BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeals of: SEATTLE FOR GROWTH and SEATTLE MOBILITY COALITION From a DNS issued by the Seattle City Council.	Hearing Examiner Files: W-18-012 and W-18-013 SEATTLE MOBILITY COALITION'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS RESPONSE TO MOTION TO DISMISS

I. INTRODUCTION

Appellant Seattle Mobility Coalition ("Coalition") files this supplemental brief in response to the question posed by the Hearing Examiner at the February 27, 2019 hearing on Respondent City of Seattle's ("City") motion to dismiss. The Examiner asked whether an appellant with State Environmental Policy Act ("SEPA") standing may raise issues unrelated to the injury on which the appellant's standing is based. The answer to this question is yes.[1]

[1] As requested, this brief discusses the legal effect of a decision that the Coalition established only some of the injuries in fact it alleges. This is an argument in the alternative, not a concession that such a decision would be correct. For the reasons discussed in the Coalition's response to the City's motion to dismiss, the Coalition alleges an injury in fact with regard to all the impacts discussed in its appeal, including effects to its members' pipeline development projects. When an ordinance affects "the way specific parcels of property can be used," such as by imposing a fee that is likely to limit the scope of development that can occur, the "owners of property affected by such a detailed regulation have standing to challenge such an ordinance." *See Cty. All. v. Snohomish Cy.*, 76 Wn. App. 44, 54, 882 P.2d 807, 812 (1994). Here, the Amendment impacts Coalition members' ability to provide housing and accessory parking on their properties. This creates an injury in fact supporting the Coalition's standing.

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Appellant has found no Washington case directly addressing the question. However, Washington courts look to federal case law analyzing the National Environmental Policy Act ("NEPA") to interpret SEPA standing requirements. Ample federal authority expressly allows parties who have established standing based on an injury relating to one element of the environment to allege additional environmental impacts as well. This rule is consistent with the policy of SEPA for full environmental disclosure.

II. ARGUMENT

Washington courts look to federal case law on NEPA to interpret SEPA standing requirements. This case law establishes that the standing requirement does not limit the impacts that can be alleged in an appeal only to the impacts constituting an injury-in-fact to a particular appellant. This is consistent with the policy of SEPA favoring full disclosure of the environmental consequences of an action.

"Because NEPA is substantially similar to SEPA, [Washington courts] may look to federal case law for SEPA interpretation." *Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 525, 309 P.3d 654, 661 (2013). Likewise, Washington has "adopted the federal approach" to "the standing of [an association] to challenge government actions threatening environmental damage." *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 312, 230 P.3d 190, 193 (2010) (citation omitted); *see also Snohomish Cty. Pub. Transp. Benefit Area v. Pub. Emp't Relations Comm'n*, 173 Wn. App. 504, 513, 294 P.3d 803, 808 (2013) ("Washington courts interpret the injury-in-fact test consistently with federal case law.").

The D.C. Circuit Court of Appeals has repeatedly affirmed that "having established standing to challenge the adequacy of [a Final Environmental Impact Statement ("FEIS")] on at

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least one ground, [plaintiffs] are entitled to raise other inadequacies in the FEIS." *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C. Cir. 1978).[2] In *Adams*, appellants challenged the EIS for the Pan American Highway, claiming an inadequate analysis of (1) the control of aftosa, or foot-and-mouth disease; (2) alternative routes; and (3) impacts to the Cuna and Choco Indians inhabiting the area the highway would traverse. *Id*. at 391. The Court found that appellants had standing based on their concern that construction would result in the spread of aftosa in the United States and that the claim about alternatives was merely an extension of this issue, since one alternative would be to not build the highway. *Id*. The Court noted, however, that appellants "have not alleged any specific harm they will suffer as a result of inadequate discussion and consideration" of impacts on the Indian tribes. *Id*. at 391-392. Nevertheless, the Court determined that "having established standing to challenge the adequacy of the FEIS on at least one ground, they are entitled to raise other inadequacies in the FEIS[.]" *Id*. at 392. This holding was based on the "'public interest' in requiring government officials to discharge faithfully their statutory duties under NEPA." *Id.* To hold otherwise would "unnecessarily restrict[] the ability of plaintiffs properly before the court to challenge additional inadequacies in an environmental impact statement [and] would be patently inconsistent with the unequivocal legislative intent embodied in NEPA that agencies comply with its requirements to the fullest extent possible." *Id.* at 393.

More recently, the D.C. Circuit considered a NEPA challenge in which appellants were

[2] Although this appeal concerns the sufficiency of environmental analysis resulting in a determination of nonsignificance ("DNS"), *Adams* and the other federal cases described in this brief instead consider the adequacy of an EIS once it has been issued. This is a distinction without a difference; both SEPA and NEPA standing cases treat precedent from both scenarios as interchangeable. *See, e.g., Cty. All., supra,* 76 Wn. App. at 53 (injury-in-fact analysis interchangeably citing *Coughlin v. Seattle School Dist. 1,* 27 Wn. App. 888, 621 P.2d 183 (1980), an EIS case, and *Concerned Olympia Residents for Env't v. Olympia*, 33 Wn. App. 677, 657 P.2d 790 (1983), a DNS case). This equivalence is logical, as in either case a plaintiff asserts "the 'archetypal procedural injury' – an agency's failure to *prepare (or adequately prepare)* an EIS before taking action with adverse environmental consequences." *Wildearth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (emphasis added).

