Supreme Court No. 1028938
[Court of Appeals No. 56938-8-II]
[Pierce County Superior Court No. 21-2-08733-9]

SUPREME COURT
STATE OF WASHINGTON

ADVOCATES FOR A CLEANER TACOMA, SIERRA CLUB; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON PHYSICIANS FOR SOCIAL RESPONSIBILITY; STAND.EARTH, AND THE PUYALLUP TRIBE OF INDIANS,

Petitioners,

v.

PUGET SOUND CLEAN AIR AGENCY; PUGET SOUND ENERGY, INC.,

Respondents.

PUGET SOUND ENERGY, INC.'S ANSWER TO PETITIONER PUYALLUP TRIBE OF INDIANS' PETITION FOR REVIEW

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I. INTRODUCTION

The Puyallup Tribe of Indians (Tribe) offers no valid reasons for this Court to review an unpublished portion of the decision of the Court of Appeals (the Opinion),[1] which appropriately applied longstanding principles of administrative deference in upholding the decision of the Pollution Control Hearings Board (PCHB). Despite its bold claims that the Court of Appeals "created [a] new doctrine" preventing air permitting agencies from considering statutorily mandated factors when making a Best Available Control Technology (BACT) determination, Tribe Pet. at 13, the decision below is a routine review of findings made by the PCHB in its review of a permitting action by the Puget Sound Clean Air Agency (Agency).

The Tribe inappropriately relies on inapposite case law on administrative review of permitting agency decisions to argue

[1] Citations to the pages in the Opinion are from the Tribe's Appendix ("A-…").

that the Court of Appeals erred. Here, however, the decision by the Agency was reviewed in a 10-day evidentiary hearing[2] that followed more than a year of fact and expert discovery. The PCHB appropriately weighed the evidence before it, including evidence presented by all parties on technologies the Tribe argues should have been considered for BACT. Based on this evidence, and after allotting proper deference to the Agency's decision, the PCHB concluded that the Tribe had failed to carry its burden to demonstrate that the Agency's BACT analysis was unlawful. The Court of Appeals, in turn, found no abuse of discretion in the PCHB's factual determinations, agreed with the deference allotted to the Agency, and upheld the PCHB's BACT determinations. The Court of Appeals further found no reason to import federal legal precedent where both parties agreed it did

[2] Five of these days were devoted entirely to the Notice of Construction (NOC) for PSE's Tacoma liquified natural gas (TLNG) plant that is the ultimate subject of the Tribe's challenge.

not apply.

Having failed to identify an issue of substantial public interest, or a conflict with this Court's precedent, the Tribe has failed to meet its burden under RAP 13.4(b)(1) and (4) and its petition should be denied.

II. STATEMENT OF THE CASE

The Agency presents a thorough and detailed Statement of the Case in its Answer, *see* Agency Opp. 2-12, and the Opinion below contains a detailed timeline of the relevant facts. *See* A-24-35.[3] This filing's Statement of the Case will focus narrowly on the key facts for the BACT issues addressed herein.

[3] The Tribe does not challenge the Opinion's factual summary. PSE disagrees with the Tribe's Statement of the Case with respect to its characterization of PSE's decision-making process for installing the flare at TLNG. Tribe Pet. at 8-9. Not only is PSE's rationale for including the flare in the design irrelevant to making a BACT determination, but the Tribe also mischaracterizes the decision-making process. The Tribe ignores, for example, testimony from Matthew Stobart, the CBI engineering manager for the TLNG project, stating that alternatives to the flare were deemed "prohibitively expensive and prohibitively dangerous." VRP (Apr. 21, 2021) at 1523.

The Tribe's Petition raises alternative technologies that it would prefer for BACT: waste gas recovery (such as a tailgas line) and leakless and sealless valves. Tribe Pet. 28-30, 34-36. But it presented no comments or information on these preferred technologies to the Agency during the public comment period. *See* AR 25350-444. The Tribe raised these issues for the first time in the hearing before the PCHB.

