92335-3

APPENDIX

To Answer to
PRV

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COLUMBIA RIVERKEEPER; and NORTHWEST ENVIRONMENTAL DEFENSE CENTER, Appellants, SIERRA CLUB, Plaintiff, v. PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver USA Board of Commissioners President; BRIAN WOLFE, Port of Vancouver USA Board of Commissioners Vice President; and NANCY I. BAKER, Port of Vancouver USA Board of Commissioners Secretary, Respondents.	No. 46130-7-II PUBLISHED OPINION

MAXA, J. — Columbia Riverkeeper and the Northwest Environmental Defense Center (Riverkeeper) appeal the trial court's partial summary judgment order dismissing two of their six claims against the Port of Vancouver. Riverkeeper's claims relate to the Port's agreement to lease property to the Tesoro Corporation and Savage Companies (Tesoro/Savage) for construction of a crude oil transportation facility. Riverkeeper asserts that the Port violated the

State Environmental Policy Act (SEPA), chapter 43.21C RCW, in entering into the lease agreement.

The parties agree that the Port's execution of the lease is contingent on the project's certification by the Energy Facility Site Evaluation Council (the Council)[1] following preparation of an environmental impact statement (EIS) and ultimate approval by the governor, pursuant to the Energy Facility Site Locations Act (EFSLA), chapter 80.50 RCW. However, Riverkeeper claims that the Port violated SEPA by entering into an agreement to lease the property to Tesoro/Savage for the project before the Council issued its EIS. Riverkeeper also claims that the Port violated EFSLA regulations because the lease agreement with Tesoro/Savage limits the Port's choice of reasonable alternatives available for the facility.

We hold that the Port's decision to enter into the lease agreement (1) was exempt from SEPA's EIS requirement under RCW 80.50.180, an EFSLA provision, because the lease agreement involved the approval of the location of an energy facility; and (2) did not violate WAC 197-11-070(1), a SEPA regulation, because the lease agreement does not limit the choice of reasonable alternatives available to the Council and the governor for the facility during the site certification process. Accordingly, we affirm the trial court's order granting partial summary judgment in favor of the Port.

FACTS

In late 2012, the Port solicited proposals from companies interested in developing a crude oil terminal on its property. In early 2013, it selected Tesoro/Savage as the most suitable

[1] The parties refer to the Council by the acronym EFSEC. We use the short form "the Council" in order to prevent any confusion with the "Energy Facility Site Locations Act" (EFSLA), which we reference throughout the opinion.

companies for such a project. The Port negotiated a lease agreement with Tesoro/Savage and then approved that agreement at a public meeting in July 2013. However, because of concerns over the procedure used at that meeting, the Port voted a second time to approve the lease agreement at another public meeting in October 2013.

The lease agreement provides for a 10-year lease (extendable for two five-year terms at Tesoro/Savage's option) following construction of the terminal facility. But before the construction or lease periods begin, either party may terminate the agreement if any conditions precedent are not satisfied. The primary condition precedent is that "all necessary licenses, permits and approvals have been obtained for the Permitted Use." Clerk's Papers (CP) at 288. This provision requires Tesoro/Savage to acquire full regulatory approval for its operations before it may begin construction or use of the land.[2] Therefore, either the Port or Tesoro/Savage may terminate the agreement before the lease begins if Tesoro/Savage cannot obtain full regulatory approval.

The lease agreement describes the activities to be allowed on the land, which include the loading and unloading of crude oil from rail lines, the storage of crude oil, and the loading of crude oil onto marine vessels. The agreement also requires Tesoro/Savage to maintain pollution liability insurance with limits of $25 million.

Before approving the lease agreement, the Port did not prepare an EIS and did not formally assess whether one was required under SEPA. The chair of the Council advised the Port that the Council would have sole responsibility for environmental review as part of the site

[2] The other condition precedent involves preparation of a baseline environmental assessment to determine the extent to which the land is already contaminated, which expressly benefits only Tesoro/Savage.

certification process under EFSLA. After the parties executed the lease agreement, Tesoro/Savage applied to the Council for site certification as required under EFSLA. The Council determined that environmental review under SEPA was necessary and declared that it would prepare an EIS for the project.

Riverkeeper filed suit against the Port, asserting six claims relating to the Port's execution of the lease agreement. Claim five alleged that the Port "violated SEPA by approving the lease for the petroleum products terminal before the completion of either a determination of nonsignificance or an EIS." CP at 14. Claim six alleged that the Port "violated SEPA by taking action – approval and execution of the lease for the proposed petroleum products terminal – that limits the choice of reasonable alternatives concerning the proposal before completion of either a determination of nonsignificance or an EIS." CP at 15.

The trial court granted the Port's summary judgment motion regarding these two claims. The trial court ruled that RCW 80.50.180 exempts execution of the lease agreement from SEPA's EIS requirement and that execution of the lease agreement did not limit the reasonable range of alternatives to be considered in the review of the project. The trial court subsequently entered final judgment on claims five and six under CR 54(b).

Riverkeeper appeals the trial court's grant of partial summary judgment on claims five and six.

ANALYSIS

A. STANDARD OF REVIEW

We review a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle* (*ILWU*), 176 Wn. App. 512, 519, 309 P.3d 654 (2013). Summary judgment is proper if there are

no issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. SCOPE OF EFSLA EXEMPTION

Riverkeeper argues that SEPA applies to the Port's proprietary decision to lease public property to Tesoro/Savage, and therefore that the Port violated SEPA by entering into the lease agreement before completion of an EIS. We disagree because under RCW 80.50.180, the Port's decision to enter into the lease agreement involved the approval or authorization of the location of an energy facility and therefore is exempt from SEPA's EIS requirement.

1. SEPA EIS Requirement

In order to ensure that the government agencies consider the impact of their actions on the natural environment, SEPA requires agencies to submit an EIS before pursuing "major actions significantly affecting the quality of the environment." RCW 43.21C.030(2)(c); *see also Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 634, 246 P.3d 822 (2011). The EIS is a "detailed statement" describing

> (i) the environmental impact of the proposed action;
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (iii) alternatives to the proposed action;
>
> (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

RCW 43.21C.030(2)(c).

An EIS serves to enhance agency decision making both by informing the agency directly and by facilitating public engagement with the agency:

> The EIS process enables government agencies and interested citizens to review and comment on proposed government actions, including government approval of private projects and their environmental effects. . . . An environmental impact statement is more than a disclosure document. It shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions.

WAC 197-11-400(4).

Because projects often involve multiple agencies, Department of Ecology regulations provide for designation of a "lead agency" for purposes of preparing an EIS for any project. WAC 197-11-050. The lead agency "shall be the agency with main responsibility for complying with SEPA's procedural requirements and shall be the only agency responsible for: (a) The threshold determination [of significance]; and (b) Preparation and content of environmental impact statements." WAC 197-11-050(2). This ensures that there will be only one EIS for each project. *See* WAC 197-11-060(3)(b).

2. EFSLA Certification Process

EFSLA, codified at chapter 80.50 RCW, "governs the location, construction, and operation conditions of energy facilities in Washington." *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 284, 197 P.3d 1153 (2008). The term "energy facility" is defined to include certain types of "energy plants." RCW 80.50.020(11), (12). This definition includes any facility "which will have the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum or liquefied petroleum gas which has been or will be transported over marine waters." RCW 80.50.020(12)(d). Tesoro/Savage's project falls within this definition.

A primary focus of EFSLA is to establish a process for certifying construction of energy facilities. *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 284-85. The EFSLA created the Council to administer the site certification process. RCW 80.50.030; *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 285. The Council is composed of representatives from various state agencies and also includes a representative of the county, city, or port district[3] in which the facility is proposed to be located. RCW 80.50.030(3)-(6).

Under EFSLA, the Council administers the process of certifying construction sites for energy facilities. RCW 80.50.040, .060(1). The Council receives, processes, and evaluates applications for site certification under EFSLA and the regulations and guidelines it adopts. RCW 80.50.040(5)-(11); *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 285. The site certification process begins when an applicant requests review of a proposed energy facility. RCW 80.50.071(1). The applicant provides detailed information about the project and the natural environment at the proposed site, WAC 463-60-010, and the Council determines whether preparation of an EIS is necessary. WAC 463-47-060, 070. If needed, the Council prepares an EIS.[4] WAC 463-47-090(1).

The Council ultimately recommends that the governor approve or deny the application. RCW 80.50.100(1). If the Council recommends approval, it has authority to impose conditions on certification to implement the provisions of EFSLA. RCW 80.50.100(2). The governor either approves the application, rejects the application, or directs the Council to reconsider

[3] Port districts have a nonvoting representative on the Council for review of proposed energy facilities on port property. RCW 80.50.030(6).

[4] If an EIS is required, the Council operates as the lead agency for EIS purposes if other agencies are involved in an energy facility project. WAC 197-11-938(1).

certain aspects of the certification. RCW 80.50.100(3). EFSLA places only procedural limitations on the Council's evaluation of an energy facility application and places no restrictions at all on the governor's decision. *Friends of the Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 334, 310 P.3d 780 (2013).

The legislature designed EFSLA certification to be the exclusive method for approving the construction of energy facilities. RCW 80.50.110 provides that EFSLA supersedes conflicting state laws and regulations and expressly preempts energy facility certification decisions by other governmental entities. *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 285. Site certification under EFSLA authorizes the applicant to construct and operate an energy facility without obtaining a permit or certification from any other governmental entity. RCW 80.50.120(3); *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 285.

3. Interpretation and Application of RCW 80.50.180

a. Statutory Language

EFSLA expressly exempts certain actions involving energy facilities from SEPA's EIS requirement. RCW 80.50.180 provides that

> all proposals for legislation and other actions of any branch of government of this state, including state agencies, municipal and public corporations, and counties, to the extent the legislation or other action involved *approves, authorizes, permits*, or establishes procedures solely for approving, authorizing or permitting, the *location*, financing or construction of any *energy facility* subject to certification under chapter 80.50 RCW, shall be exempt from the "detailed statement" [EIS] required by RCW 43.21C.030.

(Emphasis added.) The issue here is whether the Port's entry into a lease agreement involving the construction of an energy facility constitutes an action "approving," "authorizing," or "permitting" the location of that facility.

b. Principles of Statutory Interpretation

Statutory interpretation is a matter of law that we review de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. *Id.* at 762. To determine legislative intent, we first look to the plain language of the statute. *Id.* We consider the language of the provision in question, the context of the statute in which the provision is found, and related statutes. *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 969, 344 P.3d 705 (2015). When the statute at issue or a related statute includes an applicable statement of purpose, the statute should be read in a manner consistent with that stated purpose. *Id.* at 969-70.

If the statutory language is unambiguous, we apply that statute's plain meaning as an expression of legislative intent without considering extrinsic sources. *Jametsky*, 179 Wn.2d at 762. We will not rewrite unambiguous statutory language or add language to an unambiguous statute under the guise of interpretation. *Protect the Peninsula's Future*, 185 Wn. App. at 970. And we "must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). Instead, we construe statutes assuming that the legislature meant exactly what it said. *In re Marriage of Herridge*, 169 Wn. App. 290, 297, 279 P.3d 956 (2012).

c. Ordinary Meaning Analysis

RCW 80.50.180 expressly exempts from SEPA's EIS requirement any action that "approves, authorizes [or] permits" the location of an energy facility. The ordinary meaning of "approve" is "to express often formally agreement with and support of or commendation of as meeting a standard." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 106 (2002). "Authorize" ordinarily means "to endorse, empower, justify, or permit by . . . some recognized or proper

authority." WEBSTER'S at 146. And "permit" ordinarily means "to consent to expressly or formally [or] grant leave for or the privilege of." WEBSTER'S at 1683. Taken together, these three terms broadly refer to any actions that formally grant a right or privilege necessary to move a project forward.

Here, the Port's lease agreement formally grants Tesoro/Savage the right to move forward with a project to construct an energy facility at a particular location on Port property, subject to certain conditions. Therefore, the RCW 80.50.180 exemption unambiguously applies to the lease agreement.

Riverkeeper argues that the phrase "approves, authorizes [or] permits" in RCW 80.50.180 refers only to "regulatory" actions and not to "proprietary" actions. However, there is no basis in the statutory language for making this distinction. RCW 80.50.180 potentially applies to "all . . . other actions," not to "all other *regulatory* actions." The statute uses the broad phrase "approves, authorizes [or] permits," not "regulates." Riverkeeper's argument is inconsistent with the plain statutory language, and adopting that argument would require us to add language to RCW 80.50.180.

d. Context Analysis

Riverkeeper argues that distinguishing between regulatory actions and proprietary actions is supported by interpreting the statutory language in the context of other EFSLA and SEPA provisions.

Specifically, Riverkeeper asserts that (1) the fundamental purpose of EFSLA is to centralize the *regulatory* process for energy facilities, citing RCW 80.50.110(2) (EFSLA preempts only the "regulation and certification" of energy facilities by other governmental entities) and RCW 80.50.120(3) (stating that the issuance of a certificate shall be in lieu of any

"permit, certificate or similar document," which are issued pursuant to regulatory authority); (2) a narrow interpretation of RCW 80.50.180 is consistent with a core policy of SEPA,[5] which Riverkeeper claims is to ensure that decision makers like the Port have the information necessary to make responsible environmental decisions before selling or leasing public property, *see ILWU*, 176 Wn. App. at 522 (stating that the "fundamental idea of SEPA" is to "prevent government agencies from approving projects and plans before the environmental impacts of doing so are understood"); and (3) other sections of EFSLA's and SEPA's implementing regulations show that agencies other than the Council can have SEPA responsibilities for energy facilities, citing RCW 80.50.175(4) and WAC 197-11-938(1), which was adopted for EFSLA purposes in WAC 463-47-020.

However, one of the legislature's stated purposes in enacting EFSLA was "[t]o avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). The Port argues that if proprietary actions relating to energy facilities were not exempt, a governmental entity taking such actions would be required to prepare an EIS in addition to the EIS that the Council is required to prepare. Riverkeeper responds that it is not claiming that the Port should have to prepare its own EIS, but only that the Port must wait until the Council completes its EIS before deciding whether to lease the property. But, as in this case, the developer of an energy facility may require a written lease agreement before proceeding with its application under EFSLA. In that situation, if leasing property was not exempt under RCW 80.50.180, a governmental entity may have no choice but to prepare a duplicative EIS before entering into the lease.

[5] Riverkeeper notes that under RCW 43.21C.030(1), all Washington laws must be interpreted in accordance with the policies set forth in SEPA.

In addition, RCW 43.21C.030(2)(c) and RCW 80.50.180 use almost identical language regarding the general scope of those statues. Under RCW 43.21C.030(2)(c), an EIS is required for "proposals for legislation and other major actions." Similarly, RCW 80.50.180 applies to "all proposals for legislation and other actions." Consideration of these two statutes together suggests that RCW 80.50.180 exempts all activities that might otherwise be subject to SEPA's EIS requirement.

We hold that interpreting RCW 80.50.180 in the context of various EFSLA and SEPA provisions does not clarify the plain meaning of "approve, authorize, [or] permit" as used in that statute. Riverkeeper's arguments at best show that the legislature could have exempted regulatory actions from the EIS requirement without conflicting with other statutory provisions. But the legislature did not limit RCW 80.50.180 in that manner. We will not add language to the statute based on context arguments that cut both ways.

Moreover, it is not clear that conditioning approval on the Council's EIS review, rather than EIS review by the Port, conflicts with the policies set forth in SEPA. As long as an EIS is prepared and the review is completed, the policies underlying SEPA review appear to be satisfied. *See* RCW 43.21C.010, .020. And applying the RCW 80.50.180 exemption to all actions, regulatory or proprietary, is consistent with the legislature's clear intent to centralize the authorization process for energy facilities with the Council. Limiting the exemption to regulatory actions potentially could undermine that purpose.

We hold that based on the plain language of RCW 80.50.180, the Port's decision to enter into a lease agreement with Tesoro/Savage relating to the construction of an energy facility was exempt from SEPA's EIS requirement.

B. LIMITING THE CHOICE OF REASONABLE ALTERNATIVES

Even if the Port is exempt from SEPA's EIS requirement, Riverkeeper argues that the Port violated WAC 197-11-070(1) by entering into the lease agreement because the lease terms limited the choice of the Port's reasonable alternatives before completion of an EIS. We disagree because the lease agreement did not limit *the Council's* or *the governor's* choice of reasonable alternatives regarding the certification process.

1. SEPA/EFSLA Regulations

WAC 197-11-070(1) limits the actions of a governmental entity during the SEPA process. That regulation provides,

> Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would:
>
> . . .
>
> (b) Limit the choice of reasonable alternatives.

WAC 197-11-786 defines "reasonable alternative" as

> an action that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation. Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts, either directly, or indirectly through requirement of mitigation measures.

See also King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 138 Wn.2d 161, 184-85, 979 P.2d 374 (1999). The Council has expressly adopted these regulations for the EFSLA process. WAC 463-47-020.

In an EIS, an agency considers three categories of alternatives: no action, other reasonable courses of action, and mitigation measures. WAC 197-11-792(2)(b).

2. Applicability of WAC 197-11-070(1)

Initially, WAC 197-11-070(1) states that a governmental agency cannot take an "action" that limits the choice of reasonable alternatives. Under WAC 197-11-704(2)(a)(ii), leasing property constitutes an "action" under SEPA. However, the Port's lease agreement is contingent on Tesoro/Savage obtaining certification under EFSLA. Riverkeeper argues that despite this contingency, entering into the lease agreement constituted a SEPA "action." We agree.

In *Magnolia Neighborhood Planning Council v. City of Seattle*, the city approved a plan for residential development on property the city had not yet obtained. 155 Wn. App. 305, 308, 230 P.3d 190 (2010). Division One of this court held that this approval was a "project action" under WAC 197-11-704 because it was "a decision on a specific construction project, located in a defined geographic area." 155 Wn. App. at 314. The court also noted that the city's approval of the plan had a "binding effect" because once the city obtained the property, the city would be bound to use the property based on the approved plan. *Id.* at 317.

On the other hand, in *ILWU* the city entered into a memorandum of understanding that contemplated the use of public funds for a sports arena. 176 Wn. App. at 514. Division One held that the memorandum of understanding was not a "project action" under WAC 197-11-704 because the memorandum was merely a preliminary step to set forth an arena proposal that was sufficiently definite to allow further study. *Id.* at 520-21. Further, unlike in *Magnolia*, the memorandum did not limit or control the city's future decisions and therefore did not have a binding effect. *ILWU*, 176 Wn. App. at 523.

Here, the Port's lease agreement is much more like the binding plan approval in *Magnolia* than the nonbinding memorandum of understanding in *ILWU*. As in *Magnolia*, the lease agreement represents a decision on a specific construction project in a specific location.

155 Wn. App. at 314. Further, upon certification by the Council the lease agreement essentially will be binding on the Port. As a result, we hold that the Port's entry into the lease agreement with Tesoro/Savage was an "action" under SEPA and therefore was subject to WAC 197-11-070(1)(b).

3. Lease Agreement's Effect on Reasonable Alternatives

Riverkeeper argues that the lease agreement significantly limits the Port's choices of reasonable alternatives for Tesoro/Savage's energy facility. Specifically, Riverkeeper asserts that the lease agreement commits the Port to (1) the location of the facility, (2) the design of the facility, (3) the permitted uses of the site, (4) site closure and reclamation requirements, (5) the dedication of berths to ships servicing the terminal, and (6) the amount of pollution liability insurance Tesoro/Savage must obtain. Riverkeeper also points out that the lease agreement precludes the Port from leasing the property to any other tenant.[6] In contrast, the Port argues that the lease agreement does not limit the choice of reasonable alternatives available to *the Council* or *the governor* in determining whether to approve the project.

The deciding issue here is whether WAC 197-11-070(1)(b) refers to the choice of reasonable alternatives available to the agency conducting the EIS or whether it refers to the choice of reasonable alternatives available to any governmental entity involved in a project. WAC 197-11-070(1)(b) is silent regarding this issue. It states only that until "[t]he responsible official" issues an EIS or determination of nonsignificance, an agency cannot "[l]imit *the* choice

[6] The Port argues that the terms of the lease agreement allow it to make changes regarding the facility depending on the results of the EIS. However, as Riverkeeper points out, the only meaningful contingency in the lease agreement is that Tesoro/Savage obtain all necessary certifications. Once certification occurs, the Port will be bound by the specific provisions in the lease agreement.

of reasonable alternatives" without particularly specifying *whose* choice cannot be limited. (Emphasis added.) Because this language arguably is subject to two reasonable interpretations, WAC 197-11-070(1)(b) is ambiguous. *Jametsky*, 179 Wn.2d at 762. We resolve ambiguity by considering other indications of legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Id.* The same rules apply for regulations. *See Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010).

No legislative history or cases directly address this issue. However, as a principle of construction, we attempt construe laws relating to the same subject matter together. *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 308-09. To the extent two such laws conflict, we give precedence to the more specific law. *Id.* at 309.

Here, WAC 197-11-070(1)(b) addresses the scope of environmental review generally. EFSLA also addresses environmental review, but is tailored specifically to energy facilities. It is designed to place all administrative responsibility for the certification of those facilities, including the necessary environmental review, on the Council, and places final decision making authority on the governor. *See Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 284-85. EFSLA preempts the regulation of certification of energy facilities by any other agency, RCW 80.50.110(2), and exempts other agencies from conducting an EIS regarding the location of energy facilities. RCW 80.50.180. And it gives the Council and the governor broad discretion in considering applications for the construction of energy facilities. *Friends of the Columbia Gorge*, 178 Wn.2d at 334.

This more specific statutory scheme controls our resolution of the ambiguity in WAC 197-11-070(1)(b). We hold that the most reasonable interpretation of WAC 197-11-070(1)(b) is that when certification of energy facilities under EFSLA is involved, that regulation only

prohibits an agency from limiting the choice of reasonable alternatives available to the Council and the governor. Because the legislature has placed all authority regarding the certification of energy facilities with the Council and the governor, in this context whether a local agency's choices have been limited is irrelevant.

Here, the Port's lease agreement involves an energy facility. The Port's lease agreement is expressly conditioned on Tesoro/Savage obtaining EFSLA certification. And because the Council and the governor have broad discretion in considering applications for the construction of energy facilities, the terms of the lease agreement – which might be binding on the Port but not on the Council or the governor – necessarily can have no effect on the certification decision. The Council is free to deny or approve certification contingent on changing or supplementing the lease terms. Under these circumstances, whether the Port has limited *its own* choices is immaterial.

We hold that the Port's entry into the lease agreement with Tesoro/Savage did not violate WAC 197-11-070(1)(b).

C. "SNOWBALLING" EFFECT

Riverkeeper also argues that the "snowballing" inertia generated by the lease agreement effectively forecloses full consideration of alternative possibilities and constitutes a separate violation of WAC 197-11-070(1)(b). We disagree.

