On January 30, 2025, the City made an oral motion to dismiss issue number one for lack of evidence. Issue one concerns the adverse impacts to the ductile iron pipe under the BNSF railroad tracks. The City asserted that "the damage that he [Mr. Lider] sees to the city's pipe is caused by saltwater corrosion" and "he [Mr. Lider] admitted on cross examination that none of the city's maintenance activities actually cause any harm to the city's pipe." [unofficial transcript]. The Examiner requested that appellants provide a brief response to the City's motion by 5pm on February 3, 2025 via email. The City's motion should be denied for the following reasons.

A. The City's motion should be denied because appellant has not yet had the opportunity to examine the City's witnesses.

The City's motion should be denied because appellant has not yet had the opportunity to examine City witnesses. Bernhoft reserved the right to call any witness identified by the respondent. The examination of City witnesses is particularly important here because the City's record contains no meaningful information related to the City's environmental review. There are no reports, no checklists, no data, no surveys, no flow analysis, no requests for information, no calculations, and no diagrams in the City's record. SEPA requires informed decision making and we must be allowed to question City witnesses about their review of these impacts.

B. The City's motion should be denied because there is legally sufficient evidence to support appellant's claim.

The City's motion should be denied because there is legally sufficient evidence to support appellant's claim.

1. Standard of review

A motion to dismiss or motion for directed verdict may be granted only if "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue." *Ramey v. Knorr*, 130 Wash. App. 672, 675–76, 124 P.3d 314, 317 (2005). A motion for a directed verdict admits the truth of the evidence of the nonmoving party and all inferences that reasonably can be drawn therefrom. *Id*. The evidence must be considered in the light most favorable to the nonmoving party. *Id.* The trial court may grant a directed verdict only when it can be held that as a matter of law, there is no evidence, nor reasonable inferences from the evidence, to sustain the verdict. *Id.*

2. SEPA requirements related to issue one

The threshold determination is probably the most important single step in the SEPA process. The public policy of SEPA is thwarted if an EIS is not prepared for a project with significant impacts. *Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d 267, 273, 552 P.2d 674 (1976). The threshold determination must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335; WAC 197-11-330; *Anderson v. Pierce County*, 86 Wn. App. 290, 301(1997). *See also Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 276 (1976); *Spokane County v. E. Wash. Growth Management Hr'gs Bd*., 176 Wn. App 555, 579, 309 P.3d 673 (2013), *review denied* 179 Wn. 2d 1015, 318 P.3d 279 (2014).

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 Northwest v. Okanogan County*, 194 Wn. App. 1034, 2016 WL 3453666, *32 (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, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192). This information must be adequate to demonstrate that the agency has taken the requisite "hard look" at environmental impacts. *Pub. Util. Dist. No. 1 of Clark County*, 137 Wn. App 150, 158, 151 P.3d 1067 (2007).

For the purpose of deciding whether an EIS is required, the relevant information necessary to assess the project impacts must be specified in the environmental checklist that is prepared and submitted with the application. A threshold determination must ultimately be based on the information that is provided in the environmental checklist and any additional information that is requested by the responsible official. WAC 197-11-335 and 197-11-350. The purpose of the checklist is to ensure that the agency fully discloses and carefully considers a proposal's environmental impact before adopting it. *Spokane County v. E. Wash. Growth Management Hr'gs Bd.,* 176 Wn. App at 579. For that purpose, the information provided in the checklist must be detailed and complete. *Id. See also Conservation Northwest v. Okanogan County,* 194 Wn. App.

1034, 2016 WL 3453666, *32 (2016). (unpublished nonbinding authority per GR 14.1). Broad generalizations and rote answers in a checklist are condemned as improper. *Id.* A DNS that relies on inadequate or incomplete information about project impacts is noncompliant with SEPA requirements and must be reversed and remanded for additional review. *Conservation NW. v. Okanogan County*, 2016 WL 3453666 at *31.

A "baseline" is a practical tool borrowed from NEPA jurisprudence and used in environmental analysis 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. *Chuckanut Conservancy*, 156 Wn. App. at 284 n.8, 232 P.3d 1154 (2010). "[C]ourts not infrequently find NEPA violations when an agency miscalculates the ... baseline or when the baseline assumes the existence of a proposed project." *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012). Where activities would not continue absent the new agency action, the baseline or status quo should be a no-operations scenario. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781-84 (9th Cir. 2006) (EIS required because, instead of preserving the status quo, the lease extension gave the project proponent another five years to develop the project); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior*, 655 Fed. App'x 595, 598 (9th Cir. 2016) (agency improperly assumed renewal of water delivery contracts as the "no action" alternative).

