BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

IN RE ROBERT BERNHOFT'S DNS APPEAL	File No. PLN 2024-0020 CITY'S CLOSING ARGUMENT

I. INTRODUCTION

The City proposes to continue maintaining, for three more years, the high-flow bypass / diversion structure that it has maintained since the structure was first constructed in the 1990s. The maintenance involves removing sediment and cobbles from within and around the structure so that it can continue to perform its flood control function. At issue is whether continuing this maintenance for three more years (the Proposal) will cause a probable significant adverse impact upon the environment. The City determined that it did not and issued a DNS, which was appealed by Mr. Bernhoft. After the City sought to narrow the appeal issues, the hearing examiner ultimately allowed three issues to proceed forward to the evidentiary hearing:

(1) whether the Proposal causes a probable significant adverse environmental impact to the City's ductile iron (DIP) pipe under the BNSF railroad tracks;

(2) whether the Proposal causes a probable significant adverse environmental impact to fish passage downstream from the diversion structure along the former stream channel; and

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(3) whether the Proposal causes a probable significant adverse environmental impact to sediment deposition at the mouth of Perrinville Creek where the City's culvert (and previously the BNSF culvert) discharge into the Puget Sound.

With a proper understanding of the baseline condition, the evidence presented during the hearing did not show any probable significant adverse environmental impact with regard to any of the three appeal issues. Given the lack of adverse impacts, the City respectfully requests that the hearing examiner dismiss the appeal. Appellant failed to demonstrate that the DNS was clearly erroneous. Appellant failed to make the requisite showing that permitting (through an HPA) three more years of maintenance would create a probable significant adverse environmental impact. This is particularly the case where the current environmental condition, with the diversion structure taking the entire flow of Perrinville Creek, has persisted since the winter of 2020-2021, and where there is no longer any other channel capable of carrying Perrinville Creek to the BNSF culvert. This appeal fails to demonstrate that the City was clearly erroneous in issuing a DNS, and therefore must be dismissed.

II. LEGAL AUTHORITY AND ARGUMENT

A. Standard Of Review

Before the Department of Fish & Wildlife (DFW) processes a hydraulic project approval (HPA) it asks local government applicants like the City of Edmonds to comply with SEPA. Agencies review an environmental checklist in making the threshold determination, which assists the agency in considering the environmental impacts of proposals. *See* WAC 197-11-315; 197-11-960. The "agency shall make its threshold determination based upon information *reasonably* sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335 (emphasis

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added). Based on the environmental checklist, the agency will decide whether a proposal has a probable significant adverse environmental impact. WAC 197-11-300(2). Then the agency "can either issue a DNS (if no probable significant adverse environmental impact exists) or a determination of significance (if probable significant adverse impact exists)." *King Cnty. v. Friends of Sammamish Valley*, 3 Wn.3d 793, 815-816 (2024).

The agency's threshold determination is entitled to "substantial weight" under RCW 43.21C.090. "In reviewing the SEPA decision, the reviewing court recognizes and defers to the expertise of the administrative agency." *Pease Hill Cmty. Grp. v. Cnty. of Spokane*, 62 Wn. App. 800, 809, 816 P.2d 37, 42 (1991). "Selection of environmental review process and protection is left to the sound discretion of the appropriate governing agency, not this court." *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 302 (1997). Courts apply the "clearly erroneous" standard of review to an agency's DNS. *Norway Hill Pres. & Prot. Ass'n. v. King County Council,* 87 Wn.2d 267, 275–76 (1976). A SEPA determination is clearly erroneous "only when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Chuckanut Conservancy v. Washington State Dep't of Nat. Res.*, 156 Wn. App. 274, 286 (2010), *citing Norway Hill*, 87 Wn.2d at 274 (internal quotations omitted). "If the governmental body makes a threshold determination of 'no significant impact' under SEPA, it must then demonstrate that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA." *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814 (1978). "The burden of demonstrating the invalidity of agency action" rests with the appellant. *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d 846, 866 (2022).

