation into the proposed amendments, it failed to analyze how climate change will likely exacerbate the significant impacts of the proposed amendments. Ms. Morgan testified that climate change will likely exacerbate impacts to frequently flooded areas, wetlands, wildlife species and habitats, aquifers, and fire hazard areas, referring to exhibits BND_Doc37; BND_Doc38; BND_Doc39; BND_Doc40; BND_Doc41; BND_Doc59; BND_Doc60; and BND_Doc61. The county neither considered nor analyzed any of the underlying impacts, let alone how climate change would exacerbate them.

Washington regulatory agencies (including but not limited to the Department of Ecology and Department of Natural Resources) have repeatedly and emphatically warned counties of the likely impacts they are facing from climate change. These warnings are posted prominently on the agency websites and are outlined clearly in BND_Doc59; BND_Doc60; and BND_Doc61. Because these impacts are well known and are already part of the reasons for water shortage litigation in Watershed 55, the county's failure to include or reference any data or studies regarding the impact of climate change on water supply and water quality, and all the biota dependent on abundant clean water, is inexplicable. There is no evidence in the record that the county factored the effects of

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climate change into the county's purported analysis of the environmental impacts of the proposed amendments. Water availability and protection of instream flow for salmonid populations is an acute issue with current shortages likely to be exacerbated by climate change trends. BND_Doc60.

V. THE EXAMINER SHOULD REJECT THE COUNTY'S EXCUSES FOR NOT ADDRESSING THE PROPOSALS' ENVIRONMENTAL IMPACTS

The county was required to "carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer." WAC 197-11-060(4)(c). The county was also required to consider cumulative effects, WAC 197-11-060(4)(e). But the County did not even attempt to assess the probable environmental impacts of its landscape-level amendments under SEPA.

The SEPA Checklist (BND_Doc28) provides no information about the impacts of the proposed amendments. Instead, the Checklist assumed that, as a non-project action, any and all impacts would be analyzed later, at the project level. Forty-nine times in Part B of the Checklist, the county answers, in response to the standard environmental impact questions, "Not applicable, non-project action." The Checklist's "Supplemental sheet for nonproject actions" asks a series of questions about how the proposal is likely to affect aspects of the natural and built environment, and each such question has a follow-up question asking for an explanation of proposed measures to avoid or reduce those impacts. The county responds to these questions by simply asserting that the "sensitive areas code" (BND_Doc15_Redlined Chapter XX.36 Environmentally Sensitive Areas) will protect against any harmful impacts. Even if the sensitive areas code will offer some backstop protection, the county did not address or analyze the cumulative effects of denser land development.

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The county asserted three reasons for failing to analyze the impacts of the proposed amendments. First, the county asserted that there will be no impacts because the proposed amendments 'are just changing colors on a map' and simply legitimize existing nonconforming uses. Second, the county asserted that it is too early to assess the impacts of specific project applications. Third, the county asserted that the sensitive areas code will protect against any adverse impacts from any particular project.

A. The Proposed Amendments Are Not Just Changing Colors on a Map.

The county's development director, Greg Snow, testified that the proposed amendments will not be an "environmental nightmare" because the amendment simply legitimize existing nonconforming uses. Mr. Snow described the proposed amendments as an exercise in "changing colors on a map." Mr. Snow is wrong, in several respects.

First, there is no evidence to support the claim that the more than one half million acres of land[1] proposed for a rezone are already developed with nonconforming uses. If the county wanted to succeed with its assertion that the impacts of these wholesale changes are slight because of existing nonconforming uses, it had the burden to present evidence in support of that claim. But the county did not provide any substantial evidence to support this assertion, because there is none.[2]

Second, even where nonconforming uses exist, legitimizing them in a wholesale fashion would have probable significant environmental impacts. Nonconforming uses are strictly limited, cannot be expanded, and may be abandoned through non-use. Greg Snow admitted that on cross-

[1] There are 556,450 acres under public (federal, state and local) and tribal ownership that are proposed to be designated as NR. BND_Doc01. Additional publicly owned acres are proposed for industrial and commercial uses. BND_Doc07. The proposal also would convert lands zoned for rural residential use to industrial and commercial uses. BND_Doc11. *See also* BND_Doc03 at PDF 11–18 (proposed Future Land Use Map and proposed Zoning Map).

[2] The only evidence submitted was Mr. Snow's testimony of some nonconforming uses around Diamond Lake. That does not meet the County's burden to demonstrate that nonconforming uses predominate across the hundreds of thousands of acres proposed for more intense uses.

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examination. "The public policy of this state, as well as the spirit of zoning measures, is to restrict rather than increase such nonconforming uses in order that they ultimately may be phased out." *Keller v. City of Bellingham*, 20 Wn. App. 1, 9 (1978), *aff'd*, 92 Wn.2d 726 (1979). Permitted uses, on the other hand, may be expanded and are not abandoned after a period of non-use.