Riverkeeper's argument is based on a line of cases beginning with *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 663-64, 860 P.2d 1024 (1993). In that case, the Supreme Court noted that

> [e]ven if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions

> may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

122 Wn.2d at 664; *see also ILWU*, 176 Wn. App. at 522 ("The snowballing metaphor is powerful because it embodies the fundamental ideal of SEPA: to prevent government agencies from approving projects and plans before the environmental impacts of doing so are understood.").

Based on this principle, an agency violates SEPA by shaping the details of a project before completing an EIS, effectively turning administrative approval into a "yes or no" vote on that project as detailed, rather than allowing for the development and consideration of alternatives after the EIS is completed. *See Lands Council v. Wash. State Parks Recreation Comm'n*, 176 Wn. App. 787, 806-07, 309 P.3d 734 (2013). Similarly, if the initial agency action has a coercive effect on final approval such that it will likely limit the range of alternatives the approving agency will consider, this may also violate SEPA. *Cf. ILWU*, 176 Wn. App. at 524-25. For instance, this can occur where the approving agency has expended large amounts of resources to lay the groundwork for a particular project before approval and would be unable to lay that groundwork again for an alternative project. *Pub. Util. Dist. No. 1 of Clark County. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 162, 151 P.3d 1067 (2007).

Riverkeeper's argument might have some merit if the Port was conducting the EIS and making the certification decision. Here, however, the Council is solely responsible for environmental review of the proposed energy facility. The Council likely will not be affected by whatever inertia the Port has generated for the project. Further, the Council is not bound to simply vote yes or no on the details of the project outlined in the lease agreement. The Council has authority to impose conditions on site certification not contemplated in the lease agreement in order to implement the provisions of EFSLA. RCW 80.50.100(2).

Riverkeeper argues that the lease agreement necessarily generates inertia because the Council will have to approve or deny the project "against the backdrop of a detailed lease that promises millions of dollars in revenue to a Washington public body." Reply Br. of Appellant at 25. However, the Council would face a similar situation even if the Port had not entered into a formal lease agreement.

Riverkeeper also notes that the lease agreement commits the Port to work diligently to pursue all necessary licenses, permits, and approvals. Again, this provision could improperly build momentum for the project if the Port was making the certification decision. But because the Port has only a nonvoting representative on the Council, *see* RCW 80.50.030(6), this provision does not limit the Council's full consideration of reasonable alternatives. And it certainly does not constrain the governor, who ultimately will decide whether to certify the project.

We hold that the Port's entry into the lease agreement with Tesoro/Savage did not violate WAC 197-11-070(1)(b) because of any "snowballing" effect.

We affirm the trial court's order granting partial summary judgment in favor of the Port.

Maxa, J.
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We concur:

Johanson, C.J.
JOHANSON, C.J.

Sutton, J.
SUTTON, J.

Appendix B

NO. 46130-7-II

COURT OF APPEALS, DIVISION II,
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OPENING BRIEF FOR COLUMBIA RIVERKEEPER and NORTHWEST ENVIRONMENTAL DEFENSE CENTER

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Regulations

I. Introduction

Columbia Riverkeeper and Northwest Environmental Defense Center (collectively, "Riverkeeper") challenge the Port of Vancouver, USA and its commissioners' (collectively, the "Port") execution of a lease prior to the preparation of an Environmental Impact Statement ("EIS") in violation of the State Environmental Policy Act ("SEPA"). The ten-year lease commits roughly 42 acres of public property near downtown Vancouver, Washington, for use as a crude-by-rail terminal that would receive and ship 360,000 barrels of crude oil each day, and store more than 2 million barrels of crude oil on the banks of the Columbia River. The Port executed this binding lease with Tesoro Savage Petroleum Terminal, LLC ("Tesoro") before the analyses required by SEPA of the human health risks and environmental impacts of the crude oil terminal had even begun. The Port violated the letter and the fundamental purposes of SEPA by contracting away its ability to reject the project or require additional or alternative lease terms before an EIS is complete.

The parties agree that Tesoro's proposed project is subject to Washington's Energy Facilities Site Locations Act ("EFSLA") and therefore that the Energy Facility Site Evaluation Council ("EFSEC") is statutorily designated as the lead SEPA agency charged with preparing an EIS for the project. However, the Superior Court erred in finding that EFSLA allows the Port to execute the lease before EFSEC completes an

EIS studying the human health and environmental impacts of the crude oil terminal. The Superior Court further erred by concluding that the lease allows the Port to withdraw from the lease or meaningfully modify the lease terms in response to information about human health and environmental risks disclosed through the SEPA process. This Court should reverse the Superior Court's decision and ensure that the Port is not allowed to evade SEPA's core goals by an irreversibly committing to host a massive crude-by-rail terminal on public property before the environmental impacts are analyzed and disclosed.

II. Assignments of Error and Issues

1. Assignments of Error

a. First Assignment of Error

The Superior Court erred in granting the Port's motion for summary judgment as to Riverkeeper's Fifth Cause of Action by finding that the Energy Facilities Site Locations Act, RCW 80.50.180 (App. p.16), exempts the Port's decision to lease public land from SEPA's EIS requirement, RCW 43.21C.030(2)(c) (App. p.2).

b. Second Assignment of Error

The Superior Court erred in granting the Port's motion for summary judgment as to Riverkeeper's Sixth Cause of Action by finding that the lease did not limit the reasonable range of alternatives prior to the

completion of SEPA review of the project. *See* WAC 197-11-070(1) (App. p.20); WAC 463-47-020 (App. pp.53–59).

2. Issues Pertaining to Assignments of Error

a. Issue Pertaining to First Assignment of Error

Did the Port violate SEPA by making a proprietary decision to enter into a long-term lease for the development of a massive crude oil shipping terminal on public land before the human health and environmental impacts of the terminal are analyzed and disclosed to the public in an EIS?

b. Issue Pertaining to Second Assignment of Error

Did the Port violate SEPA by limiting the choice of reasonable alternatives before the completion of the EIS by executing a long-term, legally binding lease detailing the location, fundamental design, and certain conditions of a massive crude oil terminal, and requiring the Port to advocate for the licensing of the terminal as described in the lease?

III. Statement of the Case

1. Washington's State Environmental Policy Act

SEPA was enacted to "encourage productive and enjoyable harmony between humankind and the environment" and to "prevent or eliminate damage to the environment and biosphere." RCW 43.21C.010 (App. p.1). To achieve these goals, SEPA requires agencies to integrate environmental concerns into their decision making processes and study and explain the environmental consequences

before making decisions. *See Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 117–18, 508 P.2d 166 (1973).

Specifically, SEPA requires that all branches of the State government include, in each proposal for a major action with probable significant adverse environmental impacts, a "detailed statement" on:

> (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

RCW 43.21C.030(2)(c) (App. p.2). This "detailed statement" is commonly referred to as an EIS. RCW 43.21C.031(1) (App. p.3).

Where two or more agencies have decision-making authority over different aspects of a proposed project, one agency is designated the "lead" SEPA agency. *See* WAC 197-11-922–948 (App. pp.36–50); *and* WAC 197-11-055(5) (App. p.19); *and* WAC 197-11-030(2)(d)–(e) (App. p.17). The lead agency prepares the EIS for the proposed project. WAC 197-11-050(2)(b) (App. p.18). The other non-lead agencies involved must use that EIS unless an exception applies, such as where a non-lead agency believes that its comments on the draft EIS warrant additional analysis, whereupon the non-lead agency prepares a supplement to the EIS. WAC 197-11-600(3)(c) (App. p.28). This procedure eliminates duplicative analyses but ensures that all responsible agencies have the benefit of an EIS before making decisions. Until the EIS is issued, both lead and

non-lead agencies are prohibited from taking any actions that would have adverse environmental impacts or limit the choice of reasonable alternatives. WAC 197-11-070(1) (App. p.20).

2. Washington's Energy Facilities Site Locations Act

EFSLA governs the regulation of "energy facilities," RCW 80.50.060(1) (App. p.9), which include "[f]acilities which will have the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum or liquefied petroleum gas which has been or will be transported over marine waters . . . ." RCW 80.50.020(12)(d) (App. p.4).

EFSLA also created EFSEC, an agency consisting of a chair person appointed by the governor and several public officers and officials, to administer a certification process for proposed energy facilities. RCW 80.50.030 (App. pp.5–6); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 284–85, 197 P.3d 1153 (2008). For energy facilities proposed to be located on port district property, the affected port district appoints a representative as a nonvoting member of EFSEC. RCW 80.50.030(6) (App. p. 6). "Site certification [from EFSEC] authorizes the applicant to construct and operate an energy facility in lieu of any other permit or document required by any other agency or subdivision." *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 285, 197 P.3d 1153 (citing RCW 80.50.120(2), (3)

(App. p.14)). EFSLA thereby "preempts" any other local or state agency from regulating, permitting, or certifying energy facilities that are subject to the statute. RCW 80.50.110 (App. p.13).

EFSEC is the lead SEPA agency charged with preparing EISs for energy facilities subject to EFSLA. WAC 197-11-938(1) (App. p.44). EFSLA exempts agencies—other than EFSEC—from the requirement to prepare an EIS for certain regulatory actions related to energy facilities subject to the statute:

> Except for actions of the [EFSEC] under [EFSLA], all proposals for legislation and other actions of any branch of government..., to the extent the legislation or other action involved approves, authorizes, [or] permits...the location, financing or construction of any energy facility subject to certification under [EFSLA], shall be exempt from the [EIS] required by [SEPA].

RCW 80.50.180 (App. p.16). However, EFSEC has also adopted regulations that prohibit any such non-lead agencies from taking actions that would limit the choice of reasonable alternatives before EFSEC completes its EIS. WAC 463-47-020 (App. p.53) (adopting WAC 197-11-070(1)(b)) (App. p.20).

3. Tesoro's Proposed Crude-by-rail Terminal

Tesoro proposes constructing a massive crude oil terminal on public property at the Port of Vancouver. CP at 0079–95. Up to 360,000 barrels of crude oil per day would arrive at Tesoro's terminal near downtown Vancouver, Washington, in rail tanker cars. CP at 0162. At full operation, the terminal would receive an average of four mile-and-a-half-long oil trains every day. CP at 0163. The terminal would store more

than 2 million barrels of crude oil in large above-ground tanks, and load crude oil into tanker ships that would pass through the Columbia River Estuary and cross the Columbia River Bar on their way to refineries. CP at 0162.

To build and operate the proposed crude oil terminal at the Port, Tesoro must secure both the proprietary right to use the Port's land and the regulatory approval necessary to operate a large crude oil shipping facility. Without the Port's consent to lease public land along the Columbia River near downtown Vancouver, Tesoro could not construct the proposed crude oil terminal. CP at 0269–335 (App. pp.67–171). While the proposed crude oil terminal is an "energy facility" within the meaning of EFSLA, RCW 80.50.020(12)(d) (App. p.4), and therefore requires regulatory certification from EFSEC, RCW 80.50.060(1) (App. p.9), EFSEC does not control the Port's decision to lease public land to Tesoro. *See* RCW 80.50.040 (App. pp.7–8) (listing EFSEC's powers).

4. The October 2013 Lease

The Port and Tesoro executed a lease for the development of the crude oil terminal on October 22, 2013. CP 0333 (App. p.131). The lease provides that it is the entire, "absolute and irrevocable" legal agreement between the Port and Tesoro. CP at 0282, 0332 (App. pp.79, 130). The lease describes specific details of Tesoro's proposed project, including the project's fundamental design, CP at 0273–74, 0279–80, 0337–43 (App.

pp.71–72, 77–78, 135–141), use, CP at 0277, 0289–94 (App. pp.75, 87–92), payment and financing, CP at 0274–76, 0284–89 (App. pp.72–74, 82–87), and exclusive options. CP at 0290–91 (App. pp.88–89). The lease further specifies the amount of pollution liability insurance that Tesoro is required to maintain for the project—$25 million. CP at 0278 (App. p.76). The lease also specifies the duration of the agreement; ten years with the option to extend the lease for two consecutive five-year terms. CP at 0274, 0282–83 (App. pp.72, 80–81).

The lease states that it is subject to two "conditions precedent," CP at 0281 (App. p.79), but neither of these conditions enable the Port to withdraw from the lease or renegotiate any of its material terms if the SEPA analysis discloses significant environmental or human health risks. The first condition states that the oil terminal will not be built if Tesoro cannot obtain the necessary regulatory permits—*i.e.*, certification from EFSEC. *Id.* The second condition, that Tesoro must obtain a baseline environmental investigation of the property, is explicitly provided only for Tesoro's benefit; the Port has no ability to void or renegotiate the lease if this condition is not met. *Id.* Unless Tesoro, of its own volition, actually fails to pursue development and commence construction of the crude oil terminal as described in the lease, the Port will be unable to withdraw from or renegotiate the lease. CP at 0282 (App. p.80).

The Port negotiated and executed this binding lease before the EIS, or even a draft of the EIS, was available to the Port or the public. *See* CP at 0045. While the Port provided opportunities for public comment on its leasing decision, CP at 0040–41, no formal study existed to explain the environmental and human health risks posed by the crude oil terminal. *See* CP at 0045. Accordingly, that information—which EFSEC's forthcoming EIS will presumably contain—was not available to members of the public, including Riverkeeper, attempting to provide meaningful input about the Port's decision. Further, this lack of disclosure interfered with the public's understanding of the consequences of the publicly elected Port commissioners' decision.

5. EFSEC's SEPA Review of Tesoro's Proposal

EFSEC is in the process of preparing an EIS to analyze the human health and environmental impacts of the proposed crude oil terminal. Tesoro filed its application for EFSEC regulatory certification on August 29, 2013, and requested that EFSEC determine that an EIS is required. CP at 0045. On October 3, 2013, EFSEC "determined that [the crude oil terminal] is likely to have a significant adverse impact on the environment" and designated itself as the lead agency for preparing the EIS. *Id.* The Port appointed, and EFSEC hired, Lawrance Paulson as the Port's representative member on EFSEC during the certification process for Tesoro's project. *See* CP at 0247. To the best of Riverkeeper's

knowledge, EFSEC is still preparing a draft EIS as of the date of this filing.

IV. Argument

The Port violated the spirit and the letter of SEPA by leasing public land to Tesoro before EFSEC completes the EIS for the proposed crude oil terminal. EFSLA does not exempt proprietary decisions to lease public land from SEPA review. The Port thus violated SEPA's basic requirement that an EIS must precede all major actions significantly impacting the environment. RCW 43.21C.030(2)(c) (App. p.2); *see also* CP at 0014–15. Even if EFSLA exempted the Port's lease decision from the EIS requirement—which it does not—the Port's binding and detailed lease violates EFSEC's SEPA regulations prohibiting any action that would limit the reasonable alternatives to a proposal before EFSEC completes an EIS. *See* WAC 463-47-020 (App. p.53) (adopting WAC 197-11-070(1)(b) (App. p.20)); *see also* CP at 0015.

The Port's premature decision to negotiate and execute a lease of public land compromised SEPA's primary goal: to "prevent or eliminate damage to the environment," RCW 43.21C.010 (App. p.1), by ensuring that the values of ecological health and human welfare become part of every agency's decision-making process. *Stempel*, 82 Wn.2d at 117–18, 508 P.2d 166. SEPA review should begin "at the earliest opportunity," *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122

Wn.2d 619, 646, 860 P.2d 390 (1993), so agencies can and will weigh the environmental consequences before making a decision. WAC 197-11-400(1), (4) (App. p.21); *see also Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (The National Environmental Policy Act's ("NEPA") success "depends entirely on involving environmental considerations in the initial decisionmaking process.") (citing 40 C.F.R. §§ 1501.2, 1502.5 (App. pp.61–62)).[1] An EIS is not a means for "justifying decisions already made." WAC 197-11-402(10) (App. p.22). The Port should have waited for and used the analysis in the EIS to decide whether, or under what conditions, to lease public land for the crude oil terminal. The Port's failure to do so cause the Port to make its decision without the required consideration for "ecological health and human welfare . . . ." *Stempel*, 82 Wn.2d at 117–18, 508 P.2d 166.

By leasing public land to Tesoro before the EIS process had even begun, the Port also undercut SEPA's disclosure, public scrutiny, and decision-maker accountability functions. The EIS process should both alert the public to the consequences of an agency's proposed action and "give the public enough information to be able to participate intelligently"

[1] "NEPA is substantially similar to SEPA, [so] Washington Courts may look to federal case law for SEPA interpretation." *Public Utility Dist. No. 1 of Clark County v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067 (2007) ("*Clark PUD*"). Further, the policies behind SEPA are even stronger than NEPA. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 224, 995 P.2d 63 (2000).

in the decision-making process. *Nisqually Delta Assoc. v. Du Pont*, 103 Wn.2d 720, 741–42, 696 P.2d 1222 (1985) (Dore, J., dissenting); *and see Cal. v. Block*, 690 F.2d 753, 772 (9th Cir. 1982) (stating that a purpose of the EIS process under NEPA is also "to give the public enough information to be able to participate intelligently"). As the U.S. Supreme Court explained, an EIS "provides a springboard for public comment" and also informs the public whether the agency "has indeed considered environmental concerns in its decisionmaking process. . . ." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (citations and quotations omitted). In addition to informing the underlying decision, the requirement to disclose environmental impacts serves the purpose of "strengthening agency accountability. . . ." *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Com.*, 599 F.2d 1333, 1344 n.13 (5th Cir. 1979).

The Port's commitment of public property for a crude oil terminal before the EIS was published prevented the public from understanding the environmental and safety implications of the Port's decision. Without this critical information, Riverkeeper and other members of the public were not able to provide the "public scrutiny" and input that is "essential" to the EIS process and the Port's leasing decision. *See Brodsky v. United States NRC*, 704 F.3d 113, 120 (2d Cir. 2013) (citing 40 C.F.R. § 1500.1(b) (App. p.62)); *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d

472, 492 (9th Cir. 2011). Failure to disclose and explain the environmental and human health consequences of the Port's decision also insulated the Port and the Port commissioners—elected public officials—from public accountability.

The relief sought by Riverkeeper is neither burdensome nor complicated: the Port should be required to wait until EFSEC's EIS discloses the human health and environmental risks associated with operating a massive crude oil terminal on the Columbia River near downtown Vancouver, Washington, before committing public property to that project. That, after all, is the point of SEPA.

1. Standard of Review

The Court of Appeals reviews decisions on summary judgment de novo, engaging in the same inquiry as the trial court. *Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 511, 519, 309 P.3d 654 (2013). All Washington laws "shall be interpreted . . . in accordance with the policies set forth" in SEPA. RCW 43.21C.030(1) (App. p.2); *see also Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 65, 510 P.2d 1140 (1973).

2. The Port's decision to lease public land for a crude-by-rail terminal is subject to SEPA's EIS requirement.

As the sale or lease of public land often has important environmental impacts, proprietary decisions like the Port's decision to lease land for a crude oil terminal require SEPA review. WAC 197-11-

704(2)(a)(ii) (App. p.32) (defining actions that may trigger SEPA to include leases of public lands); *see also In re Recall of Telford*, 166 Wn.2d 148, 158, 206 P.3d 1248 (2009) (discussing the SEPA process for a lease by a port).

The parties do not dispute that the proposed crude oil terminal would have significant environmental impacts, and therefore requires an EIS. Because the proposed crude oil terminal is an energy facility within the meaning of EFSLA, EFSEC is the lead agency charged with preparing the EIS for the proposed project. CP at 0045. As a non-lead agency with decision-making authority over a proposed project for which an EIS is being prepared, the Port was required to wait for and use EFSEC's EIS before negotiating and executing the lease. RCW 43.21C.030(2)(c) (App. p.2); WAC 197-11-600 (App. pp.28–29). This is how SEPA's fundamental requirement to prepare an EIS applies to non-lead agencies like the Port.

When EFSEC has jurisdiction over certifying an energy facility, some regulatory decisions by other state agencies are exempt from SEPA's requirements. However, proprietary decisions like the Port's lease are not exempt. Specifically, EFSLA provides:

> "all proposals for legislation and other actions of . . . municipal and public corporations, . . . to the extent the legislation or other action involved approves, authorizes, [or] permits . . . the location, financing or construction of any energy facility subject to certification under [EFSLA], shall be exempt from the [EIS] required by [SEPA]."

RCW 80.50.180 (App. p.16). A lease is not an action that "approves, authorizes, [or] permits" the oil terminal within the meaning of EFSLA. Rather, the terms "approves," "authorizes," and "permits" in this provision refer to regulatory—not proprietary—decisions. Because EFSLA does not exempt the proprietary lease decision from SEPA, the Port violated SEPA's fundamental requirement by making a decision that significantly impacted the environment before an EIS was prepared. RCW 43.21C.030(2)(c) (App. p.2); *Int'l Longshore*, 176 Wash. App. at 522, 309 P.3d 654 (SEPA's "fundamental idea" is "to prevent government agencies from approving projects and plans before the environmental impacts of doing so are understood.").

a. In the context of EFSLA, the terms "approves," "authorizes," and "permits" refer to regulatory—not proprietary—decisions.

The statutory context where the terms "approves," "authorizes," and "permits" appear shows that these terms refer only to regulatory authorizations, such as pollution control permits and zoning approvals. Statutory interpretation begins with the plain meaning of the term in question. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). The plain meaning should be discerned from the ordinary meaning of the term *in the context of the statute where it appears. Id.* at 146 Wn.2d at 10–12, 43 P.3d 4; *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309–10, 237 P.3d 256 (2010). Accordingly,

the meaning of "approves," "authorizes," and "permits" in RCW 80.50.180 (App. p.16) should be determined based on the context of EFSLA.

Specifically, terms in EFSLA should be interpreted in the context of EFSLA's overarching purpose; to centralize *regulatory* authorizations required for the development of large energy facilities. *Cf. Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 284–85, 197 P.3d 1153; *see also* RCW 80.50.090(2) (App. p.10). The heart of EFSLA is the pronouncement that the statute "preempts the *regulation and certification*" of large energy facilities. RCW 80.50.110(2) (App. p.13) (emphasis added). The rules implementing EFSLA provide that certification by EFSEC is "in lieu of any *permit, certificate, or similar document*" otherwise required by state or local agencies. WAC 463-14-050 (App. p.51) (emphasis added).[2] Other EFSLA rules instruct EFSEC to consider the "*laws or ordinances, rules or regulations*, which may be preempted by certification." WAC 463-14-080(7) (App. p.52) (emphasis added).

[2] The full text of WAC 463-14-050 (App. p.51) reads: "Chapter 80.50 RCW operates as a state preemption of *all matters* relating to energy facility sites. Chapter 80.50 RCW certification is given in lieu of any permit, certificate, or similar document which might otherwise be required by state agencies and local governments." (emphasis added). It is not literally true, of course, that EFSLA preempts "all matters" relating to energy facility sites. Read broadly, the Port's lease is a 'matter related to an energy facility site,' but no party suggests that the Port's lease is preempted. Instead, WAC 463-14-050 (App. p.51) reflects that EFSLA was not intended to have any bearing on proprietary decisions by local governments. RCW 80.50.180 (App. p.16) should be interpreted in that context.

