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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. _____

Court of Appeals No. 46130-7-II

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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS.

The Petitioners are Columbia Riverkeeper and Northwest Environmental Defense Center (collectively, "Riverkeeper"). Riverkeeper was a plaintiff in the original action before the Clark County Superior Court and the appellant in Division II of the Court of the Appeals.

II. COURT OF APPEALS DECISION.

Riverkeeper seeks review of the published opinion terminating review issued by the Court of Appeals, Division II, on August 25, 2015, in *Columbia Riverkeeper v. Port of Vancouver USA*, a copy of which is appended hereto as Appendix A.

III. ISSUE PRESENTED FOR REVIEW.

Regulations implementing the State Environmental Policy Act ("SEPA") prohibit agencies from taking actions that limit the choice of reasonable alternatives on a proposal before the preparation of an environmental impact statement ("EIS"). For a project subject to the Energy Facilities Site Locations Act ("EFSLA"), do SEPA's regulations prohibit actions that would limit the alternatives available to any agency with jurisdiction over the project?

IV. STATEMENT OF THE CASE.

The Port of Vancouver USA ("Port") entered into a long-term binding lease wherein the Port consented to development of the nation's

largest crude oil by rail terminal on Port property. The terminal is subject to EFSLA, and SEPA regulations therefore require the Energy Facility Site Evaluation Council ("EFSEC") prepare the EIS evaluating and disclosing environmental impacts. However, the Port negotiated and executed its lease before the EIS was completed. The Court of Appeals ruled that the Port's lease, issued without the benefit of SEPA review, did not violate SEPA's prohibition on limiting alternatives because the lease did not limit the choice of alternatives available to EFSEC or the governor. The Court of Appeals ruled that actions limiting the Port's alternatives prior to the EIS are irrelevant. This position was not argued by the parties and is inconsistent with the Department of Ecology's ("Ecology") SEPA regulations, which are entitled to substantial deference.

A. Statutory Framework.

1. The 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. SEPA requires agencies to integrate environmental concerns into their decision making processes by studying and explaining environmental consequences before decisions are made. *See Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 117–18 (1973).

SEPA requires that State agencies and local governments prepare, for any major action significantly affecting the quality of the environment, 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). This detailed statement is known as an EIS. *See* RCW 43.21C.031(1).

Ecology promulgates regulations to implement SEPA, RCW 43.21C.110, and such regulations are to be "accorded substantial deference." RCW 43.21C.095. Ecology's SEPA regulations provide that, where more than one agency has decision-making authority over a project, one agency is designated the "lead" SEPA agency responsible for preparing the EIS. *See* WAC 197-11-050(2)(b), -055(5), *and* -922 *through* -948. Other agencies must use the lead agency's EIS when making their own decisions, subject to limited exceptions not relevant here. WAC 197-11-600(3)(c). Ecology's regulations further provide that:

> Until the responsible official issues a...final [EIS], no action concerning the proposal shall be taken by a

> governmental agency that would...[l]imit the choice of reasonable alternatives.

WAC 197-11-070(1)(b). Ecology defines "reasonable alternative" as:

> [A]n 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.

WAC 197-11-786. Ecology further defines "agency with jurisdiction" to mean:

> [A]n agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal).

WAC 197-11-714(3).

2. <u>The Energy Facilities Site Locations Act.</u>

EFSLA regulates projects that implicate substantial public interests—oil refineries, oil terminals, and nuclear power plants. *See* RCW 80.50.020(12)(a) *through* (f). The statute applies to oil terminals "which will have the capacity to receive more than an average of fifty thousand barrels per day..." *See* RCW 80.50.020(12)(d).

EFSLA created EFSEC—an agency consisting of a chair person appointed by the governor, the heads of several State agencies, and other public officials—to administer a regulatory certification process. *See*

RCW 80.50.030. After reviewing an application for a large energy facility, EFSEC recommends that the governor either certify the project under EFSLA or reject the project. RCW 80.50.100(1)(a). If certified, the applicant may construct and operate the energy facility subject to the terms set forth in the certification, which acts "in lieu of any permit, certificate, or similar document required by any department, agency, division, bureau, board, or political subdivision of this state, which a member of [EFSEC] or not." RCW 80.50.120(3). EFSLA thus preempts the "regulation and certification" of facilities subject to the statute. *See* RCW 80.50.110(2). However, nothing in EFSLA gives EFSEC the power to preempt real estate agreements or to exercise eminent domain.

EFSLA exempts certain actions taken on an energy project subject to the statute, other than those of EFSEC, from SEPA's EIS requirement. RCW 80.50.180 (action exempt to the extent it "approves, authorizes, [or] permits...the location, financing or construction" of the project). Ecology's regulations specify that EFSEC is the lead SEPA agency for projects subject to EFSLA. WAC 197-11-938(1). EFSEC adopted that regulation and Ecology's regulations prohibiting actions that limit reasonable alternatives before an EIS is complete and defining "reasonable alternative." WAC 463-47-020 (adopting WAC 197-11-070 and -786).