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B. Petitioner Fails To Demonstrate That The DNS Was Clearly Erroneous

In making his appeal, Appellant must demonstrate that the threshold determination was clearly erroneous based on the entire evidence in the record. Mr. Bernhoft has failed to make this showing regarding the City's DNS for the renewed HPA, because he has failed to provide evidence of a probable significant adverse environmental impact.

When courts review an agency's threshold determination, they review the record that was before the agency when making their decision. *Wild Fish Conservancy*, 198 Wn.2d at 867. Courts do not require the agency's checklist to be perfect, just reasonably sufficient. *PT Air Watchers v. State, Dep't of Ecology*, 179 Wn.2d 919, 927 (2014). To prevail, the appellant must show that there is enough evidence of a probable significant adverse environmental impact as to meet the clearly erroneous standard.

For example, in *King Cnty. v. Friends of Sammamish Valley*, 3 Wn.3d 793 (2024), King County passed Ordinance 19030, which "altered zoning and business licensing regulations for wineries, breweries, and distilleries (WBDs), and accompanying tasting rooms, within land designated as agricultural and rural under the King County comprehensive plan." *Friends of Sammamish Valley*, 3 Wn.3d at 797. Before adopting the ordinance, the county made a checklist, determined that the proposed ordinance was a nonproject action, and made a determination of nonsignificance. *Id*. at 799. The appellant challenged the validity of the ordinance by appeal to the Central Puget Sound Growth Management Hearings Board. *Id*. at 800. The Board held that the county failed to establish a prima facie showing of SEPA compliance and that the county violated SEPA by basing its DNS on an inadequate checklist. *Id*. at 800-801. On appeal, the Washington Supreme Court agreed with the Board, finding in part that the record disclosed

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"current, specific developments and land use changes that are probable to result from the proposed action." *Id*. at 821. The expansion of WBDs created a probable significant adverse environmental impact to land that was classified as agricultural or rural, which are subject to a statutory requirement to assure that the agricultural and rural nature of the land is preserved. *Id*. at 806, 821. The Court found ample evidence in the record of reasonably foreseeable impacts from businesses that were likely to operate in this area after Ordinance adoption. *Id*. at 821, 822. "While some businesses already exist and impact the condition of the land, under the Ordinance, more structures will be built, land will be paved, and water usage and sewage will inevitably increase, all having a very likely impact on the condition of the land and a negative impact on the environment." *Id*. at 823. Looking at the record, the Court determined that the checklist was inadequate (and thus the DNS clearly erroneous) where it did not address the inevitable increase in business and its related impacts.

By contrast, in *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 300–05, 936 P.2d 432, 439–41 (1997), the Court found an MDNS was not clearly erroneous where the applicant could not point to a probable significant adverse environmental impact that the county failed to consider in its threshold determination. In that case, the county received a permit application for a soil bio-remediation facility, and after the county planning department received environmental studies and evaluations of potential impacts, issued an MDNS. The Court looked to the record and found ample evidence that the county considered environmental factors in issuing its DNS. *Anderson*, 86 Wn. App. at 304-305. Further, the Court held that the appellant "has failed to cite any fact or evidence in the record demonstrating that the RPW Project, as mitigated by the 54 MDNS conditions, will cause significant adverse environmental impacts. Despite repeated inquiries at oral argument, Buckley could not identify a single environmental impact that had not been

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adequately addressed in the MDNS. Buckley's skepticism about the effectiveness of some mitigation measures is speculative at best and does not provide a basis for holding the MDNS to be 'clearly erroneous.'" *Id*. Similarly, in *Moss v. City of Bellingham*, 109 Wn. App. 6 (2001), the Court held that an MDNS for a large-scale subdivision development preliminary plat approval was not clearly erroneous where "although appellants complain generally that the impacts were not adequately analyzed, they have failed to cite any facts or evidence in the record demonstrating that the project as mitigated will cause significant environmental impacts warranting an EIS." *Moss v. City of Bellingham*, 109 Wn. App. 6, 23–24, 31 P.3d 703, 712 (2001).

In the present matter, the totality of the evidence in the record that shows that continued maintenance of the diversion structure will not cause a probable significant adverse environmental impact. Because the record, as a whole, does not reflect the probability of a significant adverse environmental impact, the City's DNS was not clearly erroneous.

