PEND OREILLE COUNTY
HEARING EXAMINER

IN RE:

DETERMINATION OF NONSIGNIFICANCE FOR STATUTORY COMPREHENSIVE PLAN UPDATE.

POST-HEARING BRIEF OF PEND OREILLE COUNTY

I. INTRODUCTION

The Determination of Nonsignificance (the "DNS") issued on April 22, 2021 by Pend Oreille County (the "County") for its statutorily required update to its Comprehensive Plan, Development Regulations, Environmental Sensitive Areas Ordinance, Future Land Use Map and Zoning Map (the "Update") should be affirmed.

The sole issue for resolution in this appeal is whether the DNS was based upon information reasonably sufficient to determine the environmental impact of the Update. RG*NEW failed to meet its burden of proof to show that the County's decision to issue the DNS for the Update was clearly erroneous and was based upon insufficient information. There are no probable, significant adverse environmental impacts that will result due to the

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

Update. The County made the *prima facie* showing of its compliance with SEPA that it was required to make.

The County's use of a Determination of Nonsignificance for changes to its land use regulations is nothing new. Similar to the land use changes proposed in the Update, in 2018 the County initiated an application to change land that was designated and zoned as a "public land" to other land use designations in compliance with the County's Comprehensive Plan. *See, e.g.* CPU-18-001 (the "2018 Application"). The County issued a Determination of Nonsignificance for the 2018 Application (the "2019 DNS"). RG*NEW appealed the 2019 DNS to the Hearing Examiner alleging many of the same errors as it does in the instant appeal, including suggesting that "street talk" about a contemplated smelter that could be constructed in the County was a "proposal" requiring environmental review as part of the 2018 Application. Despite the allegations that the County engaged in incomplete environmental review, the Hearing Examiner affirmed the 2019 DNS via a decision dated September 25, 2019.

RG*NEW once again attempts to argue that the County engaged in incomplete environmental review. This is contrary to the record. Remarkably, they go so far as to introduce an untimely Declaration of Robert Allen Rumsey (the "Rumsey Declaration") which provides unverifiable statements and conjures up impressions of a party who did not testify at the hearing before the Hearing Examiner in an attempt to advance their case. As discussed below, the Rumsey Declaration should be struck in total because the Appellant fails to provide any support for the quotations.

Unlike Appellant's unverifiable or speculative statements, the record establishes:

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

(i) The County followed SEPA in preparing an environmental checklist for the Update based upon the information available to it at the time;

(ii) The DNS considered the specific circumstances and information available to the County at the time of the issuance of the DNS, therefore satisfying the procedural requirements of SEPA;

(iii) The County engaged in meaningful environmental review in connection with the proposal as required by WAC 197-11-055;

(iv) The County considered the cumulative environmental impacts of the Update;

(v) The County's Responsible Official, Community Development Director Greg Snow, could identify no probable, significant adverse environmental impacts that warrant the preparation of an environmental impact statement;

(vi) The County is committed to engaging in full environmental review of any future proposal as required by SEPA and has the authority to do so in the future; and

(vii) None of the evidence presented by RE*NEW during the course of the hearing caused Greg Snow to change his mind regarding the issuance of the DNS.

The evidence submitted by the Appellant fails to establish that the DNS was clearly erroneous; therefore, they do not meet their burden of proof.

Even if Appellant had met their burden of proof, Appellant claims that the only outcome here is to remand this matter for the County to consider additional evidence of remote environmental impacts that they seem to think are important. Such conclusion defies the requirements under SEPA that local jurisdictions employ the "rule of reason" when conducting environmental review with the County vested with the responsibility to consider

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

what level of environmental review is adequate. The County's analysis was reasonable under the circumstances and within the scope of review that is ordinarily permitted under SEPA.

The County's DNS was issued on the basis that there was no probable, significant adverse environmental impacts that it could identify as a result of the Update. The County received no comments containing any specific evidence of environmental impacts to the contrary, nor did any evidence presented by RE*NEW during the course of the hearing cause Mr. Snow to change his mind regarding the issuance of the DNS. For the reasons set forth herein, the DNS issued by the County should be affirmed.