B. The Port's Lease for a Crude-by-Rail Terminal.

A newly created joint venture between Tesoro Corporation and Savage Companies ("Tesoro-Savage") proposes to develop the largest crude-by-rail terminal in North America on public property along the shore of the Columbia River near downtown Vancouver, Washington. *See* CP 76, 89, 167. The facility would receive up to 360,000 barrels of crude oil daily. CR 162, 166. The oil would arrive at the facility on an average of four trains each day, each consisting of 120 tanker cars. CP 163. The terminal would store up to two million barrels of crude oil in large above-ground tanks before loading it onto tanker ships for transport down the Columbia River and over the Columbia River bar. *See* CP 162, 166.

The Port entered into a binding lease with Tesoro-Savage establishing legal rights and obligations for the development of the crude oil terminal on October 22, 2013. *See* CP 269–697.[1] This was before the SEPA process to evaluate and publicly disclose the project's impacts had even begun.

The lease prescribes the permitted use as a terminal that will load and unload oil by rail and marine vessels and store and blend petroleum

[1] The Port first voted to approve the lease on July 23, 2013, but then voted again in October in an effort to "cure" violations of the Open Public Meetings Act. *See* CP 43–44.

products. CP 277. The term is ten years from commencement of terminal operations with two options to extend for five years each. *See* CP 274.

The lease includes a preliminary description of the terminal and requires the Port and Tesoro-Savage to "work diligently and in good faith to . . . develop and approve depictions and legal descriptions of the Final Premises . . . ." CP 273–74, 281. The lease sets insurance requirements, which require only $25 million in pollution liability insurance for what would be the nation's largest crude-by rail facility. *See* CP 277–78, 309–10. The lease establishes procedures for evaluating and remediating environmental contamination at the conclusion of the lease. CP 300–01.

The lease conditions Tesoro-Savage's right to develop the terminal on obtaining "all necessary licenses, permits and approvals...for the Permitted Use"—namely, certification under EFSLA. *See* CP 281. Further, the lease provides that "a final Facility and Safety Plan shall be mutually approved [by the Port and Tesoro-Savage] prior to operation of the Facility." CP 330. However, the lease obligates the Port to "work diligently and in good faith [with Tesoro-Savage] to pursue all necessary licenses, permits, and approvals required for the development and construction of the Facility for the Permitted Use." CP 281.

EFSEC determined that the project is likely to have a significant impact on the environment, triggering the need for an EIS. CP 167.

EFSEC is the lead SEPA agency preparing the EIS for the oil terminal. *Id.* The initial SEPA hearings were scheduled for October 28 and 29, 2013—after the Port executed the lease. *See* CP 166. The SEPA process is ongoing.

C. Proceedings Below.

Riverkeeper filed a complaint on October 2, 2013, alleging violations of the Open Public Meetings Act ("OPMA") stemming from, *inter alia*, the Port excluding the public from deliberations on the lease. *See* CP 9–10, 13. Riverkeeper amended its pleadings on October 31, 2013, to allege two SEPA violations: (1) that the Port violated SEPA by executing the lease before the EIS was complete; and (2) by taking an action, in the form of the lease, that limits the choice of reasonable alternatives before completion of the EIS. CP 14–15.

The Port moved for summary judgment on all claims on December 2, 2013. *See* CP 32–71. Regarding the first SEPA claim, the superior court held that the Port did not violate SEPA because EFSLA exempts the lease from the EIS requirement. CP 1012. On the second SEPA claim, the Port argued that it did not violate the prohibition on actions that limit alternatives because "the Port retains discretion to require modifications as a result of information that is revealed during the SEPA process." CP

971.[2] Specifically, the Port contended that it retains discretion to approve construction plans, modify insurance requirements, and approve the safety and operations plan. CP 970–71. The superior court agreed with the Port, finding that "contingencies contained in the lease ensure that...[it] does not limit the reasonable range of alternatives..." CP 1012.[3]

The superior court granted a CR 54(b) motion filed by Riverkeeper and entered final judgment on the SEPA claims, allowing immediate appeal. CP 1016. The superior court noted that the issues "presented [by the SEPA claims] are of substantial public importance" and that "[t]he proposed crude oil terminal . . . has drawn the attention of a wide variety of Washington agencies, interest groups, and citizens." *Id.*

The Court of Appeals affirmed summary judgment in favor of the Port. Appendix A, pp. 2, 19. The Court of Appeals agreed with the superior court on the first SEPA claim, finding that EFSLA exempts the lease from the EIS requirement. *Id.* at 5–12.

On the second SEPA claim, the Court of Appeals ruled that, for projects subject to EFSLA, SEPA only prohibits actions that limit the

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[2] The Port also argued that the lease does not limit the choice of alternatives available to EFSEC. *See* CP 63, 969–70. Riverkeeper does not contest that point in this Petition. *See* CP 63, 969–70.

[3] The superior court granted Riverkeeper's CR 56(f) request for a continuance of the Port's summary judgment motion on the OPMA claims to allow for discovery. CP 1012.

alternatives available to EFSEC and that any limitations on alternatives available to the Port are immaterial. *Id.* at 16–17. The Court of Appeals arrived at this holding by first finding the SEPA regulation codified at WAC 197-11-070(1)(b) ambiguous as to which agency's alternatives cannot be limited. *Id.* at 15–16. The Court of Appeals then noted that EFSLA vests "all authority regarding certification of energy facilities with [EFSEC] and the governor." *Id.* at 17. The Court of Appeals resolved the apparent ambiguity in the SEPA regulation by applying the principle of statutory construction under which precedence is given to the more specific of two conflicting provisions. *Id.* at 16–17.