C. The Proper Baseline Is The Current Condition Of The Environment – Which Includes A Fully Diverted Creek And A Diversion Structure That Needs Periodic Maintenance

Mr. Bernhoft rests his appeal on an argument that the baseline for the examiner's review should be a "no-action" baseline, based on the fact that the previous HPA permit has expired. This argument is unsupported.

When assessing the DNS issued by the City, the court must look to the appropriate environmental baseline – the current condition of the environment. Because the Lower Perrinville diversion structure has been periodically maintained on a consistent basis for approximately 30 years with it taking the entire flow of the creek for the four plus most recent years, the examiner must consider that complete diversion, associated necessary maintenance,

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and lack of an alternative channel as the appropriate baseline for review of the DNS regarding the most recent three-year maintenance proposal.

Courts use the concept of a "baseline" to identify the possible consequences of a proposed agency action. "The basic idea is that establishing baseline environmental conditions is necessary to determine the effect a proposal will have on the environment." *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d 846, 869 (2022). Courts have established that "the appropriate baseline to compare the environmental impacts of the proposed action is the *condition* of the existing *environment*, rather than considering the current *uses* of the land." *Friends of Sammamish Valley*, 3 Wn.3d at 822. "[A] proposal must degrade the existing condition of the environment to have significant adverse impact. Mere failure to restore or improve environmental quality is not a significant adverse impact under SEPA." *Wild Fish Conservancy*, 198 Wn.2d at 871, *citing* Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis,* § 13.01[1], at 13-22.

In determining the condition of the existing environment, the agency need not establish the baseline as a "no action" or "no operations" scenario. Rather, the agency should take a practical look at the actual condition of the existing environment in assessing whether the proposal would create probable adverse environmental impacts. A useful case for comparison is *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d 846 (2022). In that case, permit applicant Cooke ran Atlantic salmon farming operations in the Puget Sound over the previous 30 years. After the state legislature enacted a statute prohibiting the state from issuing new aquatic land leases for nonnative aquaculture (thus prohibiting the farming of nonnative fish in Washington waters after the current leases expire), Cooke submitted an aquaculture permit to the Washington Department of Fish and Wildlife to transition his net-pen operations to native

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steelhead trout. This change necessitated SEPA review, and WDFW issued an MDNS determination for the cultivation of steelhead trout based in part on the existing salmon farming that had operated for the past several decades.

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

It is worth noting that the Court in *Wild Fish Conservatory* was not persuaded by appellant's argument that the baseline should be "no action" because the enactment of the statute made it unlawful for Cooke to farm Atlantic salmon after his current lease was set to expire (and could therefore no longer serve as an "existing use" baseline). *Id*. The Court similarly was not persuaded by the fact that Cooke did not hold valid leases to farm salmon in all of his net-pens. The Court specifically read the "existing condition of the environment" to mean the practical reality of continuous finfish farming.

The Court's decision in *Wild Fish Conservatory* does not conflict with *Friends of*

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Sammamish Valley, the most recent case to discuss the baseline concept. In that case, the DNS was deemed clearly erroneous because it did not consider how the WBD Ordinance would create adverse environmental impacts on the agricultural land. The Court did not consider the existing *uses* of the agricultural land (where 54 WBDs were in operation before the Ordinance but only 4 were licensed) as a basis for its decision. *Friends of Sammamish Valley*, 3 Wn.3d at 799, 822. Instead, it determined that the Ordinance would vastly affect the condition of the land, which is zoned as agricultural, by increasing the number of WBDs: "The Board looked at the current *condition* of the land, noting that the land is primarily agricultural and rural in nature, and the Ordinance would have an effect on the existing condition of the land. This comparison is consistent with our analysis in *Wild Fish Conservancy*, where we said that it is useful to establish a baseline *environmental* condition to compare a proposal's impact. The designation of the land as agricultural defines the existing environmental condition." *Id*. at 823 (citation omitted). While the *Friends of Sammamish Valley* case does not conflict with *Wild Fish Conservatory*, it is not as applicable as *Wild Fish Conservatory* is to the present facts. Notably, *Friends of Sammamish Valley* relates to a nonproject (programmatic) action to adopt an ordinance that will have reasonably foreseeable future impacts, while *Wild Fish Conservatory* relates to a project action (permit approval).

