



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

April 4, 2016

Sent via Email and USPS Mail

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Re: COMMENTS ON OKANOGAN COUNTY'S DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR CODE AMENDMENT 2015-1 OCC 17A ZONE CODE

Dear Mr. Huston,

I write on behalf of the Yakama Nation Department of Natural Resources ("YN DNR") to express serious concerns with the Draft Environmental Impact Statement (the "DEIS") issued by Okanogan County regarding Code Amendment 2015-1, a proposed revision to the Okanogan County Zone Code.

As a sovereign Indian nation and a co-manager of the fisheries within the State of Washington, the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") should have been engaged timely and directly by the County in government-to-government consultation on the DEIS, particularly as a key purpose of the DEIS is the evaluation of the potential impacts of the County's proposed zoning actions on water resources and fish populations. The Yakama Nation should not have been left to provide public comments. However, the DEIS is of critical interest to the Yakama Nation; and its contents (and lack thereof) have raised significant concerns for YN DNR.

YN DNR is broadly concerned that the DEIS lacks sufficient information about (1) the comparative alternatives being considered by the County, (2) their probable adverse environmental consequences, and (3) how such consequences may be mitigated. More specifically, the DEIS lacks appropriate scientific analysis and mitigation measures for likely adverse impacts to water quantity and quality. The DEIS should be significantly revised prior to finalization to ensure that it addresses these critical issues, and fulfills its purpose to provide County decision makers with a meaningful tool for avoiding environmental degradation and safeguarding environmental quality.

These comments are based upon information available to YN DNR at this time. Should additional information become available, our assessment and requests may be revised. In providing these comments, the Yakama Nation does not waive, alter, or otherwise diminish its sovereign rights, its rights as a co-manager of the fisheries within the State of Washington, or its rights and privileges guaranteed by the U.S. Treaty with the Yakamas of 1855.

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I. The DEIS Generally Lacks “Sufficient Information” Required by SEPA.

The State Environmental Policy Act (“SEPA”) strives to avoid environmental degradation, to preserve and even enhance environmental quality by requiring the actions of state and local government agencies to be based upon sufficient environmental information.<sup>1</sup> Although SEPA does not compel environmentally wise choices, an Environmental Impact Statement (“EIS”) must provide decision-makers with “sufficient information to make a reasoned decision.”<sup>2</sup>

A nonproject EIS (e.g., for a zoning code update) must contain a “reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency’s decision.”<sup>3</sup> In other words, the nature and extent of the environmental analysis to be included in an EIS may be tailored to fit the specific proposal, but must be specific and detailed enough to realize SEPA’s ultimate purposes. No matter its analytical scope, the EIS must be more than mere disclosure, rationalization or justification; it is to be used by agency officials in *making decisions on proposed actions*.<sup>4</sup>

The County’s DEIS does not describe any significant aspects (positive or negative) of the probable environmental consequences of either Code Amendment 2015-1 (the “proposed revisions”), or of returning to the County’s pre-interim zoning regulations (the “no action alternative”). Indeed, the DEIS – a rambling document, which lacks substantive and comparative information – bears little resemblance to the evaluative decision-making tool required by SEPA. Rather, it reads mainly as an awkwardly organized description of other applicable laws and policies, peppered with repeated assertions that the adoption of a new Zoning Ordinance “will not, *per se*, affect the environment,” and in any case, other “existing regulations are sufficient” to deal with potential environmental impacts of development due to the slow pace and wide space for growth in the County.

Because the DEIS lacks sufficient environmental information, and fails to describe the significant aspects of the probable environmental consequences of either of the potential actions it ‘considers,’ the DEIS is insufficient under SEPA.

A. *The DEIS Does Not Include a Clear Objectives Statement*

The DEIS lacks a clear objectives statement. An EIS must include, and exists to present, a reasonable range of alternatives, including “actions that could feasibly attain or approximate a proposal’s objectives, but at a lower environmental cost or decreased level of environmental degradation.”<sup>5</sup> This requirement pre-supposes that an EIS will include a clear objectives statement against which the relative environmental merits of proposed alternatives can be measured.

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<sup>1</sup> RCW 43.21C.010, RCW 43.21C.020, RCW 43.21C.030(2).

<sup>2</sup> *Citizens Alliance To Protect Our Wetlands v. City of Auburn*, 126 Wn. 2d 356, 362 (1995).