The construction adopted by the Court of Appeals—that SEPA only prohibits actions that limit alternatives available to EFSEC—was never argued by the parties.[4, 5] Such a construction conflicts with Ecology's interpretations of "reasonable alternative" and "agency with jurisdiction." Further, the decision misapplied this Court's statutory construction precedents because there is no conflict between SEPA and EFSLA regulatory or statutory provisions. If the ambiguity was not

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[4] As noted, the Port argued that it retained sufficient post-EIS discretion over the proposal such that it had not unlawfully limited its alternatives. CP 970–71.

[5] The Court of Appeals therefore should not have ruled in this manner without requesting supplemental briefing. *See* RAP 12.1.

resolved by Ecology's SEPA regulations, the Court of Appeals should have addressed the matter consistent with the Legislature's direction "that, to the fullest extent possible...[t]he policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in [SEPA]..." RCW 43.21C.030(1).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

This Court should review the Court of Appeals' holding that a Port can commit to hosting a large energy facility on public property without evaluating or disclosing the impacts to the public. *See* Appendix A, pp. 15–17. Review should be accepted because of the substantial public interest raised by this issue. *See* RAP 13.4(b)(4). This Court should also accept review because the Court of Appeals' decision conflicts with existing precedent. *See* RAP 13.4(b)(1), (2).

A. The Public has a Substantial Interest in Local Officials Understanding Risks before Leasing Public Property for Large Energy Projects.

The public has a substantial interest in ensuring that local officials understand the consequences of their decisions, especially when such decisions relate to controversial and potentially dangerous energy facilities. SEPA recognizes, and was designed specifically to vindicate, this type of interest. *See Stempel*, 82 Wn.2d at 117–18 (by requiring consideration of environmental impacts before decisions are made, SEPA

attempts to shape the "future environment by deliberation, not default"); *see also King Cnty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 658–59 (1993). The Court of Appeals' decision undercuts SEPA's ability to protect that important public interest with respect to Tesoro-Savage's proposal and other pending proposals under EFSLA. This Court should therefore accept review. *See* RAP 13.4(b)(4).

Over the past decade, new technologies and rising energy prices precipitated an unprecedented level of fossil fuel extraction in central North America. Producers of crude oil, natural gas, coal, and liquefied petroleum gas increasingly seek to bring these fossil fuels to market through Washington's public ports. Communities across Washington now face 'pipelines on rails' headed toward Washington ports such as Vancouver, Longview, Grays Harbor, and Anacortes.[6] This headlong race to get new fossil fuels to market has resulted in catastrophic oil train derailments, spills, and explosions across North America.[7] Additionally, the toxic air pollution from new oil terminals, refineries, and diesel locomotives poses harm to thousands of Washingtonians.

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[6] Sightline Institute, *The Northwest's Pipeline on Rails*, p. 1 (2015) (online at: http://www.sightline.org/research/the-northwests-pipeline-on-rails/).
[7] Pipeline and Hazardous Materials Safety Administration, *Draft Regulatory Impact Analysis for Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, p. 2 (2014).

Faced with this rapid increase of fossil fuel shipping proposals—some of which are also subject to EFSEC review—port and other local officials must evaluate the benefits and risks of these projects. By virtue of land ownership, ports and cites have power to determine appropriate uses of public property and to require tenants mitigate their environmental impacts. Ports and cities across Washington are currently deciding whether, or under what conditions, to approve fossil fuel shipping and processing projects.[8]

When an energy facility proposed on port or city property does not trigger EFSEC's regulatory review, SEPA plays an important, and mandatory, role in the local agency's decision-making process. For instance, the Washington Shorelines Hearings Board invalidated the City of Hoquiam's attempt to approve a crude-by-rail terminal without preparing an EIS. *See Quinault Indian Nation*, S.H.B. Order No. 13-012c, pp. 14–38 (2013) (order on summary judgment). The City of Hoquiam, with Ecology's assistance, is preparing an EIS before deciding whether, and under what terms, to approve the oil terminal.

Ports have the same authority, and make precisely the same type of decisions, whether or not EFSEC conducts the regulatory review and site

[8] Sightline Institute, *The Northwest's Pipeline on Rails*, p. 2 (2015).

certification.[9] It is illogical that a port need not evaluate an EIS when deciding whether to host a large oil terminal (which triggers EFSLA) but a port *must* use an EIS to make the same decision about a smaller project. A port's authority, and the decision before it, are identical in both instances. SEPA exists to vindicate the public's interest in fully informed environmental decision-making at all levels of government. The Court of Appeals' opinion undercuts that public interest when it matters most: in the context of Washington's largest energy facilities.

Other Washington ports are preparing to make decisions similar to the lease at issue in this case. There are at least two energy projects currently proposed that will trigger EFSEC review; an oil refinery and a liquefied petroleum gas terminal, both proposed at the Port of Longview.[10] The Port of Longview will therefore soon decide whether, and under what terms, to allow these energy facilities to use public land and infrastructure. The Port of Longview's authority as a land owner presents the opportunity for that port to evaluate the impacts and disclose them to Longview residents prior to approving the projects. Nevertheless, the Court of

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[9] From a port's perspective, the only difference when ESFEC is involved is that EFSEC performs all the regulatory tasks that would otherwise get divvyed up between several State and local agencies.

