

August 18, 2006, 9:30 am
Judge James H. Allendoerfer

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

FRIENDS OF GUEMES ISLAND, a
Washington non-profit corporation,

Plaintiff,

v.

SKAGIT COUNTY BOARD OF
COMMISSIONERS, and SKAGIT
COUNTY,

Defendants.

NO. 06-2-09088-6

FRIENDS' REPLY IN SUPPORT OF
ITS SUMMARY JUDGMENT
MOTION

I. INTRODUCTION

In Friends' Summary Judgment Motion Re: Noncompliance with SEPA ("Motion"), Friends of Guemes Island ("Friends") asserted that Skagit County ("County") violated SEPA requirements by acting on a proposal to extend weeknight hours of scheduled service for the Guemes Island ferry without having a Final Environmental Impact Statement. Motion at 1-2. Friends relied on its Verified Complaint and the exhibits attached to Friends' Memorandum in Support of its Summary Judgment Motion ("Memorandum"). Motion at 4. One exhibit

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attached to the Memorandum was the Declaration of Gerald Steel which states that Resolution #R20060184 was adopted and implemented without any environmental analysis (Para. 3), the proposal was not categorically exempt (Para. 4), prior to adoption there was no environmental checklist (Para. 5), prior to adoption there was no EIS or DNS (Para 6), and that 75 % of the voters on Guemes Island oppose the ferry schedule expansion (Para 11). These facts were not disputed in Skagit County’s Response to Friends’ Motion for Summary Judgment (“Co. Resp.”).

In its Memorandum, Friends asserted that “there are no disputed material facts that cannot be determined as a matter of law.” Memorandum at 8. In response, the County only identifies one dispute, “the county disputes that SEPA applies to its decision to formally extend the ferry’s operations with a schedule change.” Co. Resp. at 3. This is not a factual dispute but rather is an issue of law that this Court can decide based on the record before it. Later in this brief, Friends will present its argument as to why this Court should find that SEPA applies to the County’s proposal to extend the ferry schedule. Infra, this brief at 10-15.

If this Court finds that SEPA does apply to the proposal to extend scheduled weeknight ferry hours from 6 pm to 10 pm, then based on the undisputed facts in the record, this Court should find that the County acted in a arbitrary and capricious and clearly erroneous manner when it adopted and implemented Resolution #R20060184 in violation of SEPA’s requirements that no action be taken by the County that would have an adverse impact on the environment or limit the choice of reasonable alternatives until there is a final

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DNS or final EIS. Motion at 3 citing to WAC 197-11-070(1) which is adopted by reference in SCC 14.12.020. It is undisputed that Resolution #R20060184 was adopted and implemented before there was a final DNS or final EIS. It is undisputed that the proposal would both have a direct adverse impact on the environment and limit the choice of reasonable alternatives. See Verified Complaint Para. 2.21, 2.22, and 2.23.

If this Court finds that the County erred in adopting and implementing Resolution #R20060184 before there was a final DNS or final EIS, then this Court should determine if this Resolution is to be voided and if the schedule change is to be terminated as Friends requested in its Motion at 3-4. The test should be whether, based on all evidence presented to the Court, that this Court concludes that a significant adverse impact is probable. King County v. Boundary Review Board, 122 Wn.2d 648, 661-67, 860 P.2d 1024 (1993).

In its Response, the County presents a “post hoc” DNS that was prepared at the request of the County Counsel for the benefit of this Court approximately two months after Resolution #R20060184 was adopted and approximately one month after the extended ferry operation began. True and accurate copies of the “post hoc” DNS and associated checklist were provided in a Declaration of Brandon Black.¹ There is no oath or certification that the statements in environmental checklist are factually accurate. See the Declaration of Brandon Black and its attachments. The Declaration of Brandon Black states that Mr. Black reviewed the checklist. There is no oath or certification that prior to the issuance of the “post hoc”

¹ The Declaration is titled Declaration in Support of Skagit County’s Response Opposing Friends’ Motion for Summary Judgment.