<sup>3</sup> *Gebbers v. Okanogan County. Pub. Util. Dist. No. 1*, 144 Wn. App. 371, *review denied*, 165 Wn. 2d 1004 (2008).

<sup>4</sup> See, WAC 197-11-400(4), 197-11-402(1), 197-11-406. See, *King County v. Boundary Review Board*, 122 Wn. 2d 648, 666 (1993); *Barrie v. Kitsap County*, 93 Wn. 2d 843, 854 (1980); *Mentor v. Kitsap County*, 22 Wn. App. 285, 291 (1978) (“...an environmental impact statement should not merely be an ex post facto justification of official action but should serve to inform lawmakers of the environmental consequences of the proposal before them.”), citing, *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973).

<sup>5</sup> WAC 197-11-440(5)(b).

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The County's DEIS should specifically state the needs and motivations informing the County's proposal to update to the zoning code. Instead, the DEIS instead only describes the general purposes of a zoning code:

The objective of the Zoning Ordinance . . . is to provide a variety of allowable uses of land proposed for development and to provide guidance on the limits and controls on those uses and the processes by which the controls are to be implemented.<sup>6</sup>

This boilerplate list of zoning objectives will be satisfied by just about any zoning code, which is a problem because it does not set a meaningful baseline for the EIS's comparison of proposed alternatives.

B. *The DEIS Fails to Identify and Analyze Significant Aspects of the Probable Environmental Consequences of the Agency's Decision.*

An EIS must contain a "reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision."<sup>7</sup> The County's DEIS does not provide a clear statement of such probable environmental consequences, much less include a thorough discussion of their significant aspects. Instead, the DEIS first waffles on whether or not there will even be adverse environmental consequences, then punts that question to the project-level environmental review processes, and ultimately attempts to offer other existing regulatory controls as a form of mitigation for potential environmental impacts.

A positive SEPA threshold determination, formalized by a Determination of Significance ("DS"), explicitly or implicitly acknowledges that a contemplated agency undertaking is a proposal of legislation or other major action which is not categorically exempt and is *environmentally significant*.<sup>8</sup> "DS issuance signifies that . . . intensified environmental scrutiny, documented by an environmental impact statement, is required."<sup>9</sup> When the County issued its DS for Code Amendment 2015-1, it found that the proposed revisions were "likely to have a significant adverse effect on the environment," and referenced potential impacts identified during the County's prior integrated Comprehensive Plan / Zoning review process.<sup>10</sup> However, the DEIS does not demonstrate any "intensified environmental scrutiny" of the proposed zoning code revisions. Rather, the DEIS appears to backtrack, questioning the environmental significance of the proposed revisions without having first provided a meaningful qualitative or quantitative analysis of their impacts.

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<sup>6</sup> DEIS § I.

<sup>7</sup> *Gebbers v. Okanogan County. Pub. Util. Dist. No. 1*, 144 Wn. App. 371, review denied, 165 Wn. 2d 1004 (2008).

<sup>8</sup> Richard L. Settle, The Washington State Environmental Policy Act, Vol. 1, Rel. 26, at 548 (2014).

<sup>9</sup> *Id.*

<sup>10</sup> October 16, 2015 Okanogan County Planning Department Determination of Significance re: Okanogan County Revised Zone Code.



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For example: On the one hand, the DEIS acknowledges the proposed revisions' potential for adverse environmental consequences;<sup>11</sup> on the other, it states that neither the proposed revisions nor the 'no action' alternative will cause significant environmental impacts.<sup>12</sup> These conflicting statements at best impair the DEIS's value as an evaluative tool for policy makers, and at worst defeat SEPA's purpose in requiring the preparation of an EIS.