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unable to "establish standing based on the effects of global climate change" but could show injury-in-fact based on harm to "recreational and aesthetic interests from local pollution." *Wildearth Guardians, supra*, 738 F.3d at 307. In this case, the appellants challenged the environmental review for a Bureau of Land Management ("BLM") decision allowing the lease of federal land adjacent to an existing coal mine. The appellants, various environmental groups, submitted affidavits establishing that the lease of the area for mining would impact their members' aesthetic and recreational use. These affidavits were sufficient to establish standing to challenge the EIS's analysis of local pollution. The appellants also challenged the EIS's discussion of global climate change. The district court disallowed this claim because it was not related to the appellants' local recreational interests. The court of appeals reversed, stating that the district court had "sliced the salami too thin." *Id.* at 307. The appellants alleged a connection between the substantive decision (the lease) and the appellant's injury (to its aesthetic and recreational interests). If the BLM were required to adequately consider these environmental concerns, it could change its mind about the lease offering "whether or not the inadequacy [in the EIS] concerns the same environmental issue that causes [the appellants'] injury." *Id*. at 306-307. "[E]ither way, the remedy is 'limited to the inadequacy' – here, a deficient FEIS – 'that produced the injury in fact that the plaintiff has established.'" *Id.* (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)). Since the appellants' members' injuries were caused by the allegedly unlawful lease decision and would be redressed by reversal of this decision on the basis of *any* defect in the EIS, the court concluded the appellants "may challenge each of the alleged inadequacies in the FEIS," including global climate change. *Id.* at 308; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1366-1367 (D.C. Cir. 2017) ("The deficiency need not be directly tied to the members' specific injuries.").

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Other circuits have reached the same conclusion. The Tenth Circuit has rejected the argument "that Plaintiffs' injury must be tied to the particular deficiency alleged in the FEIS, [for example,] that Plaintiffs must allege a climate-change related injury in order to have standing to challenge [an] analysis of climate change impacts." *Wildearth Guardians v. United States BLM*, 870 F.3d 1222, 1231 (10th Cir. 2017). Like the D.C. Circuit, the court looked to "the *form of relief*, rather than the *arguments* upon which that relief might be based," *id.* (emphasis in original), and determined that the available remedy – correction of the failure to engage in procedurally required environmental analysis – would address a claim of NEPA noncompliance regardless of the specific grounds raised by a plaintiff.

Similarly, the Ninth Circuit recently considered a claim that the Army Corps of Engineers had conducted an inadequate NEPA analysis of a potential project near a California river. The only NEPA deficiency alleged was insufficient consideration of impacts on downstream Southern California steelhead habitat. *Friends of the Santa Clara River v. United States Army Corps of Eng'rs*, 887 F.3d 906, 919 (9th Cir. 2018). The plaintiffs' standing, by contrast, depended on impacts to their recreational and natural resource interests *within* the project area, where no steelhead were present. The court held that because the underlying agency action was the issuance of a permit, "the plaintiffs need show only that the issuance of the permit will affect their interest in recreation and aesthetics in the Project area; they do not need to show that the alleged inadequacies in the Corps's analysis of the Project's impact on steelhead will have such an effect." *Id.* Notably, the *Santa Clara* plaintiffs had not alleged that impacts on their particular interests were also inadequately considered – for purposes of the standing analysis, the *only* relationship between the impacts establishing standing and the impacts establishing the NEPA deficiency was that they would both result from the same project. Nonetheless, "the

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plaintiffs need show only that the challenged [agency] action will threaten their concrete interests, not that the alleged procedural deficiency will threaten such interests." *Id.* (internal quotation marks and citation omitted).

Conditioning the consideration of each alleged deficiency in a DNS on a separate "injury-in-fact" inquiry would be contrary to the purpose of SEPA, which "*mandates* governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters." *Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 490, 513 P.2d 36, 46 (1973) (emphasis in original); *Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 702, 601 P.2d 501, 513 (1979) (When a DNS "has been challenged, the scope of review is broad and the search for factors indicating more than a moderate effect on the environment must be considered in light of the public policy of SEPA."). Just as with NEPA, the purpose of SEPA is to serve as "an environmental full-disclosure law." *Swift v. Island Cty.*, 87 Wn.2d 348, 356, 552 P.2d 175, 180 (1976). "The SEPA policies of full disclosure and consideration of environmental values require actual consideration of environmental factors before a determination of no environmental significance can be made." *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 927, 319 P.3d 23, 29 (2014) (citation omitted). Indeed, "the public policy behind SEPA is stronger than that behind NEPA." *Kucera v. DOT*, 140 Wn.2d 200, 224, 995 P.2d 63, 70 (2000). If the Examiner determines that some of the Coalition's alleged impacts do not establish standing but that others do, that does not preclude the argument that the DNS is invalid because of its failure to address *all* impacts.

III. CONCLUSION

For these reasons, the Hearing Examiner should find that the Coalition has standing and may raise all the issues identified in its appeal.

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