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**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF OLYMPIA**

In re: Eastbay Flats and Townhomes  
(Westman Mill)

No. 17-2795

Appeal of Determination of Non-  
Significance and Land Use Approval

APPELLANT OLYMPIA URBAN  
WATERS LEAGUE’S SUPPLEMENTAL  
BRIEF ON THE MERITS AND OMNIBUS  
OPPOSITION TO APPLICANT AND PORT  
OF OLYMPIA’S DISPOSITIVE MOTIONS  
AND REQUEST FOR JUDGMENT ON  
SEPA CLAIM

**I. INTRODUCTION**

Appellant Olympia Urban Waters League (“League”) submits this brief in response to the Port of Olympia and the Applicant’s motions for summary judgment on the League’s SEPA and Critical Areas Ordinance claims. This brief is also a supplemental brief on the merits, and supplements the Appeal Brief filed by the League in this case on March 8, 2018, the contents of which are hereby incorporated by reference. The League requests that the Hearing Examiner deny the Port and the Applicant’s motions and, instead, enter summary judgment in favor of the League on the SEPA claim because there are no genuine issues of material fact and the City’s Determination of Non-Significance (DNS) is defective as a matter of law.

**II. FACTUAL BACKGROUND**

The League filed this appeal of a City SEPA and land use approval on March 8, 2018. Relevant facts related to the history of the League and its standing in this case are set forth in the Declaration of Harry Branch filed concurrently with the present briefing. For simplicity of

1 reference, the League incorporates by reference the summary of the facts related to the League’s  
2 standing set forth in the Facts section of the League’s opposition to the Applicant’s motions to  
3 dismiss and/or for summary judgment on standing. *See generally* Omnibus Opposition to  
4 Applicant’s Motions on Standing, Facts section.

### 5 **III. EVIDENCE RELIED UPON**

6 This opposition relies on the Declaration of Harry Branch filed in support of this brief,  
7 and upon the record presently before the Hearing Examiner.

### 8 **IV. ARGUMENT**

#### 9 **A. Standard of review on the League’s SEPA claim.**

10 Citing cases involving *judicial* review of administrative SEPA decisions, the Port invites  
11 the hearing examiner to apply the clear error standard to review of the responsible official’s DNS.  
12 The League contends that the OMC 18.75.040(F) prescribes the appropriate standard of review.  
13 Appeal Brief at 21. Nonetheless, to the extent that a clear error standard is applied, the entire  
14 record should be reviewed to determine whether, although there may be some substantial  
15 supporting evidence for the decision, “the reviewer is left with the definite and firm conviction  
16 that a mistake has been committed.” *Norway Hill Pres. & Prof. Assn. v. King County Council*,  
17 87 Wn.2d 267, 274 (1976). The standard also requires consideration of the “public policy  
18 contained in the act of the legislature authorizing the decision” and that policy is part of the  
19 review. *Id.* at 275. SEPA constitutes an environmental full disclosure law. “The act’s procedures  
20 promote the policy of fully informed decision making by government bodies when undertaking  
21 ‘major actions significantly affecting the quality of the environment.’” *Id.* at 272.

22 More specifically, the Legislature recited several policy principles underlying SEPA:

- 23 • a human being depends on biological and physical surroundings for food, shelter,  
24 and other needs, and for cultural enrichment as well;
- 25 • human beings have a profound impact on the interrelations of all components of  
26 the natural environment, particularly the profound influences of population growth,  
27

1 high-density urbanization, industrial expansion, resource utilization and  
2 exploitation, and new and expanding technological advances;

- 3 • there is a critical importance of restoring and maintaining environmental quality to  
4 the overall welfare and development of human beings;
- 5 • each person has a fundamental and inalienable right to a healthful environment and  
6 that each person has a responsibility to contribute to the preservation and  
7 enhancement of the environment.

8 RCW 43.21C.020. Accordingly, in RCW 43.21C.020(2), the Legislature informed entities with  
9 SEPA duties that it was the “continuing responsibility of ... all agencies” to use all practicable  
10 means to ensure that the state and its citizens fulfill the responsibilities of each generation as  
11 trustee of the environment, assure safe, healthful and beneficial uses of the environment and  
12 achieve a balance between population and resources use which permits sharing of life’s amenities.

13 Bearing in mind these policies, for its DNS to survive judicial scrutiny, the City must  
14 demonstrate that it actually considered relevant environmental factors before reaching the  
15 threshold determination. *Boehm v. Vancouver*, 111 Wn. App. 711, 718 (2002). It must also  
16 demonstrate that its decision to issue the DNS was based on information in the environmental  
17 checklist sufficient to evaluate the proposal’s environmental impacts. *Id.* The record must  
18 demonstrate that the City adequately considered the environmental factors in a manner sufficient  
19 to constitute *prima facie* compliance with SEPA. *Id.*

20 Washington Courts reviewing SEPA determinations also look to federal NEPA cases for  
21 guidance. Under federal law, simple conclusory statements of “no impact” fail to fulfill an  
22 agency’s duty when preparing an initial environmental assessment. *Foundation on Econ. Trends*  
23 *v. Weinberger*, 610 F. Supp. 829, 841 (D.D.C. 1985). An agency must take a hard look at the  
24 environmental concern and the initial assessment must indicate that the agency has taken a  
25 searching realistic look at the potential hazards, and with reasoned thought and analysis, candidly  
26 and methodically addressed those concerns. *Id.*

1 **B. The responsible official's DNS determination is clearly erroneous.**

2 ***1. Based on the Port's arguments, there is at least a material issue of fact regarding***  
3 ***whether the City complied with its own SEPA procedures.***

4 The Port asserts that the City complied with required SEPA procedures as a matter of law.  
5 Port SJM at 8. But its defense of the City's decision requires reference to several environmental  
6 documents (a 1994 FEIS and 14 addenda and a 2007 MDNS with addenda) that were not adopted  
7 by the City, or incorporated into the DNS, or mentioned in the checklist for the Westman Mill  
8 project. If, as a matter of fact, the City intended to rely on those documents for this review, it  
9 committed an error of law by not properly adopting or incorporating them by reference. OMC  
10 14.04.020 (adopting WAC 197-11-600(4)); WAC 197-11-635. The Port's summary judgment  
11 motion can be denied on this basis alone.