The DEIS's solution to the current lack of clear information about probable environmental impacts is to defer meaningful environmental analysis to the project-level environmental review process:

All future projects proposed under the new [zoning] ordinance will require administrative review to assure compliance with zoning and other regulatory requirements. Where appropriate, projects with identified potential for significant impact are subject to subsequent environmental review by the County. This approach has been approved by the Courts so long as the County retains the ability to address the project specific impacts at the time a specific plan is in place.<sup>13</sup>

The County cites *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*<sup>14</sup> in support of its deferral of environmental analysis. However, the "piecemeal" EIS approach permitted by the Court in the *Cathcart* case did not create a broadly approved approach to environmental impact analysis.<sup>15</sup> Indeed, the *Cathcart* Court states that piecemeal EIS's have typically been approved in narrow situations, and only where the first phase of the project is independent of the second and the consequences of ultimate development cannot be assessed.<sup>16</sup>

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<sup>11</sup> See e.g., DEIS § I ("The objective of this EIS is to review the proposed Zoning Ordinance . . . to assess whether the tools in place are sufficient to address . . . *probable adverse environmental impacts* to the natural and built environment and particularly the quality and quantity of water."); DEIS § I(B) ("[The primary objective of the EIS is to] [r]eview the proposed Zoning Ordinance . . . to identify and mitigate *potential significant adverse environmental consequences* of the proposed action . . ."); DEIS § IV(B) ("The adoption of . . . the Zoning Ordinance per se has *no direct impact on the environment*. The uses allowed under the [Zoning Ordinance] *may potentially impact the environment*."); DEIS § IV(D) ("As noted above, the adoption of a new Zoning Code *does not per se affect the environment*. It does, however, allocate growth . . . [which could] give rise to a *reasonable probability of more than a moderate impact* on the environment . . ."); DEIS § VI (which, by its very title – "Summary of Impacts and Controls" – implies that there are impacts; and which contains a bulleted list whose items appear to be formatted in the mode of 'Topic – Impact – Control' (e.g. "Water Quality – development – Addressed by Health Department regulations . . .").

<sup>12</sup> See e.g., DEIS § IV(F)(2) ("[T]he potential [*environmental*] *impacts* . . . *are only marginally affected* by the Zoning Ordinance . . ."); DEIS § V ("[T]he County has determined that the no action alternative and the proposed alternative make *no difference in overall [environmental] impact* given the dispersion of growth and the very slow pace of growth."); DEIS § VII(A) ("Upon review, the County has identified *no material [environmental] impacts* under either the 'no action' alternative or the proposed Zoning Ordinance.").

<sup>13</sup> See e.g., DEIS § IV(E), citing, *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cty.*, 96 Wn.2d 201, 210 (1981).

<sup>14</sup> *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cty.*, 96 Wn.2d 201 (1981).

<sup>15</sup> *Id.* at 210.

<sup>16</sup> *Id.* See also, *Id.* (noting that piecemeal EIS's have often been rejected as improper under SEPA because they "may permit adverse consequences to go unidentified until after the project has so progressed that preventing its completion, or mitigating its consequences, becomes either unlikely or impossible."). See also, *Ullock v. City of Bremerton*, 17 Wn. App. 573, 580–82 (1977) (holding that a worst case environmental impact analysis, based upon the most environmentally offensive development possible under the proposed zoning, was sufficient where it would not have been cost-effective to review the environmental consequence of every permissible use if a nonproject rezone was granted).

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Moreover, *Cathcart* does not excuse an initial EIS from identifying the potential environmental impacts of a proposed action.<sup>17</sup> Thus, the County's failure to, at a minimum, clearly identify and discuss the potential significant environmental impacts of the proposed zoning code revisions, and of the 'no action' alternative, makes the DEIS insufficient under SEPA.

Finally, the DEIS improperly attempts to sidestep the need to analyze or compare the proposed alternatives' environmental impacts by simply stating that existing regulatory controls are sufficient to prevent significant adverse environmental impacts.<sup>18</sup> In effect, the DEIS offers such regulatory controls as de facto mitigation, and asks decision makers and the public to rely on their sufficiency. However, YN DNR has concerns about the sufficiency of the environmental protections offered by the County's other regulatory controls;<sup>19</sup> and many of these regulatory controls are themselves being revised or due to be revised in the near future.<sup>20</sup>

In sum, the DEIS lacks sufficient environmental impact information to allow decision makers and the public to weigh the relative environmental merits of the alternative zoning actions proposed, and is therefore insufficient under SEPA. The DEIS's general lack of SEPA information is particularly disturbing to YN DNR because YN DNR sees a high potential for the proposed revisions to adversely impact water quantity and quality in the region, which could harm protected fisheries under the Yakama Nation's Treaty with the United States.