During the five days of evidentiary hearings devoted to the NOC, the Tribe's evidence on these technologies consisted of only two items. First, the Tribe's expert indicated in a few sentences that such technologies generally exist and should have been considered. *See* AR 21098 ¶150; ("EPA has required consideration/use of leakless and/or certified low leak components in consent decrees for similar facilities…."); AR 21098-100, ¶149 (should have considered flare gas recovery); *id.* ¶154 (should have considered flare gas recovery and

leakless/sealless valves); VRP (Apr. 21, 2021) at 1646-48 (should have considered tail gas line and leakless/sealless valves). Second, the Tribe pointed to an email from 2017 showing that PSE's contractor thought about a waste gas recovery system at one point. AR 20606-07. The PCHB considered the Tribe's arguments and found that the Tribe did not carry its burden of proof. The Court of Appeals affirmed this determination.

III. ARGUMENT

The Court should deny review of the unpublished portion of the Opinion that involves the application of settled law. The Tribe makes no attempt to explain how a non-precedential opinion—that, by definition, does not control any other case—merits this Court's review. Even if the Tribe so attempted, it would only run up against another obstacle to review—that nothing about the merits of the Opinion's analysis requires this Court's intervention. This is not a case of a rogue court flouting

precedent to reach a predetermined result. Rather, it involves only the routine application of settled Washington law on the deferential review of these types of agency determinations, which are by definition fact-specific. In short, all relevant factors point in the same direction: the Court should deny review.

A. An unpublished, non-precedential portion of an opinion could merit this Court's review only in extraordinary circumstances that are absent here.

The first barrier to the Tribe's request for this Court's review is that the portion of the Opinion on the BACT issue is unpublished. A-18 ("In the unpublished portion of this opinion, we address . . . whether the PCHB erred in affirming the NOC Order of Approval because PSCAA did not conduct a sufficient BACT analysis…."). "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court." GR 14.1. Indeed, "Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions." *Id.* Accordingly, this

part of the opinion is a one-off result that will have no significant impact on Washington jurisprudence.

The Tribe acknowledges this in a single sentence, but then in the same breath claims that review is nevertheless warranted because "air agencies around the state will feel compelled to follow [the unpublished opinion]." Tribe Pet. 14. Tellingly, however, the Tribe cites nothing in support of that claim, presumably because it is unclear why state agencies or anyone else would feel compelled to follow an opinion that, by definition, has no force of law beyond the narrow dispute it decided.

Perhaps a truly egregious unpublished opinion that flouts binding precedent could merit this Court's review as pure matter of error correction, but the Tribe does not claim that is the case here. The furthest it ventures on that score is to assert that the opinion below creates "a split within the Court of Appeals," Tribe Pet. 15, 25-27, but that is not possible because an

unpublished opinion is not precedential and therefore cannot establish the law of any division of the Court of Appeals. For that reason, there would be no "split" even if the Tribe were correct (and it is not, *see infra* at 13-14) that the Opinion's analysis is not in accord with Division I's precedent.

In sum, the unpublished BACT portion of the Opinion below binds no future case or regulatory proceeding. As such, it would not merit this Court's review even if the Tribe were correct in its claims of technical flaws in the Opinion's analysis. That alone provides a more than sufficient basis for the Court to deny review.

B. The Opinion's routine application of settled Washington law offers no cause for this Court's intervention.

The Opinion's analysis of the BACT issue should resolve any remaining doubt about the worthiness of this case for the Court's review. Indeed, even if this part of the Opinion were published, it still would not merit the Court's intervention

because it consists only of the routine application of settled Washington law on the deferential review of these types of agency determinations. The Court of Appeals properly reviewed the PCHB's factual, evidentiary findings based on the record the parties created during five days of evidentiary hearings, as well as the determinations made by the Agency in the permitting process. *See generally* AR 15647-55, 15719-23; 15632-33, 15713. The Court of Appeals accorded those findings the appropriate agency deference since they reflect the considered judgment of both the Agency and PCHB. The Tribe's various efforts to manufacture an error in that sound analysis all fail in light of the facts and law.