12 If it was indeed the City's intent to adopt or incorporate additional environmental  
13 documents into this review, before it does so, it should also consider whether the analysis in those  
14 documents remains appropriate for the current condition of the environment within the Moxlie  
15 Creek watershed generally and this site in particular—and whether the past analysis adequately  
16 addressed this proposal's environmental impacts. WAC 197-11-158. For example, since the 1994  
17 FEIS, the City has nearly 25 years of additional data showing that water quality in the Moxlie and  
18 Indian Creek drainage basins and East Budd Bay has continuously failed to meet state standards.  
19 *Compare* 1993 Indian/Moxlie Creek Drainage Basin Plan, at p.38 (“The water quality of Indian  
20 and Moxlie Creeks is degraded and commonly exceeds Washington water quality standards”) *to*  
21 2017 Draft SSWP at p. D.26 (“Indian and Moxlie Creek are Class A Streams and should exhibit  
22 excellent water quality. However, water quality is typically poor and conventional pollutants  
23 commonly exceed standards”).<sup>1</sup> Pollution levels in these receiving waters have, thus far, proven  
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26 <sup>1</sup> Exhibit 1 is an excerpt of the City's Draft SSWP showing a worsening trend in the biological health of the City's  
27 streams as compared to Thurston County and the rest of Puget Sound. Unfortunately, the news is similarly bad for  
28 the biological health of Budd Inlet. According to the Puget Sound Partnership, marine water quality index scores in  
Budd Inlet have significantly declined over the last 10 years. consistently.<http://www.psp.wa.gov/vitalsigns/in-marine-water-condition-index.php>.

1 resistant to the City's efforts to control non-point sources and protect and restore water quality as  
2 it required to do under Clean Water Act and related state laws.

3  
4 Additionally, before relying on the Port's SEPA documents, the City should consider  
5 whether its legal obligations concerning habitat restoration projects have changed since 1994 or  
6 2007, when the documents were published. The City has admitted elsewhere that it may be  
7 required to build one or more habitat restoration projects in order to meet its Clean Water Act (33  
8 U.S.C. § 1251 *et seq.*) or NPDES obligations to protect and restore chronically degraded water  
9 bodies such as Indian/Moxlie Creek and East Budd Bay. *E.g.*, Draft [2017] SSWP Ch. 8 at p.20  
10 ("Habitat improvements ... can be required under TMDL and NPDES requirements.") With  
11 respect to the law of off-reservation treaty fishing rights, in a very recent brief to the Supreme  
12 Court, Attorney General Bob Ferguson asserted (at p.27) that the Ninth Circuit's culvert case  
13 decision declared an "extraordinarily broad new treaty right," to salmon habitat protection which  
14 evidently has not been considered by the City (or the Port).<sup>2</sup>

15 In any event, even if they had been properly incorporated or adopted, the SEPA documents  
16 identified in the Port's SJM (1994 FEIS and addenda and the 2007 MDNS) documents did not  
17 evaluate the environmental effect of this proposal or redevelopment generally upon degraded  
18 estuarine/wetland resource located adjacent to the current outfall for Moxlie and Indian Creeks.  
19 Similarly, the SEPA documents identified in the Checklist in response to Question #8, which were  
20 used by the Washington Department of Ecology to evaluate the impacts of the MTCA remediation  
21 work, did not evaluate the environmental impacts of the Applicant's proposal or any other land  
22 use. In fact, when in 2008 during the SEPA review of the MTCA clean-up action, one of the  
23 League's officers attempted to comment on future land use, the Department of Ecology reported  
24 that land uses were beyond the scope of the SEPA review for the MTCA clean-up at the East Bay  
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28 <sup>2</sup> <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-269.html>.

1 redevelopment site.<sup>3</sup> The League acknowledges that, as the Port describes, the Port has always  
2 assumed that its previous, heavily polluting, water-dependent industrial development would be  
3 replaced by some form of commercial or industrial development. SJM at 5-6. But, so far as the  
4 League can determine, no entity adequately evaluated the environmental impacts to the land and  
5 water resources or other consequences of this proposal on this unique site.

6 The Port's briefing identified a second possible procedural error as well. After citing  
7 WAC 197-11-158 and WAC 197-11-340, the Port asserted that the DNS contains an implicit  
8 finding that "the responsible official concluded that existing plans, laws, and regulations  
9 adequately mitigate any environmental impacts steaming [*sic*] from the Project without additional  
10 conditions or review." Port SJM at 9-10.

11 Again, if as a matter of fact, it was the responsible official's intent to make such a finding  
12 or rely on laws to substitute for analysis, she failed to follow the City's procedural requirements.  
13 WAC 197-11-158(1) provides that when making a threshold decision, a GMA city may at its  
14 option:

15  
16 determine that the requirements for environmental analysis, protection, and  
17 mitigation measures in the GMA county/city's development regulations and  
18 comprehensive plan adopted under chapter 36.70A RCW, and in other applicable  
19 local, state, or federal laws or rules, provide adequate analysis of and mitigation for  
20 some or all of the specific adverse environmental impacts of the project.