Moreover, a proposed permitted use, unlike a nonconforming use, may qualify for variances and exemptions that allow the permitted use to go forward even if it does not strictly comply with the requirements of the development code. The first of five criteria for a variance (BND_Doc50 at xx.72.020.A) is: "That such variance is necessary, because of special circumstances relating to the size, shape, topography, location or surroundings of the subject property, to **provide it with use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located**" (emphasis supplied). The proposed change from PL to NR20/40 makes single family residential development a right "permitted to other properties in the vicinity and in the zone in which the subject property is located" where no such right existed under the PL designation. The proposed changes from PL to the new proposed Commercial and Industrial land use designations not only allow uses that were forbidden under the PL designation to be permitted, but to receive variances from the code's requirements.

Similarly, newly permitted uses that were forbidden in the PL designation may qualify for "reasonable use exemptions" from the county code requirements. *See* BND_Doc51 at xx.74.030: ("A landowner/applicant may apply for a reasonable use exception pursuant to this title **if the landowner/applicant has reason to believe that the application of this title denies any fundamental attribute of private property ownership inconsistent with the limitations upon other properties in the zone** in which the property is situated."). (Emphasis supplied). In the NR20/40 zone where single family residential is a permitted use, single family development is a

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fundamental attribute of private property ownership that is consistent with the limitations upon other properties in the zone in which the property is situated. So, the SAC notwithstanding, once the land is rezoned away from PL, single family residential development and its attendant impacts may be unstoppable. As with variances, the proposed redesignations from PL to NR and to the newly proposed Commercial and Industrial land use designations not only allow uses that were forbidden under the PL designation to be permitted, but to receive exemptions from the code's requirements.

B. It Is Not Too Early to Assess the Impacts of these Sweeping Changes in Land Use Plans and Regulations.

The county asserted that it is too early to assess the impacts of specific project applications. But now is the time to assess the range of probable impacts, including short-term and long-term effects. Review at the project level would be piecemeal and ineffective because analysis of individual projects will focus on the impacts of that particular project and will not address the cumulative impacts of all projects that the proposed amendments would, for the first time, make possible. Moreover, if the new regulations are adopted, compliance with the regulations would create a presumption that any individual project will have no significant impacts. RCW 43.21C.240.4.b. Only now, at the programmatic level, before 'the horse is let out of the barn,' can the individual and cumulative impacts of the projects that will follow from the proposed amendments be analyzed. As the county admits: "When considering a non-project action, the agency conducting the environmental review must consider the maximum potential development under various zoning classes[.]" Prehearing Brief of Pend Oreille County (Nov. 30, 2021) at 6.

"Agencies shall carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a

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proposal or, depending on the particular proposal, longer." WAC 197-11-060(3)(c). Applied here, this regulation requires the county to carefully consider impacts—including cumulative impacts—that are "allowed by virtue of the change in designation itself." *Whidbey Environmental Action Council v. Island County*, WWGMHB No. 03-2-0008, FDO (Aug. 25, 2003) at 39. The "County must evaluate the impacts allowed under the changed designation at the time of that non-project action." *Id*. *See also Assoc. of Citizens Concerned About Chambers Lake Basin v. City of Olympia*, WWGMHB No. 13-20014, FDO (Aug. 7, 2013) at 9 (stating "agencies must evaluate environmental impacts of non-project actions up-front and not wait until the project level") (internal citation omitted); WAC 197-11-060(3)(d) (stating "A proposal's effects include direct and indirect impacts caused by a proposal. . . . For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects[.]").

Here, the proposed amendments allowing formerly prohibited types of residential, industrial, and/or commercial development on hundreds of thousands of acres throughout the county will "encourage or tend to cause" those types of projects to be built. The county failed to analyze that and failed to gather and consider the evidence necessary for that analysis. For that reason alone, the Hearing Examiner should issue an order remanding the DNS with direction to the staff to analyze all of the impacts allowed under the proposed amendments at the time of the non-project action.

The county was aware that that non-project actions often require full environmental analysis in an Environmental Impacts Statement (EIS) under SEPA. Ben Floyd, a planning consultant hired by the county to manage the proposed amendments, testified that he has worked on five subarea plans (City of Richland, City of Pasco, Grant County, Benton County, and Columbia County) and testified that each of those non-project actions required full SEPA review in an EIS or tiered EIS.

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Pend Oreille County's proposed sweeping map and text amendments should have received the same attention and analysis.