Here, the existing condition of the property sets the baseline for review of Edmonds' DNS. The City of Edmonds has maintained the subject bypass / diversion structure under various HPAs since the 1990s. This maintenance is comprised of removing sediment from the creek once or twice a year as a flood mitigation measure. Because the most recent HPA has expired, the City is seeking to renew its HPA to continue that maintenance as it has for decades. The regulatory

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status of the permit[1] should not affect the baseline measure; what matters is the condition of the existing environment. While the City may need to periodically renew its regulatory permits, that does not change the physical characteristics of the environment. The appropriate baseline for this review is the environmental condition of the property when the checklist is prepared. Appellant fails to demonstrate that the DNS would cause a probable significant adverse environmental impact based on the correct baseline. Appellant essentially argues for a hypothetical baseline, one where the city has stopped performing maintenance activity and the waters of the creek have begun to flood or sheet flow their way downhill. The city knows of no case holding that it is proper to use a hypothetical condition as the baseline instead of the existing environmental condition. Using such a baseline here would constitute error.

D. Uncontested Facts Around the Current Environmental Condition aka the Baseline

The following uncontested facts about the existing environmental condition, as it pertains to the City's proposed maintenance, should be included in the examiner's findings:

1. Since sometime in the winter of 2020-2021, the waters of Perrinville Creek have reached the Puget Sound almost entirely through the City's diversion structure;
2. Occasional extreme flow events, where the water sheet flows across the McLaughlin property are the only exceptions to the above condition, and, due to the City's ongoing maintenance, those instances are infrequent and short lived;

[1] If the validity of the DNS turned on whether the previous HPA had expired, absurd results would follow. For example, assume the City's previous HPA expired on May 1, 2024. Appellant would have to concede that a SEPA checklist prepared on April 1, 2024 would have a dramatically different analysis than a SEPA checklist prepared on June 1, 2024, even if the environmental condition had not changed at all during that two month period. Such an absurd result is unsupported by law and avoided if one bases the SEPA analysis on the environmental condition and not the regulatory status.

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3. The former channel across the McLaughlin and Robinson properties has been largely, if not entirely, filled with sediment since the winter of 2020-2021;
4. Even during the occasional extreme flow events referenced above, the waters of Perrinville Creek still do not travel the path of the former channel;
5. The former channel lies across private property owned by McLaughlin and Robinson and the City does not have the right to restore that channel without the consent of the owners, which has not been provided;
6. Given the unusable condition of the former channel, in the short term (the duration of the proposed three year HPA), there are only two non-speculative pathways for the waters of Perrinville Creek: 1) the diversion structure and City pipe; or 2) sheet flow flooding across the McLaughlin property to lower ground;
7. Perrinville Creek currently enters the City's diversion structure which leads to a City-owned metal pipe (sometimes referred to as the DIP) that passes underneath the BNSF railroad tracks;
8. To the extent that the existing condition of the pipe is degraded from its original condition, that is primarily due to salt water, tidal, and wave impacts, not the passage of fresh water and sediment through the pipe;
9. Anadromous fish that would enter the concrete BNSF culvert in an attempt to gain access to the portion of Perrinville Creek above the diversion structure have not been able to make that passage since the winter of 2020-2021 because the former channel is no longer fish passable;
10. The City's diversion structure and pipe carries some sediment to Puget Sound, while other sediment needs to be removed as part of the City's maintenance

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efforts;

11. The BNSF culvert, because it no longer drains Perrinville Creek, also does not carry any sediment from Perrinville Creek to Puget Sound.

E. <u>The Evidence in the Record Fails To Show That The Proposal Would Have A Probable Significant Adverse Environmental Impact On The City's DIP</u>

Perhaps the most compelling evidence of no impact comes from the Appellant's own expert witness, Mr. Lider. The relevant testimony appears at approximately 03:41:15.000 – 03:43:14.000 on January 24, 2025 (the first day's transcript), during Mr. Lider's cross examination:

[Jeff Taraday:] Those issues in the pipe that we're talking about are being caused by salt water corrosion, not by the city's HPA maintenance, right?