[10] *See* Port of Longview website (last accessed Sep. 23, 2014): http://www.portoflongview.com/AboutThePort/ProjectsProposals/WatersideEnergy.aspx.

Appeals' opinion allows the Port of Longview to make these decisions before the completion of an EIS. Given the number and size of energy facilities proposed at Washington ports over the last decade, it is almost certain that more projects will fall into the SEPA loophole created by the Court of Appeals.

The facts of this case, by themselves, implicate substantial public interests. Tesoro-Savage proposes the nation's largest crude-by-rail terminal, located along the shore of the Columbia River near downtown Vancouver, Washington. *See* CP 76, 89, 167. The facility would receive up to 360,000 barrels of crude oil daily in four mile-long trains, each consisting of 120 tanker cars. CP 162, 163, 166. The terminal could store two million barrels of crude oil in above-ground tanks and load crude onto oil tankers that would traverse the Columbia River estuary and the Columbia River Bar—a hazardous waterway known as 'the graveyard of the Pacific.' *See* CP 162, 166. Tesoro-Savage's proposal and the Port's substantial role in it have "drawn the attention of a wide variety of Washington agencies, interest groups, and citizens." *See* CP 1016. Whether the Port can commit public property to Tesoro-Savage's project without even reading an EIS that discloses the risks and consequences is an issue of substantial public interest.

B. The Court of Appeals Misinterpreted WAC 197-11-070.

The Court of Appeals adopted an interpretation of SEPA's prohibition on actions that limit alternatives that conflicts with the plain meaning of Ecology's SEPA regulations and a previous Court of Appeals decision. This undermines the important public interest in having Ecology, Washington's expert agency charged with protecting the environment, implement SEPA and its underlying policies.

The Court of Appeals found that WAC 197-11-070(1)(b), Ecology's SEPA regulation prohibiting actions that limit the choice of reasonable alternatives, is ambiguous as to "*whose* choice cannot be limited." Appendix A, p. 16 (emphasis in original). The Court of Appeals thereafter adopted an interpretation of the regulation that it found "most reasonable." *Id.* at 16. Under that interpretation, limitations on alternatives available to agencies other than EFSEC are "irrelevant." *Id.* at 17. In doing so, the Court of Appeals ignored Ecology's regulatory definitions of "reasonable alternative" and "agency with jurisdiction" and a prior Court of Appeals' decision.

Ecology defined the term "reasonable alternative," as used in its own SEPA regulations, in a manner that resolves any ambiguity as to whose alternatives cannot be limited. Ecology defines "reasonable alternative[s]" to include:

> "those [alternatives] over which **an agency with jurisdiction** has authority to control impacts, either directly, or indirectly through requirement of mitigation measures."

WAC 197-11-786 (emphasis added). Ecology further defines "[a]gency with jurisdiction" to mean "an agency with authority to approve, veto, or finance all or part of a...proposal." WAC 197-11-714(3). Under these rules, "reasonable alternative[s]" are those available to any agency with jurisdiction to control impacts—not just the alternatives available to the lead SEPA agency or the agency with the most statutory authority over the project.

The Legislature "strongly declared" the State's environmental policies in SEPA. *See Stempel*, 82 Wn.2d at 117-18; *see also, e.g.,* RCW 43.21C.010 *and* .020. The Legislature charged Ecology—the State agency with the most expertise in environmental issues—with promulgating regulations to implement SEPA and explicitly directed that such regulations are to be "accorded substantial deference." RCW 43.21C.095, .110. Ecology exercised this authority in defining reasonable alternatives to include those available to *any* agency with jurisdiction, evincing Ecology's intent to prohibit actions that would limit the "reasonable alternatives" of *any* agency with jurisdiction to control project impacts.

The Port has jurisdiction over the public property that it manages and authority to control its tenants' environmental impacts. The choices before the Port while it was negotiating and executing the lease were therefore "reasonable alternative[s]" within the meaning of WAC 197-11-786. Under Ecology's definition of "reasonable alternatives," the Port was prohibited from taking actions that limit *its own* alternatives prior to issuance of the EIS. The Court of Appeals' decision is inconsistent with the plain language of Ecology's regulations and thereby undermines the Legislative intent that deference be given to Ecology in its implementation of SEPA. Review is therefore warranted under RAP 13.4(b)(4).

The decision also conflicts with another opinion from the Court of Appeals that held WAC 197-11-070(1)(b)'s prohibition applies against an agency that, like the Port, is not the lead SEPA agency and has no regulatory authority over a proposal. *See Pub. Utility Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 162–63 (2007). In that case, a public utility district had applied to Ecology for a permit to drill test wells as part of a larger groundwater development project. *Id.* at 156. Though Ecology would be the lead SEPA agency and decide whether the utility district's project conformed to Washington's water resources regulations, the utility district was nevertheless a

public agency with jurisdiction over the project. *Id.* at 162. Accordingly, the Court of Appeals there explained that the utility district could not limit its own "reasonable alternatives" before Ecology completed SEPA review without violating WAC 197-11-070(1)(b). *Id.* at 163. The conflict between the Court of Appeals' decisions in *Public Utility District* and this case further justifies this Court accepting review. *See* RAP 13.4(b)(2).