Accordingly, EFSLA is a statute that deals only with the consolidation and preemption of regulatory and permitting processes. In that context, the terms "approves," "authorizes," and "permits" in RCW 80.50.180 (App. p.16) should be interpreted to refer only regulatory and permitting decisions.

EFLSA does not preempt, disturb, or even address the authority of local governments and municipal corporations to make proprietary decisions about selling or leasing their public lands. Nothing suggests the legislature even considered disturbing the local proprietary control of the lands where energy facilities might be located. For instance, EFSEC could not acquire the 42 acres in question through eminent domain, or otherwise force the Port to lease or sell property for the proposed oil terminal. *See* RCW 80.50.040 (App. pp.7–8) (listing EFSEC's powers). Rather, Tesoro was required to negotiate with the Port regarding the terms of the lease and the Port was required to make its own decision related thereto. EFSLA and EFSEC are simply not concerned with the sale or lease of public lands. In that context, it would make no sense to interpret the terms "approves," "authorizes," or "permits" in RCW 80.50.180 (App. p.16) to refer to proprietary decisions.

b. Riverkeeper's interpretation of RCW 80.50.180 supports SEPA's goals and policies.

RCW 80.50.180 (App. p.16) is best read as requiring SEPA compliance before public bodies lease or sell land for energy facilities.

The Washington Legislature provided explicit and mandatory instruction for interpreting state laws: all Washington laws "shall be interpreted . . . in accordance with the policies set forth" in SEPA. RCW 43.21C.030(1) (App. p.2); *see also Juanita Bay Valley Cmty. Ass'n*, 9 Wn. App. at 65, 510 P.2d 1140. For example, in *English Bay Enterprises v. Island County*, the Supreme Court noted that this legislative directive "mandated" a broad interpretation of the Shoreline Management Act to ensure environmental protection of Washington's shore lands. 89 Wn.2d 16, 20, 568 P.2d 783 (1977); *see also Herman v. Shorelines Hearings Bd.*, 149 Wn. App. 444, 459, 204 P.3d 928 (2009). Additionally, RCW 43.21C.030(1) (App. p.2) uses the mandatory command "shall" to direct those interpreting Washington law to honor SEPA's "policies," not merely SEPA's text. The Court should use this statutory mandate, when interpreting RCW 80.50.180 (App. p.16), to effectuate SEPA's policies and not to undermine them.

Interpreting RCW 80.50.180 (App. p.16) to exempt only regulatory—but not proprietary—decisions would support SEPA's core policy of ensuring that decision-makers like the Port have the information necessary to make responsible environmental decisions when selling or

leasing public land.[3] SEPA's policy is to "prevent or eliminate damage to the environment," RCW 43.21C.010 (App. p.1), by ensuring that the values of ecological health and human welfare become part of every agency's decision-making process. *Stempel*, 82 Wn.2d at 117–18, 508 P.2d 166. Interpreting RCW 80.50.180 (App. p.16) as requiring local governments to use EFSEC's EIS when deciding whether to sell or lease public land for energy facilities perfectly complements SEPA's goals. An EIS provides agencies like the Port with the necessary information to understand a project's impacts on ecological health and human welfare. WAC 197-11-400 (App. p.21). By making the critical decision to lease public land for a crude oil terminal without the benefit of an EIS, the Port violated SEPA's core policy. Accordingly, this Court should interpret the terms "approves," "authorizes," and "permits" in RCW 80.50.180 (App. p.16) as exempting only regulatory and permitting decisions from SEPA, because that interpretation effectuates SEPA's goals and policies.

SEPA's disclosure and accountability goals are served by interpreting EFSLA to require local governments to make decisions about whether to sell or lease public land *after* the EIS publicly explains the project's environmental and human-health implications. *Cf. Robertson*, 490 U.S. at 349 (EISs inform the public whether the agency "has indeed

[3] Exempting *regulatory* decisions by agencies other than EFSEC does not offend SEPA's policies because EFSEC makes the regulatory decisions about large energy facilities, and EFSEC must comply with SEPA's EIS requirement. *See* RCW 80.50.180 (App. p.16).

considered environmental concerns"); *see also Atlanta Coalition on Transp. Crisis, Inc.*, 599 F.2d at 1344 n.13 (EISs serve the purpose of "strengthening agency accountability"). Moreover, allowing the public to review the information in the EIS before commenting on a local government's decision to lease or sell public land will strengthen both the EIS and the underlying proprietary decision. *See Robertson*, 490 U.S. at 332 (an EIS "provides a springboard for public comment"); *see also Cal. v. Block*, 690 F.2d at 772 (The EIS process should "give the public enough information to be able to participate intelligently" in the decision-making process.).

Faced with competing interpretations about the breadth of EFSLA's SEPA exemption, the Court is guided by the Legislature's command to interpret all statutes to effectuate SEPA's policies. The Court should therefore interpret EFSLA as not exempting proprietary decisions like the Port's lease from SEPA because only that interpretation ensures that the Port will make its decision when the pertinent information is available—in the form of an EIS—to the Port and the public.

c. EFSLA and its implementing regulations demonstrate that agencies besides EFSEC can have SEPA responsibilities for energy facilities.

A broad interpretation of RCW 80.50.180 (App. p.16) conflicts with, and would render meaningless, other sections of EFSLA and EFSEC's regulations. The Court should reject such an interpretation.

Courts should interpret and construe statues as a whole, so that all of the language in a statute "is given effect, with no portion rendered meaningless or superfluous." *G-P Gypsum Corp.*, 169 Wn.2d at 309, 237 P.3d 256. Other sections of EFSLA and its implementing regulations demonstrate that non-EFSEC agencies sometimes have SEPA responsibilities, even when EFSEC is preparing the EIS. A broad interpretation of RCW 80.50.180 (App. p.16) would render these sections meaningless and should therefore be rejected. *See G-P Gypsum Corp.*, 169 Wn.2d at 309, 237 P.3d 256.

For instance, RCW 80.50.175 (App. p.15), which allows discretionary site studies of potential energy facilities, demonstrates that agencies besides EFSEC can have SEPA responsibilities, even when EFSLA applies. RCW 80.50.175(4) (App. p.15) states that any site study "prepared . . . pursuant to subsection (3) of this section *may be used in place of the 'detailed statement' required by RCW 43.21C.030(2)(c)* by any branch of government except [EFSEC]." (Emphasis added). The pronouncement that a non-EFSEC agency may use EFSEC's site study "in place of" an EIS necessarily anticipates that—in some instances—a non-EFSEC agency would be required use an EIS. An overly broad interpretation of RCW 80.50.180 (App. p.16), which would absolve non-EFSEC agencies of all SEPA responsibilities, would render RCW 80.50.175(4) (App. p.15) meaningless.

Further, the Washington Department of Ecology's ("Ecology")[4] and EFSEC's SEPA regulations demonstrate that agencies other than EFSEC can have obligations under SEPA for projects subject to EFSLA. These regulations designate EFSEC as the "lead agency" for SEPA in EFSLA proceedings. WAC 197-11-938(1) (App. p.44); WAC 463-47-020 (App. pp.53, 59). The sole purpose of the "lead agency" designation and its associated procedures is to delineate the respective roles and responsibilities where multiple agencies have jurisdiction and SEPA responsibilities over one project. If Ecology and EFSEC interpreted RCW 80.50.180 (App. p.16) as exempting all non-EFSEC agencies from all SEPA responsibilities, there would be no need to designate EFSEC as the lead SEPA agency. Reading EFSLA's SEPA exemption too broadly would make EFSEC's lead agency rules superfluous.

Riverkeeper's proffered interpretation of RCW 80.50.180 (App. p.16) would harmonize that provision with RCW 80.50.175(4) (App. p.15), WAC 463-47-020 (App. pp.53, 59), and WAC 197-11-938(1) (App. p.44) by acknowledging that certain decisions by non-EFSEC agencies, like the Port's proprietary leasing decision, must be preceded by an EIS even when EFSLA applies.

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[4] SEPA assigns Ecology primary responsibility to promulgate regulations to implement the statute. RCW 43.21C.110(1). Ecology's SEPA regulations are given substantial deference. RCW 43.21C.095.

3. The Port's binding lease with Tesoro violated regulations implementing SEPA and EFSLA by limiting the choice of reasonable alternatives before EFSEC issues the EIS.

As explained above, RCW 80.50.180 (App. p.16) does not exempt the Port's lease decision from the EIS requirement. However, even if it did, that exemption would not absolve the Port of all SEPA obligations with respect to Tesoro's proposed crude oil terminal. The exemption at RCW 80.50.180 (App. p.16) only relates to the requirement to prepare (or, in the case of a non-lead agency, to use) a "detailed statement" (*i.e.*, an EIS). In addition to the EIS requirement, EFSEC has adopted its own regulations governing SEPA review of projects subject to EFSLA. One of these regulations is a prohibition against any government actions that would limit the choice of reasonable alternatives before EFSEC issues the EIS. The Port violated this mandate by negotiating and executing a long-term lease for the terminal before EFSEC issued the EIS.

WAC 197-11-070(1)(b) (App. p.20) states:

> Until the responsible official issues a final determination of nonsignificance or final [EIS], no action concerning the proposal shall be taken by a governmental agency that would . . . [l]imit the choice of reasonable alternatives.

EFSEC's regulations adopt this prohibition. WAC 463-47-020 (App. p.53).

Consideration of reasonable alternatives to a proposed action is an essential aspect of the SEPA process. *See* RCW 43.21C.030(2)(c)(iii), (e)

(App. p.2); *and see Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 41, 873 P.2d 498 (1994) (an EIS must contain a "reasonably detailed analysis of a reasonable number and range of alternatives"). Ecology explains that "[a]lternatives are one of the basic building blocks of an EIS. They present options in a meaningful way for decision-makers." Ecology, SEPA Online Handbook, § 3.3.2, Identifying Alternatives (App. pp.65–66).

SEPA regulations state that "alternative[s]" may include (i) no action; (ii) other reasonable courses of action; or (iii) mitigation measures that are not included in the proposed action. WAC 197-11-792(2)(b) (App. p.35). A "reasonable" alternative is "an action that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-786 (App. p.34). Alternatives that should be considered under SEPA include the no action alternative and "design alternatives, location options on the site, different operational procedures, various methods of reclamation for ground disturbance, closure options, etc." Ecology, SEPA Online Handbook, § 3.3.2, Identifying Alternatives (App. pp.65–66).

The "reasonable alternatives" to be considered under SEPA—and therefore not to be restricted before the completion of an EIS—encompass more than just the alternatives available to the lead SEPA agency. The regulation prescribing the content of EISs defines "reasonable

alternatives" as alternatives over which "an agency" with jurisdiction has authority to control impacts. WAC 197-11-440(5)(b)(iii) (App. p.24); *see also* WAC 197-11-786 (App. p.34). Given that SEPA repeatedly differentiates between the "lead agency" and other agencies, *see, e.g.*, WAC 197-11-440(2)(c), (d), and (j) (App. p.23), the "reasonable alternatives" included in an EIS necessarily include more than just those over which the lead SEPA agency has jurisdiction. As a government entity with jurisdiction to decide whether, and under what terms, to lease public property to Tesoro for a crude oil terminal, the Port had ample authority through its lease negotiation process to control the impacts of the proposed project. Accordingly, reasonable alternatives for the project must include actions available to the Port related to leasing public land and the terms of the lease.

EFSEC's prohibition on actions prior to the final EIS that limit the choice of reasonable alternatives, *see* WAC 463-47-020 (App. p.53) *and* WAC 197-11-070(1)(b) (App. p.20), applies to the Port's decision to lease public property to Tesoro.[5] The Port violated EFSEC's regulation by committing itself to the binding terms of the lease, thereby foreclosing reasonable alternatives prior to completion of the EIS.

[5] The Port tacitly acknowledged that WAC 197-11-070(1)(b) and WAC 463-47-020 prohibit the Port from taking actions that limit reasonable alternatives before completion of a final EIS. CP at 0969–71.

a. The Port's lease is a binding agreement that committed the Port to hosting a massive crude oil terminal on public property.

The Port's decision to execute the lease was an "action" under the plain terms of SEPA, subject to EFSEC's regulation prohibiting actions that limit reasonable alternatives. WAC 463-47-020 (App. p.53); WAC 197-11-070(1)(b) (App. p.20). SEPA regulations define a "project action" as "a decision on a specific project," including agency decisions to "lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified." WAC 197-11-704(2)(a) (App. p.32). The lease meets SEPA's definition of "project action."

The Port's lease is binding; it does not provide the Port discretion to "back out" based upon the human health and environmental risks disclosed through EFSEC's SEPA process. Before the Superior Court, the Port attempted to identify contingencies, or "off-ramps," in the terms of the lease. CP at 0970–72. Within the four corners of the lease, however, there are precisely two conditions precedent that must be met before the lease is fully effective: "(1) all necessary licenses, permits and approvals have been obtained for the Permitted Use; and (2) Lessee shall obtain a baseline investigation of environmental conditions at the Premises . . . ." CP at 0281 (App. p.79). Only the first condition is relevant here because

the lease states the second condition is for the sole benefit of Tesoro and the Port may not enforce it. *Id.*

The plain terms of the first condition precedent do not provide the Port with the flexibility of an "exclusive option" that the Port claims to have reserved. *See* CP at 0046, 0966. The condition is not premised on the information disclosed in EFSEC's EIS; it is dependent simply on site certification by EFSEC. As the Port stated to the court below, if the SEPA process leads EFSEC to deny certification, then the project may not proceed.[6] CP at 0971. However, if EFSEC certifies the project but the EIS reveals environmental or human health impacts that the Port had not contemplated when executing the lease, the Port has no power to withdraw or renegotiate the lease terms.

Further, various obligations in the lease apply regardless of the satisfaction of any conditions precedent: (1) Tesoro's obligation to pay a contingency period fee, (2) both parties' obligations to work diligently and in good faith to pursue all necessary licenses, permits, and approvals for the development and construction of the Facility for the Permitted Use, and (3) the indemnity obligations. CP at 0281 (App. p.79). Thus,

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[6] As the lead agency under SEPA, EFSEC must prepare an EIS before making its recommendation to the Governor, who ultimately decides to certify or deny the project. RCW 50.80.100(3) (App. pp.11–12). The SEPA analysis informs EFSEC's recommendation about certification to the Governor, and the SEPA analysis must be complete before EFSEC makes its recommendation.

regardless of satisfaction of the conditions precedent, the Port obligated itself to support "the development and construction of the Facility for the Permitted Use" before completion of the EIS.

Other language in the lease similarly does not allow the Port to rescind or renegotiate the terms based upon information disclosed through the SEPA process. This language allows the Port to terminate the lease only if Tesoro is not prepared, or does not intend, to commence construction as contemplated in the lease. CP at 0282 (App. p.80). In short, nothing in the lease provides the Port with discretion to reconsider or renegotiate the terms based on the human health and environmental impacts disclosed in EFSEC's EIS.

The possibility that Tesoro's proposal for a crude oil terminal may not survive EFSEC's review does not detract from the binding nature of the Port's lease. An action may be binding even if it is not the last decision that will move a project forward. *See Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 318, 230 P.3d 190 (2010) (noting that even though implementation of a city's development plan was subject to federal approval, "once adopted by the federal government as a condition of transfer of . . . property, it will bind the City as to its use of that property"). Just as the *Magnolia* court determined that a city's "decision on a specific construction project, located in a defined geographic area" was binding, *id.* at 314, 190, the Port's lease binds it to a

specific construction project located in a defined geographic area. *See* CP at 0372–73 (App. pp.170–71) (describing the Port's and Tesoro's infrastructure improvements); 0336–71 (App. pp.134–69) (outlining the defined geographic location of the project at the Port's property). The designs in the lease and exhibits thereto are extremely detailed and will bind the Port upon certification by the Governor, much like the "very detailed" development proposal in *Magnolia* that was found to "bind the City as to its use of that property" upon federal approval. 155 Wn. App. at 317, 230 P.3d 190.

In contrast, the Port's lease is nothing like the procedural memorandum in *International Longshore*, 176 Wn. App. 511, 309 P.3d 654 (2013), that was found not to be a binding action. That memorandum outlined "a proposed deal and the process by which the governments would decide whether to participate." *Id.* at 515, 654. Moreover, the memorandum expressly reserved the city's right to unilaterally withdraw once an EIS was completed if the EIS revealed unacceptable impacts. *Id.* at 516, 654. Here, however, the Port will be obligated under the lease when the EIS is complete. The *International Longshore* court explained that because "the memorandum . . . does not limit or control future decisions the city and county may be called upon to make," "[i]t is not 'binding' as that word is used in *Magnolia*." *Id.* at 523, 654. In contrast, the Port's lease is a legally binding decision to lease public property for

petroleum product loading and unloading, the "Permitted Use." Unlike the memorandum in *International Longshore*, that outlined a decision-making process that expressly included consideration of the impacts disclosed in the EIS, the Port committed to lease its property for a massive crude oil terminal when it executed the lease, well before completion of the EIS.

Washington courts have recognized that "[i]n land use law generally, the possibility that a proposal could fail if construction-level standards are not met subtracts nothing from the nature of a prior *use* approval for the proposal." *Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wn. App. 787, 798, 309 P.3d 734 (2013) (emphasis in original). In *Lands Council*, the court determined that classifying land proposed for an alpine ski expansion as "Recreation" "was the agency decision approving the use, even though the proposal could still conceivably founder if the director could not approve the precise configuration of the [ski] runs." *Id.* Likewise here, the unambiguous terms of the Port's lease fix the type of use permitted at specific sites, under specific design configurations. CP at 0277 (App. p.75) (listing as "Permitted Use," *inter alia*, loading and unloading of petroleum products by rail, transfer of such petroleum products to and from storage or the marine terminal area, and rail operations and maintenance associated with the receipt, loading, unloading, and transfer

of such petroleum products); *see also* CP at 0289–90 (App. pp.87–88) (stating that "Lessee shall occupy and use the Premises for the Permitted Use set forth in Paragraph 1.I and shall not use the Premises for any other purpose without the prior written consent of Lessor").

Indeed, the terms of the lease are more precise and definite than other agency actions that Washington courts have previously determined to be binding for SEPA purposes. *See King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993) (requiring SEPA review prior to an annexation decision even though there was no pending development proposal for the property because "[t]he absence of specific development plans should not be conclusive of whether an adverse environmental impact is likely"); *and see Magnolia*, 155 Wn. App. at 308–09, 317, 230 P.3d 190 (city impermissibly adopted a development plan without first conducting SEPA review where the plan would be binding on the city upon federal approval).

Federal case law under NEPA also supports the conclusion that the Port's action before completion of the EIS was impermissible. Federal courts have held that agencies are precluded from making an "irreversible or irretrievable commitment of resources" before completing an EIS. Many of these NEPA cases turned on whether the agency reserved its right to prevent certain future uses of a natural resource until after completing

NEPA review. *See Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988) (concluding federal gas and oil leases on national forest land prematurely committed resources in violation of NEPA because the government did not "reserve . . . the absolute right to prevent all surface-disturbing activity" (i.e. the no action alternative) pending the outcome of NEPA review); *Metcalf*, 214 F.3d at 1144 (determining that the government irreversibly committed to a project by contracting to assist certain whaling activities without conditioning that agreement on a NEPA determination that the "whaling proposal would not significantly affect the environment"); *Center for Environmental Law & Policy v. U.S. Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1195 (E.D. Wn. 2010), *aff'd*, 655 F.3d 1000, 1006 (9th Cir. 2011) (authorization of water right permits was not an irreversible commitment because the agency retained "absolute authority to decide whether" to actually allow the water use until after the agency completed an NEPA review); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (finding that the agency's "Tentative Operating Schedule" made no irretrievable commitment of resources "because the government retains absolute authority to decide whether any such activities will ever take place on the . . . lands") (quoting *Conner*). The Port's lease crosses the line drawn by *Conner* and other federal NEPA cases because—so long as EFSEC and Tesoro agree to

move the project forward—the Port has not reserved its authority to disallow the proposed crude oil terminal based on the outcome of the EIS.

b. The Port's lease limits the consideration of reasonable alternatives under SEPA in violation of WAC 463-47-020 and WAC 197-11-070(1)(b).

EFSEC is the lead agency responsible for completing the analysis in the EIS, including a discussion of reasonable alternatives. Because the Port has the authority to decide whether, and under what terms to lease public property to Tesoro for a crude oil terminal, alternatives to those decisions should be considered in EFSEC's EIS. By committing to the terms in the lease before EFSEC even began preparing the EIS, the Port limited the consideration of reasonable alternatives in the EIS in violation of WAC 463-47-020 (App. p.53) and WAC 197-11-070(1)(b) (App. p.20). The Port also limited its authority to consider whether to enter into the lease or negotiate alternative terms after EFSEC completes the EIS.

The lease commits the Port and Tesoro to a specific "Facility" design and "Permitted Uses" and defines closure and reclamation requirements, thereby limiting the reasonable alternatives that may be considered, in violation of WAC 463-47-020 (App. p.53) and WAC 197-11-070(1)(b) (App. p.20). Unlike the memorandum in *International Longshore* that "expressly anticipate[d] that the [SEPA] review process w[ould] consider at least the alternative of Seattle Center as well as a 'no action' alternative," 176 Wn. App. at 525, 309 P.3d 654, the Port's lease

explicitly precludes any alternative site for the proposed oil terminal. Rather, the Port's lease describes the location of the proposed crude oil facilities with specificity. CP at 0273–74, 0339–71 (App. pp.71–72, 137–69).

Further, an analysis of reasonable alternatives in an EIS must include more than just alternative sites. *See* WAC 197-11-792(2)(b) (App. pp.35) (defining alternatives as no action, other reasonable courses of action, or mitigation measures not included in the proposed action); *and see* WAC 197-11-440(5)(d) (App. p.25) (for private projects, "the lead agency shall be required to evaluate only the no action alternative plus other reasonable alternatives for achieving the proposal's objectives on the same site"); Ecology, SEPA Online Handbook, § 3.3.2, Identifying Alternatives (App. pp.65–66) (alternatives include "design alternatives, location options on the site, different operational procedures, various methods of reclamation for ground disturbance, closure options, etc."). Yet, as noted above, the Port's lease determines closure and reclamation requirements, CP at 0300–01 (App. pp.198–99) and the facility's basic design, CP at 0277 (App. p.75), thereby limiting alternatives to these lease terms.

Of particular note is that the lease established the amount of pollution liability insurance that Tesoro must carry for its proposed crude oil terminal—a remarkably low $25 million for a project of this nature and

size—before any environmental analyses had been conducted under SEPA that would identify the extent of potential harm from pollution. CP at 0278 (App. p.76). This $25 million amount is not subject to revision based on the outcome of EFSEC's environmental review. Rather, the lease terms give the Port the right to increase the coverage amount only "upon its knowledge that Lessee intends to: (1) change its operations, (ii) change its use or other handling of Petroleum Products or Hazardous Substances at the Premises, or (iii) make Alterations to the Premises." CP at 0310 (App. pp.108). By agreeing to a specific amount of pollution liability insurance, the Port limited the consideration of alternatives that might have provided a more appropriate level of insurance and environmental protection.