1. *The Tribe's argument about "new doctrines" tears down a strawman.*

The Tribe devotes the lion's share of its petition to an attack on a holding that the Opinion never made. It claims that the Opinion "creat[es] . . . a new prohibition on 'redesigning the facility' in a BACT determination" that will lead to all manner

of ill consequences. Tribe Pet. 15-27. But that is a strawman that appears nowhere in the Opinion.

All that the Court of Appeals did is make a mundane, technical holding that the Agency must evaluate the application before it and give a yes or no answer:

> [I]t is clear that if a proposed project meets the requirements, regardless of how the agency or another party might have designed its own facility, the agency has no choice but to issue an order of approval. Conversely, if the proposed project does not meet the requirements, the NOC application must be denied. There is nothing in the applicable statutory or regulatory scheme that authorizes or requires PSCAA to condition a project approval on major design changes when all criteria are met; indeed, it would necessitate an entirely new NOC application on the part of the applicant. Therefore, we hold that the PCHB did not erroneously interpret the law when it stated that BACT and PSCAA's NOC permit review does not authorize or require re-design of a project.

A-78-79. That is the supposedly "new doctrine" that is the focus of the Tribe's petition. But rather than announcing a "new doctrine," the Opinion is merely summarizing the approval criteria for NOC applications and explaining that when an application satisfies these criteria, including the application of

BACT, then the Agency must approve the application.[4]

The Tribe's various angles of attack fail in the face of the plain language that encompasses the Opinion's holding on this point. The Court of Appeals did not establish a new "'redesigning the facility' doctrine" or create an "exception to the BACT requirement." Tribe Pet. 16. Nor did it hold that the Agency was not "required to assess whether various aspects of TLNG, including its 'design,' were the best available means of limiting 'the quantity, rate, or concentration of emissions of air contaminants on a continuous basis.'" Tribe Pet. 18 (quoting RCW 70A.15.1030(12)).

All the Opinion below held is that, as a matter of the Agency's review of applications, the Agency should approve any that meets the governing criteria, which include compliance with BACT requirements, and deny those that fall short. A-78. Here,

[4] The Opinion devotes subsequent sections to its analysis of whether the PCHB erred in its analysis of the alternative technologies favored by the Tribe. A-79-87.

the Court of Appeals reviewed the PCHB's decision upholding the Agency's BACT determination; based on the factual evidence before the PCHB, including the credibility determinations made by the PCHB, and the principles of administrative deference, the Court of Appeals upheld the BACT determination specifically for PSE's facility. Try as it might, the Tribe cannot contort the Opinion's plain language into making some sort of substantive limitation on consideration of facility design in the BACT analysis—because it simply is not there.

The same goes for the Tribe's digression into the federal "redefining the source" doctrine. Tribe Pet. 19-23. The Court of Appeals could have not been clearer that it was not addressing that doctrine in its opinion: "[A]ll parties appear to agree that the doctrine is inapplicable. Because the inapplicability of the doctrine is not in dispute, we need not address whether it applies." A-77. Nor did the Court of Appeals create any new analogue to that doctrine, as it made no substantive holding at all

on this point and limited its analysis to the procedural issue discussed above.

2. There is no split within the Court of Appeals.

There is no conflict between the opinion below and *Brooks Manufacturing Co. v. Northwest Clean Air Agency*, 14 Wn. App. 2d 1, 474 P.3d 1077 (2019). Tribe Pet. 25-27. The two cases instead cover different ground. *Brooks* did not even concern BACT, but instead focused on the question of whether a baghouse at a certain facility fell within the term "emission control technology" that appears in a different statutory provision, RCW 70.94.153. *Brooks*, 14 Wn. App. 2d at 9. The Opinion in this case, in contrast, confronted the procedural issue of how the Agency should deal with permit applications that meet the governing BACT criteria and those that do not. A-77-79. It did not, as the Tribe once again claims, place a "prohibition on BACT approaches that could impact a polluting facility's design" or "allow[] a new source of air pollution to use inferior

control technology from the outset." Tribe Pet. 26-27. Rather, all it held is that "if a proposed project meets the requirements . . . the agency has no choice but to issue an order of approval," whereas "if the proposed project does not meet the requirements, the NOC application must be denied." A-78. Further, the Opinion does not at all address the "use[] of the term 'control technology'," the purported point of conflict with *Brooks*. Tribe Pet. 27. The Opinion's straightforward holding about the mechanics of permit application processing creates no conflict with *Brooks*—or, for that matter, with any other cited authority.[5]