## II. The DEIS Specifically Lacks Sufficient Information About Impacts to Water Quantity and Quality.

Even before the County issued its proposed revisions to the Okanogan County Zone Code, there was significant public concern over how proposed zoning revisions, in tandem with the County's updated Comprehensive Plan, could impact local water resources.<sup>21</sup> Critically, in the recent zoning code EIS scoping process, the Department of Ecology ("DOE") and the Methow Valley Citizens' Council ("MVCC"), amongst others, expressed specific concerns that the proposed zoning revisions could open the door for the abuse of permit-exempt wells, exacerbate water shortages, impact protected instream flows, and negatively impact

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<sup>17</sup> *Id.* at 211 (finding the EIS sufficient because it "identifies the potential impacts and provides a framework for further EIS preparation").

<sup>18</sup> *See e.g.*, DEIS § IV(B) ("The official controls are used to regulate that development [and] *sic* provide the necessary protections."); DEIS § IV(D) (stating that development uses "that have a potential for significant impact" are also subject to SEPA processes, which will ensure that "all factors affected by the use in a given environment are given proper consideration."); DEIS § IV(G) (describing at length laws and policies other than the County's zoning code which serve as 'official controls'); DEIS § V (stating that "the regulatory controls are sufficient to address the environmental impacts of any new growth under the Zoning Ordinance"); DEIS § VII(A)(1) (stating that "the regulatory controls in place in the county are adequate to address [impacts to the natural elements of the environment] and avoid or require mitigation to prevent significant environmental harm or impacts," and that such regulatory controls are also sufficient to address potential impacts to the built environment); DEIS § VII(A)(2) (stating that "the regulatory controls" are likewise sufficient to prevent or mitigate harm to critical areas, resource lands, and shorelines); DEIS § VII(A)(3) (stating that "the regulatory controls" are adequate to address and avoid impacts to the adequacy and availability of lawful water supplies and protection of water quality).

<sup>19</sup> *See e.g.* March 18, 2016 Letter from YN DNR to DOE re: Comment Letter on Okanogan County's Shoreline Management Program update.

<sup>20</sup> *E.g.* the County's Shoreline Master Program and Critical Areas Ordinance.

<sup>21</sup> *See e.g.*, DOE's Amicus Curiae Brief, *Methow Valley Citizens Council, et al. v. Okanogan County*, No. 15-2-00005-7 (Okanogan County Sup. Ct., filed September 22, 2015).



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water quality.<sup>22</sup> YN DNR shares these concerns, and adds the concern that impacts to the quantity and quality of instream flows in WRIA 48 could impact the Yakama Nation's Treaty-protected fisheries resource without sufficient mitigation.

Based on the clear concerns identified through the EIS scoping process, YN DNR expected that the DEIS would provide a detailed, scientifically rigorous comparative analysis of how the proposed zoning revisions and the 'no action' alternative would respectively impact water resources in WRIA 48. However, as described above, the DEIS failed to include a reasonably thorough discussion of the probable environmental consequences that the proposed zoning revisions will have on water quantity and quality. And, where the DEIS did offer minimal analysis of potential impacts to water resources, such analysis was not based on a thorough review of the best available science.

A. *The Revised EIS Should Include Detailed Analyses of Potential Impacts to Water Resources.*

The specific potential for County zoning updates to adversely impact water resources, including water quantity and quality, has been exhaustively described by DOE – both in its analysis of the current interim zoning guidelines,<sup>23</sup> and its EIS scoping comments<sup>24</sup> – and by MVCC.<sup>25</sup> For the sake of efficiency, YN DNR will not repeat their observations here; but generally incorporates them by reference, and directs the County's attention to them for future review. A final EIS for the proposed zoning update should fully address these specific concerns.

Further, the final EIS should clearly analyze the potential water resource impacts associated with "exempt" wells based on the fundamental understanding that, while such wells may be exempt from certain permitting requirements, their practical consumptive use remains subject to the prior satisfaction of protected instream flow requirements.<sup>26</sup> Although the DEIS contains language which recognizes that "the adequacy and availability of . . . water must be demonstrated at the time a development approval is granted," its subsequent discussion of exempt well activities is vague, and its failure to discuss any potential environmental impacts associated with increasing the number and/or density of exempt wells, or any specific mitigation measures, leaves some confusion in YN DNR's mind as to the County's recognition of the superior rights of protected instream flows.