The lease's description of "Permitted Uses" limits consideration of alternate designs, such as other locations or configurations of the terminal on the Port's property. The preliminary and final premises descriptions expressly set forth a particular design for the project. CP at 0273–74 (App. pp.71–72). The lease also states that "Lessee shall occupy and use the Premises for the Permitted Use set forth in Paragraph 1.I and shall not use the Premises for any other purpose without the prior written consent of Lessor." CP at 0289–90 (App. pp.87–88). The Port's commitment to these designs is not conditional in nature, as the Port claims, simply because the lease provides that the Port and Tesoro will "develop mutually

agreeable depictions and legal descriptions" of the final designs. CP at 0966, 0970–71. Rather, the lease requires that the parties "shall" develop these final designs "[d]uring the Contingency Period," and "[u]ntil such substitution has occurred, the Premises shall consist of" the areas defined in Exhibits A, B-1, B-2 and B-3 of the lease. CP at 0281 (App. p.79). Hence, the Port committed itself to identifying the final designs during the contingency period, which is, by definition, before EFSEC completes the EIS. By specifying the particular design of the facility in the lease, the Port limited consideration of reasonable alternative designs.

The Port's lease also limits the consideration of other operational procedures or courses of action. The lease's terms constrain the Port's ability to control the operation of the marine berths dedicated to the crude oil terminal, limiting the consideration of alternative operational procedures. CP at 0294 (App. p.92) ("Lessor shall not impose rules or regulations relating to the operation of the Berth that would have the effect of interrupting or materially interfering with Lessee's safe operation of the Berth."). Plus, the Port lost its ability to consider leasing this property to other potential tenants who would fulfill the Port's objectives—*e.g.*, revenue in the form of rent payments—but in a less environmentally harmful way. CP at 0283 (App. p.81) ("Lessor may not, without compensating Lessee for the same . . . enter into a lease, license or other occupancy agreement with a third party for all or any portion of the

Premises whereby the Premises and the improvements and Alterations made by Lessee are used by such third party for a use substantially similar to the Permitted Use."). By binding itself to these terms, the Port limited the consideration of alternative operational procedures or courses of action at the same site.

c. Executing the lease limited the reasonable alternatives by building momentum in favor of Tesoro's crude oil terminal.

The "fundamental idea of SEPA" is "to prevent government agencies from approving projects and plans before the environmental impacts of doing so are understood." *Int'l Longshore*, 176 Wn. App. at 522, 309 P.3d 654. The Port executed the binding lease before EFSEC had a chance to complete an EIS analyzing and disclosing the environmental impacts of the proposal. Contrary to SEPA's fundamental purpose, the Port illegally stacked the deck in favor of Tesoro's oil terminal as defined in the lease before the environmental impacts of the project were understood.

Washington courts have recognized that such government action "can 'snowball' and acquire virtually unstoppable administrative inertia." *King County*, 122 Wn.2d at 644, 860 P.2d 1024. The cases have recognized that "[p]ostponing environmental review risks 'a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds.'" *Int'l Longshore*, 176 Wn. App. at 522,

309 P.3d 654 (quoting *King County*, 122 Wash.2d at 664, 860 P.2d 1024).

The Supreme Court of Washington has explained:

> Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

King County, 122 Wash.2d at 664, 860 P.2d 1024 (emphasis in original). The Port's lease does precisely what the Supreme Court warned against: it creates a "snowball effect" of administrative inertia in favor of Tesoro's crude oil terminal as described in the lease.

In *Lands Council*, the court concluded that an EIS was required before reclassifying public lands for an alpine ski expansion, even though the action was predicated on the director's approval and environmental review, because the agency inappropriately created a "snowball effect" before an EIS had been prepared when it "effectively approved a specific proposal." 176 Wn. App. at 807, 309 P.3d 734.

Specifically, the lease immediately obligates the Port "to work diligently and in good faith to pursue all necessary licenses, permits, and approvals required for the development and construction of the Facility for

the Permitted Use." CP at 0281 (App. p.79).[7] The Port admits that the lease obligates it to "work diligently and in good faith" to "develop and mutually approve milestones and preliminary engineering and construction plans" during the contingency period, before the EIS is completed. CP at 0970. These obligations arose immediately upon the effective date of the lease and without regard to the conditions precedent. Given that a representative of the Port will sit as a member of EFSEC when EFSEC reviews Tesoro's application, *see* RCW 80.50.030(6) (App. p.6), the Port's obligation to further the project essentially requires it to lobby EFSEC for approval from within, providing undeniable momentum for the project's certification.

Likewise, in *Magnolia*, the court determined that an up-front EIS was necessary because the city's amendment to its zoning plan would have a "snowballing effect" even though it was contingent on federal approval. 155 Wn. App. at 317, 230 P.3d 190. The court agreed with plaintiffs that later environmental review would "be little more than lip service given that the decision about the kind, type, and extent of the development was made when the City Council approved" the plan. *Id.* at 317, n.17, 230 P.3d 190. The Port's lease is no different; it was

[7] The lease also obligates the Port to make specific infrastructure improvements for the benefit of Tesoro's project, and explains "[i]t is anticipated that the Facility will be constructed and fully operational within 9 to 12 months from the receipt of all required permits." CP at 0372–73 (App. pp.170–71).

specifically designed to build momentum in favor of Tesoro's crude oil terminal.

The Port's lease builds momentum for Tesoro's project by obligating the Port to a ten-year lease for a petroleum products loading and unloading terminal at a particular location within the Port of Vancouver. For the first 12 months of the lease, including the time prior to site certification or EFSEC's completion of the EIS, Tesoro will pay the Port $360,000 in rent. CP at 0064. The Port claims this amount is "minor" and therefore too little to generate inertia favoring the project. CP at 0966. Yet this represents $360,000 more than the Port would otherwise have received had the Port not executed the lease. If EFSEC's review extends to 24 months, the Port will have received $840,000 in rent from Tesoro. *Id.* This is far greater than the zero sum that the Port would have otherwise collected. These financial commitments, in combination with the legal obligation to work in furtherance of this particular project, create an incentive for the Port to promote Tesoro's crude oil facility.

By generating administrative inertia in favor of Tesoro's crude oil terminal, the lease prematurely limits the consideration of reasonable alternatives. The Port's lease decision limited the Port's, EFSEC's, and the public's consideration of alternatives during the EIS process by focusing attention on the specific terms of the project identified in the lease. Public comments submitted during the SEPA scoping phase

focused on the project proposal as set forth by the terms of the lease. In turn, EFSEC's consideration of impacts in the final EIS is likely to focus on the details of the project as set forth in the lease. The Port's lease violates WAC 197-11-070(1)(b) (App. p.20) and WAC 463-47-020 (App. p.53) because it did, and was specifically designed to, build momentum in favor of the crude oil terminal identified as the "Permitted Use."

V. Conclusion

For the reasons explained above, this Court should reverse the Superior Court's decision granting summary judgment to the Port with regard to claims five and six in Riverkeeper's first amended complaint and hold that the Port's leasing decision is subject to SEPA.

RESPECTFULLY SUBMITTED this 15th day of August, 2014.

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CERTIFICATE OF SERVICE

I, Miles Johnson, declare under penalty of perjury of the laws of the United States, that I am a citizen of the United States, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on August 15, 2014, I caused the foregoing Appellants' Opening Brief to be served on the following by U.S. mail to the following addresses and by electronic service to the following email addresses:

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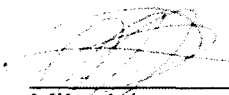

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Appendix C

Court of Appeals No. 46130-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

COLUMBIA RIVERKEEPER; and NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Appellants,

v.

PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver USA Board of Commissioners President; BRIAN WOLFE, Port of Vancouver USA Board of Commissioners Vice President; and NANCY I. BAKER, Port of Vancouver USA Board of Commissioners Secretary,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
HONORABLE DAVID E. GREGERSON

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Port of Vancouver USA (together with the other respondents, the "Port") entered into a contingent ground lease with Tesoro-Savage Joint Venture (the "tenant" or "Tesoro-Savage"), a company proposing to develop the Vancouver Energy Distribution Terminal. The project has the potential to trigger significant investment and economic development in Clark County. It also has generated a good deal of public interest and comment focusing on potential environmental impacts. Conscious of its role in the community and its responsibility to safeguard the environment, the Port engaged the public in a months-long process before approving the lease. When concerns were raised about the approval process, the Port reopened the lease and received additional public comment.

The Port also was careful to include conditions in the lease that make sure that the environmental consequences of the project are fully understood before the project proceeds. The lease does not allow the tenant to break ground until all environmental approvals are received. Because the project is an energy facility, it is subject to a special environmental review framework, where the final decision is made by the Governor. The lease ensures this review process will be fully completed before any construction may begin.

Specifically, the lease does not take full effect until all environmental review is completed, including preparation of an environmental impact statement ("EIS"), adjudication by the Energy Facility Site Evaluation Council ("EFSEC" or "Council"), and a final decision by the Governor. The lease further requires the tenant to obtain the Port's approval for its operation and safety plans, as well as its site design and engineering, before it can begin construction. The tenant must continue to obey all environmental laws, including the conditions of all environmental permits, which are explicitly incorporated into the lease.

EFSEC's enabling statute gives the Council exclusive jurisdiction over the Tesoro-Savage project, and the statute preempts regulation of the project by other state or local governmental entities. Consequently, any actions relating to the project by any other arm of government are exempted from the procedures of the State Environmental Policy Act ("SEPA"). EFSEC is required to engage in a comprehensive, coordinated, and exclusive review process for energy facilities. The Port was educated about the Council process when it considered whether to lease to Tesoro-Savage, and it was assured by the Council that a full environmental impact statement would be prepared. The Council subsequently issued a public notice determining that it would prepare such a statement. Since the

EFSEC statute exempts other agency actions on EFSEC projects from SEPA procedures, the Port did not prepare an EIS before entering into the lease, nor did it issue any "threshold" SEPA determination. The Port's actions were intended to, and did, follow the statutory design of both SEPA and the EFSEC statute.

Despite the Port's careful compliance with the specialized statutory scheme, appellants Columbia Riverkeeper and Northwest Environmental Defense Center (together, "Riverkeeper") seek to impose additional and unnecessary procedures. Riverkeeper claims the Port violated SEPA in two ways by entering into the lease before the Council completed an EIS. First, despite the plain exemption established by the EFSEC statute, Riverkeeper incorrectly argues the Port should have waited for the statement to be completed before the terms of the lease were even negotiated. In support of this argument, Riverkeeper asks this Court to ignore the plain language of the EFSEC statute's exemption and create a new distinction between "proprietary" and "regulatory" government decisions. Riverkeeper's proposed distinction has no basis in Washington law and is contrary to the review structure established by SEPA. The Superior Court correctly rejected Riverkeeper's argument, holding that the

plain language of the EFSEC statute exempted the Port's action from SEPA procedures. This Court should do the same.

Second, Riverkeeper asserts that by entering into the contingent lease, the Port improperly limited the reasonable range of alternatives to be considered by the Council and the Governor in siting the project. Riverkeeper has not identified how the Port can limit the ultimate decision making of the Council or of the Governor. Nor has it identified any public resource that has been irrevocably committed to the project. Instead, the lease is entirely contingent on the outcome of environmental review at both the federal and state levels.

Riverkeeper further alleges that the Port limited the reasonable range of alternatives by giving up discretion to change course if the project receives the Council's and the Governor's approval but still presents unacceptable environmental impacts. To the extent this argument has legal merit, it is based on selective and inaccurate readings of the lease. The lease contains ongoing contingencies relating to the design, construction, and operation of the project. The Superior Court correctly found the contingencies provided enough "outs" to ensure consideration of a reasonable range of alternatives.

Because the Port's execution of the lease complied with SEPA, the EFSEC statute, and implementing regulations, this Court should affirm the judgment of the Superior Court, which entered summary judgment in the Port's favor.

II. RESTATEMENT OF THE ISSUES PRESENTED FOR APPEAL

A. Issue pertaining to the first assignment of error

Did the Superior Court correctly hold that RCW 80.50.180 exempts the execution of a lease contingent on EFSEC review from SEPA's procedural requirements?

B. Issue pertaining to the second assignment of error

Does the execution of a lease contingent on environmental review, and which contains further post-review contingencies, improperly limit the range of reasonable alternatives to be considered during the environmental review?

III. RESTATEMENT OF THE CASE

A. Legal Framework

1. The State Environmental Policy Act.

SEPA is primarily a procedural statute. It constitutes "an environmental full disclosure law." *Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council*, 87 Wn.2d 267, 272, 552 P.2d 674, 677 (1976). "The

basic purpose of SEPA's command for environmental review is to require governments to fully consider environmental and ecological factors when taking actions that significantly affect the quality of the environment." *Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067, 1070 (2007). Other laws of this state are to be interpreted in accordance with SEPA policies "to the fullest extent possible . . . ." RCW 43.21C.030.

SEPA requires state and local government agencies to include, in every proposal for an action with likely significant adverse environmental effects, a "detailed statement" by the responsible agency. The detailed statement includes the following elements:

> "(i) the environmental impact of the proposed action;
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) alternatives to the proposed action;
> (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented[.]"

RCW 43.21C.030(2)(c). The "detailed statement" is also called an environmental impact statement or EIS. SEPA regulations also require a

preliminary procedure, called a "threshold determination" or "determination of significance," which establishes whether a full EIS is required.

SEPA does not apply to every single government activity. It applies to "actions" that are not otherwise exempt. "Actions" are defined broadly to include activities "financed, assisted, conducted, regulated, licensed, or approved" by an agency, along with regulatory decisions and legislative proposals. WAC 197-11-704(1). SEPA regulations also classify activities as "project" or "nonproject" actions, which impacts how the ultimate analysis is conducted. A lease of public land is a "project" action. WAC 197-11-704(2)(a)(ii).

Various statutes and regulations create exemptions from SEPA procedures for activities that otherwise would be considered "actions." *See Snohomish Cnty. v. State*, 69 Wn. App. 655, 670, 850 P.2d 546, 555 (1993) (construing statutory exemption for certain forest practices). Both the Department of Ecology, which administers SEPA, and the Council have established lists of actions that are exempt from SEPA review because they do not significantly affect the environment. WAC 197-11-720; WAC 197-11-800 through 197-11-890; WAC 463-47-020. Statutory and regulatory exemptions from SEPA review are generally called

"categorical" exemptions, because they apply to categories of activity, and because they completely exempt the activity from the full range of SEPA procedures. *Id.*; WAC 197-11-720. (App. 20.)

2. The Energy Facilities Site Locations Act

The Energy Facilities Site Locations Act ("EFSLA," "EFSEC statute," or "the Act"), RCW Chapter 80.50, was enacted to "avoid costly duplication in the siting process [for energy facilities] and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). (App. 17.) In general, a party wishing to develop an energy generation or transmission facility in Washington must apply to EFSEC for a site certification. RCW 80.50.060(1). The parties do not dispute that the facility here is subject to EFSEC review pursuant to RCW 80.50.020(12)(d), which defines subject facilities to include terminals for marine transport of significant quantities of petroleum products.

The Act supersedes all other laws or regulations, RCW 80.50.110(1), and preempts local "regulation and certification" of subject energy facilities. Council regulations state that the Council's certification is "in lieu of any permit, certificate, or similar document" which might be issued by local or state governments. WAC 463-14-050. The Council's specific and exclusive jurisdiction controls over general statutes, like SEPA or the Growth Management Act, even if the general statute is

enacted later. *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 309, 197 P.3d 1153, 1170 (2008).

The site certification process is described in some detail by the Supreme Court in *Kittitas*. The applicant must pay a $50,000 minimum fee, RCW 80.50.071(1)(a), and the requirements for an application are extensive. The applicant must provide a comprehensive description of the proposal and its design as well as a complete analysis of the natural environment at the site. WAC Chapter 463-60. The Council must hold a public adjudicative hearing, where "any person" is entitled to be heard in support of or in opposition to the project. RCW 80.50.090(3). The Council is made up of representatives from state agencies including the Departments of Ecology, Natural Resources, Health, and Fish & Wildlife. RCW 80.50.030(3). For this project, Clark County and the City of Vancouver each have a voting member, RCW 80.50.030(4), (5), while the Port has a nonvoting representative. RCW 80.50.030(6). The Attorney General also appoints a "counsel for the environment" to participate in every EFSEC review. RCW 80.50.080.

The EFSEC process incorporates and requires SEPA compliance, and the Council has adopted most of Ecology's SEPA rules by reference. WAC 463-47-020. When the Council receives an application, it

determines whether the proposal is an "action" to which SEPA applies, and then follows the standard SEPA process. WAC 463-47-060(1), 463-14-080(3). The Council is responsible for preparing any threshold determination of significance or EIS. WAC 463-47-090(1).

The Act consolidates and expedites review of energy facilities. Therefore, it establishes a SEPA exemption for concurrent or preliminary actions on energy projects by all other state and local agencies. RCW 80.50.180. Agency actions, such as the lease here, are exempt from SEPA procedures so far as the action "approves, authorizes, [or] permits" the "location, financing or construction" of the facility subject to EFSLA. *Id.* The statute is structured so that the Council reviews, in a consolidated and comprehensive manner, the environmental impacts of the proposal and its component actions.

After the Council finishes its review, it must recommend to the Governor an appropriate final decision, and it must submit a draft certificate for the site. RCW 80.50.040(8). The certificate must include conditions that protect governmental or community interests affected by the energy facility, RCW 80.50.100(2), as well as conditions accounting for other laws, such as SEPA, preempted by EFSLA. *Id.* The certificate acts "as a contract between the State and applicant, setting forth the

conditions that must be satisfied for implementation of the project." *Friends of Columbia Gorge, Inc. v. EFSEC*, 178 Wn.2d 320, 329, 310 P.3d 780, 783 (2013).

The Governor may impose additional conditions on the application, approve it, or reject it. *Id.*; *Kittitas*, *supra*, 165 Wn.2d at 291-92, 197 P.3d at 1161. The Governor's final decision is subject to judicial review in the Thurston County Superior Court and can be certified for plenary expedited review in the Supreme Court. RCW 80.50.140; *Kittitas*, 165 Wn.2d at 300-03, 197 P.3d at 1165-67.

B. Facts and Proceedings

1. The Port executed a contingent lease to Tesoro-Savage only after engaging in an extensive public process.

The Port of Vancouver USA is one of many public port agencies throughout Washington. Public ports were first established by act of the Legislature in 1911, for purposes including the construction of "rail or motor vehicle transfer and terminal facilities." RCW 53.04.010(1). The importance of public ports to economic development was recognized by a constitutional amendment in 1966, which was passed by the Legislature and approved by the voters. Wash. Const. Art. 8 § 8 (authorizing use of port funds to promote industrial development). The Port's commissioners (respondents Oliver, Baker, and Wolfe) are publicly elected.

The Port's mission is to "provide economic benefit to our community through leadership, stewardship and partnership in marine and industrial development." (CP 132.) In keeping with the stewardship component of its mission, the Port has established environmental values of integrated decision making, sustainability, pollution prevention, and compliance. (CP 135.) The Port seeks to incorporate these environmental values into every stage of its business operations. (*Id.*) For example, it conducts regular environmental audits of all tenants. (Lease ¶ 11.D, Riverkeeper "RK"' App. 94.)

As the North American oil shale market has matured in recent years, the Port began to receive inquiries from parties interested in transporting petroleum products through the Port. (CP 116.) In November 2012, the Port obtained statements of interest from companies looking to develop petroleum transport facilities. (*Id.*) The Port selected Tesoro-Savage as the potential tenant and began negotiating the terms of the lease. (*Id.*) The proposed energy terminal could create up to 2,700 jobs in Clark County over 10 years, including 80-120 direct living-wage jobs. (CP 89, 119.)

The Port involved the public throughout its negotiations with Tesoro-Savage by conducting multiple public workshops. At one of these

workshops, the then-chairman of EFSEC presented an overview of the Council process. (CP 202.) The chair stated that the Council's purpose is "one stop shopping" for covered projects and that the Council's final decision preempts all other state and local governments. (CP 709.) The chair explained how the Council process would incorporate compliance with SEPA. (CP 202, 716, 722-23.) He also gave an overview of the substantive environmental standards that the Council would use. (CP 702.)

The Commissioners initially approved the lease to Tesoro-Savage at a public meeting on July 23, 2013. (CP 227-32.) At this meeting, the Commissioners referred to and relied upon the environmental review to be conducted by EFSEC. (CP 231-32.) They indicated the importance of full review of the project, describing the lease as a "starting point," and stating that the Council would "scrutinize" the project before the Governor's final decision. (CP 232.)

The Port re-opened the lease for a new vote on October 22, 2013 to make sure the Port's consideration of the lease complied with the Open Public Meetings Act. Tesoro-Savage filed its 872-page application with EFSEC on August 29, including references to the lease. (CP 146-56.) EFSEC issued a Determination of Significance and Scoping Notice on

October 1. (CP 169-71.) This was the "threshold determination" that is the first step of the SEPA process, and it designated EFSEC as the lead agency for SEPA compliance. (CP 170.) It also stated that the Council "has determined that this proposal is likely to have a significant adverse impact on the environment." (*Id.*) The Council declared that an EIS "is required under RCW 43.21C.030(2)(c) and *will be prepared.*" (*Id.*, emphasis added.)

In the October 22 public meeting, the Commissioners again were informed of the "rigorous and comprehensive" EFSEC process to come, as well as of a pending federal permit process. (CP 118, 255-257, 267, 269.) A Tesoro-Savage representative spoke at that meeting and acknowledged that "the lease is subject to the robust open EFSEC permitting process and will only be effective if the permits are approved." (CP 265.) The Commissioners indicated, again, they were relying on EFSEC to conduct a thorough environmental review. (CP 267, 269.) After two hours of public comment and an hour of public deliberation, the Commission approved the lease. (CP 269.)

2. The lease is contingent on the Council process and provides additional contingencies after the Council and Governor make their decisions on the project.

The lease that was approved on October 22 is entirely contingent on the outcome of the Council's and the Governor's review. Specifically, paragraph 2.D(1) provides that a condition precedent to the obligations under the lease is that "all necessary licenses, permits and approvals have been obtained. . . ." (RK' App. 79.) The lease explicitly requires that Tesoro-Savage "shall, at its sole cost and expense, comply with all Environmental Laws." (Lease ¶ 11.C, RK App. 94.) The lease is also subject to any permit conditions, as the environmental compliance requirement includes "all permits applicable to the Premises and issued to Lessee." (*Id.*) Thus any conditions issued by the Council, or Governor, or federal reviewers automatically become requirements of the lease. The design and operation of the facility will be reviewed by the Council, which has established construction and operation standards for energy facilities. WAC Chapter 463-62. (*See* CP 147-48.)