II. DISCUSSION

A. <u>The County is Entitled to Deference for its Decision to Issue a DNS</u>.

RCW 43.21C.075(3)(d) requires that the "procedural determinations made by the responsible official shall be entitled to substantial weight." RCW 43.21C.075(3)(d). In addition, RCW 43.21C.090 provides that "the decision of a governmental agency shall be accorded substantial weight" in any "attack on a determination by a governmental agency relative to the absence of the requirement, or the adequacy of a 'detailed statement ...'" *See also Norway Hill Preservation & Protection Ass 'n v. King Cnty. Council*, 87 Wn.2d 267, 275 (1976) (acknowledging the clearly erroneous standard "will allow a reviewing court to give substantial weight to the agency determination as required by RCW 43.21C.090 ...."), *superseded by statute on other grounds*. The standard that the responsible official must meet is that there was prima facie compliance with the procedural requirements of SEPA. *Sisley v. San Juan County,* 89 Wn.2d 78, 84, 569 P.2d (1977).

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

Under the "clearly erroneous" review standard, courts will only overturn the agency's determination if, "after reviewing all the evidence, it is left with the definite and firm conviction that the agency committed a mistake." *Lands Council v. Wash. State Parks & Recreation Comm 'n.*, 176 Wn. App. 787, 795 (2013).

Accordingly, the threshold determination (a procedural determination) issued by the County shall be accorded substantial weight. The County complied with the procedural requirements of SEPA. The decision by the County to issue a DNS was not clearly erroneous and should be affirmed.

B. The DNS Was Not Clearly Erroneous.

The DNS issued by the County was not clearly erroneous. The Appellant has not met their burden. The County reviewed the relevant information that it had on the Update and determined that there was no probable, significant adverse environmental impact that would occur.

The evidence before the County at the time of the issuance of the DNS established that (i) there was a "proposal" to amend its Comprehensive Plan, Future Land Use Map, Development Regulations and Zoning Regulations, (ii) there was a SEPA checklist that disclosed the environmental impacts associated with the proposal based upon the information that could be reasonably ascertained by the Responsible Official at the time of SEPA review; (iii) the Responsible Official received no comments containing specific environmental impacts (let alone those that would be probable significant adverse environmental impacts requiring an EIS); (iv) no agency with expertise submitted any comments indicating that the issuance of a DNS was inappropriate, (v) the cumulative impacts of all amendments under

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

consideration by the County to amend its land use codes were considered; and (vi) the end result of this environmental review was to issue the DNS.

This is *prima facie* proof of SEPA compliance by the County. *See, e.g. Boehm v. City of Vancouver,* 111 Wn.App. 711, 718 (2002). SEPA does not impose any additional requirements beyond the outcome arrived at by the County.

C. The SEPA Checklist Was Completed With the Information Possessed by the County at the Time of Completion.

1. *SEPA Review is Based Upon the Applicant's Own Knowledge and Observations.*

Appellant asserts the County's alleged deferral of identification of environmental impacts to a future point in time when the impacts are actually known is not permitted under Washington law. Checklists, however, are supposed to be based upon "applicant's own knowledge and observations." RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT, § 13.01[4][c]. As Professor Settle points out, "do not know' and "'does not apply,' where appropriate, are acceptable responses." *Id.*

The County engaged in a two-year public process before it ever assembled the SEPA checklist. The public process included numerous workshops and meetings, many of which were attended by members or affiliates of the Appellant. *County Exhibit* 11, *Greg Snow Testimony*. As the County pointed out in its testimony, the County completed the checklist based upon its own knowledge and its own available observations, which occurred only after the completion of the two years' worth of public process. *Greg Snow Testimony.*

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

2. *The Rule of Reason Does Not Require the County to Assess Remote and Speculative Impacts.*

Appellant further contends that the County lacked information to assess impacts. As Professor Richard Settle notes, lacking information and a cumulative impact analysis has the potential to infinitely expand environmental review:

> Unless reasonably limited, requiring the analysis of conceivable cumulative impacts of conceivable future proposals could infinitely expand the scope of environmental review. Thus, SEPA limits the scope of environmental review to impacts that are "probable" and "significant." And the impacts of potential future proposals must be cumulatively assessed only when the instant proposal would be a necessary antecedent for such future proposals. Most fundamentally, the scope of cumulative impact analysis is limited by the rule of reason that does not require assessment of remote and speculative impacts.

R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis,* §14.01[1][c][iii] (emphasis added). When considering a non-project action, the agency conducting the environmental review must consider the maximum potential development under various zoning classes; however, not every remote or speculative consequence need be considered. *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hr'gs Brd.*, 2 Wn. App.2d 737, 753, 413 P.3d 590 (2018). The probability of significant impact is a determining factor in whether an environmental impact statement is required. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 662 - 663, 860 P.2d 1024 (1993).