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DNS that Mr. Black reviewed or considered the environmental record (or the impacts identified in this record) submitted to the BOCC at its May 23, 2006 meeting where the BOCC considered Resolution #R20060184. Exhibits 2-7 attached to the Verified Complaint are true and correct copies of documents in the said record. Second Declaration of Gerald Steel, Para. 3.

There is no evidence that Mr. Black reviewed or considered the growth-inducing impacts of significantly increasing accessibility by providing public access to and from the Island seven nights a week instead of three nights a week including:

- 1) The undisputed fact that the pre-July 2006 ferry schedule “served to restrain the resident population to those willing to live with limited transportation access.” Verified Complaint, Para. 2.27².
- 2) The undisputed fact that the Island has a sole-source aquifer that “is under significant pressure with existing development” with salt-water intrusion into wells in areas of denser development.” Id.
- 3) The undisputed fact that the extended ferry schedule will “increase demand for development of additional homes.” Id.
- 4) The undisputed fact that “additional homes would cause further pressure on potable

² Because of the “post hoc” DNS, Friends has provided certification by Barbara Rudge that Para. 2.27 in the Verified Complaint accurately represents her expert opinion and is factually accurate. Declaration of Barbara Rudge, Para. 2-4. The Verified Complaint certifies that the May 21, 2006 letter report of Barbara Rudge was in the County’s record. Verified Complaint, Para. 2.27.

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water supplies” both because of “increased withdrawals and less permeation.”³ Id.

5) The undisputed fact that “there has been no watershed planning or analysis” for the Guemes aquifer. Id.

6) The undisputed fact that “additional wells [from additional homes] would have a negative impact on the Guemes aquifer and cause more saltwater intrusion.” Id.

7) The undisputed fact that “ground water levels are directly connected with water levels in wetlands.” Id.

8) The undisputed fact that “about 70% of the shoreline area within about 1000 feet from the shoreline is habitat for endangered or threaten priority species on Guemes Island.” Id.

9) The undisputed fact that ground water levels lowered by over-withdrawal would impact these species dependent on local wetlands by causing habitat loss. Id.

10) The undisputed fact that the impact of piped water brought to the Island as a result of the County’s failure to have adequate environmental analysis and planning for additional houses caused by increased ferry accessibility ”would be to create intense demand for new housing and and forever alter the rural nature of the island.” Id.

11) The undisputed fact that such “increased water supply would increase effluent entering on-site septic systems” eventually causing failures with “untreated effluent

³ Less permeation of water to recharge the aquifer is caused by increased impervious surfaces associated with new development that causes more water to be lost to runoff.

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2 flows into the shore water directly impacting wildlife and their habitat.” Id.

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4 In preparing the checklist and DNS, and in responding to this Summary Judgment
5 Motion, the County has not made a prima facie case that it has considered the indirect and
6 long-term impacts of the increased accessibility proposed for the Island including addressing
7 the undisputed facts presented above.

8 For the MDNS to survive judicial scrutiny, the record must
9 demonstrate that environmental factors were considered in a
10 manner sufficient to amount to prima facie compliance with the
11 procedural requirements of SEPA and that the decision to issue
12 an MDNS was based on information sufficient to evaluate the
13 proposal's environmental impact.

14 Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123
15 (2000); See Memorandum at 9, lines 19-21.

16 The Comprehensive Plan requires the development of a subarea plan for Guemes
17 Island. Memorandum at 5. The County has been working on this subarea plan since 2003.
18 Resolutions #R20030037 and #R20050025; Second Declaration of Gerald Steel, Para. 5.
19 Three of the six items that must be addressed in this sub-area plan are the sole-source aquifer
20 issues, ferry service, and maintaining rural character and lifestyles. Memorandum at 5.
21 These issues should all be addressed in an Environmental Impact Statement before the
22 County is allowed to increase public access to the Island from three nights per week to seven
23 nights per week.