Tesoro-Savage must carry $25 million in pollution legal liability insurance, which the Port may require to be increased in some circumstances. (Lease ¶¶ 1.L, 8.C, 15.C, RK' App. 76, 88, 107-08.) Exhibit H to the lease specifically identifies EFSEC and the U.S. Army

Corps of Engineers as permitting authorities. (CP 369; *see also* Lease Exhibit D, RK App. 171, describing the Council process as prerequisite to construction.) Paragraph 1.C of the lease provides that if the conditions precedent, requiring all permits to be obtained, have not been satisfied or waived by a particular date, either party may terminate the lease simply by written notice with, generally, no "further cost or obligation." (RK' App. 72.)

Lease paragraph 3.A states that Tesoro-Savage shall "have and hold the Premises commencing on the Conditions Precedent Expiration Date. . . ." (RK App. 80.) This means Tesoro-Savage is allowed to occupy the site only once the Port agrees that all conditions precedent are satisfied. (*See* Lease Exhibit E, CP 381.) Tesoro-Savage cannot begin construction before all permits are approved. In keeping with its contingent nature, the lease refers to "conceptual[]" descriptions of the project. (Lease ¶ 14.A, RK App. 102.)

The environmental permits are necessary conditions for the effectiveness of the lease, but they are not the end of the process in themselves. Lease paragraph 2.D provides that the parties will, during the contingency period of the lease, "develop and mutually approve milestones and preliminary engineering and construction plans,

specifications, and designs." (RK App. 80.) Tesoro-Savage must submit these plans for the Port's "review and approval." (*Id.*) Paragraph 30 additionally requires that "a final Facility Operation and Safety plan shall be mutually approved prior to operation of the Facility. . . ." (RK App. 128.) If these efforts at mutual approval are ultimately unsuccessful, the lease could be terminated. "Notwithstanding anything to the contrary herein, if [the Port] is not reasonably satisfied on or before the Conditions Precedent Outside Date that Lessee is prepared to, and intends to, commence construction by [a designated time], [the Port] may terminate this lease without any further obligations on the part of either Party. . . ." (Lease ¶ 2.D, RK App. 80.) The Port may make additional rules and regulations governing the use of the property. (Lease ¶ 30, RK App. 128.) Tesoro-Savage's compliance with environmental laws such as SEPA is an ongoing requirement of the lease. (Lease ¶ 11.C, RK App. 94.)

3. The Superior Court granted the Port's motion for summary judgment on the SEPA claims.

Appellants, Columbia Riverkeeper and the Northwest Environmental Defense Center, along with the Sierra Club (which is not participating in this appeal), included two SEPA claims in their Amended Complaint. They alleged that (1) the Port was required to complete a SEPA process prior to execution of the lease and (2) that the Port's

execution of the lease impermissibly limited the range of reasonable alternatives. (CP 2:14-15.)

The Superior Court granted the Port's CR 56(b) motion for summary judgment. The Court found the material facts were undisputed. (RP 33:17-21.) On the first SEPA claim, the Court found that EFSLA did preempt and control the process for approving the energy facility. (RP 33:22-25.) On the second SEPA claim, the Court was satisfied that the lease contained "enough outs" to ensure that there was no limit on the range of reasonable alternatives. (RP 34:3.) In the Court's view, the lease is "basically a confidence building measure" and a necessary component for a major development such as this energy project. (RP 34:3-8.) The Court also found that the lease contained "multiple contingencies and conditions which may or may not ripen," so that the Port retained sufficient control over the project. (RP 34:12-22.) Accordingly, the Court found the contingencies in the lease to be an "appropriate mechanism" to allow the application to the Council to go forward while ensuring the integrity of the environmental review process. (RP 34:9-10.)

The Superior Court's written order found that EFSLA "exempts the execution of the lease . . . from procedures under SEPA," and that "the contingencies contained in the lease ensure that the execution of the lease

does not limit the reasonable range of alternatives . . . ." (CP 1011.) The Court certified the SEPA claims for appeal pursuant to CR 54(b), and this appeal followed. (CP 1015-17, 1006-07.) RAP 2.2(d) provides for appeal of a decision certified under CR 54(b), so the parties seeking review, Columbia Riverkeeper and Northwest Environmental Defense Center, are referred to herein as "appellants" pursuant to RAP 3.4.

IV. STANDARD OF REVIEW

The Superior Court held that there were no genuine disputes of material fact and therefore judgment was appropriate as a matter of law. Orders on summary judgment are reviewed de novo, "engaging in the same inquiry as the trial court and viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to respondents, the nonmoving parties." *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82, 84 (2005). The purpose of summary judgment is to examine the sufficiency of the evidence behind the plaintiff's allegations "in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989). The Court of Appeals will affirm a summary judgment if the parties have "failed to present to the trial court evidence of a genuine issue of material fact and, further, if the moving party is entitled

to judgment as a matter of law." *Adams v. Thurston Cnty.*, 70 Wn. App. 471, 474-75, 855 P.2d 284, 287 (1993).

The issues in this appeal, statutory and contractual meaning, are issues of law. The meaning of a statute is a question of law reviewed de novo. *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4, 9 (2002). Determining the legal effect of contract clauses, or construing them, is "always a question of law." *Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279, 283 (2010). If the court is not looking to extrinsic evidence to determine the intent of the parties, or if there are no factual disputes regarding extrinsic evidence, then interpreting a contract is likewise an issue of law. *Id.* at 697 n.5; *accord Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323, 1326 (1995) (holding that "[i]f a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.")

V. SUMMARY OF ARGUMENT

The contingent lease complies with SEPA and the Superior Court correctly entered summary judgment in favor of respondents. The lease is an action that additionally authorizes the location of the energy facility. As such, RCW 80.50.180 exempts the lease from SEPA procedures. Riverkeeper's attempts to divide the EFSLA exemption into "proprietary" and "regulatory" decisions are not supported by statutory text, context, or

structure. The exemption covers all actions relating to an EFSEC project that would otherwise be subject to SEPA.

The lease does not impermissibly limit the range of reasonable alternatives. The Council and the Governor are free to consider and select any or all alternatives. There is no danger that the lease will create expectations, or give this project momentum, that will prevent the Council or Governor from fulfilling SEPA's process and policy. The contingent nature of the lease also allows the Port to respond, if necessary, after the conclusion of the environmental review.

The Port was careful to enter into a lease that gave the tenant enough assurances while making sure that a full environmental review would take place. It intended to and did comply with SEPA at every step. Riverkeeper would have the Court impose procedural steps that are not required by SEPA and which are directly contrary to the consolidated review that the Legislature intended when it established the Council. The judgment of the Superior Court should be affirmed.

VI. ARGUMENT

A. The Superior Court correctly dismissed Riverkeeper's first SEPA claim because EFSLA exempts the decision to approve the lease from a separate SEPA process.

1. The plain language of RCW 80.50.180 exempts the lease decision from SEPA procedures.

The lease from the Port to Tesoro-Savage falls within the exemption established by section 180 of EFSLA, RCW 80.50.180. Because of the exemption, the Port was not required to engage in SEPA procedures before it executed the lease. SEPA does not require the Port to prepare an EIS, nor does it require the Port to make a "threshold determination" of significance. Both these actions are the responsibility of the Council. The Superior Court correctly dismissed Riverkeeper's claim and the first assignment of error should be overruled.

The relevant statutory text is:

> "[A]ll actions of any branch of government of this state, including . . . municipal and public corporations . . . to the extent . . . [the] action involved *approves, authorizes, permits* . . . the *location, financing or construction* of any energy facility subject to certification under chapter 80.50 RCW, *shall be exempt* from the 'detailed statement' required by RCW 43.21C.030. Nothing in this section shall be construed as exempting any action of the council from any provision of chapter 43.21C RCW."

RCW 80.50.180 (emphasis added). On its face, this statute applies to the lease. The lease is a necessary condition for the location and construction of the project. It conditionally approves, authorizes, and permits the location and construction of an energy facility subject to Council certification. If it did none of those things, Riverkeeper would have no reason to oppose the lease or to bring suit. "If a statute's meaning is plain on its face, then [Washington courts] give effect to that plain meaning as an expression of legislative intent." *Snohomish Cnty. Pub. Transp. Ben. Area v. State Pub. Emp't Relations Comm'n*, 173 Wn. App. 504, 516, 294 P.3d 803 (2013). RCW 80.50.180 plainly exempts the lease here from SEPA procedures.

Riverkeeper contends that the lease does not "'approve, authorize, [or] permit[]' the oil terminal within the meaning of EFSLA." (Riverkeeper's ("RK") Br. at 15.) To be sure, the lease does not permit the facility as a whole. But Riverkeeper's argument elides the language of the statute referring to decisions that approve, permit, or authorize the *location* of the project at issue. The lease is a preliminary step to the Council process, so it is the type of action covered by RCW 80.50.180.

The Act's exemption from the "detailed statement" (the EIS requirement) is a complete exemption from SEPA procedures. Thus the

Port had no duty to prepare either an EIS or a threshold determination. Because EFSLA consolidates all SEPA responsibilities with the Council, the threshold determination has been prepared by the Council, and Council will prepare the EIS. (CP 169-71.) WAC 197-11-720. (App. 20.)

Once an activity is determined to fit within a categorical exemption, the court's inquiry is at an end, absent a challenge to the validity of the exemption itself. *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 363, 932 P.2d 158, 166 (1997). The Court does not examine the effects of the individual action because to do so would undermine the purpose of the exemption. *Id.* Here, because the tenant is prohibited both by contract and statute from beginning construction before to the Council's certification, there can be no concern that giving effect to the statute would lead to adverse environmental impacts.

In *Snohomish Cnty. v. State*, 69 Wn. App. 655, 850 P.2d 546 (1993), Division I construed a statute, RCW 76.09.050(1)(d), which, similarly to EFSLA, provided that certain forest practices were "exempt from the requirements for preparation of a detailed statement under the state environmental policy act." The court rejected the argument that a threshold determination of significance was required. Since the practices

were "generally exempt from preparation of an EIS, it logically follows that no intermediate steps need be taken." 69 Wn. App. at 670, 850 P.2d at 555. *Snohomish* reasoned that the very purpose of the preliminary steps (the threshold determination of significance) was to facilitate the preparation of an EIS, so when a statute exempted the practice from an EIS, the threshold determination would be pointless. The same is true here. The Council has made the threshold determination and will produce the EIS, as anticipated by the statute and by the Port's action in approving the lease.

2. Riverkeeper's proposed distinction between "regulatory" and "proprietary" decisions is not supported by the statutory text, context, or structure.

Riverkeeper does not seriously contest that if RCW 80.50.180 applies to the Port's action, it exempts the Port from all SEPA procedures, which includes both the threshold determination and the environmental impact statement. Instead, they attempt to create a distinction between "proprietary" and "regulatory" actions that has no support in the statutory or regulatory scheme of EFSLA or SEPA. Under this artificial distinction, they argue that RCW 80.50.180 only applies to "regulatory" actions. Riverkeeper's argument is not supported by the plain meaning of the two statutes. Riverkeeper contends that regulatory actions would consist of

plan approvals, legislation, or permits, and should be contrasted from "proprietary" actions where an agency is selling or leasing public property. Riverkepper has fabricated this distinction in order to escape the clear statutory mandate that all concurrent actions on a facility subject to EFSEC are exempt from SEPA. The Council should prepare the one and only EIS on the facility, just as any other lead agency under SEPA would prepare the single EIS for each project under its jurisdiction.

When interpreting statutes, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 9-10, 43 P.3d at 9. Plain meaning of a statute is not simply the isolated word or phrase in question. Plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Ellensburg Cement Prods., Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 743, 317 P.3d 1037, 1041 (2014). In its plain language analysis, the court "must remain careful to avoid 'unlikely, absurd or strained' results." *Berrocal*, 155 Wn.2d 585 at 590, 121 P.3d at 84. To the extent necessary on appeal, the court may take judicial notice of

legislative facts, "those facts which enable the court to interpret the law." *In re Marriage of Campbell*, 37 Wn. App. 840, 845, 683 P.2d 604, 608 (1984).

The text of the statute does not distinguish between "regulatory" and "proprietary" actions. Instead, it is written expansively, to encapsulate decisions by "any branch of government of this state." RCW 80.50.180. It includes decisions that authorize not just location or construction, but financing of a subject facility as well. *Id.* It is easy to imagine financing decisions that could be characterized as proprietary; for example, a local government was the sponsor of a project and sought to issue bonds or directly expend funds on a project. Riverkeeper's reading of section .180 would exclude any facility with some agency involvement from the statute's scope since that agency activity could arguably be characterized as "proprietary."

Riverkeeper's reading would thus require at least two SEPA processes for any facility involving a public body. This is contrary to one of the central purposes of the Council, which is "[t]o avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5). (App. 17.) "The legislature passed EFSLA as an expedited and centralized process for

reviewing potential energy sites in Washington." *Friends of Columbia Gorge*, 178 Wn.2d at 328, 310 P.3d at 783. As Council regulations state, "RCW 80.50.010 requires the council 'to recognize the pressing need for increased energy facilities.'" WAC 463-14-020. (App. 21.) Riverkeeper's interpretation is contrary to these aims of the statute.

Riverkeeper's interpretation, by requiring multiple SEPA processes, conflicts with SEPA too. SEPA requires one EIS for each project, which is prepared by the lead agency. WAC 197-11-060(3)(b). SEPA policies strongly disfavor "segmentation" or "piecemealing" of review because of the risk that environmental effects could be overlooked if pieces of a project are reviewed only in isolation. *E. Cnty. Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 441, 105 P.3d 94, 99 (2005). By placing, and consolidating, SEPA responsibilities with the Council, EFSLA fulfills the important SEPA policy favoring comprehensive environmental review.

The session law that enacted what became RCW 80.50.180 indicates the Legislature intended the Council to have lead and exclusive SEPA responsibilities. The court "may examine the legislative declaration of purpose to assist in determining that the plain meaning as we ascertain it is consistent with that declared purpose." *N. Coast Air Servs., Ltd. v.*

Grumman Corp., 111 Wn.2d 315, 321, 759 P.2d 405, 407 (1988). The Legislature stated that "[i]t is the intent of [the bill] . . . to minimize duplication of effort in conducting studies of and preparing environmental impact statements relating to such sites . . . and to provide for a single detailed statement in accordance with RCW 43.21C.030 (c)." Laws of 1974, 1st Ex. Sess., ch. 110, § 1 (Engrossed Substitute Senate Bill 3229). (App. 18.) So, as here, the Council will prepare the EIS on the Tesoro-Savage facility. The Port's lease execution is exempt from the EIS requirement because the duty to prepare the EIS has been placed with EFSEC. Riverkeeper's contrary reading is diametrically opposed to the intent of the Legislature.

RCW 80.50.180, enacted four years after EFSLA and three years after SEPA, harmonized the two statutes. It made sure the Council could continue to carry out its mission of consolidated and expedited review of energy facilities, while still ensuring appropriate environmental review occurs. Thus, any interpretation of RCW 80.50.180 must minimize duplication of SEPA procedures to carry out the intent of the Legislature. Riverkeeper's interpretation would undo this harmonization and undermine the intent of the Legislature as expressed in RCW 80.50.010 and Senate Bill 3329. (App. 18.)

Read together, the statutory structures of SEPA and EFSLA show that section .180's exemption is intended to "cover the waterfront" of actions that potentially could be subject to SEPA. SEPA applies to "proposals for legislation and other major actions." RCW 43.21C.030(2)(c). Similarly, section .180 applies to "all proposals for legislation and other actions . . . ." RCW 80.50.180.

SEPA regulations have established a distinction between "project" and "nonproject" actions. WAC 197-11-704. RCW 80.50.180 is structured to encompass both project and nonproject actions. It includes actions that approve, authorize, or permit a specific facility or location. Similarly, the project actions listed in WAC 197-11-704(b)(2)(a) include licensing, funding, or undertaking an activity, and actions such as selling or leasing public land.

Section .180 also applies to actions which "establish[] procedures solely for approving, authorizing or permitting" projects. This is similar to the nonproject actions described in WAC 197-11-704(b)(2)(b), including legislation, regulations, policies, plans, or programs. Because the ultimate purpose of section .180 is to place SEPA responsibilities on the Council, it makes sense that it is written to cover all activities that might otherwise be subject to SEPA.

Applying the exemption here is also consistent with the way SEPA concentrates authority and responsibility in the "lead" agency on a proposal. WAC 197-11-050(2) says the lead agency is the one with "main responsibility" for SEPA's procedural requirements and "*the only agency*" responsible for the threshold determination or EIS. (Emphasis added.) The Council assumed lead agency status on the Vancouver terminal and made the threshold determination of significance. (CP 170.) Thus, under both EFSLA and SEPA regulations, compliance with SEPA's procedures is the Council's responsibility.

The most natural reading of section .180 is that it exempts any action on a subject facility that would otherwise be subject to SEPA. Riverkeeper claims that local government decisions about the sale or lease of public lands are not contemplated by section .180 because those decisions are not "regulatory" decisions. In essence, Riverkeeper's argument is that any EFSEC project on public land is subject to additional requirements that are not found in the statute. There is no basis in SEPA or EFSLA for creating a new classification system from whole cloth, when the SEPA regulations have already classified government actions according to the mandates of the statute.

The Council itself has issued a ruling interpreting the statute consistent with the Port's position. *In re Tesoro Savage Vancouver Energy Distribution Terminal*, EFSEC Order No. 872 (Aug. 1, 2014). (App. 1-16.) The Council held a public hearing pursuant to RCW 80.50.090(2) to determine whether the Tesoro-Savage proposal is consistent with local land use plans and zoning ordinances. (Order at 1, App. 1.) An initial step in that process is for the City to make its own land use consistency determination. WAC 463-26-100. Various parties requested the Council postpone the land use consistency determination, arguing that it would violate SEPA for the City to review consistency of the use with its zoning ordinances prior to the Council publishing the EIS. (Order at 2, App. 2.)

The Council declined to defer its determination, stating that it "disagrees with the contention that an EIS must precede the City's consideration of land use consistency." (Order at 6-7, App. 6-7.) It further stated that "RCW 80.50.180 exempts from the requirement of an EIS *all local government actions related* to EFSEC projects." (Order at 7, App. 7 (emphasis added).) The Council interprets section .180 broadly, so as to encompass all local actions that might be subject to SEPA, including the City's zoning review. As an EIS need not precede the City's

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consideration of land use consistency for an EFSEC project, neither must it precede the Port's decision to execute a lease for the same project. As the agency charged with exercising special expertise to evaluate energy facilities, the Council is entitled to deference in interpreting EFSLA so long as its determination is consistent with the statute. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091, 1094 (1998). The Council's view furthers the centralization of SEPA review with the Council. Thus it is most consistent with the intent of the Legislature and so should be granted "substantial weight." *Id.*

Riverkeeper claims the Court should read the scope of section .180 narrowly for consistency with section .110(2), which provides that the state, via EFSLA, "preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities. . . ." RCW 80.50.110(2). (RK Br. at 16-17.) Their argument is that since Council preemption is limited to "regulation and certification," the SEPA exemption should be similarly limited. The argument is not consistent with the statutory text or structure. The Legislature could have used "regulate and certify" instead of "authorizes, approves, [or] permits," but it did not. "[T]he legislature is deemed to intend a different meaning when it uses different terms." *State v.*

Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196, 201 (2005). Logically, it makes sense for the exemption to be broader than the preemption power. The preemption power involves the state permanently overriding local laws or plans in which there is a strong local interest. The SEPA exemption does not permanently override anything. Instead, it consolidates SEPA review with the Council.

The text, context, and structure of EFSLA and SEPA show that the Port's lease approval was exempt from SEPA procedures. Thus, the Port was not required to wait until completion of an EIS before approving the contingent lease.

3. Public agencies are permitted to act while an EIS is being prepared, so long as they do not take action to foreclose the range of reasonable alternatives.

Since the statute exempts the lease from SEPA procedures, the Court's inquiry on Riverkeeper's first claim should be at an end. However, in a fallback argument, Riverkeeper claims its position is supported by the policies underlying SEPA, which favor review early in the decisional process. (RK Br. at 17-20.) As such, Riverkeeper argues, an early EIS can be a base for public commentary. (RK Br at 20.) At minimum, they contend, SEPA required the Port to wait until the EIS was

complete before negotiating or entering into the lease. Their argument is wrong.

Specifically, SEPA does not prohibit preliminary actions to take place before an EIS is complete, so long as the preliminary actions do not have adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070(1). As the U.S. Supreme Court has described, "[e]ven if a particular agency proposal requires an EIS, applicable regulations allow the agency to take at least some action in furtherance of that proposal while the EIS is being prepared." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 145, 130 S. Ct. 2743, 2750, 177 L. Ed. 2d 461 (2010). The contingent lease is a preliminary action consistent with these principles.

Nevertheless, Riverkeeper claims that SEPA's underlying policy imposes additional, undefined restrictions on agency action. SEPA's underlying policies do no such thing. Instead, those policies ensure that agencies like the Port are conscious of their environmental responsibilities and SEPA obligations throughout their operations and decisions. The Port followed those policies here, acting on the understanding that the Council would conduct a rigorous review and conditioning the lease on that process.

The policies underlying EFSLA also weigh against Riverkeeper's argument. The Act preempts SEPA to the extent they are inconsistent. RCW 80.50.110(2); *see Kittitas*, *supra.* Riverkeeper's claim would frustrate the Council's purpose by breaking apart the consolidated process instituted by its statute. The Legislature has established that the policies favoring expedited review of energy facilities are of paramount importance and cannot be ignored. *See* WAC 463-14-020. (App. 21.) At the same time, the Council strives to minimize the adverse environmental impact of permitted facilities. *Id.* at .020(1). EFSLA section .180 harmonizes the two statutes and gives effect to both statutes' policies. The Council should, and will, conduct extensive environmental review of this project.

Riverkeeper's argument has practical problems as well. As the Superior Court recognized, "[i]t would be hard to imagine any possible lessees getting serious about a major development such as this unless they had some sort of guarantee of exclusivity from an owner such as the Port." (RP 34:3-8.) Although the lease is conditioned on the completion and outcome of the SEPA review, it at least assures Tesoro-Savage that the Port will refrain from developing something else on that land during the time it takes to complete review. Given the expense and length of the

permitting process, even as expedited under the Act, coupled with the need for large projects for economic development, such an assurance is reasonable and complies with SEPA.

If an applicant had no possible way to assure access to the site other than to hope it could negotiate terms after years of environmental review, the application process could easily become duplicative or wasteful, which is exactly the outcome EFSLA is designed to avoid. This outcome would also frustrate EFSLA's purpose of enabling timely review of energy projects that the Legislature has determined serve a public need.

The Port's execution of the lease was subject to a statutory exemption under EFSLA section .180, so SEPA procedures were not required. The Superior Court correctly dismissed Riverkeeper's first SEPA claim.