21 If indeed the City intended to exercise its option to rely on plans, regulations, or laws to  
22 avoid any environmental analysis, protection, or mitigation measures, it was also required to  
23 follow the process in subsection (2) and (4) of WAC 197-11-158, and place the following  
24 statement in the DNS:

25  
26 <sup>3</sup> Department of Ecology, *Responsiveness Summary for East Budd Bay Redevelopment Cleanup Site* (Jan. 2009) at  
27 p. 14 ("Under Washington's Model Toxics Control Act (MTCA), Ecology does not have the authority to direct the  
28 future land use through the cleanup process. Rather, Ecology considers the site's historical and current uses, projected  
future use, and local zoning designations in making a determination of the appropriate cleanup levels to be applied  
in a cleanup.")

1 The lead agency has determined that the requirements for environmental analysis,  
2 protection, and mitigation measures have been adequately addressed in the  
3 development regulations and comprehensive plan adopted under chapter 36.70A  
4 RCW, and in other applicable local, state, or federal laws or rules, as provided by  
RCW 43.21C.240 and WAC 197-11-158. Our agency will not require any  
additional mitigation measures under SEPA.

5 There is no such statement, nor anything similar, in the DNS. The DNS does not  
6 acknowledge any potential environmental impact, or mention the growth management act, any  
7 applicable substantive environmental law or regulation, or any development plan or regulation.  
8 Therefore, if the responsible official intended to make the determination described in WAC 197-  
9 11-158(1), she failed to follow the procedural requirements and the DNS should be vacated for  
10 that legal error alone.

11 **2. *The Applicant's proposal impacts the environment.***

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13 Turning to the substance of the threshold decision, “[e]nvironmental impacts are effects  
14 upon the elements of the environment listed in WAC 197-11-444.” WAC 197-11-752. The first  
15 phase of the Applicant’s development will affect elements of the earth and water including the  
16 unique physical features of the site (*i.e.* a large parcel of undeveloped land featuring disturbed  
17 estuary adjacent to a freshwater outfall) and its surface water, groundwater flows, and wetland  
18 hydrology by excavating approximately 2,500 cubic yards of soil, depositing another 1,000 cubic  
19 yards of fill, driving piles through the historic estuary and underlying aquitard, covering 88% of  
20 the parcel with buildings, parking lots and other impermeable surfaces and the remainder with  
21 landscaping. Rainwater currently infiltrating into the parcel, which was apparently sufficient to  
22 create an emergent wetland in short order, will be collected into a storm sewer and routed to the  
23 LOTT plant. These impacts and perhaps others will persist for at least several generations because  
24 the Port’s lease option agreement with the Applicant ties up the site and the adjoining parcels for  
25 several generations (*i.e.* up to 80 years under the terms of the initial agreement).<sup>4</sup>

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27 <sup>4</sup> Exhibits 2 through 7 are geological x-sections and aerial photographs from an October, 2008 RI/FS report that was  
28 incorporated into the DNS.

1 The impacts upon the environment of this construction on the historic estuarine wetland  
2 near the mouth of Moxlie Creek were not acknowledged by the responsible official, much less  
3 discussed, in the DNS or checklist. For example, although technical reports cited in the Checklist  
4 indicated that the infrastructure construction *expanded* (rather than created) the emergent wetland,  
5 the environmental effect of removing the half-acre emergent wetland for this proposal was  
6 ignored in the City’s environmental review based on the notion that a wetland emerging from a  
7 previously filled wetland was “created” by 2010 infrastructure construction work and  
8 “impoundment” of storm water and thus not a “jurisdictional wetland.” Checklist at 6.  
9

10 Of all the East Budd Bay tidelands filled by the Port and City over the years, this site is  
11 unique due to its size and location near the freshwater outfall for the Moxlie/Indian Creek  
12 drainage basins.<sup>5</sup> Despite decades of abuse and neglect, the not-so-deeply buried legacy estuary  
13 is remarkably resilient. One of the Department of Ecology’s MTCA contractors described the site  
14 hydrology as follows:

15 Ponded water has been present near the boundary between Parcels 2 and 3 since at  
16 least 2006. Since other investigation activities have ruled out the most plausible  
17 explanations for this ponded water (e.g., artesian well, leaking water main), it is  
18 speculated that this ponded water may represent natural artesian flow resulting from  
19 a previous breach of the regional confining layer (GeoEngineers 2007c, PIONEER  
20 2011a). The extent of this ponded water has expanded since the infrastructure  
21 construction project was completed in 2010. As a result, this area was assessed for  
22 the presence of a jurisdictional wetland as documented in a wetland assessment  
23 report (ACERA 2013; Appendix B). The site assessment resulted in the delineation  
24 of a wetland in the western portion of Parcel 2 and the eastern portion of Parcel 3  
25 that contained indicators of wetland hydrology, hydric soils, and a predominance  
26 of hydrophytic vegetation.

27 ...

28 In summary, the uppermost groundwater-bearing zone is encountered at depths  
ranging from ground surface to approximately 11 feet below ground surface (bgs),  
depending on location and tidal fluctuation (PIONEER 2011a). Tidal fluctuation  
is present in monitoring wells (MWs) located proximate to the East Bay of Budd

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<sup>5</sup> Exhibit 8 is a picture from Google Earth that shows the relationship of the site to East Bay and the Moxlie Creek outfall.