3. Appellant presented legally sufficient evidence to support issue one

Appellant presented legally sufficient evidence to support appellant's claim that the DNS should be reversed because the City failed to adequately disclose and assess the probable significant adverse impacts that the proposal will cause to the ductile iron pipe under the BNSF railroad tracks. In addition, appellant provided considerable evidence demonstrating that the proposed action may have probable significant adverse impacts in this regard. Appellant anticipates that the testimony of the City's witnesses will provide additional evidentiary basis to support this claim.

SEPA seeks to ensure that decision makers and the public are fully informed of the likely impacts of agency actions. Appellant demonstrated that the City of Edmonds undermined that intent by using a fictional baseline that assumes continued operation and maintenance of the fish killing flow splitter. The proposed action is maintenance of a fish killing flow splitter that diverts

all flow from Perrinville Creek into a rusting, crumbling, and inadequately sized City-owned pipe that cannot even safely convey a 6-month storm event (1-inch of rain in 24-hours) that runs beneath railroad tracks. The fish killing flow splitter does not work without continual maintenance any time there is a significant rain event, even during periods outside the closed "fish window" when in-water work is prohibited. The environmental baseline is the condition without the proposed action. In this case, the baseline is a clogged/non-functional flow splitter and the re-establishment of a natural surface channel for the creek and no creek flow in the ductile iron pipe. The City must consider the impacts of the project measured against not doing the maintenance.

The City's motion reveals the underlying error of the City's entire environmental review process—the failure to consider the impacts of the proposed action and a misunderstanding of the environmental baseline. The City argues that it is up to the citizens to prove that environmental impacts will occur. The City also appears to believe that the environmental baseline for its review is a fully functioning diversion structure. That is not the correct standard of review nor the correct baseline here.

The City's SEPA review is required to carefully consider impacts to elements of the environment, which include rail traffic, movement/circulation of people or goods, potential releases to the environment affecting public health, and public services and utilities such as maintenance, water/stormwater, waste, and other governmental services or utilities. WAC 197-11-444. Each of these elements relate to the ductile iron pipe—issue one—before the Examiner in this appeal. The proposed action involves an undersized and deteriorating stormwater utility pipe that runs underneath a busy rail traffic line. Mr. Lider's testimony demonstrated that the City failed to consider the condition of the pipe or the risks associated with the undersized and crumbling infrastructure upon which the proposed action would rely.

The City's proposed action relies on a rapidly deteriorating pipe. Mr. Lider provided testimony and evidence regarding pipe's deterioration over the past 15 years—documenting rust blisters, scaling, delamination, and holes. Mr. Lider provided testimony and evidence that the pipe has rusted through at multiple spots, including at least one hole large enough for ballast rock to fall through. Exhibit B31. He also testified that the City inspection record failed to mention this sizeable hole. Mr. Lider testified that the spot where rock was falling through the pipe may be under the load prism of the railroad. Lider Testimony; Exhibit B31. He explained the safety risks

that are likely to result from ballast rock under railroads entering pipes below. For example, the continued deterioration of this pipe could displace rock and result in train derailment. Loss of ballast rock creating a void under the railroad tracks might not be determined by surface inspection, until a rapid shift in the rock that could result in a train derailment. Holes in the pipe can allow water to jet out under pressure eroding the base course supporting road loads above. In turn, this allows larger ballast rock to impinge point loads on the pipe, accelerating its failure. Although Mr. Lider acknowledged that the rust was likely caused by saltwater, that does not terminate the required analysis under SEPA.

Additionally, water flowing in this pipe could make the problem worse. Flowing water has the potential to carry the rocks that fall through the pipe downstream. If water was not flowing through the pipe, it is possible that falling rock could pile up under the hole in the pipe. A clogged pipe may be safer than a flowing but deteriorating pipe. The City did not consider the condition or risks associated with this failing pipe and water flow.

The City's SEPA review should consider the proposed action impacts on the utilities/infrastructure. The proposed action will divert the entirety of Perrinville Creek into an undersized pipe that cannot handle a major storm event. Mr. Lider presented testimony and documentation demonstrating that the proposed action relies on a pipe which cannot safely convey a 5-year storm event. Lider Testimony; Exhibit B79: Exhibit B4. Mr. Lider provided ample testimony showing that the City did not consider this inadequate infrastructure in its review.

C. Conclusion

Appellant respectfully requests that the Examiner deny the City's oral motion. Appellant's expert has provided testimony and evidence related to the issues with the proposed action's ductile iron pipe as well as the City's failure to consider the pipe in its environmental review as required under SEPA. Further, since one of the main themes in this appeal is the City's lack of analysis, denying appellants an opportunity question City witnesses about their analysis, or lack thereof, undermines the appeal. Considering all facts and evidence in the light most favorable to appellant, a directed verdict/dismissal of issue one should be denied.