B. The Port's approval of the lease does not limit the range of reasonable alternatives.

1. The lease does not coerce any particular outcome of the Council process or Governor's review.

Riverkeeper's second SEPA claim alleges that the Port's approval of the Tesoro-Savage lease violates regulations that prohibit any agency from taking action prior to issuance of an EIS if the action would "[l]imit the choice of reasonable alternatives." WAC 197-11-070(1)(b). (App. 20.) The lease does not limit the range of reasonable alternatives because

it is conditioned on, rather than constrains or coerces, the Council's and Governor's ultimate SEPA review, and because the Port retains post-review discretion.

A "reasonable alternative" is an alternative to a proposal that would meet the objective of the proposal, "but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-786. "The word 'reasonable' is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative." *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 510, 306 P.3d 1031, 1038 (2013) (quoting WAC 197-11-440(5)(b)(i)).

An action limits the range of reasonable alternatives if it "coerces" a specific final outcome prior to the completion of SEPA review. *Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Board*, 137 Wn. App. 150, 162, 151 P.3d 1067, 1072 (2007) ("*Clark PUD*"). This does not mean that an agency or applicant cannot propose a specific course of action, but only that the final decision must not be predetermined. "Early designation of a preferred alternative in no way restricts the lead agency's final decisions." (Wash. Dep't of Ecol., *SEPA Handbook* § 3.3.2.2., App. 22-23.)

The lease does not go into effect until both the Council and the Port are satisfied with the SEPA review. Completion of environmental review is an express condition precedent. (Lease ¶¶ 2.D(1), 11.C, RK App. 79, 94.) The lease does not transfer possession of the property until all permits are obtained and the Port is satisfied that construction may begin. (Lease ¶ 3.A, RK App. 80.) The lease requires Tesoro-Savage and the Port mutually agree on site design and engineering and on a safety and operations plan. (Lease ¶¶ 2.D, 30, RK App. 79-80, 128.) Because of these contingencies, the Port will be able to use these mechanisms to respond appropriately to the results of the Council and federal permit processes. (Lease ¶ 3.A, App. 80.)

The contingent nature of the lease is underscored by the postponement of possession until after the Port is satisfied with the environmental permitting. "The fundamental right delivered in a lease is possession." 1 M. Friedman on Leases § 4:2, at 4-12 (5th ed. 2005 & supp.). And "[a] landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property." Restatement (Second) of Property, Land. & Ten. § 1.2 (1977). In traditional contract terms, the tenant does not obtain the fundamental rights under this lease

unless the permitting process, including an impact statement, is completed to the Port's satisfaction.

This Court held in *Clark PUD* that an action does not limit the range of reasonable alternatives if it does not "coerce" the final outcome of the process. 137 Wn. App. at 162, 151 P.3d at 1072. There is not a plausible mechanism by which the Port's approval of the lease could limit the range of alternatives to be considered by the Council and the Governor, much less coerce the final result. Perhaps recognizing this fact, Riverkeeper does not attempt to distinguish *Clark PUD*, where this Court held that issuing a permit to drill test wells did not foreclose the ultimate application process for a wellfield. *Clark PUD* is instructive and controlling. There, the plaintiffs argued that issuance of an exploratory well permit, and the PUD's expenditure of funds on exploratory drilling, would limit reasonable alternative sites for a wellfield. *Id.* This Court disagreed because the permit grant did not have any bearing on whether Ecology would eventually grant a wellfield permit. *Id.* Here, the case against coercion is stronger, since the Port is a separate agency from the Council and the Governor, whereas both processes in *Clark PUD* were administered by Ecology. The lease does not restrict full consideration of

the proposal, including other sites, by the Council or the Governor. It simply frames the proposal for environmental review.

Because the lease establishes procedures for the Port to respond to environmental review, it has similarities to the memorandum held not to limit alternatives by Division I in *Int'l Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 309 P.3d 654 (2013). That memorandum conditioned further action, including possible expenditure of $200 million in public funds, upon the completion of SEPA review and determinations by the government bodies "whether it is appropriate to proceed with or without additional or revised conditions based on the SEPA review. . . ." 176 Wn. App. at 517-18, 309 P.3d at 657. Division I held that these conditions meant that "[t]he city and county remain free to change course" after the completion of environmental review, and there was no SEPA violation.

The same is true here. The lease is conditioned on the outcome of SEPA review, as well as federal environmental review, and the Port reserves discretion after that review ends. The Port must be satisfied that the condition precedent, obtaining all applicable permits, has been met. (Lease ¶ 2.D, RK App. 79.) The Port also has authority to review and approve design specifications and the operations and safety plan. (Lease

¶¶ 2.D, 30, RK App. 80, 128.) The Port also has the ongoing authority, after SEPA review, to terminate the lease if Tesoro-Savage fails to comply with all environmental laws and permits, which is an express lease requirement. (Lease ¶ 11.C, RK App. 94.) Like the city and county in *International Longshore*, the Port can change course if the SEPA review suggests it should.

Riverkeeper attempts to rewrite the lease to make it more constraining than it is. They argue the lease predetermines the design of the facility and of the amount of liability insurance. (RK Br. at 34-36.) Yet they ignore the broader contingencies discussed above as well as the conditions placed both specific clauses. With regard to design, the parties are to work diligently and in good faith during the contingency period. But nothing is settled either on the structure or the timing of the design. And SEPA "does not preclude developing plans or designs" before completion of review. WAC 197-11-070(4). The liability insurance clauses allow for adjustment if appropriate. (Lease ¶¶ 8.C, 15.C., RK App. 88, 107-08.).

The lease is conditioned on the outcome of the environmental review process and preserves discretion for the Port to respond to review.

The Port's execution of the contingent lease did not limit the range of reasonable alternatives.

2. The lease does not create inertia in the project's favor.

Riverkeeper argues that the lease creates a danger of "snowballing" or otherwise building unstoppable momentum in favor of the terminal project. (RK Br. at 37.) This argument again fails because of the conditional nature of the lease. By conditioning the lease on Tesoro-Savage obtaining all necessary certifications, the Port made SEPA review a condition of the project and preserved the no-action alternative as well as other alternatives that the Council and Governor may consider.

In contrast with this case, courts are concerned about "snowballing" where "the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless." *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993). Riverkeeper does not suggest, much less show, that the "inertia" granted by the signing of the lease could carry the project through a decision by a Council made up of all the state's environmental agencies and a final decision by its highest official. The structure of EFSLA and the Council seems designed to insulate the ultimate decision from any

impact from local inertia. Riverkeeper fails to overcome this structural issue, a failure that is fatal to their second SEPA claim.

Moreover, the snowballing cases are distinguishable on their facts. *King County* held that an annexation can "induce expectations of environmentally significant development which future decision makers may be reluctant to disappoint." *Id.* at 688, 860 P.2d at 1046. Here, there can be no expectations that the Port would continue with the project in the absence of approval by EFSEC and the Governor. And Tesoro-Savage has no such expectations, stating publicly that it understands the lease is conditional on the completion of the Council process. (CP 265.)

Similarly, *Lands Council v. Wash. State Parks & Rec. Comm'n*, 176 Wn. App. 787, 807, 309 P.3d 734, 744 (2013), found that the agency had inappropriately created a "snowball effect" when it "effectively approved a specific proposal" by a classification decision. The agency retained no ability to condition the decision on the outcome of a SEPA process, treating SEPA as a mere formality. *Id.* Here, the Port's lease is conditioned on the outcome of the EFSEC certification and the Port retains absolute authority to terminate the lease if the permits are not obtained. (Lease ¶¶ 1.C, 2.D, RK App. 72, 79.) The lease has not "effectively approved" the facility but awaits the result of the Council's

and Governor's review. SEPA is not a formality but an integral component of the process.

In the same vein, Riverkeeper erroneously relies on *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 308-09, 317, 230 P.3d 190, 191 (2010). *Magnolia* did not address whether a decision limited the range of reasonable alternatives, because no SEPA process was going to be undertaken with regard to a land use decision. The City of Seattle argued that no "action" triggering SEPA had occurred since the decision was conditional. 155 Wn. App. at 316, 230 P.3d at 195. The court disagreed because the decision was not actually conditional. *Id.* Here, the issue whether the Port's lease approval is an "action" triggering SEPA is not under review. This case is not like *Magnolia* because the lease is explicitly conditioned on SEPA review, and reserves discretion with the Port.

Finally, Riverkeeper's argument that some contingency fee payments to the Port create inertia is not well-taken. (RK Br. at 40.) These payments merely compensate the Port for the option value of the land. Nothing in the record suggests the Port has taken any action based on expectations regarding these payments.

3. NEPA case law supports a finding that the lease does not limit the range of alternatives.

Federal authorities support finding that the lease did not limit the range of reasonable alternatives. Federal authorities are helpful because SEPA was modeled after its federal counterpart (NEPA) and because the NEPA regulations include a provision (40 C.F.R. § 1506.1, App. 19) very similar to WAC 197-11-070.

Some of the federal cases equate a limitation of reasonable alternatives with an irreversible or irretrievable commitment of resources. *WildWest Inst. v. Bull*, 547 F.3d 1162 (9th Cir. 2008); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000). However the question is framed, these cases show that the Port did not limit the range of reasonable alternatives.

Riverkeeper attempts to equate the lease here with the agreement at issue in *Metcalf*. In *Metcalf*, "[a]lthough it could have, [the agency] did not make its promise to seek a quota . . . and to participate in the harvest conditional upon a NEPA determination that the Makah whaling proposal would not significantly affect the environment." *Id.* at 1144. This failure to condition the contract caused the NEPA violation. But here the lease is conditional on successful completion of the SEPA process.

In a closely analogous case, the Tenth Circuit in *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004), approved an agreement that was

conditional on completion of NEPA requirements. The court held that the conditional agreement did not limit the range of reasonable alternatives because there was "no indication here that the U.S. Air Force prejudged the NEPA issues." *Id.* at 1240. Here, neither the Port, the Council, nor the Governor have prejudged SEPA issues. This lease will not go into effect until after completion of all SEPA requirements.

The lease is also like the "no surface occupancy" leases approved in *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988). Tesoro-Savage is not allowed to occupy the premises until the completion of environmental review. In *Conner,* the tenants signed leases that did not allow them to "occupy[] or us[e] the surface of the leased land" prior to additional agency approval, which would include environmental review. 848 F.2d at 1447. The Ninth Circuit held that these leases "cannot be considered the go/no go point of commitment at which an EIS is required. What the lessee really acquires . . . is a right of first refusal, a priority right much like the one granted in *Sierra Club* [*v. Fed. Energy Reg. Comm'n*, 754 F.2d 1506 (9th Cir. 1985)]. This does not constitute an irretrievable commitment of resources." *Id.* at 1448. Nor does the Port's lease to Tesoro-Savage.

The lease does not coerce or prejudge the final outcome of the Council process, on which the lease's effectiveness is conditioned, nor does it irretrievably dedicate public resources. The Port retains sufficient discretion to act in response to SEPA review. There is no danger of snowballing. Thus the lease does not limit the range of reasonable alternatives and Riverkeeper's second SEPA claim fails as a matter of law.

C. The Court should award RAP 14.3 costs.

RAP 14.2 provides that a substantially prevailing party on review is entitled to costs. RAP 14.3 enumerates the eligible costs. Because the Court should find in favor of the Port, it should award the Port's eligible costs, which the Port will submit in its cost bill pursuant to RAP 14.4.

DATED this 12th day of September, 2014.

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DECLARATION OF SERVICE

I, Lawson E. Fite, declare under penalty of perjury under the laws of the State of Washington that I am an attorney employed by Markowitz Herbold Glade & Mehlhaf, P.C. and that on September 12, 2014, I have made service of the foregoing BRIEF OF RESPONDENTS on the parties listed below in the manner indicated:

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DATED this 12th day of September, 2014, at Portland, Oregon

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Appendix D

NO. 46130-7-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

COLUMBIA RIVERKEEPER; and
NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Petitioners,

v.

PORT OF VANCOUVER USA;
JERRY OLIVER, Port of Vancouver USA Board of Commissioners President; BRIAN WOLFE, Port of Vancouver USA Board of Commissioners Vice President; and NANCY I. BAKER, Port of Vancouver USA Board of Commissioners Secretary,
Respondents.

REPLY BRIEF FOR COLUMBIA RIVERKEEPER and NORTHWEST ENVIRONMENTAL DEFENSE CENTER

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I. Argument

1. The Port violated SEPA by executing the lease without using EFSEC's EIS.

The Port of Vancouver USA (Port) decided to lease public land for a proposed crude oil terminal. Had the Port decided against leasing the land, it would have terminated the current proposal to ship and store crude oil in Vancouver. The first question on appeal is whether the Port should make its leasing decision before or after understanding the crude oil terminal's environmental and human health risks.

a. Riverkeeper's relief would not require duplicative EISs or disrupt EFSEC's review.

Appellants' (hereinafter collectively "Riverkeeper") contention is simple: the Port made its leasing decision too early, before the Energy Facility Site Evaluation Council (EFSEC) released the Environmental Impact Statement (EIS). The relief Riverkeeper seeks is correspondingly straightforward: the Port should re-consider the lease in light of the information in EFSEC's EIS. This comports with the State Environmental Policy Act's (SEPA) basic principle, that agencies should act after—not before—the environmental and human health risks of their actions are studied and described. *Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 511, 522, 309 P.3d 654 (2013) (SEPA's "fundamental idea" is "to prevent government agencies from approving

projects and plans before the environmental impacts of doing so are understood."). Courts must give substantial weight to the policy of informed decision making when interpreting statutes like RCW 80.50.180 (Appendix to Riverkeeper's Opening Brief (hereinafter "App.") p.16). RCW 43.21C.030(1) (App. p.2).

i. Riverkeeper is not seeking duplicative reviews.

The Port repeatedly argues that Riverkeeper's interpretation of RCW 80.50.180 would require the Port and EFSEC to conduct two side-by-side, duplicative EISs and "two SEPA processes." (Port's Br. p.27; *see also id.* at pp.28–29, 31.) This argument misconstrues Riverkeeper relief. Riverkeeper has repeatedly explained that it is not seeking duplicative SEPA processes, or requesting that the Port prepare its own EIS. (Riverkeeper's Opening Br. pp.1–2, 4–5, 13, 14; Clerks' Papers (hereinafter "CP") p.932; Report of Proceedings (hereinafter "RP") pp.14–16.) There will be only one SEPA process for the oil terminal, culminating in one EIS, and EFSEC will be the lead agency preparing that EIS. WAC 197-11-060(3)(b); WAC 197-11-938(1) (App. p.44); WAC 463-47-020 (App. p.59). The Port's argument that Riverkeeper's relief would require multiple EISs or SEPA processes is therefore misguided.

Riverkeeper is not asking the Court to create "additional requirements" for the Port. (Port's Br. at p.31.) Riverkeeper simply wants the Port to follow the law by using EFSEC's EIS to inform the leasing decision. Here, the Port should follow the normal, well-established SEPA procedures in effect whenever two agencies have jurisdiction over different aspects of the same project. In this situation, the lead agency (here, EFSEC) conducts the SEPA process and prepares the EIS, and the non-lead agency (here, the Port) uses the EIS to inform the decisions over which it has jurisdiction. WAC 197-11-050(2)(b) (App. p.18); WAC 197-11-600(3)(c) (App. p.28). This is the standard practice under SEPA and—absent the current debate about the breadth of RCW 80.50.180 (App. p.16)—this is *precisely* how the Port would be using EFSEC's EIS. Riverkeeper is just asking the Port to behave like any other non-lead SEPA agency.

Similarly, Riverkeeper's relief would not "break apart" or decentralize EFSEC's review. (Port's Br. p.36.) EFSEC does not negotiate or oversee local proprietary agreements like the lease, so the Port is in no danger of intruding upon EFSEC's authority or review. Tesoro's application to EFSEC, not the lease, is the document that "frames the proposal for environmental review." (Port's Br. p.41.) And neither EFSEC's certification process nor the EIS require a lease between the Port

and Tesoro in order to proceed, as the Port argues. (Port's Br. p.23 ("the lease is a preliminary step to the Council process"); *see id.* at pp.25, 35.)

ii. Riverkeeper's interpretation of RCW 80.50.180 will not harm business.

Riverkeeper's interpretation of RCW 80.50.180 will not interfere with business at the Port. While the Port argues that Riverkeeper's relief would hinder economic development (Port's Br. p.36), there are practical ways to protect port customers without sacrificing SEPA's requirements and benefits. The Superior Court recognized the difficulty of attracting possible lessees without a "guarantee of exclusivity" from the Port (RP p.34:3-8), but never explained why such a guarantee must take the form of a binding lease. For instance, the Port and Tesoro might have simply continued their exclusive bargaining agreement that pre-dated the lease (CP p.0011), and reserved the Port's ultimate decision about whether to enter into a binding lease until after the EIS. Such an arrangement could have been structured similarly to the memorandum of understanding upheld in *International Longshore*. 176 Wn. App. at 516, 309 P.3d 654; *see also* § I.2.a.iii, *infra* (describing *Int'l Longshore*). A binding and detailed lease was not necessary to protect or assure Tesoro.[1]

[1] Moreover, the argument that the lease is necessary to, and does, "assure [Tesoro] access to the site" (Port's Br. p.37) is in considerable tension, both conceptually and factually, with the Port's assertion that it can "change course if SEPA review suggests it should." (Port's Br. p.42.)

b. RCW 80.50.180 does not excuse the Port's duty to use EFSEC's EIS when deciding whether to lease public property.

i. Proprietary decisions do not 'approve, authorize, or permit' energy facilities within the meaning of RCW 80.50.180.

The Energy Facilities Site Locations Act's (EFSLA), RCW 80.50, context and structure, which inform RCW 80.50.180's plain meaning, indicate that a lease is not an 'approval, authorization, or permit.' The plain meaning of a statute is not simply derived from its text, but also from the statutory context where that text appears. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10–12, 43 P.3d 4 (2002); *see also G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309–10, 237 P.3d 256 (2010). In the context of EFSLA, a statute designed to centralize regulatory decision making in the State, the terms 'approves, authorizes, or permits' do not refer to local proprietary decisions like the Port's lease, which EFSLA does not preempted. (Riverkeeper's Opening Br. pp.15–17.) Tacitly acknowledging the Supreme Court's directive to include context in 'plain meaning' statutory analyses,[2] the Port makes several arguments involving the context and structure of EFSLA and SEPA. The

[2] The Port does makes one short argument based on the bare text of RCW 80.50.180 (App. p.16), wherein the Port summarily concludes that the lease "approves, authorizes, and permits" the oil terminal. (Port's Br. p.23.) This ignores the Supreme Court's clear directive that "plain meaning" is derived text *and* statutory context. *See G-P Gypsum Corp.*, 169 Wn.2d at 309–10, 237 P.3d 256.

Port's primary contextual argument is that Riverkeeper's reading of EFSLA's SEPA exemption would require multiple EISs and SEPA processes. (Port's Br. pp.27–29, 31.) But as explained in § I.1.a.i, *supra*, Riverkeeper's interpretation of RCW 80.50.180 would not compel this result. Riverkeeper responds to the Port's other contextual arguments below.

ii. RCW 80.50.180 does not encompass all actions subject to SEPA.

RCW 80.50.180 exempts only a sub-set of the actions that are subject to SEPA. Certain governmental actions effect large energy facilities, and are subject to SEPA, and are not exempted by RCW 80.50.180. The Port's lease is this type of non-exempt action. The Port advances an over-broad reading of RCW 80.50.180, arguing that that section covers *all* actions that could possibly be subject to SEPA. (*See* Port's Br. p.30 ("[S]ection .180's exemption is intended to 'cover the waterfront' of actions that could potentially be subject to SEPA.").) The Port arrives at this conclusion by selectively comparing sections of SEPA and EFSLA. *Id.* Some of the language *is* strikingly similar: SEPA applies to all "proposals for legislation and other major actions," RCW 43.21C.030(2)(c) (App. p.2), and EFSEC's SEPA exemption begins by describing "all proposals for legislation and other actions . . . ." RCW

80.50.180 (App. p.16). However, the Port ignores the *express limitation* that follows in RCW 80.50.180. EFLSA's SEPA exemption provides, in pertinent part, that:

> "all proposals for legislation and other actions of any branch of government . . . , *to the extent* the legislation or other action involved approves, authorizes, [or] permits . . . the location, financing or construction of any energy facility . . . shall be exempt from the [EIS] required by [SEPA]."

RCW 80.50.180 (App. p.16) (emphasis added). To accept the Port's interpretation would be to effectively delete everything in RCW 80.50.180 after "to the extent . . . ."[3] The phrase "to the extent" in RCW 80.50.180 (App. p.16) necessarily limits the preceding language about "all proposals for legislation and other actions . . . ." The flaw in the Port's argument highlights that some actions subject to SEPA are not exempted by EFSLA. The Port's lease is precisely this type of action.

iii. EFSLA's SEPA exemption is co-extensive with EFLSA's preemption of regulatory authority.

Nothing in EFSLA's structure indicates that RCW 80.50.180's exemption is broader than EFSLA's regulatory preemption. The Port's reading would create a jurisdictional vacuum where local governments like the Port could make proprietary decisions about large energy facilities without adequate information or accountability provided by SEPA. Even

[3] That RCW 80.50.180 exempts some "project" and some "non-project" actions does not cure this flaw in the Port's reasoning. (*See* Port's Br. p.30.)

though EFSLA's preemption power only covers the "regulation and certification" of energy facilities, RCW 80.50.110(2) (App. p.13), the Port argues that EFSLA's SEPA exemption extends to local proprietary decisions. (Port's Br. pp.33–34.) The Port claims this is "[l]ogically" so because EFSLA's "SEPA exemption . . . consolidates SEPA review with [EFSEC]." *Id.* at p.34.

The Port's argument is premised on a misreading of the applicable law. The regulations designating EFSEC as the lead SEPA agency—not RCW 80.50.180—consolidate SEPA review and the preparation of an EIS with EFSEC. *See* WAC 197-11-938(1) (App. p.44) (adopted by EFSEC at WAC 463-47-020 (App. p.59)). Therefore, the argument that EFSLA's SEPA exemption must be broader than EFLSA's substantive preemption in order to consolidate SEPA review with EFSEC is meritless. EFSLA's SEPA exemption simply delineates which actions are exempt from SEPA's requirement not to act until the EIS has been published. Because the lead agency regulations clearly vest EFSEC with control of the SEPA process and the preparation of the EIS, the Port's justification for making EFSLA's SEPA exemption broader than EFSLA's preemptive power makes no sense.

iv. EFSEC Order No. 872 is irrelevant.

The Port's brief describes an EFSEC proceeding wherein the City of Vancouver—acting in its capacity to regulate land use, not as a property owner—considered whether the oil terminal was consistent with the City's land use rules and regulations. (Port's Br. pp.32–33; Port's App. pp.6–7.) Consideration of whether the terminal complies with local land use rules was an activity of a clearly regulatory nature. As a result, EFSEC ordered that the City's activity was exempted from SEPA by RCW 80.50.180. (Port's Br. p.32; Port's App. p.7.) The Port takes EFSEC's statement out of context and applies it to a scenario that EFSEC never contemplated.