1 Inlet. The direction of groundwater flow is generally to the northeast towards the  
2 East Bay of Budd Inlet, although localized variations do exist. Most notably, a  
3 groundwater mound, which is suspected to be associated with natural artesian flow  
conditions ... is present in Parcel 3.

4 Remedial Investigation/Feasibility Study Report, East Budd Bay 2-2 to 2-3 (Dec. 2016).

5 The Port misconstrues the League's contentions regarding the environmental impact of  
6 the Applicant's proposal in at least two respects. Port SJM at 7-9. The environmental impacts  
7 encompass more than the effects of foreclosing future environmental restoration projects in the  
8 chronically degraded water bodies of East Budd Bay and Indian/Moxlie Creeks and their  
9 associated watersheds. Additionally, the claims or concerns regarding water quality impacts  
10 raised by the League in this proceeding have nothing to do with the transmission of legacy  
11 contaminated ground water from the East Bay redevelopment site to other water bodies. As  
12 shown in the remainder of this section, the environmental impacts of concern to the League fit  
13 squarely within the City's definition of environmental impacts, and in the interest of  
14 environmental full disclosure and fully informed decision making, should be assessed as such.

15 In a long-suffering watershed with chronically degraded water quality due to persistent  
16 non-point source pollution, and degraded estuarine and other ecological functions caused by the  
17 filling of the historic estuary and associated wetlands and burying freshwater streams in pipes, a  
18 large publicly owned block of undeveloped land adjacent to the point where the piped freshwater  
19 discharges to the saltwater is valuable part of the environment.<sup>6</sup> WAC 197-11-444 (defining  
20 elements of "the environment"); WAC 197-11-740 (definition of "environment.") The public  
21 recognizes the value of this particular resource. Virtually all of the public commentary contained  
22 in the 94 pages published on the City's website opposed project approval based on its impacts  
23 upon historic estuary, tidelands, and wetlands underlying the site. Of all the commenters, only  
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27 <sup>6</sup> Of the 1547 acres within the Moxlie Creek watershed, there are only 50 acres of remaining wetlands. 2017 Draft  
28 SSWP. Appendix D. The land underlying the Applicant's ground lease is about 1.5 acres and the total area covered  
by the lease and options is about 4 acres. The 1993 Basin Plan (p.19) identified the need for an additional 50 acres  
of open space and an additional 10 acres of Parks in the watershed.

1 one supported the project. <http://m.olympiawa.gov/news-and-faq-s/construction-news/westman->  
2 [mill-redevelopment.aspx](http://m.olympiawa.gov/news-and-faq-s/construction-news/westman-) (visited 4/6/2018).

3 The Applicant's proposal aroused public concern because the site is widely known as the  
4 last large block of undeveloped historic tideland near the Moxlie Creek outfall. It encompasses  
5 the natural historic shoreline of East Budd Bay and several fills and it featured an emergent  
6 wetland. *Id.* As one commenter noted, before the area was filled and industrialized, the  
7 Moxlie/Indian Creek estuary served as an important fishing and gathering location and meeting  
8 place for various cultures. Many of the commenters provided thorough descriptions of the  
9 relationship of this parcel to the ecology of the Indian/Moxlie Creek drainage basin and the  
10 historic estuary, or described the pleasure they felt when walking by the existing wetland.  
11 Concerned citizens also recognized that the proposal would affect contemplated estuarine habitat  
12 restoration projects.  
13

14 Estuaries and their surrounding wetlands are bodies of water usually found where rivers  
15 or streams meet the sea. Estuaries are home to unique plant and animal communities that have  
16 adapted to brackish water—a mixture of fresh water draining from the land and salty seawater.  
17 Estuaries serve important water quality, flood control, fish habitat and other ecological functions.  
18 Salt marsh estuaries act like enormous filters. As water flows through a salt marsh, the grasses  
19 and other organic components filter pollutants such as herbicides, pesticides, metals, excess  
20 nutrients and sediment.<sup>7</sup> Properly functioning streams, wetlands, lakes, and marine waters  
21 function as “natural infrastructure which can be damaged by land development.” 2017 Draft  
22 SSWP at 8-2.

23 Within a functioning watershed, estuaries, creeks, and groundwater are hydraulically  
24 connected. “The marine environment of Budd Inlet interacts importantly with the freshwater  
25 habitat of Indian and Moxlie Creeks. With the development of downtown Olympia, the historical  
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27 <sup>7</sup> United States Environmental Protection Agency, *Volunteer Estuary Monitoring: A methods manual*. EPA 842-B-  
28 93-004 (1973).

1 estuary at the creek mouths was filled and the interface between marine and fresh water degraded.  
2 Impacts throughout Budd Inlet affect the viability of the area's creek habitat.”<sup>8</sup> In turn,  
3 contaminants from Indian and Moxlie Creek are major contributors to pollution in East Budd Bay.  
4 *Id.* at 35.

5  
6 Poor water quality in the Moxlie/Indian Creek basins and East Budd Bay is caused in large  
7 part by excessively degraded estuary habitat and loss of estuarine wetlands. 1993 Indian/Moxlie  
8 Creek Basin Plan at pp. 31-38. As a result, comprehensive planning efforts, the City determined  
9 that habitat restoration was a possible solution to the basin's water quality problems. The quarter  
10 century old Basin Plan identified several specific habitat restoration projects that were needed to  
11 solve or prevent identified problems within the basin. As discussed in the League's Appeal Brief  
12 (pp. 8-10), two of those projects involved removing the Moxlie Creek outfall culvert and  
13 surrounding fill to restore estuarine functions. The City reported that it planned to use the potential  
14 water quality improvements projects as part of permitting process for its municipal storm and  
15 surface water permit. Basin Plan at 7, 10. The Basin Plan also instructed City staff to use the  
16 document when responding to development proposals within the Indian/Moxlie Creek drainage  
17 basin. *Id.* at p.5.