C. The Court of Appeals Misapplied Precedent.

The Court of Appeals also misapplied precedent from this Court. Review is therefore warranted under RAP 13.4(b)(1).

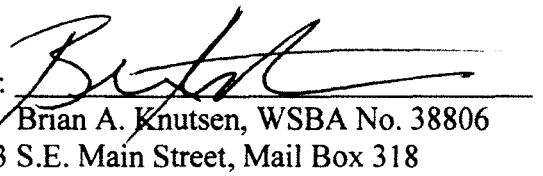
The Court of Appeals found Ecology's regulation ambiguous as to whose alternatives cannot be limited prior to completion of an EIS. Appendix A, pp. 15–16. The Court of Appeals purported to resolve the ambiguity using this Court's holding that, where two laws conflict, the more specific law controls. *Id.* at 16–17 (citing *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 309 (2008)). The Court of Appeals found that EFSLA, the "more specific statutory scheme," controls such that SEPA only prohibits actions prior to environmental review that limit the choices available to EFSEC and that any limits on the Port's alternatives are irrelevant. *Id.* at 16–17.

This was a misapplication of this Court's precedent. The principle of statutory construction that the Court of Appeals employed only applies when two conflicting provisions cannot be harmonized. *See, e.g., Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 309 ("...these two statutes present an apparent contradiction. A state agency cannot both preempt local laws and comply with such laws at the same time."); *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867 (1976) ("where concurrent general and special acts are *in pari materia* and cannot be harmonized, the latter will prevail...").

No such conflict exists here. While EFSEC is responsible for preparing the EIS and issuing a certification under EFSLA, such obligations in no way conflict with WAC 197-11-070(1)(b)'s requirement that the Port refrain from limiting its own alternatives prior to completion of the EIS. The Court of Appeals thus misapplied this Court's precedent by applying a principle of statutory construction used to resolve conflicts between statutory requirements where no such conflict exists.

RESPECTFULLY SUBMITTED this 24th day of September, 2015.

KAMPMEIER & KNUTSEN, PLLC

By: 
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APPENDIX A

Decision of the Court of Appeals

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

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[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.
MAXA, J.

We concur:

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

Sutton, J.
SUTTON, J.

APPENDIX B

Cited Statutory and Regulatory Provisions

Table of Contents

Statutes:

Regulations:

RCW 43.21C.010

Purposes.

The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and [to] stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

RCW 43.21C.020

Legislative recognitions — Declaration — Responsibility.

(1) The legislature, recognizing that a human being depends on biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of a human being's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (a) Foster and promote the general welfare; (b) create and maintain conditions under which human beings and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

RCW 43.21C.030

Guidelines for state agencies, local governments — Statements — Reports — Advice — Information.

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on the environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official 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;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available

resources;

(f) Recognize the worldwide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

RCW 43.21C.095

State environmental policy act rules to be accorded substantial deference.

The rules adopted under RCW 43.21C.110 shall be accorded substantial deference in the interpretation of this chapter.

RCW 43.21C.110

Content of state environmental policy act rules.

It shall be the duty and function of the department of ecology:

(1) To adopt and amend rules of interpretation and implementation of this chapter, subject to the requirements of chapter 34.05 RCW, for the purpose of providing uniform rules and guidelines to all branches of government including state agencies, political subdivisions, public and municipal corporations, and counties. The proposed rules shall be subject to full public hearings requirements associated with rule adoption. Suggestions for modifications of the proposed rules shall be considered on their merits, and the department shall have the authority and responsibility for full and appropriate independent adoption of rules, assuring consistency with this chapter as amended and with the preservation of protections afforded by this chapter. The rule-making powers authorized in this section shall include, but shall not be limited to, the following phases of interpretation and implementation of this chapter:

(a) Categories of governmental actions which are not to be considered as potential major actions significantly affecting the quality of the environment, including categories pertaining to applications for water right permits pursuant to chapters 90.03 and 90.44 RCW. The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment. The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review. An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter.

(b) Rules for criteria and procedures applicable to the determination of when an act of a branch of government is a major action significantly affecting the quality of the environment for which a detailed statement is required to be prepared pursuant to RCW 43.21C.030.

(c) Rules and procedures applicable to the preparation of detailed statements and other environmental documents, including but not limited to rules for timing of environmental review, obtaining comments, data and other information, and providing for and determining areas of public participation which shall include the scope and review of draft environmental impact statements.

(d) Scope of coverage and contents of detailed statements assuring that such statements are simple, uniform, and as short as practicable; statements are required to analyze only reasonable alternatives and probable adverse environmental impacts which are significant, and may analyze beneficial impacts.

(e) Rules and procedures for public notification of actions taken and documents prepared.

(f) Definition of terms relevant to the implementation of this chapter including the establishment of a list of elements of the environment. Analysis of environmental considerations under RCW 43.21C.030(2) may be required only for those subjects listed as elements of the

environment (or portions thereof). The list of elements of the environment shall consist of the "natural" and "built" environment. The elements of the built environment shall consist of public services and utilities (such as water, sewer, schools, fire and police protection), transportation, environmental health (such as explosive materials and toxic waste), and land and shoreline use (including housing, and a description of the relationships with land use and shoreline plans and designations, including population).