[5] This includes *Bernardo's Aroma Rosteria v. PSCAA*, No. 04-041, 2004 WL 1944718 (PCHB Aug. 27, 2004) (cited at Tribe Pet. 24). The Tribe again uses a strawman to illustrate its claimed consequence of the Opinion. In *Bernardo's*, the Agency issued a denial of a coffee roaster's application because it failed to meet the BACT criteria. *Id.* at *4, 7-8. The BACT analysis involved consideration of what emissions control technologies would be effective and economically feasible, *id.*, which is entirely consistent with the Opinion. The Tribe's claim that the applicant could design its roaster in a way that is incompatible with the control equipment that was determined to be BACT (and thus avoid BACT controls) is nonsensical. If the roaster were designed differently, another BACT analysis would need to be

3. The Court of Appeals appropriately required the Tribe to satisfy its burden of proof.

The Tribe's argument that the Court of Appeals failed to apply the appropriate burden of proof or standard of review is based on inapposite cases. *See Tribe* Pet. 33-34 (citing *Utah Chapter of Sierra Club v. Air Quality Bd.*, 226 P.3d 719, 734 (Utah 2009); *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 83 (4th Cir. 2020); *Covington v. Great Basin Unified Air Pollution Control Dist.*, 43 Cal. App. 5th 867, 882 (2019)).

In *Utah*, the court vacated a BACT determination where the analysis was incomplete, having failed entirely to assess available technologies. *Utah Chapter of Sierra Club*, 226 P.3d at 733-34. Here, the PCHB considered the Tribe's proposed technologies in a de novo proceeding with fact and expert testimony, and it determined that there was a lack of evidence to

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conducted to reflect any revised configuration. The technology deemed to be "best" for one facility design may not be "best" for another.

undercut the Agency's BACT determination. A-79-87.

Buckingham involved an appellate court's direct review of a permitting agency's decision where the permitting agency was found to have failed to consider a technology in its BACT analysis. Having made such a determination based on a review of the administrative record only, without the benefits of a full evidentiary hearing as is the case here, the reviewing court had no choice but to vacate or remand the permitting action so that the permitting agency could consider the technology. *Friends of Buckingham*, 947 F.3d at 84-85.[6] *Covington* is entirely off-point, involving a challenge to an environmental impact report that is required under the California Environmental Quality Act, and thus offering no helpful guidance on the proper manner for conducting a BACT analysis under the Clean Air Act.

[6] Both the *Utah* and *Buckingham* cases turn on the application of the "redefining the source" principle, which the Court of Appeals explicitly did not apply as all parties in this case previously agreed that it did not apply here. *See supra* at 12-13.

The Court of Appeals here properly applied the burden of proof and standard of review in light of the process for NOC permit action reviews in Washington. The Tribe ignores the fact that the proceedings below in this case included a de novo hearing before the PCHB—an agency itself which conducts a full review of the Agency's decision and where all parties had full discovery and presented evidence so that the PCHB could consider the alternative technologies that the Tribe prefers separately and in addition to the Agency's analysis. It is the PCHB's determinations that were under review by the Court of Appeals, not the Agency's administrative record for the permitting action. Thus, the analysis of alternative technologies as potential BACT that the Tribe claims is prohibited as a result of the Opinion, *see* Tribe Pet. 12, did in fact occur—before the PCHB.

4. The Tribe's hodgepodge of other attacks on the opinion below similarly fail.

The Tribe mounts various other attacks on the Opinion, none of which have merit, much less rise to the level of meriting this Court's review of an unpublished opinion.