18 In its most recent Shoreline Master Program, the City again acknowledged the degraded  
19 shoreline ecological functions and identified salt marsh restoration projects to help restore lost  
20 functions.<sup>9</sup> Similarly, each of the City's SSOWPs has reported the persistence of water quality  
21 problems in the Indian/Moxlie Creek basins and lamented the continued loss of habitat. However,  
22 despite all of this documentation and specific public concern, the checklist and DNS do not  
23 acknowledge the chronic water quality and habitat problems in the basin or evaluate whether any  
24 part of the site might be necessary for a previously identified habitat restoration project. There is  
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27 <sup>8</sup> *City of Olympia, et al*, Indian/Moxlie Creek Comprehensive Drainage Basin Plan, p.98 (May 1993).

28 <sup>9</sup> City of Olympia, 2015 Shoreline Master Program (Restoration plan).

1 no indication that the responsible official took the 1993 Basin Plan, the SMP, or the SSWP into  
2 account when she reviewed the Checklist and issued the DNS.

3         The *Thornton Creek* case is expansively and mistakenly cited by the Port for the  
4 proposition that a proposal’s interference with a future environmental restoration project cannot  
5 constitute an environmental impact as a matter of law. Like most SEPA cases, the *Thornton Creek*  
6 case is fact specific. 113 Wn. App. 34, 41-47 (2002). The environmental setting was quite  
7 different from this case, as Thornton Creek discharges to Lake Washington and the portion of the  
8 “stream” at issue in the case was several miles from the freshwater estuary area.<sup>10</sup> (Additionally,  
9 unlike Thornton Creek, the estuary at issue here is a saltwater estuary closely adjoining the site o  
10 the proposed development.)  
11

12         The *Thornton Creek* case involved review of the City of Seattle’s approval of a General  
13 Development Plan, which was a precursor to Seattle’s issuance of master use permits. The  
14 General Development Plan was a conceptual plan for site development, akin to the Port of  
15 Olympia’s Vision 2025 plan in this case and not proposal for a new structure. The SEPA review  
16 at issue in *Thornton Creek* was not the final environmental review because the master use permit  
17 applications were subject to further SEPA review. *Id.* at 53. As the Court noted, because there  
18 were no building plans available, it was premature to determine whether the development would  
19 violate the critical area ordinance or any other environmental protection law. *Id.* at 60.  
20

21         The General Development Plan in *Thornton Creek* contemplated future buildings on top  
22 of an existing parking lot for the Northgate Shopping Center in North Seattle. *Id.* at 62. The plan  
23 did not add any impervious surface to the site. *Id.* In its ruling upholding the trial court’s exercise  
24 of discretion regarding a motion *in limine*, the Court held only that appellant “had not offered any  
25 evidence showing that erecting buildings over the pipe will change the current physical conditions  
26 of water in the drainage pipe.” *Id.* at 59.

27 <sup>10</sup>The parties in *Thornton Creek* disagreed about whether a drainage pipe underlying the shopping center parking lot  
28 constituted Thornton Creek for purposes of Seattle’s Critical Areas Ordinance.

1           Some obvious distinguishing characteristics of this case are that, instead of underlying  
2 one of the first post-war, suburban mall-type shopping centers in the United States, the Port's site  
3 is undeveloped and covered entirely by a permeable surface which will be dramatically altered  
4 by the construction and operation of the Applicant's project; the physical location overlying the  
5 historic estuarine wetlands and near the Moxlie Creek outfall makes it particularly important to  
6 the natural ecology of the watershed and to previously identified projects to restore some of the  
7 watershed's degraded ecological functions; and the League has pointed to environmental impacts  
8 other than those associated with adding storm water to an existing drainage system under an  
9 existing shopping mall parking lot.

10  
11           So, the *Thornton Creek* decision is not determinative of the League's SEPA claims, but  
12 the subsequent history of that urban drainage shed is instructive.<sup>11</sup> In 2014, the City of Seattle  
13 rebuilt 1600 feet of the disturbed stream. One of the primary ecological goals of the project was  
14 to restore the ecological functions of the hyporheic zone which the Seattle Times described for  
15 its readers:

16           Waters above and below ground constantly exchange, flowing into and out of one  
17 another, circulating oxygen, removing wastes and moderating temperatures in the  
18 main channel, cooling the water in summer and warming it in the winter. A  
19 menagerie of tiny creatures live there, too, many invisible to the naked eye, but  
20 performing herculean tasks. Tiny invertebrates shred leaf litter, cycling nutrients  
21 from the land to the water. Microbes on the surface of the rocks and gravel provide  
22 free water treatment, consuming the nutrients in fertilizer runoff, and even breaking  
23 down hydrocarbons from oil pollution, making the hyporheic a kind of liver for the  
24 river. The food web starts here, too, in those shredders and grazers working the  
25 detritus from the rain of bugs and leaves from nearby trees, and in the biofilm that  
26 microbes build on rocks. They in turn are food for bigger bugs, living between rocks  
27 and particles of sand, that then feed fish and birds. The land, surface waters and in-  
28 stream and subsurface flows all are connected.

29           As noted previously (2017 Draft SSWP at P.10), one of significantly impaired ecological  
30 functions in the Moxlle Creek watershed was caused by the City's destruction of the hyporheic

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<sup>11</sup> <https://www.seattletimes.com/seattle-news/environment/thornton-creek-gets-a-makeover-from-the-ground-up/>  
(January 11, 2016).