(g) Rules for determining the obligations and powers under this chapter of two or more branches of government involved in the same project significantly affecting the quality of the environment.

(h) Methods to assure adequate public awareness of the preparation and issuance of detailed statements required by RCW 43.21C.030(2)(c).

(i) To prepare rules for projects setting forth the time limits within which the governmental entity responsible for the action shall comply with the provisions of this chapter.

(j) Rules for utilization of a detailed statement for more than one action and rules improving environmental analysis of nonproject proposals and encouraging better interagency coordination and integration between this chapter and other environmental laws.

(k) Rules relating to actions which shall be exempt from the provisions of this chapter in situations of emergency.

(l) Rules relating to the use of environmental documents in planning and decision making and the implementation of the substantive policies and requirements of this chapter, including procedures for appeals under this chapter.

(m) Rules and procedures that provide for the integration of environmental review with project review as provided in RCW 43.21C.240. The rules and procedures shall be jointly developed with the department of commerce and shall be applicable to the preparation of environmental documents for actions in counties, cities, and towns planning under RCW 36.70A.040. The rules and procedures shall also include procedures and criteria to analyze planned actions under RCW 43.21C.440 and revisions to the rules adopted under this section to ensure that they are compatible with the requirements and authorizations of chapter 347, Laws of 1995, as amended by chapter 429, Laws of 1997. Ordinances or procedures adopted by a county, city, or town to implement the provisions of chapter 347, Laws of 1995 prior to the effective date of rules adopted under this subsection (1)(m) shall continue to be effective until the adoption of any new or revised ordinances or procedures that may be required. If any revisions are required as a result of rules adopted under this subsection (1)(m), those revisions shall be made within the time limits specified in RCW 43.21C.120.

(2) In exercising its powers, functions, and duties under this section, the department may:

(a) Consult with the state agencies and with representatives of science, industry, agriculture, labor, conservation organizations, state and local governments, and other groups, as it deems

advisable; and

(b) Utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies, organizations, and individuals, in order to avoid duplication of effort and expense, overlap, or conflict with similar activities authorized by law and performed by established agencies.

(3) Rules adopted pursuant to this section shall be subject to the review procedures of chapter 34.05 RCW.

RCW 80.50.020

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

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(12) "Energy plant" means the following facilities together with their associated facilities:

(a) Any nuclear power facility where the primary purpose is to produce and sell electricity;

(b) Any nonnuclear stationary thermal power plant with generating capacity of three hundred fifty thousand kilowatts or more, measured using maximum continuous electric generating capacity, less minimum auxiliary load, at average ambient temperature and pressure, and floating thermal power plants of one hundred thousand kilowatts or more suspended on the surface of water by means of a barge, vessel, or other floating platform;

(c) Facilities which will have the capacity to receive liquefied natural gas in the equivalent of more than one hundred million standard cubic feet of natural gas per day, which has been transported over marine waters;

(d) Facilities 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, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction;

(e) Any underground reservoir for receipt and storage of natural gas as defined in RCW 80.40.010 capable of delivering an average of more than one hundred million standard cubic feet of natural gas per day; and

(f) Facilities capable of processing more than twenty-five thousand barrels per day of petroleum or biofuel into refined products except where such biofuel production is undertaken at existing industrial facilities.

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RCW 80.50.030

Energy facility site evaluation council — Created — Membership — Support.

(1) There is created and established the energy facility site evaluation council.

(2)(a) The chair of the council shall be appointed by the governor with the advice and consent of the senate, shall have a vote on matters before the council, shall serve for a term coextensive with the term of the governor, and is removable for cause. The chair may designate a member of the council to serve as acting chair in the event of the chair's absence. The salary of the chair shall be determined under RCW 43.03.040. The chair is a "state employee" for the purposes of chapter 42.52 RCW. As applicable, when attending meetings of the council, members may receive reimbursement for travel expenses in accordance with RCW 43.03.050 and 43.03.060, and are eligible for compensation under RCW 43.03.250.

(b) The chair or a designee shall execute all official documents, contracts, and other materials on behalf of the council. The Washington utilities and transportation commission shall provide all administrative and staff support for the council. The commission has supervisory authority over the staff of the council and shall employ such personnel as are necessary to implement this chapter. Not more than three such employees may be exempt from chapter 41.06 RCW. The council shall otherwise retain its independence in exercising its powers, functions, and duties and its supervisory control over nonadministrative staff support. Membership, powers, functions, and duties of the Washington state utilities and transportation commission and the council shall otherwise remain as provided by law.

(3)(a) The council shall consist of the directors, administrators, or their designees, of the following departments, agencies, commissions, and committees or their statutory successors:

(i) Department of ecology;

(ii) Department of fish and wildlife;

(iii) Department of commerce;

(iv) Utilities and transportation commission; and

(v) Department of natural resources.

(b) The directors, administrators, or their designees, of the following departments, agencies, and commissions, or their statutory successors, may participate as councilmembers at their own discretion provided they elect to participate no later than sixty days after an application is filed:

(i) Department of agriculture;

(ii) Department of health;

(iii) Military department; and

(iv) Department of transportation.