24 In the expert opinion of Barbara Rudge, in order to understand the indirect and long-
25 term impacts of this increase in night-time accessibility to the Island, the County should

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3 “complete the analysis for the subarea plan and water resource management plan” for the
4 Island. Verified Complaint, Para 2.27. Barbara Rudge presents her expert opinion, that this
5 increase in night-time accessibility requires a DS and EIS. Id.

6 This was also the opinion of the County when it issued the 1977 DEIS for the
7 expansion of the ferry size to the current ferry. Exhibit 2 to the Verified Complaint consists
8 of true and correct excerpts from this 1977 DEIS and Exhibit A to the Memorandum consists
9 of true and correct pages from this 1977 DEIS. See Second Declaration of Gerald Steel,
10 Para. 4 and 6. The County concluded that while increasing the size of the ferry would not
11 be likely to cause significant adverse environmental impacts, that extending the schedule will
12 have a significant impact on population, housing, and land use. Memorandum at 2-3;
13 Verified Complaint at 6; Second Declaration of Gerald Steel, Para 4. There is no evidence
14 that Mr. Black considered the analysis in the 1977 DEIS before he issued his “post hoc” DNS
15 at the request of County Counsel.
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17 For more than 30 years and since the 1977 DEIS was adopted by the County, the last
18 scheduled ferry run has been at 6 pm four days a week. Memorandum at 1-2. It is the
19 current adopted policy of the Guemes Island Ferry Schedule and Fare Task Force and the
20 Skagit County Commissioners through Resolution #R20040051 that the last scheduled ferry
21 run will continue to be at 6 pm four days a week. Memorandum at 4. The current Resolution
22 #R20060184 did not modify this policy and therefore is inconsistent with this adopted
23 County policy.
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25 Therefore based on the record that was before the BOCC at the time that they
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3 considered adoption of Resolution #R20060184 (including Exhibits 2-7 attached to the
4 Verified Complaint), this Court should find that it is likely that there will be more than a
5 moderate environmental impact from providing public access to and from the Island seven
6 nights a week instead of three nights a week. See Plum Creek Timber v. FPAB, 99 Wn. App.
7 579, 591, 993 P.2d 287 (2000). Even considering that the County Counsel has arranged for
8 Brandon Black to issue a “post hoc” DNS, this Court should still find that it is likely that
9 there will be more than a moderate environmental impact. The DNS is not a disputed fact
10 but rather is a conclusion of law that this Court reviews “de novo.” The undisputed facts
11 presented in the Verified Complaint and Memorandum and summarized in this Reply are
12 impacts that were simply not addressed in the environmental checklist and there is no
13 evidence that these facts were considered by Mr. Black before he issued his “post hoc” DNS.
14 Based on these undisputed facts, this Court should find the DNS clearly erroneous, void
15 Resolution #R20060184, terminate the use of the extended ferry schedule, and remand to the
16 County for compliance with SEPA.

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19 In cases involving reversal of a DNS, it is necessary to remand
20 to the agency for preparation of an EIS and enjoin the agency
21 action until the statement is complete.

22 King County v. Boundary Review Board, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993).

23 In the remaining sections, Friends will address the other issues raised by the County
24 in its Response.

25 **II. SUPPLEMENTAL FACTS**

26 The County states that the pre-July 2006 schedule has been subject to multiple

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exceptions. While this is true, based on analysis of records for 2004, the number of pre-July 2006 runs associated with these multiple exceptions have been minimal after the 6 pm runs. Declaration of Glen Veal (attached to the Second Declaration of Gerald Steel), Para. 2. This is why the County states:

The lack of evening runs on weekdays creates uncertainty and hardships for families whose children want to participate in school events and activities. It creates similar hardships for persons whose jobs require them to stay late and miss the return ferry.