First, because EFSEC's Order was not before the Superior Court, this Court should not consider the Port's argument. Wash. R. App. P. 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."). Regardless, the Court should not use EFSEC Order No. 872 to interpret EFSLA's SEPA exemption.

Second, the Port's execution of a proprietary lease is not analogous to the City of Vancouver's regulatory consideration of land use consistency. The Port asserts that because "an EIS need not precede the City's consideration of land use consistency for an EFSEC project, neither must it precede the Port's decision to execute a lease for the same project."

(Port's Br. pp.32–33.) The Port's attempt to equate these two local actions—one regulatory, and the other proprietary—assumes the very point at issue in this case. The City of Vancouver's preliminary determination on land use consistency is precisely the kind of local regulatory approval or authorization that RCW 80.50.180 exempts. The Port ignores the real question of whether the Port's lease, a fundamentally different kind of local decision over which EFSEC lacks jurisdiction, is exempt.

Third, because EFSEC was not considering a local proprietary decision in Order No. 872, EFSEC's statement about the breadth of RCW 80.50.180 is not helpful or entitled to deference. Courts may defer to an agency's interpretation if it "will help the court achieve a proper understanding of the statute . . . ." *Cockle v. Dep't of Labor and Industries*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001) (citing *Clark County Natural Res. Council v. Clark County Citizens United, Inc.*, 94 Wn. App. 670, 677, 972 P.2d 941 (1999) ("it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law.")). The "thoroughness, validity, and consistency of [the] agency's reasoning" all impact the amount of deference an interpretation receives. *Western Telepage v. City of Tacoma*, 95 Wn. App. 140, 147, 974 P.2d 1270 (1999)

(citing *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 102 S. Ct. 38, 70 L. Ed. 2d 23 (1981)). EFSEC's statement is simply not helpful in answering the specific question presented in this appeal because nothing in Order No. 872 suggests that EFSLA was considering proprietary decisions. Order No. 872 contains no discussion or reasoning about why RCW 80.50.180 does or does not exempt proprietary decisions like the lease. Thus, it is impossible for the Court to assess the "thoroughness, validity, and consistency of [EFSEC's] reasoning" on this issue, and therefore deference is inappropriate. *Western Telepage*, 95 Wn. App. at 147, 974 P.2d 1270 (citing *Federal Election Comm'n*, 454 U.S. at 37). The Port asks the Court defer to a statement made when EFSEC was not considering the central issue in this case. The Court should not use EFSEC's out-of-context statement to interpret EFSLA's SEPA exemption.

v. The Legislature directed courts to interpret statutes to effectuate SEPA.

The Port never explains[4] why its interpretation of EFSLA's SEPA exemption—which allows the Port to execute the lease without using the EIS—supports SEPA's policies. The Legislature directed that all laws "shall be interpreted . . . in accordance with the policies set forth" in

[4] Other than to claim, fallaciously, that Riverkeeper wants "two SEPA processes" for the proposed crude oil terminal. (Port's Br. p.27; *see also id.* at pp.28–29, 31.)

SEPA. RCW 43.21C.030(1) (App. p.2); *see also Juanita Bay Valley Community Ass'n v. Kirkland*, 9 Wn. App. 59, 65, 510 P.2d 1140 (1973). Perhaps because the Port cannot explain why leasing public land for an oil terminal without fully understanding the environmental and human health risks serves SEPA's policies, the Port attempts to characterize Riverkeeper's citation to RCW 43.21C.030(1) (App. p.2) as imposing "additional, undefined" restrictions on the Port. (Port's Br. p.35.) Riverkeeper is not asking the Court to make up rules; the issue before the Court is the correct interpretation of RCW 80.50.180 and the Legislature, in RCW 43.21C.030(1) (App. p.2), provided compulsory direction for interpreting such laws. SEPA's goals of informed environmental decision making, public disclosure, and agency accountability would all be better served if the Port made its leasing decision *after* considering the information in the EIS. (Riverkeeper's Opening Br. pp.18–20); *see also Int'l Longshore*, 176 Wn. App. at 522, 309 P.3d 654 (SEPA's "fundamental idea" is "to prevent government agencies from approving projects and plans before the environmental impacts of doing so are understood.").

2. The Port violated SEPA by limiting reasonable alternatives before the EIS is complete.

"Alternatives are one of the basic building blocks of an EIS." Ecology, *SEPA Online Handbook*, § 3.3.2, Identifying Alternatives (App. pp.65–66). Accordingly, SEPA's regulations prohibit actions that would "[l]imit the choice of reasonable alternatives" before the issuance of an EIS. WAC 197-11-070(1)(b) (App. p.20); WAC 463-47-020 (App. p.53). The Port does not deny that its actions are subject to this prohibition. (CP pp.0969–71; Port's Br. pp.37–38.) Instead, the Port argues that it did not violated WAC 197-11-070(1) (App. p.20) because the lease is contingent on the Port's satisfaction with EFSEC's EIS, and because the Port can modify key lease terms if the EIS reveals unanticipated risks. (Port's Br. pp.37–48.) The Port misses the point of WAC 197-11-070(1)(b) (App. p.20), which protects the viability of alternatives *before* the EIS, and overstates the amount of "post-review discretion" that the Port retains. (Port's Br. p.38.) Because the Port bound itself to advocate for, and allow the construction of, the oil terminal as described in the lease, executing the lease violated SEPA's prohibition on actions that limit alternatives.

a. SEPA protects reasonable alternatives *during* the EIS process, regardless of EFSEC's or the Port's ultimate decisions about the project.

The Port argues that it did not limit the choice of alternatives because the lease does not compel any particular permitting decision and the Port can "change course if the [EIS] suggests it should." (Port's Br. pp.40, 42.) Even if true, these contentions misconstrue the intent of SEPA's prohibition against limiting alternatives; to protect the "basic building blocks" of the EIS process. *See* Ecology, *SEPA Online Handbook*, § 3.3.2, Identifying Alternatives (App. pp.65–66). Even if the lease did not build momentum for the project, or did allow the Port some flexibility, the lease violated WAC 197-11-070(1)(b) (App. p.20) and WAC 463-47-020 (App. p.53) by eliminating reasonable alternatives from consideration *during* the EIS process.

The lease binds the Port to the material aspects of the oil terminal described therein. *See* § I.2.b.ii, *infra*. Because the Port is legally barred from selecting different design alternatives or site locations or tenants, the lease functionally prevents all of the parties involved from actually considering such reasonable alternatives. Accordingly, the Port's assertions that "[t]here is not a plausible mechanism by which the Port's lease could limit the range of alternatives" is wrong. (Port's Br. p.40.) Reasonable alternatives include "design alternatives, location options on

the site, different operational procedures, various methods of reclamation for ground disturbance, closure options, etc." Ecology, *SEPA Online Handbook*, § 3.3.2, Identifying Alternatives (App. p.65). Because the lease prohibits the Port from requiring, for example, a materially different location for the oil terminal on the Port's property (App. p.71–72 (Lease ¶1.B)), the lease functionally foreclosed the ability of any party to consider that reasonable alternative during the EIS process.

An action need not coerce a particular decision or outcome, as the Port claims (Port's Br. p.38), to violate SEPA's prohibition on limiting alternatives. WAC 197-11-070(1) (App. p.20) prohibits actions that "[l]imit the choice of reasonable alternatives," not just actions that coerce or pre-determine the outcome of a decision making process. By the regulation's plain terms, an action that eliminated just one of four hypothetical 'reasonable alternatives' to a proposal would violate WAC 197-11-070(1) (App. p.20), even if that action did not coerce an agency into selecting one of the three remaining alternatives.

Accordingly, the Port significantly overstates the holding in *Public Utilities Dist. No. 1 of Clark County v. Pollution Control Hearings Board*, 137 Wn. App. 150, 162, 151 P.3d 1067 (2007) ("*Clark PUD*"). There, appellants (including the Port of Vancouver) argued that issuing a permit to drill test wells would limit reasonable alternatives by coercing the agency to issue a subsequent groundwater extraction permit. *Id.* at 161. Instead of the broad holding that the

Port urges—*e.g.* that "an action does not limit the range of reasonable alternatives if it does not 'coerce' the final outcome" (Port's Br. p.40)—the *Clark PUD* court merely rejected appellants' assertion that test drilling coerced the final permit decision. *Id.* at 162. *Clark PUD* stands for the proposition that coercion of a certain outcome illegally limits alternatives; that decision did not hold, as the Port claims, that this is the *only* way an action can violate WAC 197-11-070(1) (App. p.20). Because the lease precludes the consideration of reasonable alternatives, like where on the Port's property to site terminal facilities, the lease would still violate WAC 197-11-070(1) (App. p.20) even if it did not build momentum coercing EFSEC and the Governor to approve the terminal.

b. The lease is contingent on EFSEC *publishing* an EIS, regardless of what risks the EIS reveals.

i. The lease is not contingent on the Port's satisfaction with EFSEC's EIS.

If EFSEC issues the EIS, and Tesoro decides to build, the Port cannot prevent the constructing the oil terminal, regardless of what risks the EIS reveals. (App. p.79 (Lease ¶2.D).) Nevertheless, the Port asserts that the lease will not become effective[5] unless the Port is "satisfied" with EFSEC's EIS (Port's Br. pp.39–41), and that the lease is contingent on the

[5] Actually, the Port's *first* commitments under the lease became effective on August 1, 2013. (*See* App. p.71 (Lease ¶1.A) (defining the "Effective Date" as August 1, 2013); *see also* App. p.72 (Lease ¶1.C) (stating "[t]he term of this Lease shall commence on the Effective Date"). On that date, the Port reserved the property for Tesoro's exclusive use and promised to support "the development and construction of the Facility for the Permitted Use." (App. p.79 (Lease ¶2.D).)

"outcome" of the EIS.[6] (Port's Br. pp.36, 40, 42; *see also id.* at p.42 ("[T]he Port can change course if the SEPA review suggests it should.").) These statements have no basis in the text of the lease. The lease's condition precedent section merely provides that certain lease terms will go into effect when EFSEC issues the necessary permits and the EIS. (App. p.79 (Lease ¶ 2.D) (requiring that "(1) all necessary licenses, permits and approvals have been obtained for the Permitted Use").) Nowhere does the lease mention the Port's satisfaction with, or the outcome of, EFSEC's EIS. The lease does not allow the Port to prevent construction of the terminal if the EIS reveals unforeseen or unacceptable risks.

ii. The Port has no meaningful authority to modify the terminal based on information in the EIS.

While the lease does not specify every aspect of the terminal's final design, the lease determines, in significant detail, the facility that Tesoro would be allowed to build. (Riverkeeper's Opening Br. pp.33–36.) Accordingly, the Port is incorrect that "the lease did not limit the range of reasonable alternatives" because the lease "preserves discretion for the Port to respond to [SEPA] review." (Port's Br. pp.42–43.) Many of the lease provisions foreclose alternatives to the

[6] The Port's corollary argument—that the Port retains absolute discretion to terminate the lease if EFSEC does not issue the necessary permits or the EIS (Port's Br. pp.42, 44)—is true, but meaningless. If EFSEC does not issue the necessary permits or the EIS, Tesoro cannot build the terminal regardless of whether the Port 'decides' to terminate the lease.

facility described in the lease. For example, the lease precludes consideration of alternative locations for the oil terminal, either on the Port's property or elsewhere, by explicitly designating the location of different parts of the terminal. (App. pp.71–72, 134–169 (Lease ¶1.B, App. A–C).) The lease also lists permitted uses of the site. (App. p.75, 87–90 (Lease ¶¶1.B, 8).) Similarly, the lease prevents the Port from considering leasing the property to other tenants. (App. p.80–81 (Lease ¶3).) The lease dedicates berths to ships servicing the terminal, and limits the Port's ability to control the operation of those berths and ships. (App. p.90–92 (Lease ¶9).) Finally, the lease requires Tesoro to carry $25 million in pollution liability insurance.[7] (App. p.76 (Lease ¶1.L).) The Port's brief does not address any of these limitations on reasonable alternatives.

The lease does not give the Port discretion to change course in response to the EIS, but actually requires the Port to move forward with developing the facility. To support its "discretion" to respond to the EIS, the Port points to where the lease "requires Tesoro-Savage and the Port to mutually agree on site design and engineering and on a safety and operations plan." (Port's Br. p.39 (citing Lease ¶¶2.D, 30); *see also id.* at 42.) While the Port emphasizes the language about mutual agreement, the

[7] The Port's assertion that it can increase the amount of pollution liability insurance that Tesoro must carry "if appropriate" based on information in the EIS (Port's Br. p.42) seriously overstates the Port's authority. The lease *only* allows the Port to increase Tesoro's pollution liability insurance if Tesoro changes the operation of the facility from what the lease describes. (Riverkeeper's Opening Br. p.35; *see also* App. p.107–08 (Lease ¶15.C).)

operative term in the sentence quoted above is actually "requires." (Port's Br. p.39.) As in, the lease "requires" the Port to agree with Tesoro upon the last few details necessary to implement the proposal. *Id.*

iii. The Port irreversibly committed to hosting the oil terminal.

The Port makes general assertions about its 'discretion' and its ability to 'change course' after the EIS. Yet the Port does not, and cannot, claim that it retains authority to unilaterally reject the oil terminal. Therefore, the lease irreversibly and irretrievably committed the Port to hosting the oil terminal, limiting the range of alternatives in violation of WAC 197-11-070(1) (App. p.20). (*See* Port's Br. p.46 (citing *WildWest Inst. v. Bull*, 547 F.3d 1162, 1166 (9th Cir. 2008).)

First, the Port's lease is significantly different than the memorandum of understanding in *International Longshore*. 176 Wn. App. 511, 309 P.3d 654. In that case, the City of Seattle and King County signed an agreement detailing how a basketball arena would be financed and operated "if King County and Seattle ultimately decide[d] to participate in it" after completion of an EIS. *Id.* at 514 ("Whether the city and county will agree to [the] proposal is a decision expressly reserved until after environmental review is complete."). Unlike the municipalities in *International Longshore*, the Port committed to "participate in" the oil

terminal *before* SEPA review began, and the lease does not allow the Port to escape that commitment if the EIS reveals unanticipated risks. *Id.*

Additionally, the *International Longshore* court concluded that the memorandum of understanding did not preclude consideration of alternatives during SEPA review because if "a proponent for an arena at an alternative location c[ame]forward, the memorandum w[ould] not prevent the city and county from evaluating or pursuing the alternative proposal." *Id.* at 525. In contrast, the Port's lease explicitly prevents the Port from leasing the property to other tenants (unless Tesoro defaults or elects not to continue operations). (App. p.80–81 (Lease ¶3).) Because the memorandum of understanding in *International Longshore* reserved the municipalities' "go-no go" decision until after the EIS, but the Port's lease did not, the Port's lease violated SEPA. *Id.* at 526 (citing *Center for Environmental Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011)).

Second, federal case law interpreting NEPA does not support the Port's arguments. The Port fails to respond to several instructive federal NEPA cases (*see* Riverkeeper's Opening Br. p.32), and the Port's citations to *Conner*, *Metcalf*, and *Lee* (Port's Br. pp.46–47) are inapposite. The lease crosses the line drawn by *Conner* and other federal NEPA cases because, by executing the lease, the Port relinquished its "absolute right"

to prevent construction of the oil terminal. *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988). Therefore, the Port irreversibly and irretrievably committed resources in a way that violated WAC 197-11-070(1)(b) (App. p.20).

The Port's lease is very similar to the "surface occupancy" oil drilling lease invalidated in *Conner*. 848 F.2d at 1449. There, the Ninth Circuit reviewed an agency's execution of two types of oil exploration leases prior to doing NEPA. *Id.* at 1447–49. The first type of lease forbid any ground-disturbing activity. *Id.* at 1447. The court approved the agency's decision to issue the first kind of lease before conducting NEPA because there could be no damage to the land without further government approvals (which *would* require NEPA). *Id.* at 1447–48. The second kind of lease allowed road building and oil drilling, subject to reasonable regulation by the agency. *Id.* at 1449. The Ninth Circuit reasoned that issuing the second kind of lease before doing NEPA was illegal because, although the agency could "impose 'reasonable' conditions . . . designed to mitigate the environmental impacts," the agency could not prevent the lessee from drilling for oil. *Id.* at 1449 (citing *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983). Here, the Port argues that its lease contains enough flexibility to impose reasonable conditions designed to mitigate the environmental impacts of the oil terminal. (Port's Br. p.42.)

Even if that were true, the Port cannot unilaterally prevent Tesoro from accomplishing the lease's main objective: building the terminal and shipping oil. Thus, the Port's lease is very similar to the lease rejected in *Conner*, because the Port's lease did not preserve the Port's "absolute right" to prevent the activity until after the environmental review. *Conner*, 848 F.2d at 1449.

The Port's attempt to distinguish *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000) (Port's Br. p.46) fails because the Port's lease is contingent on the publication of—rather than the information contained in—the EIS. In *Metcalf*, the Ninth Circuit faulted the agency for committing to a project without a condition that the project would not have negative environmental effects (i.e. that the whale "harvest would not significantly affect the environment"). *Metcalf*, 214 F.3d at 1144. Similarly, the lease contains no condition allowing the Port to withdraw if the SEPA process reveals that the crude oil terminal will "significantly affect the environment."[8] *Id.*

Neither can the decision in *Lee v. U.S. Air Force*, 354 F.3d 1229, 1235 (10th Cir. 2004) save the Port's lease. In *Lee*, the Air Force tentatively agreed to house German fighter planes in New Mexico. Importantly, the agreement "explicitly stated that it would not go into

[8] EFSEC actually found that the terminal is "likely to have a significant adverse impact on the environment." (CP 0167.) Tesoro and, apparently, the Port agree. (CP 0045.)

effect unless the Air Force approved the action following completion of all NEPA requirements." *Lee*, 354 F.3d at 1240. In contrast to the agreement in *Lee*, the Port will not make a "final decision" on the lease after reviewing the EIS. *Id.* at 1235. The Port already made its "go-no go" decision. *Cf. Int'l Longshore*, 176 Wn. App. at 526 (citing *Center for Environmental Law & Policy*, 655 F.3d at 1007). While the Air Force could have voided the agreement in *Lee* if the EIS had revealed unacceptable risks, the Port cannot—and does not argue that it can—prevent Tesoro from constructing the oil terminal if the EIS reveals severe risks.

c. The lease improperly builds momentum in favor of permitting the terminal.

The lease was specifically designed to, and does, build momentum that EFSEC and the Governor may find difficult to resist. Specifically, the Port committed—in advance of the EIS—to "to work diligently . . . to pursue all necessary licenses, permits, and approvals required for the development and construction of the Facility for the Permitted Use." (App. p.79 (Lease ¶2.D).) The Port contends that the hundreds of thousands of dollars it is currently receiving from Tesoro "merely compensate the Port for the option value of the land" during EFSEC's review. (Port's Br. p.45.) The Port offers no authority for this assertion,

and the lease does not specify what the payments are for. (*Id.*; *see also* App. p.72–73 (Lease ¶1.D).) Moreover, the Port overlooks the obvious fact that, during the contingency period, the lease expressly requires the Port to actively seek permits and approvals from EFSEC in furtherance of the project. (App. p.79 (Lease ¶2.D).) Additionally, the Port's brief ignores the Port's unique ability to lobby EFSEC; the Port has a non-voting representative on the Council. *See* RCW 80.50.030(6) (App. p.6). Ultimately, the lease obligates the Port to lobby EFSEC from within, providing undeniable inertia for certification.

The Supreme Court warned that inertia generated by a government decision made without an EIS can "induce expectations of environmentally significant development which future decision makers may be reluctant to disappoint." *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, n.9, 860 P.2d 1024 (1993). Misapprehending this warning, the Port argues that the lease does not generate inertia because the Port's and Tesoro's commitments to the project are contingent upon state-level permits. (Port's Br. p.44.) But under the 'snowballing' analysis, the "future decision makers" at issue are EFSEC and the Governor, not the Port. *King County*, 122 Wn.2d at 664, n.9, 860 P.2d 1024. The contingent nature of the lease merely highlight the fact that those decision makers will have to

approve or deny the project against the backdrop of a detailed lease that promises millions of dollars in revenue to a Washington public body. And as described above, the Port is incentivized, required, and specially positioned to influence EFSEC to approve the crude oil terminal.

Finally, the *Magnolia Neighborhood Planning Council v. City of Seattle* case spoke directly to the "snowballing" issue. 155 Wn. App. 305, 317, 230 P.3d 190 (2010). The Port is correct that the *Magnolia* court decided that the city's plan for residential development was an action subject to SEPA, and therefore invalid. (Port's Br. p.45.) Nevertheless, Riverkeeper's citation to *Magnolia* (Riverkeeper's Opening Br. p.39) remains appropriate because the *Magnolia* court went on to explain that the plan was also "precisely the type of government decision that would have [a] 'snowballing effect' . . . if pushed through the . . . application process without SEPA review." *Id.* The Port's lease is no different; it was specifically designed to build momentum in favor of the crude oil terminal before completion of the EIS in violation of SEPA.

II. Conclusion

For the reasons above, this Court should reverse the Superior Court's decision and void the Port's lease, which was executed in violation of SEPA.

RESPECTFULLY SUBMITTED this 10th day of October, 2014.

By: _____

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CERTIFICATE OF SERVICE

I, Miles Johnson, declare under penalty of perjury of the laws of the United States, that I am a citizen of the United States, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on October 10, 2014, I caused the foregoing Appellants' Reply Brief to be served on the following by U.S. mail to the following addresses and by electronic service to the following email addresses:

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Appendix E

IN THE COURT OF APPEALS IN THE STATE OF WASHINGTON

DIVISION II

COLUMBIA RIVERKEEPER, and NORTHWEST ENVIRONMENTAL DEFENSE CENTER, Appellants, SIERRA CLUB, Plaintiff, vs. PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver USA Board of Commissioners President; BRIAN WOLFE, Port of Vancouver USA Board of Commissioners Vice President; and NANCY I. BAKER, Port of Vancouver USA Board of Commissioners Secretary, Respondents.	)	Case No. 46130-7-II

BEFORE THE HONORABLE

JUDGE BRADLEY MAXA

JUDGE LISA SUTTON

JUDGE JILL JOHANSON

June 25, 2015

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JUDGE JOHANSON: -- like to reserve some rebuttal time?

MR. FITE: Yes, Your Honor. I reserve three minutes for rebuttal.

JUDGE JOHANSON: Thank you.

MR. KNUTSEN: And good morning. If it please the Court, my name is Brian Knutsen. With me at counsel table is Miles Johnson. We are here on behalf of Columbia Riverkeeper and Northwest Environmental Defense Center. Plaintiffs below and appellants here.

The -- the decision to enter into a long-term lease for development of what would be the largest crude-by-rail terminal on the west coast to be constructed on the banks of the Columbia River near downtown Vancouver, Washington, is one of the most significant decisions the current commissioners will make in their tenure with the Board of Vancouver.