(c) Council membership is discretionary for agencies that choose to participate under (b) of this subsection only for applications that are filed with the council on or after May 8, 2001. For applications filed before May 8, 2001, council membership is mandatory for those agencies listed in (b) of this subsection.

(4) The appropriate county legislative authority of every county wherein an application for a proposed site is filed shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the county which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

(5) The city legislative authority of every city within whose corporate limits an energy facility is proposed to be located shall appoint a member or designee as a voting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the city which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site.

(6) For any port district wherein an application for a proposed port facility is filed subject to this chapter, the port district shall appoint a member or designee as a nonvoting member to the council. The member or designee so appointed shall sit with the council only at such times as the council considers the proposed site for the port district which he or she represents, and such member or designee shall serve until there has been a final acceptance or rejection of the proposed site. The provisions of this subsection shall not apply if the port district is the applicant, either singly or in partnership or association with any other person.

RCW 80.50.100

Recommendations to governor — Expedited processing — Approval or rejection of certification — Reconsideration.

(1)(a) The council shall report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant.

(b) In the case of an application filed prior to December 31, 2025, for certification of an energy facility proposed for construction, modification, or expansion for the purpose of providing generating facilities that meet the requirements of RCW 80.80.040 and are located in a county with a coal-fired electric generating [generation] facility subject to RCW 80.80.040(3)(c), the council shall expedite the processing of the application pursuant to RCW 80.50.075 and shall report its recommendations to the governor within one hundred eighty days of receipt by the council of such an application, or a later time as is mutually agreed by the council and the applicant.

(2) If the council recommends approval of an application for certification, it shall also submit a draft certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended.

(3)(a) Within sixty days of receipt of the council's report the governor shall take one of the following actions:

(i) Approve the application and execute the draft certification agreement; or

(ii) Reject the application; or

(iii) Direct the council to reconsider certain aspects of the draft certification agreement.

(b) The council shall reconsider such aspects of the draft certification agreement by reviewing the existing record of the application or, as necessary, by reopening the adjudicative proceeding for the purposes of receiving additional evidence. Such reconsideration shall be conducted expeditiously. The council shall resubmit the draft certification to the governor incorporating any amendments deemed necessary upon reconsideration. Within sixty days of receipt of such draft certification agreement, the governor shall either approve the application and execute the certification agreement or reject the application. The certification agreement shall be binding upon execution by the governor and the applicant.

(4) The rejection of an application for certification by the governor shall be final as to that

application but shall not preclude submission of a subsequent application for the same site on the basis of changed conditions or new information.

RCW 80.50.110

Chapter governs and supersedes other law or regulations — Preemption of regulation and certification by state.

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

RCW 80.50.120

Effect of certification.

(1) Subject to the conditions set forth therein any certification shall bind the state and each of its departments, agencies, divisions, bureaus, commissions, boards, and political subdivisions, whether a member of the council or not, as to the approval of the site and the construction and operation of the proposed energy facility.

(2) The certification shall authorize the person named therein to construct and operate the proposed energy facility subject only to the conditions set forth in such certification.

(3) The issuance of a certification shall be in lieu of any permit, certificate or similar document required by any department, agency, division, bureau, commission, board, or political subdivision of this state, whether a member of the council or not.

RCW 80.50.180

Proposals and actions by other state agencies and local political subdivisions pertaining to energy facilities exempt from "detailed statement" required by RCW 43.21C.030.

Except for actions of the council under chapter 80.50 RCW, 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" 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.

WAC 197-11-050

Lead agency.

(1) A lead agency shall be designated when an agency is developing or is presented with a proposal, following the rules beginning at WAC 197-11-922.

(2) 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; and

(b) Preparation and content of environmental impact statements.

WAC 197-11-055

Timing of the SEPA process.

(1) **Integrating SEPA and agency activities.** The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

(2) **Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.

(i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

(ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

(b) Agencies shall identify the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis. Agencies may also organize environmental review in phases, as specified in WAC 197-11-060(5).

(c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070).

(d) A GMA county/city is subject to additional timing requirements (see WAC 197-11-310).

(3) **Applications and rule making.** The timing of environmental review for applications and for rule making shall be as follows:

(a) At the latest, the lead agency shall begin environmental review, if required, when an application is complete. The lead agency may initiate review earlier and may have informal conferences with applicants. A final threshold determination or FEIS shall normally precede or accompany the final staff recommendation, if any, in a quasi-judicial proceeding on an application. Agency procedures shall specify the type and timing of environmental documents that shall be submitted to planning commissions and similar advisory bodies (WAC 197-11-906).

(b) For rule making, the DNS or DEIS shall normally accompany the proposed rule. An FEIS, if any, shall be issued at least seven days before adoption of a final rule (WAC 197-11-460(4)).

(4) **Applicant review at conceptual stage.** In general, agencies should adopt procedures for environmental review and for preparation of EISs on private proposals at the conceptual stage rather than the final detailed design stage.

(a) If an agency's only action is a decision on a building permit or other license that requires detailed project plans and specifications, agencies shall provide applicants with the opportunity for environmental review under SEPA prior to requiring applicants to submit such detailed project plans and specifications.