Co. Resp. at 2. This type of hardship is consistent with the undisputed fact presented by Barbara Rudge, that the pre-July 2006 “ferry schedule has served to restrain the resident population to those willing to live with limited transportation access.” Supra, this brief at 4. Most residents of the Island value the rural lifestyle that is protected by the pre-July 2006 ferry schedule enough to oppose the new schedule. As discussed in the Memorandum, 75 percent of the residents of the Island opposed the extended ferry schedule. Memorandum at 5; Declaration of Gerald Steel, Para. 11.

The County states that the unscheduled runs are extremely costly. While this is true relative to a scheduled run, based on analysis of records for 2004, the minimal number of pre-July 2006 unscheduled runs after the 6 pm runs made the total cost for all of these unscheduled runs a minor cost compared to the cost of all scheduled runs during the same period and a minor cost compared to the projected cost during the next year for implementing the extended schedule. Declaration of Glen Veal, Para. 3.

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III. REPLY ANALYSIS

A. Standard Of Review

Assuming that this Court finds that SEPA applies to the adoption and implementation of Resolution #R20060184, then the Declaration of Gerald Steel established sufficient facts to prove that the County was clearly erroneous in the adoption of Resolution #R20060184 without a threshold determination or categorical exemption. In response, the County has submitted a “post hoc” DNS and “post hoc” environmental checklist.

In response, Friends has submitted Declarations further verifying and authenticating materials previously supplied with the Verified Complaint and Memorandum. This case is appropriate for summary judgment because there are no material disputed facts and the undisputed facts demonstrate that it is likely that there will be more than a moderate adverse environmental impact from providing public access to and from the Island seven nights a week instead of three nights a week.

Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'the moving party is entitled to judgment as a matter of law.' CR 56(c). A party opposing summary judgment may not rely on 'mere allegations or denials' set forth in the pleadings, but rather 'must set forth specific facts showing that there is a genuine issue for trial.' CR 56(e).

Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). The only dispute identified by the County is whether SEPA applies to the County’s action to provide public access to and from the Island seven nights a week instead of three nights a week. Co. Resp. at 3. This is a question of law that this Court can review “de novo” when

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2 ruling on this summary judgment motion.

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4 **B. SEPA Applies To Extending The Ferry Schedule To Provide Public**
5 **Access To And From The Island Seven Nights A Week Instead Of Three**
6 **Nights A Week**

7 In Kucera v. Dep't of Transp. (Kucera), 140 Wn.2d 200, 995 P.2d 63 (2000), the
8 Supreme Court reviewed a case where shoreline property owners sought an injunction for
9 violation of SEPA requirements against the Department of Transportation when the
10 Department added a high speed ferry to an existing ferry route within the schedule day.
11 Kucera at 201. The superior court granted a preliminary injunction limiting the speed of the
12 ferry pending compliance with SEPA. Id. at 202. The Supreme Court dissolved the
13 preliminary injunction, finding that the superior court acted without considering whether the
14 property owners have an adequate remedy at law, without finding that the high-speed
15 operation of the ferry caused actual and substantial harm, and without balancing the interests
16 of the parties and the public. Id. While this case dealt primarily with the preconditions for
17 a preliminary injunction, the Department of Transportation argued that "deployment and
18 operation of a single vessel on an established route between established terminal facilities
19 does not constitute a project action." Id. at 214. The Supreme Court did not have the
20 necessary facts to decide this issue in its interlocutory review. Id. at 217. This issue was
21 remanded back to the superior court for resolution. Id. at 225.

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23 The Court did provide guidance to the superior court as follows:

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25 But although no reported decision has explicitly held the
26 deployment and operation of a vehicle of transportation on an
established route constitutes a "project action" subject to SEPA,

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respondents correctly note courts frequently require environmental review of nonstructural transportation actions. See Downtown Traffic Planning Comm. v. Royer, 26 Wn. App. 156, 164-65, 612 P.2d 430 (1980) (holding decision to implement an exclusive bus lane program in downtown Seattle was subject to SEPA); Development Servs. of Am., Inc. v. City of Seattle, 138 Wn.2d 107, 111, 979 P.2d 387 (1999) (noting SEPA review considered the noise and land use impacts of a proposed helistop).