Appellant contends that merely because the colors on the Future Land Use Maps and Zoning Maps change, that the County is going to be inundated with land use applications and an influx of growth. Changing the colors on the map does not alleviate a future project's obligation to comply with county regulations; for example, the County's Environmentally

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

Sensitive Areas Ordinance. As Mr. Snow pointed out at the hearing, 65% of the County is currently in public ownership. The County has no evidence that suggests that any of the public owners have an interest in divesting themselves from ownership. *Greg Snow Testimony.* The County also has no evidence to suggest that even if ownership in public land was divested to a private landowner that it would be developed. *Greg Snow Testimony.* In fact, Pend Oreille County anticipates that growth will continue to remain slow. The County plans for a continued growth of approximately .3% per year based upon the Office of Financial Management. This equals 45 people per year. *Greg Snow Testimony.* Mr. Snow further testified that he was aware that there were new potential uses that could be allowed if the Update were adopted by the County. *Id.*

The only evidence that Appellant supplied of future development is a suggestion that there could be some type of land swap between a private landowner and the United States Forest Service. *See Appellant's Exhibit 27.* First, the Appellant provided no testimony about the anticipated timing of such transaction. Second, the Appellant provided no testimony that even if such transaction occurred that there would be any changes to the land use. Finally, the County has only generally heard of such transaction and has no specifics about the acquisition. *Greg Snow Testimony.* Such speculative evidence is not required to be considered by the County under SEPA.

3. *The County has the Authority to Review Subsequent Implementing Actions.*

Appellant further claims that the County is required to analyze the impacts of the Update to the greatest extent possible. SEPA does not require the County to engage in environmental review of all conceivable environmental outcomes that could occur based upon

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

the Update. To do so would require the County to go beyond the "rule of reason" in its evaluation of potential environmental impacts and defy the requirements under SEPA that local jurisdictions are subject to when conducting environmental review. The County's commitment to engage in environmental review at a future point in time is not prohibited by SEPA. To the contrary, this commitment to engaging in environmental review in the future supports SEPA's requirement that the environmental review be meaningful.

When considering a zoning action, a delay of full implementation of the environmental policies of SEPA until the development permit stage is allowed, provided that the governmental entity has the authority to implement those policies at the permit stage and so long as the environmental consequences of any development of the property are disclosed and considered at the time the zoning action is taken. *Ullock v. Bremerton*, 17 Wn. App. 573, 584 - 585, 565 P.2d 1179 (1977) (quoting *Narrowsview Preservation Ass'n v. Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974)); *Hayden v. Port Townsend*, 93 Wn.2d 870, 879, 613 P.2d 1164 (1980).

An instructive case is *Spokane County v. Eastern Wash. Growth Management Hearings Bd.,* 176 Wn.App. 555 (2013). In *Spokane County*, a property owner submitted a site specific application to Spokane County to amend the comprehensive plan and rezone to allow for the use of their property as a bistro, together with an expansion to allow an asphalt driveway, drive-through expresso service and a parking lot. *Spokane County,* 176 Wn.App. at 562-63. Spokane County prepared the SEPA checklist noting that future environmental analysis would be required if there were future developments proposed. *Id.* The Court of Appeals stated that the County's environmental review (and the underlying checklist) was

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

improper because the future intended use of the property was known. *Id.* at 580-81. The adoption of the amendment "approved the property's existing nonconforming use, thereby affecting the environment." *Id*. at 581. In fact, the Court of Appeals in *Spokane County* cited Professor Settle about when it is acceptable to delay environmental review:

> An agency may not postpose environmental analysis to a later implementation stage if the proposal would affect the environment <u>without subsequent implementing action</u>. RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT § 13.01[1], at 13-15 to -16 (1997 & Supp. 2010; *see* WAC 197-11-060(5)d)(i)-(ii).

Spokane County, 177 Wn. App. at 579 (emphasis added). The Court of Appeals invalidated the actions by Spokane County because the adoption of the Comprehensive Plan amendment allowed for known and quantifiable impacts to be realized in the event that it was adopted.