(b) Agencies may specify the amount of detail needed from applicants for such early environmental review, consistent with WAC 197-11-100 and 197-11-335, in their SEPA or permit procedures.

(c) This subsection does not preclude agencies or applicants from preliminary discussions or exploration of ideas and options prior to commencing formal environmental review.

(5) An overall decision to proceed with a course of action may involve a series of actions or decisions by one or more agencies. If several agencies have jurisdiction over a proposal, they should coordinate their SEPA processes wherever possible. The agencies shall comply with lead agency determination requirements in WAC 197-11-050 and 197-11-922.

(6) To meet the requirement to insure that environmental values and amenities are given appropriate consideration along with economic and technical considerations, environmental documents and analyses shall be circulated and reviewed with other planning documents to the fullest extent possible.

(7) For their own public proposals, lead agencies may extend the time limits prescribed in these rules.

WAC 197-11-070

Limitations on actions during SEPA process.

(1) 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:

(a) Have an adverse environmental impact; or

(b) Limit the choice of reasonable alternatives.

(2) In addition, certain DNSs require a fourteen-day period prior to agency action (WAC 197-11-340(2)), and FEISs require a seven-day period prior to agency action (WAC 197-11-460(4)).

(3) In preparing environmental documents, there may be a need to conduct studies that may cause nonsignificant environmental impacts. If such activity is not exempt under WAC 197-11-800(17), the activity may nonetheless proceed if a checklist is prepared and appropriate mitigation measures taken.

(4) This section does not preclude developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection (1).

WAC 197-11-600

When to use existing environmental documents.

(1) This section contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA.

(2) An agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents.

(3) Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:

(a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may assume lead agency status (WAC 197-11-340 (2)(e) and 197-11-948).

(b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

(c) For EISs, the agency concludes that its written comments on the DEIS warrant additional discussion for purposes of its action than that found in the lead agency's FEIS (in which case the agency may prepare a supplemental EIS at its own expense).

(4) Existing documents may be used for a proposal by employing one or more of the following methods:

(a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or

(b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.

(c) An addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.

(d) Preparation of a SEIS if there are:

(i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or

(ii) New information indicating a proposal's probable significant adverse environmental impacts.

(e) If a proposal is substantially similar to one covered in an existing EIS, that EIS may be adopted; additional information may be provided in an addendum or SEIS (see (c) and (d) of this subsection).

WAC 197-11-714

Agency.

(1) "Agency" means any state or local governmental body, board, commission, department, or officer authorized to make law, hear contested cases, or otherwise take the actions stated in WAC 197-11-704, except the judiciary and state legislature. An agency is any state agency (WAC 197-11-796) or local agency (WAC 197-11-762).

(2) "Agency with environmental expertise" means an agency with special expertise on the environmental impacts involved in a proposal or alternative significantly affecting the environment. These agencies are listed in WAC 197-11-920; the list may be expanded in agency procedures (WAC 197-11-906). The appropriate agencies must be consulted in the environmental impact statement process, as required by WAC 197-11-502.

(3) "Agency with jurisdiction" means an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal). The term does not include an agency authorized to adopt rules or standards of general applicability that could apply to a proposal, when no license or approval is required from the agency for the specific proposal. The term also does not include a local, state, or federal agency involved in approving a grant or loan, that serves only as a conduit between the primary administering agency and the recipient of the grant or loan. Federal agencies with jurisdiction are those from which a license or funding is sought or required.

(4) If a specific agency has been named in these rules, and the functions of that agency have changed or been transferred to another agency, the term shall mean any successor agency.

(5) For those proposals requiring a hydraulic project approval under RCW 75.20.100, both the department of game and the department of fisheries shall be considered agencies with jurisdiction.

WAC 197-11-786

Reasonable alternative.

"Reasonable alternative" means 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 WAC 197-11-440(5) and 197-11-660.) Also see the definition of "scope" for the three types of alternatives to be analyzed in EISs (WAC 197-11-792).

WAC 197-11-938

Lead agencies for specific proposals.

Notwithstanding the lead agency designation criteria contained in WAC 197-11-926 through 197-11-936, the lead agency for proposals within the areas listed below shall be as follows:

(1) For all governmental actions relating to energy facilities for which certification is required under chapter 80.50 RCW, the lead agency shall be the energy facility site evaluation council (EFSEC); however, for any public project requiring such certification and for which the study under RCW 80.50.175 will not be made, the lead agency shall be the agency initiating the project.

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CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the State of Washington, that I am co-counsel for Petitioners Columbia Riverkeeper and Northwest Environmental Defense Center and that on September 24, 2015, I caused the foregoing Petition for Review to be served on the following in the manner indicated:

Lawson Fite Kristin Asai David Markowitz Lynn Gutbezahl 1211 SW Fifth Ave., Suite 3000 Portland, OR 97204 lawsonfite@markowitzherbold.com lawsonfite@gmail.com kristinasai@markowitzherbold.com davidmarkowitz@markowitzherbold.com lynngutbezahl@markowitzherbold.com	❒ Messenger (hand delivery) ❒ U.S. Mail (postage prepaid) ✓ E-mail (per agreement with counsel)

Brian A. Knutsen, WSBA # 38806