A variety of transportation decisions have also been subject to environmental review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321. See Cross-Sound Ferry Servs., Inc. v. United States, 573 F.2d 725, 732 (2d Cir. 1978) (decision of Interstate Commerce Commission that operation of ferries would not significantly affect the environment was reached after compliance with initial procedural requirements of NEPA); Strahan v. Linnon, 967 F. Supp. 581, 629 (D. Mass. 1997) (holding Coast Guard vessel operations required preparation of an Environmental Assessment under NEPA), aff'd, 187 F.3d 623 (1st Cir. 1998); British Airways Bd. v. Port Authority of N.Y. & N.J., 431 F. Supp. 1216, 1219 (S.D.N.Y.) (noting NEPA review was conducted before operating the Concorde), rev'd on other grounds by 558 F.2d 75 (2d Cir. 1977); National Helicopter Corp. of Am. v. City of N.Y., 137 F.3d 81, 86 (2d Cir. 1998) (corporation required to prepare an environmental impact statement to assess an existing heliport's noise effects on the environment); National Parks & Conservation Ass'n v. Federal Aviation Admin., 998 F.2d 1523, 1533 (10th Cir. 1993) (reversing a finding of no significant impact under NEPA which approved construction, operation, and funding of an airport); Seattle Community Council Fed'n v. Federal Aviation Admin., 961 F.2d 829 (9th Cir. 1992) (noting decision to alter flight patterns of turbine-powered aircraft using Seattle-Tacoma International Airport was subject to NEPA review). Thus, it is not unprecedented to require environmental review of non-structural transportation actions.
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Accordingly we assume, without deciding, that SEPA applies to the deployment and operation of the Chinook for the purpose of our interlocutory review.

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3 Kucera at 215-17 (footnotes omitted).

4 Thus the Kucera Court found substantial precedent to require environmental review
5 of non-structural transportation actions. Id. Except for natural resource transactions, to
6 qualify as a project action subject to threshold determination requirements, the action must
7 directly adversely modify or harm the environment:

8 (a) **Project actions.** A project action involves a decision on a
9 specific project, such as a construction or management activity
10 located in a defined geographic area. Projects include and are
11 limited to agency decisions to:

12 (i) License, fund, or undertake any activity that will directly
13 modify the environment, whether the activity will be conducted
14 by the agency, an applicant, or under contract.

15 WAC 197-11-704(2) (emphasis on “directly modify the environment” supplied). In Kucera,
16 there were disputed facts regarding whether the operation of the vessel would adversely
17 modify the environment and the trial court made no finding that the operation of the vessel
18 caused direct harm or adverse modification to the environment. Id. at 217. The Kucera
19 Court was not able to conclude that the vessel operation was a project action because there
20 was no finding that the vessel operation directly adversely modified (harmed) the
21 environment which is a requirement of WAC 197-11-704(2)(a)(i). See Id. at 216-17.

22 The County misinterprets Kucera, when it concludes, “Thus, for SEPA to apply, an
23 “action” must have some significant adverse impact on the environment.” Co. Resp. at 4.
24 If this interpretation were accurate, there would be no requirement for a DNS. See WAC
25 197-11-734. A project action under WAC 197-11-704(2)(a)(i) only must directly harm the

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2 environment and it need not have a significant adverse impact to trigger SEPA requirements.

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4 Therefore, new operational decisions on activities funded or undertaken by an agency that
5 directly modify the environment are project actions under WAC 197-11-704(2)(a)(i) and
6 SEPA requirements apply if there is not a categorical exemption. See WAC 197-11-305.