Hayden v. City of Port Townsend is instructive. In *Hayden*, the City of Port Townsend was considering the adoption of a rezone. *Hayden v. City of Port Townsend*, 93 Wn.2d 870, 873, 613 P.2d 1164 (1980), overruled on other grounds by *Save a Neighborhood Environment (SANE) v. City of Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984) is instructive *Id.*. In conjunction, the responsible official issued a "negative declaration" or a Determination of Nonsignificance, since the rezone was not an action that would significantly affect the quality of the environment. *Id.* The Court, citing *Ullock v. Bremerton*, stated "[n]onproject rezoning has been held not to require an EIS as long as the council retains the authority to require such an evaluation at the project permit stage." *Id.* at 879. The court affirmed the issuance of the determination of nonsignificance because the rezone application itself carried with it no specific building permit. *Id.*

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

The County retains full authority to engage in project level review. It disclosed in the SEPA checklist that the County would consider project level review at the appropriate time. This would occur when the County was presented with an application and the existence of environmental impacts could be ascertained and analyzed. The analysis the courts have engaged in under *Spokane County* and *Hayden* provide insight into the level of environmental review required in connection with nonproject actions. In *Spokane County,* it was known that as a result of the adoption of the comprehensive plan amendment and rezone that a use would be commenced and the specific environmental impacts that would occur. The specific impacts of the use that would be permitted as a result of the adoption of the comprehensive plan and rezone were probable. In *Hayden,* the City had no specific proposal in hand therefore a determination of nonsignificance was appropriate.

In the instance of the Update, the potential for future proposals is unknown. The record establishes that the County expects that growth will continue to be slow. *Greg Snow Testimony.* Where appropriate, the known environmental impacts were disclosed by the County.

D. Appellant's Evidence was Considered by the County.

1. *County Provided an Extensive Public Participation Process.*

Appellant used the hearing for the purpose of submitting numerous exhibits claiming that the County was engaging in a shortened environmental review process. To the contrary, the County has engaged in a lengthy public review process beginning in June 2019. The County accepted public comments during the course of Planning Commission meetings and workshops since June 11, 2019. *See County Exhibit 11, p. 709.* It also accepted written

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

comments and considered those as part of the environmental review process. *See County Exhibit 9.* The County also prepared a matrix that showed the comments submitted by the public and the responses that the County had to each of the comments. *See County Exhibit 13*. Only after it engaged in the lengthy public process did the County prepare the environmental checklist and issue the DNS.

2. *Appellant's Disagreement with the Environmental Review Does Not Mean that it Did Not Occur.*

Appellant claimed the County erred in not considering a number of environmental impacts that it advanced at the hearing.

First, the County has the deference to weigh and balance what those aspects of environmental review that it thinks are important. RCW 43.21C.075(3)(d). This means that the County can weigh and balance those prospective environmental considerations that it thinks are important. Merely because the Appellant states that there are potential environmental impacts (climate change, potential fire hazards), does not mean that they were not considered by the County. In fact, both climate change and potential fire hazards were considered by the County as evidenced by the very documents that the County is working on. For example, the draft Update, dated February 2021, expressly considers and develops policies associated with climate change (*County Exhibit 3, POC 00052*) and fire hazards (*County Exhibit 3*, *POC 00084*). In other circumstances, Appellant alleged that certain impacts were not disclosed in the County's SEPA checklist (e.g. bull trout) but were plainly disclosed in the SEPA checklist. *Testimony of Tracy Morgan; County Exhibit* 12. The level of precision and disclosure that Appellant requests is not required by SEPA. *See, e.g.* WAC 197-11-335.

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

Second, in some cases Appellant's claim that the County did not consider an environmental impact simply was not true. Appellant submitted the testimony of Mr. Woody Myers to support its assertion that the Washington State Department of Fish and Wildlife ("WDFW") was not consulted as part of the update to the Environmentally Sensitive Areas Ordinance. *See Testimony of Woody Meyers.* The County testified that WDFW was consulted as the "first step" for the update to the Environmentally Sensitive Areas Ordinance. *Testimony of Greg Snow; Testimony of Ben Floyd*. Moreover, the County provided a copy of the SEPA checklist to the Department of Ecology for publication in the SEPA register. *Testimony of Greg Snow.* WDFW provided no comments on the SEPA checklist or the DNS issued by the County. *Id.*

The Appellant's appeal is driven by their disagreement with the outcome of the Update and does not mean that the environmental impacts were not considered as part of the environmental review. The judgment of the Appellant as to the adequacy of the record on environmental review cannot be substituted for that of the County's.