1 zones by placing the stream into several culverts. Stream habitat restoration would begin to  
2 ameliorate that impaired function and others, as the City determined in the 1993 Basin Plan.

3  
4 ***C. The environmental effects of the proposal are significant, and the City erred by  
5 not taking into account several mandatory factors specified by WAC 197-11-330 when  
6 determining whether the proposal had a significant environmental impact.***

7 WAC 197-11-330 prescribes several factors that the responsible official *must* consider  
8 before making the threshold decision:

9 In determining an impact's significance, the responsible official shall take into  
10 account the following, that:

11 (a) **The same proposal may have a significant adverse impact in one location but  
12 not in another location;**

13 (b) The absolute quantitative effects of a proposal are also important, and may result  
14 in a significant adverse impact regardless of the nature of the existing environment;

15 (c) Several marginal impacts when considered together may result in a significant  
16 adverse impact;

17 (d) For some proposals, it may be impossible to forecast the environmental impacts  
18 with precision, often because some variables cannot be predicted or values cannot  
19 be quantified.

20 (e) **A proposal may to a significant degree:**

21 (i) **Adversely affect environmentally sensitive or special areas, such as loss or  
22 destruction of historic, scientific, and cultural resources, parks, prime farmlands,  
23 wetlands, wild and scenic rivers, or wilderness;**

24 (ii) Adversely affect endangered or threatened species or their habitat;

25 (iii) **Conflict with local, state, or federal laws or requirements for the protection  
26 of the environment;** and

27 (iv) **Establish a precedent for future actions with significant effects, involves  
28 unique and unknown risks to the environment, or may affect public health or  
safety.**

(WAC 197-11-330(3) emphasis added).

As shown in the League's appeal brief (pp. 4-5), according to Port staff, this mixed use  
commercial project is not water dependent and could be built almost anywhere allowed by zoning  
without causing the environmental impacts described previously. Despite the apparently explicit  
direction of subsection (a) of WAC 197-12-330(3), there is no indication in the DNS, checklist,  
or elsewhere that in determining significance of the impacts the responsible official took into  
account that building the project in the historic estuary would have a significant environmental  
impact that could be avoided in another location.

1 Similarly, there is no evidence in the DNS, checklist or elsewhere that the responsible  
2 official considered whether the proposal would significantly affect unique nonrenewable  
3 resources or special areas such as the disturbed estuarine wetlands underlying the site or the  
4 emergent wetland located on the site as required by subsection (e)(i). As discussed elsewhere, in  
5 various documents produced by regulatory agencies and the City itself, the land near the mouth  
6 of Moxlie Creek is the starting point for all identified estuary restoration projects, which in  
7 addition to making this a unique part of the environment, should indicate the significance of the  
8 proposal’s environmental impact.<sup>12</sup>  
9

10 Finally, the Port (and the Applicant and City) makes much of the fact that there are no  
11 engineering plans or proposals for Moxlie/East Bay restoration project. Of course, there are no  
12 such plans or proposals because the Port and the City—the two entities primarily responsible for  
13 the past environmental degradation of these waterbodies and for funding restoration projects—  
14 refuse to prepare such plans or proposals. To be sure, the City has consistently opposed efforts  
15 to advance the restoration projects it previously identified in the Indian/Moxlie Creek Basin Plan,  
16 its SMP, or SSWP but neither the Clean Water Act nor the Medicine Creek Treaty allow the City  
17 to condemn disfavored watersheds and neighborhoods to perpetually substandard water quality.  
18 *See, e.g.,* Letter from Steve Hall to Ed Galligan dated October 27, 2016 (“the City Staff does not  
19 support nor will we advocate for the [Moxlie Creek] project.”).

20 In the 25 years since publishing the Indian Moxlie Creek Basin Plan, the City has  
21 repeatedly pleaded poverty, complexity, and other priorities in response to citizen questions about  
22 estuary restoration projects in the Moxlie/Indian Creek watershed. As far as the League can  
23 determine, however, there is no substantial scientific or engineering evidence that a stream or  
24

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25  
26 <sup>12</sup> Because the impacts here are more than simply increased economic costs, the League contends that under the facts  
27 of this case, preclusion of a future habitat restoration project could by itself be an environmental impact. However,  
28 it is also true as shown in section C. that the inclusion of the site within previously identified restoration projects  
indicates the importance of this particular parcel of undeveloped disturbed estuarine lands, and the significance of  
the proposal’s impact.

1 estuary restoration project involving the Moxlie Creek outfall would be an unusually complex,  
2 expensive, or ineffectual effort to protect and restore water quality.<sup>13</sup> When the restoration  
3 projects near the Creek mouth were first scoped in the early 1990's costs were estimated at  
4 \$75,000 to remove the last 200' of culvert and surrounding fill and \$2,500,000 for a much larger  
5 restoration project, hardly shocking figures.

6  
7 The Port and Applicant argue and the responsible official apparently concluded that the  
8 proposal will have no significant effect on the environmental conditions of concern to the League  
9 based entirely on the observation that the outer boundary of the initial mixed-use development is  
10 about 250 feet from the location where the Moxlie Creek culvert is now located under Chestnut  
11 Street. This observation, however, describes only the current artificial location of the Moxlie  
12 Creek mouth and the first phase of the Applicant and Port's development plans for the site.  
13 Contrary to the Port's contention, a mere mention in the Checklist that the site is 250 feet from a  
14 deeply buried culvert does not adequately describe the complex geology, hydrology and other  
15 unique physical features within this site; or enable informed consideration of whether the site  
16 constitutes a non-renewable natural resource needed to protect or restore essential ecological  
17 functions that will be impacted by this or future phases of the Applicant's development.