7 It is undisputed that the County funds and undertakes the operation of the Guemes Ferry. It
8 is also undisputed that the extended ferry operation will directly modify the environment.
9 Verified Complaint Para. 2.23; Environmental Checklist, Section 10(b) and 12(a); Co. Resp.
10 at 6 (“county concedes that the extended ferry hours will have some impact”).
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12 The County argues that because there were disputed facts as to whether there was
13 harm in Kucera, that the County’s dispute as to whether SEPA applies should prevent a
14 summary judgment motion from being granted. Co. Resp. at 6-7. But the County, which is
15 only on record as considering direct impacts, has conceded that extended ferry hours will
16 have some impact. Co. Resp. at 6. Thus as a matter of law, this Court can decide that SEPA
17 applies. This record includes undisputed facts of indirect, long-term, and cumulative impacts
18 that are likely to have more than a moderate adverse environmental impact on Guemes Island
19 such that the “post hoc” DNS should be reversed, the Resolution voided, and the extended
20 ferry schedule terminated.
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22 **C. There Is No Available Appeal Before The Hearing Examiner**

23 The County argues that its Hearing Examiner should review the adequacy of the
24 County’s DNS. Co. Resp. at 7. However, there is no administrative SEPA appeal to the
25 Hearing Examiner. See DNS attached to the Declaration of Brandon Black (“There is no
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2 agency appeal”). There can be no County appeal of the DNS because there is no County
3 appeal allowed of the decision (Resolution #R20060184) after it is adopted by the County.
4 SEPA requires all appeals to be of the SEPA action plus the related decision. WAC 197-11-
5 680(3)(a)(v). The only appeal of the DNS is to superior court. Friends has timely-filed a
6 Supplement Verified Complaint challenging the DNS and Checklist, and has presented a
7 Motion requesting that this Court authorize its Supplement Verified Complaint.
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10 **D. The County’s Proposal To Provide Public Access To And From The**
11 **Island Seven Nights A Week Instead Of Three Nights Is A Project Action**
12 **Under SEPA**

13 In Section D of its Analysis, the County argues again that SEPA should not apply to
14 its proposal. Co. Resp. at 8 - 10. Friends will not repeat its reply to this issue that was fully
15 covered in Section III.B of this Reply and in the Declaration of Glen Veal. The County
16 argues that the new schedule formalizes exceptions that have been in place for many years.
17 Co. Resp. at 8. This was addressed in Section II of this Reply. Supra, this Reply at 8-9.

18 The County argues that the court’s holding in Downtown Traffic Planning Comm.
19 v. Roper (Downtown), 26 Wn.App. 156, 612 P.2d 430 (1980) that a bus lane program was
20 subject to SEPA was reversed. Co. Resp. at 8-9. However, the Supreme Court has clarified
21 that the “type of decision involved in Downtown - the modification or alteration of an
22 existing transportation program (bus service) - may be an ‘action’ subject to environmental
23 review has never been overruled.” Kucera at 215 including Note 9. Mr. Black has correctly
24 determined that the instant project is not categorically exempt from SEPA. Declaration of
25 Brandon Black at 2.
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Section III.B adequately demonstrates that under Kucera, the County’s proposal is a project action requiring SEPA analysis.

IV. CONCLUSION

This Court should find that as a matter of law, based on undisputed facts, that there are direct impacts (noise, glare, etc.) to the environment associated with the County’s proposal to provide public access to and from the Island seven nights a week instead of three nights a week. This, plus the fact that the County is undertaking and funding the proposal, and considering that the proposal applies to a specific area, qualifies the proposal as a project action subject to SEPA. Friends has provided undisputed facts to demonstrate that there are long-term, indirect and cumulative impacts that are likely to have more than a moderate impact on the environment. Therefore this Court should reverse the DNS, void the Resolution, terminate the extended ferry service, and remand the matter back to the County.

Dated this 12th day of August, 2006.

Respectfully submitted,

By: _____
Gerald Steel, PE
WSBA #31084
Attorney for Friends of Guemes Island

FGI8a11.06