[Mr. Lider:] Correct…

***

[Jeff Taraday:] And I just want to confirm that it's your testimony that the maintenance that's allowed by the [HPA] Permit is not harming the pipe.

[Mr. Lider:] It's not harming the pipe. I would agree with that."

During that exchange, Mr. Lider repeatedly confirms that what he calls "lack of maintenance of the pipe itself" pertains to the City not repairing or replacing it, rather than to any routine diversion-structure maintenance performed pursuant to the HPA.

There was a dispute among the experts as to the condition of the pipe itself and whether it posed any danger to the BNSF tracks, but, in light of the above concession, that dispute is not material to the subject SEPA analysis, which only needs to address the impact of the City continuing its HPA-related maintenance. Having said that, Mr. DeLilla addressed the concerns

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that were raised by Mr. Lider regarding the baseline condition of the DIP. The excerpts below show that the forces placed on the pipe and surrounding area are quite small, and that there is no evidence that water continuing to flow through the pipe would jeopardize structural integrity.

In his February 5 testimony, Mike (Michele) De Lilla explains that the joint Mr. Lider was concerned about lies outside the structural load area for the railroad. At 05:06:22.410 to 05:07:21.320, Mr. De Lilla shows that the joint is "not over a structural portion" of the tracks, meaning even if a joint broke, "it's not really of consequence to the integrity of the tracks or any sort of derailment."

He also testifies that large internal pressures in the pipe claimed by Mr. Lider do not actually occur. Earlier in the same hearing, Mr. De Lilla testifies that water would "be gushing out of the manhole" if it were under the intense pressure that Mr. Lider claimed, and no such phenomenon has ever been observed, including under King Tide conditions: "If it even had that 9 foot [head], water would be gushing out of that manhole…that's never happened." (05:15:18.230 to 05:16:05.039).

In an attempt to salvage a lost issue, Appellant returned Mr. Lider to the stand in what was supposed to be a rebuttal capacity. Mr. Lider introduced new issues for the first time that the City, given the structure of the hearing, did not have an opportunity to respond to.

For example, at approximately 04:19:47.230–04:20:07.010 on February 14, Mr. Lider presented testimony on aerial photographs' "parallax error". Mr. De Lilla's testimony did not address parallax error. The examiner will likely find the parallax error testimony to be irrelevant for his purposes. But in the event that he finds it relevant, the City would request that the hearing be reopened to have testimony on the following offer of proof, which would have been provided by Mr. De Lilla had the parallax error issue been provided during Mr. Lider's first round of

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testimony.

> **Offer of Proof:** The image used by Mr. De Lilla is a multi-photo composite that is combined into one image to address parallax issues. This composite photo, was taken by Leica ADS100 digital aerial cameras, have been orthorectified and aerotriangulated, and were made available to the City via the by the Washington State Geospatial Program Office. They ensure that parallax is addressed and is not an issue for this intended use and measurements. The aerial photo is accurate to within mere inches, which for the intended purpose: to show that the joint at issue is at least 2-3 feet outside the load prism of the track. Engineered design drawings, which have accuracies to within about 1/10th of an inch are not needed, where the subject joint is at least 2-3 feet outside the ballast load prism.

The joint is part of the baseline condition and Mr. Lider has testified that the City's maintenance won't harm the pipe. So, none of this should matter. Having said that, the examiner may wish to be reminded of the fact that Mr. De Lilla did not rely soley on the aerial photograph in determining that the joint lies outside of the railroad prism load area. In addition to referencing the overhead image to gauge pipe alignment and distances, he also compared the stationing data from the Aqualis camera-inspection report (in particular the 93-foot mark in the footage) and used as-built references for the manhole near the diversion structure. By correlating these data points—camera footage stationing, distance from the manhole, and the aerial photo—he concluded the joint in question was well outside the area BNSF relies on for structural support. See February 14, 2025 testimony commencing at the 00:13:05.580 mark.

The totality of the evidence on this issue makes it clear that, while the experts might disagree on the existing condition of the pipe or the location of the joint at question, none of these conditions will be made worse by having Perrinville Creek continue to flow through the DIP.