3. *Supplemental Evidence Provided by Appellant is Not Evidence of a Proposal or Significant Environmental Impacts.*

Appellant attempts to supplement the record with colloquy and the unverifiable statements of individual residents of the County. The County objects to the additional evidence that was submitted well after the closing of the record. The County further objects to the inclusion of the Rumsey Declaration as being direct quotes from the purported County Commissioner meeting without actually providing either the recording or the notes of Robert Allen Rumsey as supporting exhibits. In fact, on its face the Rumsey Declaration admits that

it is not verbatim and likely inaccurate ("The quoted statements below are precisely what was said or nearly so, with no substantive alteration") (emphasis added).

The County disagrees with specific statements attributed to Greg Snow. *See* Declaration of Greg Snow. Portions of the Rumsey Declaration contain the impressions of a witness and do not constitute admissions made by the County and therefore should be struck. *See, e.g.* Declaration of Robert Allen Rumsey, Paras. 10, 11, 12, 17, 18, 19, 20, 22, 26, 29. Remarkably, the Appellant goes so far as to make up an unverifiable impression of the conduct of the Commissioners to suggest that the County does not respect the authority of the Hearing Examiner in this matter (i.e. "The Commissioners were very animated and excited during this exchange, as if they already knew the outcome of the appeal before the Hearing Examiner and were celebrating"). Statements such as these cannot be and should not be a part of the record of the completeness of the environmental review conducted by the County. In addition, any additional statements that were made by a single County Commissioner are not a statement against interest. ER 804(b)(3). No single Commissioner is vested with the authority to bind the County.

Moreover, the Appellant's claim that these statements are the equivalent to projects in the County being immediately ready to go following the adoption of the Update. That is not the case nor is it supported by the evidence of the County that growth within the County is largely limited. *Greg Snow Testimony; County Exhibit 4, POC 000034.* Appellant argued this same point in connection with an alleged smelter in connection with the 2018 Comprehensive Update. *See* Hearing Examiner Decision, CPU-18-0001, p. 30. A suggestion that there may be developers ready to immediately commence construction after the adoption

KUTAK ROCK LLP
510 W. RIVERSIDE, STE. 800
SPOKANE, WA 99201-0405
509-747-4040

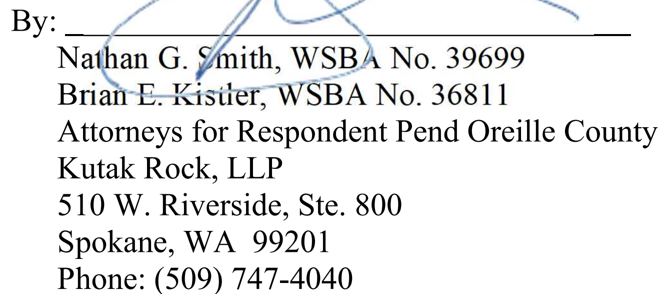
of the Update is the same "street talk" about a future project that was previously held to establish that no project existed. Declaration of Greg Snow; *Id.*

IV. CONCLUSION

The Appellant failed to meet its burden of proof to show that the County was clearly erroneous in issuing the DNS. The record supports the fact that the County made a *prima facie* showing of its compliance with SEPA. The County engaged in the meaningful environmental review required by SEPA. It satisfied the procedural requirements associated with SEPA by preparing an environmental checklist for the Application. It issued a threshold determination based upon those environmental impacts that could be meaningfully evaluated. For the reasons set forth herein the DNS should be affirmed.

DATED this 17th day of December, 2021.

KUTAK ROCK, LLP



By: ______________________________________

Nathan G. Smith, WSBA No. 39699
Brian E. Kistler, WSBA No. 36811
Attorneys for Respondent Pend Oreille County
Kutak Rock, LLP
510 W. Riverside, Ste. 800
Spokane, WA 99201
Phone: (509) 747-4040

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 17th day of December, 2021, I caused a copy of the foregoing POST-HEARING BRIEF OF PEND OREILLE COUNTY to be served on the following by the method indicated:

David Bricklin
Zachary Griefen
1424 Fourth Ave., Ste. 500
Seattle, WA 98101
bricklin@bnd-law.com
griefen@bnd-law.com

VIA ELECTRONIC MAIL

/s/ Colleen R. Sebo
Colleen R. Sebo