18 The focus within the Checklist on distance to the current pipe is artificial because  
19 successful restoration of degraded ecological functions will require much more than merely  
20 replacing culverts with open drainage trenches. *See* Appeal Brief pp. 10-11 (depicting conceptual  
21 design with restored ecological functions). As shown elsewhere, despite determined resistance  
22 from the Port and City, enough conceptual design has been uncovered to demonstrate that this  
23 proposal will interfere with any effort to restore the deteriorated estuarine ecological functions.

24 As the history of the even more urbanized Thornton Creek basin of North Seattle shows,  
25 stream restoration projects are not pie-in-the-sky dreams of environmentalists or their policy  
26

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27 <sup>13</sup> In *U.S. v. Washington*, the trial court found that the State's estimate of future barrier removal costs was  
28 significantly exaggerated. *See, e.g.*, 864 F.3d 1017, 1023 (2017) (opinion denying reh'g *en banc*).

1 preferences; such projects are planned and built to meet legal requirements imposed by the Clean  
2 Water Act, treaties and other laws applicable to entities responsible for protecting and restoring  
3 water quality and diminished fish habitat, such as the City of Olympia. Again, the City has  
4 acknowledged, for example, in planning documents required by its NPDES permit, that its efforts  
5 to control non-point source pollution have been unsuccessful and that it may be required to  
6 construct habitat restoration projects as part of the TMDL process for various water bodies such  
7 as Moxlie and Indian Creeks and East Budd Bay. Ignoring that part of inconvenient reality is  
8 inconsistent with the City's obligation to take a hard look at the environmental concern.  
9

10 Similarly, despite the clear language of subsection (e)(iii), the City evidently did not take  
11 into account that the proposal may conflict with several local, state or federal laws or requirements  
12 for the protection of the environment. Another such federal law or requirement that protects the  
13 environment is the Treaty of Medicine Creek and this law was brought to the City's attention by  
14 several commenters. So far as the League can determine, the City did not take into into account  
15 its Treaty obligations with respect to the fish passage barrier that is the Moxlie Creek outfall  
16 culvert or the impact of the Ninth's Circuit's recent decision in *U.S. v. Washington*. However, in  
17 a brief recently filed with the Supreme Court, former Attorney General Rob McKenna  
18 representing the City's lobbying organization wrote that cities, specifically including Olympia,  
19 are "gravely threatened" by the 9<sup>th</sup> Circuit's culvert opinion and that the "natural import" of that  
20 decision is to impose obligations on cities "to fund the removal and replacement of thousands of  
21 culverts..."<sup>14</sup>

22 Off-reservation treaty rights have some unique characteristics, which distinguish them  
23 from other federal laws or requirements and merit careful attention. A treaty right is both a  
24 property right, *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), and "the supreme  
25

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26  
27 <sup>14</sup> <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-269.html> (Cities'  
28 *Amicus* brief at 3-4).

1 law of the land.” U.S. Const. Art. VI, cl. 2. Because the right is a property right, a resource  
2 developer that infringes upon a treaty right cannot defend on the basis that its infringement was  
3 reasonable under the circumstances. Thus, according to Professor Blumm, following the Ninth  
4 Circuit’s opinion in *U.S. v. Washington*, “[t]he prospect of projects that would affect a treaty  
5 fishing right is especially questionable.” *Treaty Fishing Rights and the Environment*, 92  
6 *Washington Law Rev.* 1, 37-38 (2017).

7  
8 The League has made a *prima facie* showing that the City has legal obligations under the  
9 Treaty of Medicine Creek and the Clean Water Act and other laws to restore the fish habitat and  
10 water quality of Moxlie and Indian Creek and East Budd Bay that should, according to SEPA  
11 rules and policies, be considered as part of its environmental review of the Applicant’s proposal.  
12 The Moxlie outfall barrier removal project remains “hypothetical,” as the Port, City and Applicant  
13 argue, only because the City has been remarkably resistant to implementing its own Basin Plans  
14 or recognizing its treaty-based fish habitat obligations. The so-called “culvert case” was initiated  
15 by the Tribes and the United States in 2001. The WSDOT fish passage barrier culverts conveying  
16 Indian and Moxlie Creeks under I-5 are covered by Judge Martinez’s injunction. *Washington*  
17 *State Dep’t of Transportation, Fish Passage Performance Report* (2017 at pages 62 & 115.<sup>15</sup>  
18 WSDOT’s data shows that there are 7,600 meters of good salmon habitat upstream of its I-5  
19 culverts. Once those state barriers are removed, only the City’s barrier culverts will inhibit access  
20 to that habitat.

21  
22 **D. *The City Piecemealed the Environmental Review by Failing to Take Account of***  
23 ***Further Development Contemplated by the Lease Option and the Port’s Vision 2025***  
24 ***Plan.***

25 Because the checklist did not disclose the full scope of the Port and Applicant’s  
26 development plans, the responsible official did not consider whether this proposal would establish  
27 a precedent for future actions with significant effects that may affect public health. The Port

28 <sup>15</sup> <https://www.wsdot.wa.gov/publications/fulltext/projects/FishPassage/2017FishPassageAnnualReport.pdf>.