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F. The Evidence in the Record Fails To Show That The Proposal Would Have A Probable Significant Adverse Environmental Impact On Fish Passage

The question about fish passage is much more intuitive than the DIP question. If one properly acknowledges that the baseline condition for SEPA analysis is the existing condition and not some past condition (e.g., 2019) or some hypothetical future condition (e.g., one where water is allowed to flood and sheet flow across the McLaughlin property), then it is easy to conclude that the Proposal doesn't cause a probable significant adverse environmental impact to fish passage. As noted above, there is no fish passage from the Puget Sound presently. The BNSF culvert and former channel have been cut off from the rest of the creek when the former channel filled with sediment during the winter of 2020-2021. And the City's pipe is also a fish barrier.

Is the existing condition fish friendly? No, which is why the City is working with owners and stakeholders to eventually make a better connection between Perrinville Creek and Puget Sound. But the question for the examiner is whether continuing to maintain the diversion structure (continuing the baseline condition) causes adverse impacts to fish passage or fish habitat. By definition, if the Proposal is merely continuing the baseline condition, there cannot be probable significant adverse impacts for SEPA purposes. If the environmental checklist wasn't as robust on certain topics as one might find in other contexts, that isn't necessarily inappropriate when the City's proposal is merely to maintain the baseline.

While the City objects to the use of a hypothetical future baseline, it will briefly note that even using a hypothetical baseline, there still wouldn't be a probable significant adverse environmental impact. Even if water were allowed to flow across the lawn or "sheet flow" to the

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BNSF culvert, it still would not facilitate meaningful fish passage. Paul Schlenger describes why that shallow, unchannelized flow—and the vertical jump up from the culvert—precludes fish from using the area for spawning or rearing habitat. At timestamp ~00:56:07.–00:58:42, (February 5), Mr. Schlenger clarifies that fish need an actual channel with consistent depth and flow, and simply allowing water to spill or "sheet flow" across a lawn would not create viable fish passage. He characterizes the yard area as a "flow path, not habitat" and notes upstream/downstream barriers exist regardless, so unchannelized runoff across that property would not suddenly enable fish access to the BNSF culvert.

After extensive testimony and discussion of numerous challenges to fish that would attempt to spawn in this location (assuming all the conditions aligned to allow them to reach the spawning grounds), and to any eggs that would actually hatch before they got buried or washed away, Mr. Schlenger ultimately concludes that the City's maintenance does not have a probable significant adverse impact on fish habitat or fish passage. February 5, 2025, 02:39:29. The Appellant has not carried his burden on this issue.

G. The Evidence in the Record Fails To Show That The Proposal Would Have A Probable Significant Adverse Environmental Impact On Sediment Transfer

The record shows that sediment is already unable to reach the beach (via the BNSF culvert) because there is no open channel across private property to the BNSF culvert. Also, the City's maintenance at the diversion structure does not alter the existing condition in any way that would further limit sediment transport to the BNSF culvert. Even Mr. Lider agrees that the BNSF culvert is not nourishing the beach under the baseline condition. January 24, 2025, 03:58:23.

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Mr. Ambrose testimony also shows that the diversion structure allows suspended sediment to reach the beach: "during those events where all this water is moving into the diversion, and out into the sound that that water contains suspended material as well. Right? So you know the the flow path, you know, as it goes into the diversion pipe and out to the sound. You know there's certainly a decent amount of suspended material." February 5, 2025, 03:34:46. As to the overall impact of the City's maintenance on sediment transfer to the beach, Mr. Ambrose described it as "negligible." February 5, 2025, 03:40:27. A negligible impact is the opposite of a significant one. So, the record does not support that the Proposal causes a probable significant adverse environmental impact on this issue.

III. CONCLUSION

Appellant fails to demonstrate that the DNS was clearly erroneous based on the facts and evidence in the record. Merely continuing periodic maintenance of a bypass structure in the same way that the maintenance has been done over three decades will not cause a probable significant adverse environmental impact, particularly where the proper baseline is used. The DNS should stand.

DATED this 7th day of March, 2025 at Seattle, Washington.

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