Finally, the County should specifically indicate how the proposed zoning code revisions could impact (or protect) the Yakama Nation's Treaty-protected fisheries resource. If any potential impacts are identified, the EIS should describe what mitigation measures will be implemented to offset such impacts and ensure the protection of such Treaty resources.

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<sup>22</sup> See, November 13, 2015 Letter from DOE to Okanogan County Planning Director Huston re: Scope of EIS – Amend Okanogan County Zoning Ordinance (hereafter "DOE's Scoping Comments"); November 13, 2015 Letter from Methow Valley Citizens' Council ("MVCC") to Okanogan County Planning Director Huston re: Determination of Significance and Request for Comments on the Scope of EIS for the Okanogan County Zoning Update (hereafter, "MVCC's Scoping Comments").

<sup>23</sup> See DOE's Amicus Curiae Brief, *Supra*, n. 21.

<sup>24</sup> See DOE Scoping Comments, *Supra*, n. 22.

<sup>25</sup> See MVCC Scoping Comments, *Supra*, n. 22.

<sup>26</sup> See *e.g.*, WAC 173-548.

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B. *The Revised EIS Should Include Water Resource Impacts Analyses Based on Best Available Science.*

In addition to general concerns about the DEIS's lack of sufficient information, YN DNR was specifically concerned that the DEIS's limited impact analysis regarding water resources neither incorporated the best available local science, nor reflected a current understanding of Washington laws relevant to hydraulic continuity. For example, the DEIS's sole scientific basis for understanding how additional permit-exempt wells could potentially impact instream flows was a review of historic impacts to mean average flows, as indicated by stream-gauge data. However, modern courts have rejected the idea that instream flow impacts of groundwater withdrawal must be quantifiable through physical stream measurements, and clarified that even *de minimus* impairment of instream flows is prohibited under the law.<sup>27</sup> Thus, an analysis of potential instream flow impacts for WRIA 48 must be based on a comprehensive analysis of the best available science regarding hydraulic continuity in the region,<sup>28</sup> and cannot rely on past exempt-well development's failure to cause impacts measurable via stream gauge. Similarly, where mitigation measures are implemented, the final EIS should ground such measures in the best available science, rather than general intuition or anecdotal experience.<sup>29</sup>

IV. Conclusion: the DEIS is Improper under SEPA and Requires Significant Revision.

The DEIS is improper under SEPA because it (a) fails to provide sufficient information about probable adverse environmental impacts to make a reasoned policy decision, and (b) fails to describe any significant aspects of the probable environmental consequences of either Code Amendment 2015-1 (the "proposed revisions"), or of returning to the County's pre-interim zoning regulations (the "no action alternative"). The DEIS also fails to address specific water resource impact concerns raised by the DOE, MVCC, and others during the EIS scoping process. Further, it fails to consider or address the protection of water resources associated with the Yakama Nation's Treaty-protected fisheries resource. Finally, the limited scientific analysis included in the report is inconsistent with best-available science regarding hydraulic continuity, and does not analyze hydraulic continuity information or exempt well use information that is available for the WRIA 48 region, specifically. Thus, the EIS should be significantly revised prior to finalization to ensure that decision makers will have a meaningful tool for avoiding environmental degradation and safeguarding environmental quality in Okanogan County.

Please contact me at (509) 865-5121 x4655 or [prigdon@yakama.com](mailto:prigdon@yakama.com) with any questions regarding these comments, or to schedule a follow-up consultation meeting with the Yakama Nation.

Respectfully,



*Phil* PHIL RIGDON, SUPERINTENDENT  
YAKAMA NATION DEPARTMENT OF NATURAL RESOURCES

<sup>27</sup> See e.g., *Hubbard v. State*, 936 P.2d 27, 29 (Wash. Ct. App. 1997).

<sup>28</sup> YN DNR also notes that the DEIS did not incorporate or address the May 5, 2011 WRIA 48 Water Withdrawal Study prepared by Aspect consulting for the Methow Watershed Council, which specifically reviews current water use via exempt wells in the region.

<sup>29</sup> YN DNR notes that in the DEIS's discussion of potentially affected groundwater environments, the only analysis and/or mitigation offered is the County's "experience . . . that modern designed septic systems . . . are an effective control mechanism for ground and surface water protection from new development." DEIS § V(C).