1 argues that the League’s piecemealing concerns should be dismissed as a matter of law based on  
2 its interpretation of WAC 197-11-060(3)(b) & (5)(d). The Port is incorrect, perhaps because it  
3 overlooked WAC 197-11-060(3)(a), which first directs the agency (the City here) to “make  
4 certain that the “proposal that is the subject of environmental review is properly defined.” A  
5 proposal can include public projects and proposals along with proposals by applicants. WAC  
6 197-11-060(3)(a)(i). Closely related proposals or parts of proposals should be evaluated in the  
7 same document. Proposals or parts of proposals are closely related if they are interdependent  
8 parts of a larger proposal and depend on the larger proposal as their justification or for  
9 implementation.

10  
11 The City’s checklist form instructed the Applicant that the “questions apply to all parts of  
12 your proposal, even if you plan to do them over a period of time or on different parcels of land.”  
13 Checklist, p.1 (emphasis in original). Question 7 asked the Applicant, “Do you have any plans  
14 for future additions, expansion, or further activity related to this proposal?” The Applicant  
15 answered that “No future additions, expansions, or further activity related to or connected with  
16 this proposal are planned.” Because the full scope of the Applicant’s lease option agreement and  
17 future development plans for the remaining portions of the Port’s East Bay redevelopment  
18 property such as the Port’s Vision 2025 was not disclosed, the City was not able to properly define  
19 or describe the proposal under review or consider whether the phases were interdependent.

20 Evidence outside the checklist or DNS, such as the terms of the lease option agreement  
21 and various candid statements of Port executives and related documents, show that the Westman  
22 Mill proposal establishes a precedent for the future development of the optioned land. Approval  
23 of the existing proposal will make future commercial re-development of the remaining Port  
24 property near and over the Moxlie Creek outfall more likely. In addition to the complex lot line  
25 adjustment processes undertaken by the Port to meet its lease obligations (described in the Port’s  
26 SJM at 2-4), the Applicant’s lease agreement ties exercise of the options to the success of the  
27 initial development. Port staff have discussed the possibility of a parking garage to support  
28

1 additional more intensive integrated development of the entire East Bay redevelopment project.  
2 Port staff have also candidly acknowledged that a Moxlie Creek restoration project would affect  
3 all of the Port's property in the East Bay redevelopment area. *See, e.g.*, email from Mike Reid  
4 and Rachel Jameson discussing impacts. Because the Checklist did not disclose the Applicant's  
5 future plans for the site (or the Port's) the responsible official could not analyze whether the future  
6 development should be considered as part of the SEPA review for this proposal.  
7

8 ***E. The League's Appeal Is States a Valid Claim for Relief Related to the Proposed***  
9 ***Development, Not a Collateral Attack on Past Government Actions***

10 Finally, the Port argues that the League's SEPA claim is not really a SEPA claim but  
11 instead an "impermissible collateral attack on city plans and zoning as well as the Port's  
12 Comprehensive Scheme of Harbor improvements" and thus outside the Hearing Examiner's  
13 jurisdiction. SJM at p. 12-14. This assertion is also mistaken. The first page of the current  
14 Comprehensive Scheme of Harbor Improvements<sup>16</sup> briefly describes the land use authority of  
15 cities and counties and recites:

16 Ports, on the other hand, do not exercise land use authority as do cities and counties  
17 under GMA. Instead, Ports are subject to the planning requirements and the adopted  
18 Comprehensive Plans of the cities and counties in which the Ports operate.

19 That statement seems directly contrary to the Port's implicit assertion that its Harbor  
20 Scheme in any way predetermined the use of this site or foreclosed SEPA review of this land use  
21 application. The City's rules explicitly provided for SEPA review of this application and, as the  
22 arguments in the rest of this brief seek to demonstrate, the League's SEPA claim is focused on  
23 the environmental impacts of this particular land use application at this point in time.  
24 Additionally, the League respectfully contends that there are many conceivable uses of the Port  
25 property that are consistent with the City's plans (including in addition to the zoning code, its  
26 Basin Plan, Surface and Stormwater Plans, and Shoreline Master Program) and rules and avoid

27  
28 <sup>16</sup> <https://www.portolympia.com/DocumentCenter/View/2090>.

1 the environmental impacts of this proposal. For example, recreational facilities, open spaces, and  
2 parks are all allowed uses in the urban waterfront district. Also, bearing in mind the Port’s  
3 willingness to tie up public land under such developer-friendly terms, and carve up its East Bay  
4 redevelopment properties to satisfy developers, one can easily imagine other mixed-use  
5 developments within the East Bay redevelopment parcel that would not have the environmental  
6 impacts of this proposal. In this proceeding, the League objects to the responsible official’s SEPA  
7 threshold decision for this proposal—not the City’s past zoning actions or the Port’s Scheme.  
8

9 ***F. The Proposal Is Subject to Critical Areas Ordinance Review Because It Is  
10 Within 300’ Of Moxlie Creek.***

11 By way of response to applicant’s arguments regarding the CAO, Appellant incorporates  
12 pages 26-27 of its appeal brief here. Additionally, there is at a minimum a disputed issue of fact  
13 precluding summary judgment because, as the Declaration of Harry Branch explains, “the Creeks  
14 may be restored to open air by running them through a more natural course other than the middle  
15 of Chestnut Street, and it is likely that the present development lies within a short distance (under  
16 250 feet) of preferable locations for the daylighted creek to run, and/or the natural location of  
17 Indian and Moxlie Creeks and the estuary mouth at high tide.” Branch Decl., ¶ 19.  
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**V. CONCLUSION**

For the stated reasons, Appellant, Olympia Urban Waters League, respectfully requests that the Hearing Examiner deny the Port and the Applicant’s motions for summary judgment, grant summary judgment to the League, and set aside as void the City of Olympia’s SEPA Determination of Non-Significance and approval of the Applicant’s land use application, and remand this matter for further proceedings.

DATED this 11th day of April 2018.

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