This is the very sort of decision for which the State Environmental Policy Act, or SEPA, was passed in order to ensure that there would be full evaluation and public disclosure of the human health and environmental impacts of a proposal before such significant decisions are made.

In contravention of this basic requirement of SEPA, the commissioners entered into a legally binding

lease before the Environmental Impact Statement that is being prepared for this proposal had even begun -- even begun, much less been completed.

JUDGE JOHANSON: I want to make sure I understand just the very basics about your argument. You're -- are you arguing that the port should have done their own SEPA review before the EFSLA review? Or I thought your argument was they just should have waited until after that review.

MR. KNUTSEN: That's correct, Your Honor. The Department of Ecology issues regulations to implement the SEPA processes. And the Department of Ecology has passed regulations called the Lead Agency Regulations that require when there are multiple agencies with decision-making authority for a project -- it's exceedingly common -- that one agency be designated the lead SEPA agency and that that agency prepare the only Environmental Impact Statement for the proposal.

The nonlead agencies that have decision-making authority over the project are required by regulation to adopt that Environmental Impact Statement, subject only to their authority or ability to supplement the Environmental Impact Statement with additional discussion to the extent it warrants it.

JUDGE JOHANSON: So you're not asking for -- that

the port should have done one in advance, but only should have waited to enter into the lease until after --

MR. KNUTSEN: That's correct.

JUDGE JOHANSON: -- the lead agency has conducted their Environmental Impact Statement?

MR. KNUTSEN: That's correct. And, in fact, the environmental -- I'm sorry, the Energy Facility Site Evaluation Council that implements EFSLA -- or the Energy Facility Site Locations Act -- has, in fact, adopted those lead agency regulations, clearly indicating its intent -- its belief that these lead agency procedures apply.

There's no reason that these regulations would be implemented if there wasn't instances like here where there are other agencies that have decision-making authority for projects like this that are subject to the Energy Facility Site Locations Act that are still required -- still subject to the Environmental Impact Statement requirements.

JUDGE MAXA: So what if Tesoro says, we're not even going to apply to the council until we have a lease in hand? Wouldn't you then have to have two EISs here? Isn't that your proposal?

MR. KNUTSEN: No, Your Honor. I think there would still be one -- I'm sorry, could you repeat the question?

JUDGE MAXA: Well, Tesoro says, look, until we have a binding lease, we're not going to go through the expense of actually applying for certification to the council. So under your position, then, the port would have to go ahead and do the full EIS before entering into that lease. Because Tesoro says, I'm not willing to wait. We're not willing to wait until we apply to the council. It's going to cost us millions of dollars to do that. We want a lease in hand.

Wouldn't that now violate everything EFSLA stands for? We're going to have two EISs? It's going to be delayed?

MR. KNUTSEN: So your question is whether or not the Port of Vancouver could decide on its own to go ahead and prepare an Environmental Impact Statement for the lease decision?

JUDGE MAXA: No. I hear you saying they'd be required to.

MR. KNUTSEN: If there are --

JUDGE MAXA: Because it's fine to say, well, yeah, if -- if the application to the council is contemporaneous with the lease negotiations, then sure, we can just wait until the council does its job. But what if that's -- the council -- there's no application before the council yet?

MR. KNUTSEN: Sure. Well, I certainly don't think that anything would preclude the Port of Vancouver from preparing its own Environmental Impact Statement.

JUDGE MAXA: But you're saying it's required; right?

MR. KNUTSEN: I'm saying --

JUDGE MAXA: They're required to.

MR. KNUTSEN: I'm saying the -- the regulations implementing the SEPA process require agencies to consolidate the SEPA processes and prepare one Environmental Impact Statement for proposals. And so the question is whether or not a lease could be drafted without an application to the Energy Facility Site Locations Act for a project that would be subject to that certification requirements.

I don't know the answer to that question, Your Honor. I'm not sure -- I don't think anything would preclude the Port of Vancouver from going through the SEPA process on its own, but it certainly wouldn't be efficient. And there's certainly other mechanisms for entities that want assurance to obtain those necessary assurances and still comply with SEPA.

An example would be the International Longshore House case where the City of Seattle and King County, we entered into a memorandum of understanding with a private

investor who was willing to spend lots of money to develop an arena. And that memorandum of understanding expressly deferred the City and the County's ultimate decision on whether or not to move forward with the public action and investment of public money to after the SEPA process.

And so I think there's certainly ways that assurances can be made without violating the fundamental requirement of SEPA, the decisions that bind an agency not incurred before the SEPA process.

I'd like to talk a little bit about the first issue before the Court, whether or not the exemption of the Energy Facility Site Locations Act applies to the Port of Vancouver's leasing decision. I'd like to look at the language of this exemption. This is on page 16 of the appendix in plaintiffs' opening brief. This is RCW 80.50.180.

And the operative language there is, An action is exempted from the Environmental Impact Statement requirement to the extent it approves, authorizes, or permits the location, financing, or construction of a facility.

Now, the defendants have argued that this language plainly applies to the Port's leasing decision because the lease authorizes or approves the location or construction of the facility.

Plaintiffs have pointed out that this language needs to be interpreted consistently with -- with the statute as a whole, a point reiterated by the United States Supreme Court this morning.

JUDGE MAXA: Let me stop you there, though. Before going into other provisions or policy or whatever, wouldn't you agree that the plain language of 80.50.180 does apply here? I mean, this -- the Port has authorized the location of a facility.

MR. KNUTSEN: I would agree that if you were looking at this provision in isolation and not the rest of the statute, that authorizing the location of a facility would encompass a lease that authorizes a facility.

But I'd like to focus the Court's attention on RCW 80.50.120. It's on page 14 of the appendix to plaintiffs' brief. This provision is describing the effect of a certification issued by the council, the Energy Facility Site Evaluation Council. And so it's describing the preemptive scope of a certification issued by the council.

Subpart 1 provides that any certification shall bind the State and each of its subdivisions as to the approval of the site and the construction and operation of the proposed facility. Subpart 2 states that the certification shall authorize the person to construct and

operate the proposed facility, subject only to the conditions set forth in the certification.

Now, nobody would argue that when describing the effect of a certification, that these same terms authorize and approve the site and the construction extend to a lease authority -- extend to a leasing authority. If it did, it would essentially constitute eminent domain. It would essentially render the lease null and void upon certification because the provision provides that -- that the certification authorizes the construction subject only to the conditions set forth in the certification.

Instead, it's understood that the terms used here to authorize and to approve when describing the effect of the certification apply to regulatory actions, not to decisions to sell or lease public or even private land for that matter.

Now, defendants have asked the Court to give a very different and broader interpretation to these words in describing the scope of the SEPA exemption, but there's no basis for applying contradictory interpretations. The Court should construe these words consistently throughout the statute so as not to exclude the leasing decision from the Environmental Impact Statement requirement.

I would like to turn to the second issue here, whether or not the Port's lease violated the SEPA

prohibition on taking action that limits the choice of reasonable alternatives before an Environmental Impact Statement has been completed.

This -- this prohibition is -- is implemented through a regulation issued by the Department of Ecology. It has been adopted by the Energy Facility Site Evaluation Council. And therefore, it applies -- it's plain that it applies irrespective of how the Court decides on the first issue, the Environmental Impact Statement issue.

Now, reasonable alternatives within SEPA are defines to encompass those over which an agency with jurisdiction has the authority to control. So it's important to note that it's not limited to alternatives available to the lead SEPA agency. It applies to any agency with authority, which would include the Port of Vancouver here. And it would include the Port's -- it would include alternatives available to the Port such as to lease this property to a different use.

Now, the lease unquestionably limits the Port's alternatives. It defines the lease term as an initial 10-year term with another -- with options to extend for ten years. It defines the permitted use -- it limits the permitted use to loading and unloading the petroleum from rail and marine vessels and storage and blending of petroleum.

The Port is not free to reconsider these explicit lease terms in light of the impacts disclosed through the SEPA process.

JUDGE MAXA: But it clearly doesn't limit a council's -- a council's choices. It doesn't limit the governor's choices.

MR. KNUTSEN: That's correct.

JUDGE MAXA: So explain to me again why -- why that isn't what we're focusing on rather than whether it's limiting the Port's choices.

MR. KNUTSEN: Sure. And so this point is illustrated by another opinion from this Court, the Magnolia Neighborhood Planning Council decision from this Court. So they're a -- basic answer to your question is that the fact that another agency retains authority to authorize the proposal does not satisfy the Port's obligation not to limit the Port's alternatives before an Environmental Impact Statement has been completed.

And this point was illustrated by the Magnolia case that I just mentioned where the City of Seattle finalized the land redevelopment plan for land to be transferred from the federal government. The plan would become binding on the City as to the use of that property once it was approved by the federal government.

The City intended to defer its SEPA process to

some point in the future, and this court held that that violated SEPA because once adopted by the federal government, the plan would bind the City as to the use of this property, just as the lease at issue here will bind the Port of Vancouver as to the use of this property once approved by the governor.

JUDGE MAXA: Well, that's not an EFSLA case; right?

MR. KNUTSEN: That's correct.

JUDGE MAXA: So does -- do the provisions of EFSLA in terms of preempting and superseding, does that make a difference that we're dealing with EFSLA and not just general provisions?

MR. KNUTSEN: I see I'm out of time, but with your permission, I'll answer your question.

JUDGE MAXA: Go ahead.

MR. KNUTSEN: So Your Honor, EFSLA includes an exemption for the Environmental Impact Statement. That's the first issue before this Court. The second issue before this Court relates to an entirely different prohibition requirement of SEPA, and it's the prohibition on actions that limit the choice of reasonable alternatives.

And it's undisputed, and it hasn't been disputed all in the briefs, that that prohibition applies to the

Port in this proceeding. And, in fact, the Energy Facility Site Evaluation Council has adopted that regulation, that prohibition. So it's plain that it applies in proceedings in front of that council.

MR. FITE: Good morning, Your Honors. May it please the Court, may name is Lawson Fite. I represent the respondents the Port of Vancouver and its three commissioners. I'm joined at council table by my colleague David Markowitz.

There are two issues in this appeal. The first issue is the exempt -- exemption issue. And the second issue is the alternatives issue. I will address the exemption issue first and briefly and spend more time on the main issue, the alternatives issue.

The exemption issue following the plain text of RCW 80.50.180, the lease authorizes the location of the project in any local government action that authorizes, approves, or permits the location, financing, or construction of a project subject to the siting law is exempt from the EIS requirement.

The project here is subject to the siting law. It's a mandatory EFSEC application, unlike some other types of -- types of projects. The plain text includes a lease that authorizes the location of the project.

The -- the appellants, Riverkeeper, have raised

an argument that there should be a distinction between regulatory and proprietary types of decisions. There's no support for that in the text or the structure of the statute. And, in fact, the reference to funding is much more a proprietary action than leasing land might be. Or it's -- at least it's equivalent and it's even more explicit than authorizing the location, which this lease does.

There's also the argument that the preemptive power of the council extends to regulation and certification of these energy facilities throughout the state. And Riverkeeper argues that that -- that statute that's Subsection 110 should be read to control Subsection 180. But the legislature didn't write regulation and certification in Subsection 180. It wrote authorize, approve, or permit the location, financing, or construction. The legislature clearly knew how to write regulation or certification and decided not to.

Riverkeeper in oral argument today raised Subsection 120 of the energy siting law. And this -- this refers to the fact that the governor's decision is final and binding on the State, and that's absolutely true. And it goes to show how Subsection 180 plays together with the entire statutory scheme.

Subsection 180 consolidates all these local

decisions for review by the siting council. And the final decision of the governor, which will be -- which will be -- which will be made after a recommendation by the council, which itself occurs after publication of the final Environmental Impact Statement, that final decision of the governor is what controls.

And so to the extent that section -- Subsection 120 would override the lease that is recognized by the Port is recognized by the lease effect itself. Paragraph 11 of the lease says that it automatically incorporates any conditions that the governor or the energy siting council might impose.

And moving to the alternatives issue, there are four reasons that the lease here does not violate the regulatory prohibition on actions that would limit the choice of reasonable alternatives while an Environmental Impact Statement is being prepared.

The first reason is that it doesn't restrict any of the alternatives to be considered by the council or the governor during this siting process. This process is going to involve an adjudicative hearing in front of an administrative law judge. Riverkeeper is one of the interveners in that adjudicative hearing. The draft Environmental Impact Statement will be published this fall is the latest date for it and will be subject to public

comment.

After the final Environmental Impact Statement is published, then the council makes its recommendation and the governor has the power to accept, remand for modification, or reject the project.

And that -- the Kittitas case that's referred to in the briefs refer to the discretion of the governor having -- having nearly unlimited discretion -- or to be more precise of the language of the case that it's just -- there aren't a lot of standards to guide the governor's discretion.

JUDGE MAXA: So even if that's true, if it doesn't limit the council --

MR. FITE: Correct.

JUDGE MAXA: -- Riverkeeper says it doesn't matter. This regulation applies to any agency involved in the process. And if any agency's choices are limited, then it violates the regulation. What is your response to that?

MR. FITE: The response to that, Judge Maxa, is that an agency is permitted to proceed on a preferred course of action under the SEPA regulations. An agency is permitted to formulate a proposal so long as it doesn't take a step that limits the choice of reasonable alternatives during the environmental review process.

So this lease is -- because it is a contingent lease, it has a contingent precedent -- excuse me -- a condition precedent the final approval of the governor, it doesn't -- it doesn't commit any resources in advance of that environmental -- in advance of that environmental review being -- being taken.

And I'll contrast this with Magnolia. The Magnolia case from Division 1 where in a footnote the Court said it was convinced that the environmental review -- or that the City was paying only lip service to its obligations under SEPA.

Here the Port is paying an extraordinary amount of attention to its obligations. The council members were briefed by the chair of the siting council several weeks before they approved this lease. They were briefed on the complete process that a siting occupation will go through, and that's the exact process that is being followed here.

So to the extent that Riverkeeper would prefer the lease be executed at a later date, it's just not compatible with the process. The process says that any of these local actions that are taken are exempt from the Environmental Impact Statement requirement individually and they are reviewed as a whole in front of -- in front of the council and by the governor.

And that's -- that's by design. Well, before I

go into that point, I wanted to point out another distinction between this case and Magnolia. In Magnolia, there was never going to be any environmental review of the decision.

So the City said we've made this -- we've made this decision without going through SEPA review, but it's not a final decision because it's subject to someone else's review. Here, the Court says we've made a preliminary decision, it's subject to final environmental review, which is going to occur, which is underway, and any binding effect that the lease might have does not occur until after that review is completed.

The lease has as a condition precedent a completion not just of the Environmental Impact Statement, but the issuance of all the permits. So for the city in Magnolia -- Magnolia said we're not making a final decision, it's somebody else, but there was never going to be environmental review.

This case, the Port makes a preliminary decision, it's reviewed in a consolidated manner, and then -- then a final decision occurs well after the publication of the Environmental Impact Statement.

JUDGE JOHANSON: I have a question. I just want to make sure that I understand this. Because you're agreeing, I think, that the limit that you can't -- the

prohibition against limiting reasonable alternative does apply to any agency, then? I mean, it does apply to the Port here?

MR. FITE: Yes. Yes.

JUDGE JOHANSON: So it does apply to the Port. It's not -- not just looking at the council?

MR. FITE: Right. But the -- the reasonable alternatives -- this is -- this is perhaps where Riverkeeper and the Port disagree is that the reasonable alternatives are defined in the Clark Public Utilities district case as those alternatives that it could achieve the objectives of the project but at a lower environmental cost.

And so the restriction on reasonable -- on a choice of alternatives is alternatives to the project as proposed, being part of a proposal for a project. And SEPA regulations also say that an agency may select a preferred alternative, may proceed -- it just simply can't predetermine the outcome of the environmental analysis.

And so that's why these type of conditional agreements conditioned on environmental review have been consistently approved by the federal courts under NEPA. The Conner v. Burford case in particular. And Conner relied on a case that's very interesting, Sierra -- Sierra Club v. --

JUDGE JOHANSON: I know you're probably going down, you know, a very important --

MR. FITE: Yes.

JUDGE JOHANSON: -- fact, but I kind of -- I had a follow-up question --

MR. FITE: Yes.

JUDGE JOHANSON: -- to the first one.

MR. FITE: Oh. Yes, certainly.

JUDGE JOHANSON: And it's probably really basic, and I've probably now forgotten it. But so it seemed to me that the Port was bound to that location because they've given up any control of where it's going to be located or if they entered the lease because they've given all that control to -- over to the council and the governor.

I mean, because if they approve it all and with all -- whatever mitigations, et cetera, the Port is bound to go forward with that lease; is that correct?

MR. FITE: There are -- this goes to the post-review contingencies that we've identified. So the --

JUDGE JOHANSON: I take it there wasn't an easy answer for that one.

MR. FITE: Well, I would disagree that -- no, they're not -- they're not bound because of the

post-review contingencies.

JUDGE JOHANSON: Okay.

MR. FITE: So that's -- that's the answer.

JUDGE JOHANSON: That's good. Thank you for a short one. You can explain it, but I appreciate that.

MR. FITE: Yes. I didn't mean to -- didn't mean to confuse the issue, Your Honor.

So these post-review contingencies, they're contained in Sections 2D, Exhibit J, and Paragraph 30 of the lease. They require Tesoro to submit operation instruction plans, safety plans to the Port for the Port's review and approval. And part of what will happen here is this is implementing what the governor -- governor does.

I want to note that the governor and the council have the ability to consider and recommend a different site. They -- part of the alternatives analysis will include potentially -- I don't know -- there's nothing in the record as to what they're going to be -- a draft hasn't been published, but it will include alternative sites either within the Port property or other cities. It will also include the no-action alternative.

To address briefly the idea that the Port could have entered into a memorandum of understanding, something along those lines. From a SEPA perspective, there's very little difference. This lease preserves the no-action

alternative.

It makes sure that no earth will be moved. No construction will begin. The tenant does not have possession until all the permits are granted. And that's going to be, again, well after environmental review is completed.

JUDGE SUTTON: And what part of the lease are you relying upon for that?

MR. FITE: That is -- Judge Sutton, that is Section 2 -- Paragraph 2D, the conditions precedent, which require the -- obtaining all permits, licenses, and approvals for the project.

The design of this process is that the governor makes a final decision taking into account statewide considerations. The statute was enacted in the 1970s at a time when concerns about obtaining energy sources were fairly high. It allows for statewide consideration and it prevents a piece-by-piece consideration of a project like this that could have statewide impact.

The siting council has already, for example, held a -- held a meeting in Spokane. They are -- intend to hold their adjudicative hearing in Vancouver. And by consolidating the review of the governor, the legislature has directed that these decisions be made on a statewide basis based on statewide policies. And so it swoops up,

basically, all the local decision-making, including the lease. And then has an adjudicative hearing involving every environmental -- every agency of the state with environmental jurisdiction.

So this lease complies with that process. And to the extent that Riverkeeper doesn't like the lease or believes it should have been done in a different way, it's really arguing with the process that the legislature has established. And so the Port has followed the process and it should be -- it should be held to have complied with SEPA due to that.

I want to point out one case that Conner v. Burford relied on which was Sierra Club v. FERC where it was permissible to issue a preliminary permit subject to an approval by another agency. This is core NEPA law in the Ninth Circuit. And that's really analogous here, that it's a preliminary conditional approval.

It doesn't create inertia or create pressure on the governor, but it facilitates this process. And as a practical matter, it allows Tesoro-Savage to know what the economics of the project are going to be and to have some assurance that it can go through this multi-year process where we're already two years in and access the site later. That complies with the structure text of the

statute and with the State policy, thus the Superior Court should be (inaudible).

And I welcome any further questions.

JUDGE JOHANSON: Thank you.

MR. FITE: Thank you, Your Honor.

JUDGE JOHANSON: I'm interested in having you respond to his response to my question that this does not -- the lease does not limit the Port's reasonable alternatives because of -- I think, if I got this correct -- because of the post-review contingencies.

MR. KNUTSEN: Sure, Your Honor. Thank you.

The appellants strongly disagree with that. There are a couple of different, what they call, post-review contingencies that are in the lease. The two, I think, that they sort of focused on, one is a requirement to approve the final facility operations and safety plan. That is somewhere towards the back of the lease. And the other one is they're also required to agree upon the final legal boundaries of the premises.

I'd say it's somewhat unclear exactly the extent of authority that they've retained by deferring their approval of these final details of the lease. I'd call them that, they're final details.

In fact, the lease requires the Port -- this is condition -- I'm sorry, Paragraph 2D of the lease --

obligates the Port to work diligently with the developers to pursue all necessary approvals required for the development and construction of the facility for the permitted use, so they bound themselves to work diligently to finalize these final little details, these final little approvals.

They certainly haven't retained their authority to go back and renegotiate the explicit written terms of the lease. So we would -- we would strongly disagree with that.

With my 43 seconds here remaining, I'd like to go back to the original question from Judge Maxa. I've gone back and reviewed some of the lead agency regulations for SEPA. And this WAC 197-11-938. It specifies that for all government actions relating to energy facilities for which certification is required under EFSLA, the Energy Facility Site Locations Act, the lead agency shall be the Energy Facility Site Evaluation Council.

So it appears from this regulation that even if the -- and it appears that EFSEC would be required to be the lead agency for SEPA, even if the -- they -- under any process they move forward.

JUDGE MAXA: Can I ask again about the reasonable alternatives? And I'm looking at 071 which is the SEPA regulation. And it says, No action shall be

taken by a governmental agency that would limit the choice of reasonable alternatives. But it doesn't talk about whose reasonable alternatives. It doesn't say whether we're talking about the Port's reasonable alternatives or the council's reasonable alternatives.

So where do we get that answer?

MR. KNUTSEN: And so we've cited two different sources, Your Honor, in our briefs. The first is WAC 197-11-786. And this defines reasonable alternatives for purposes of SEPA. The second one was the SEPA handbook issued by the Washington Department of Ecology. And ecology is given deference for interpreting SEPA.

The first -- the first citation I mentioned, the WAC, defines reasonable alternatives to encompass those over which an agency with jurisdiction has the authority to control. And so it's not limited to the lease (inaudible) the agency.

Unless there's no further questions --

JUDGE MAXA: Thank you.

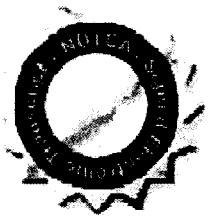
JUDGE JOHANSON: Thank you.

(End of transcription)

CERTIFICATE

I, Nicole F. Croxford, a Certified Court Reporter for the State of Washington and California and a Shorthand Reporter and Notary Public for the State of Oregon, do hereby certify that the foregoing recorded testimony was taken down by me in stenotype from an electronic audio file and transcribed through computer-aided transcription; and that the foregoing transcript constitutes a transcript prepared to the best of my ability.

Witness my hand in Portland, Oregon, this 8th day of October, 2015.



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