The county argues: "Cases requiring the preparation of an environmental impact statement in connection with a non-project action nearly universally require that the anticipated impacts of the proposal be well known." Prehearing Brief of Pend Oreille County (Nov. 30, 2021) at 9. Even if that were a true statement,[3] the anticipated impacts of the proposed amendments are well known to—and eagerly anticipated by—Pend Oreille County. RG * New has moved for leave to submit additional evidence (the Declaration of Robert Rumsey) that came to light after the December 2, 2021 hearing in this matter. As described in Mr. Rumsey's declaration, during the December 6, 2021 County Commissioners' meeting, Commissioner John Gentle asked Development Director Greg Snow if he could get the Planning Commission ready to move quickly on the proposed amendments, and Greg Snow said that he could. Rumsey Dec. at ¶¶19–20. The reason given by Commissioner Gentle for the need to move quickly was: "We've got developers waiting to put shovels in the ground right now and they're being held up by the system, waiting for the blanket rezone." *Id*. at ¶18. Commissioner Gentle added: "And these are local contractors, they're not from out of town." *Id*. Shortly thereafter, Commissioner Rosencrantz said to Commissioner Gentle: "When the Comp Plan is in place, it will significantly increase the County's finances." *Id*. at ¶23.

Despite Mr. Snow's efforts to evade acknowledging the looming development during his cross-examination, the county knew that developers are "waiting to put shovels in the ground right

[3] It is not true. The very case cited by the county held that "a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are **probable** following the government action." *King Cty. v. Washington State Boundary Rev. Bd. for King Cty.*, 122 Wn. 2d 648, 664 (1993) (emphasis supplied).

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now" and knew that those developers were being "held up" by this proceeding and only "waiting for the blanket rezone" before commencing with development that would, for the first time, be allowed by the proposed amendments. This knowledge, which the county failed to share with the Examiner during the hearing or in its prehearing brief, demonstrates that the new types of development allowed by the proposed amendments are not merely speculative, but very likely, if the proposed amendments are adopted. Consider, for example, the proposed silicon metal smelter on 188 acres owned by PacWest Silicon. The smelter is proposed to be located on land which is currently Public Land but would become Rural land under the proposed amendments. Testimony of Phyliss Kardos. On cross-examination, county Development Director Greg Snow was exceedingly evasive about whether he was aware of the proposed smelter, but eventually admitted that he was aware of it. Pend Oreille County "must evaluate the impacts allowed under the changed designation at the time of that non-project action." *Whidbey Environmental Action Council v. Island County*, WWGMHB No. 03-2-0008, FDO (Aug. 25, 2003) at 39. The county impermissibly failed to do that here.

C. The Sensitive Areas Code Will Not Preclude Significant Impacts and, in any Event, the County Lacked Adequate Information to Make that Assessment.

The county asserted that the sensitive areas code ("SAC") (BND_Doc15) would protect against any adverse impacts from any particular project. *See, e.g.*, BND_Doc28 at PDF 19/20 ("Sensitive Areas code will maintain and enhance protection of environmentally sensitive areas, endangered species habitat, wetlands, and other Critical Areas in the County"). But the SAC would not adequately protect against environmental harm once the 'horse is out of the barn' with the land use designation changes. Project-level application of the SAC is insufficient to protect against the probable adverse environmental impacts of the proposed amendments, because a project's

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compliance with the amended regs would equate to no cognizable impacts under RCW 43.21C.240.4.b. Moreover, as discussed above, if currently prohibited uses are allowed to become permitted uses,[4] the provisions in the SAC can be avoided to allow the permitted use to be developed even if the standard SAC protective measures would bar the use. That is because variances and reasonable use exemptions are available for permitted uses. The SAC itself provides for the relaxation of its standards, when "necessary to allow the reasonable use of property," BND_Doc15 at PDF 14/67, even though the relaxed requirements provide less protection for critical areas.

In addition, various probable adverse environmental impacts are not effectively addressed by the SAC at all. For example, the SAC would not protect critical aquifer recharge areas ("CARAs") from the increased single family development flowing from the land use designation changes. The proposed amended code at xx.36.080.C only requires aquifer recharge areas review and a hydrogeologic site evaluation under xx.36.080.C.1.h. for septic systems "with design flows of more than 3,500 gallons per day." Single family residential septic systems generally do not have design flows exceeding 3,500 gallons per day. *See* BND_Doc46 at PDF 89/11 ("For planning purposes, DOH uses 400 gallons a day per connection as an average rate of consumption.").

VI. Conclusion

For all these reasons, the county's SEPA threshold determination should be reversed. In the alternative, the threshold determination should be vacated and the matter remanded to the Responsible Official with directions to reconsider the decision after obtaining and utilizing adequate information for making the decision.

[4] *See* BND_Doc12_RG NEW 2015 vs 2020 TOPU comparison—single family residential is a prohibited use in the PL zone, but single family residential is permitted use in the NR20 and NR40 zones.

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Respectfully submitted,

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