Waste-gas recovery. The Tribe takes issue with the Opinion's review of the PCHB's and the Agency's waste-gas recovery analyses. Tribe Pet. 28-30. Part of the Tribe's confusion stems from its misunderstanding of what BACT actually means. BACT is not the most restrictive emissions limitations that can possibly be achieved, regardless of costs and other considerations. *See, e.g.*, Tribe Pet. 36 (criticizing the agency "fail[ing] to use the most stringent emission limit from [other] regions" that were reviewed). Instead, the statute makes clear that the Agency must conduct each highly technical BACT analysis "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." RCW 70A.15.1030(6).

When the Agency conducted that case-specific analysis here, no one—not the Tribe or any other party—raised the waste-gas recovery option. AR 22737-825; AR 1972-2066. The Agency properly reviewed the application based on the evidence before it, not on some hypothetical record that included evidence regarding a waste-gas recovery system. A-79-80. The PCHB then considered evidence presented at hearing about whether waste-gas recovery should have been considered. But as the evidence adduced at the PCHB demonstrated, waste-gas recovery would be "prohibitively expensive and prohibitively dangerous" in these circumstances. A-79.

Accordingly, the lower court's decision affirming the PCHB's determination that waste-gas recovery was not BACT is hardly a radical statement of some sweeping new doctrine. It was merely a case-specific technical determination based on the facts and evidence in this record. On that narrow question, the Court of Appeals did not err in deferring to PCHB and the Agency and

declining the Tribe's invitation to second-guess how PCHB and the Agency employ their discretion on a highly technical, fact-specific BACT determination. *See Dep't of Ecology v. Douma,* 147 Wn. App. 143, 151, 193 P.3d 1102, 1106 (2008) (citing *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.,* 112 Wn. App. 291, 296, 49 P.3d 135 (2002)); *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 930, 319 P.3d 23, 28 (2014). *See also Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139, 151 (1997) (agreeing that "substantial judicial deference to agency views would be appropriate when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise").

Evidence of waste-gas recovery costs. The Tribe next makes an evidentiary argument that it was somehow improper to consider testimony that waste-gas recovery was not feasible due to extreme costs and risks. Tribe Pet. 30-31. On this issue, the

Court of Appeals pointed to the testimony from PSE's contractor that waste-gas recovery would be "prohibitively expensive and prohibitively dangerous." A-79. It is unclear how pointing out evidence that is indisputably part of the record could be an error. If the Tribe desired more evidence on that point, it should have adduced it during the 10 days of evidentiary hearings before the PCHB. But it cannot make up for that now by faulting the Court of Appeals for noting the evidence in the record before it.

Requiring evidence of the existence of better technologies. The Tribe somehow finds fault in the lower court's commonsense observation that if the Tribe believes there is a better emissions-control technology available, then it should have adduced evidence of it before the Agency and the PCHB:

> The Tribe also argues that '[i]f there is an available technology that can eliminate 100% of pollutants, then the technology that eliminates only 99% is not the best available.' The operative word in the Tribe's argument, however, is 'if.' The Tribe does not point to any actual, available technology that would eliminate *100 percent* of pollutants.

A-88 (citations omitted); *see* Tribe Pet. 31-34. The Tribe tries to paint that as "improper shifting of the burden." Tribe Pet. 31. However, it is indisputable that the Tribe bore the burden of proof before the PCHB and failed to adduce sufficient evidence to convince the PCHB that some other technology was BACT. That the PCHB evaluated all evidence adduced during the hearing and found the Tribe had not met its burden is merely the application of the proper burden of proof, not a reversal of it. After all, BACT is a fact-specific determination that necessarily depends on the evidence the parties bring before the relevant agencies.[7] *See Citizens for Clean Air v. U.S. E.P.A.*, 959 F.2d 839, 847 (9th Cir. 1992) (holding that parties challenging a BACT failed to provide "hard evidence" of the effectiveness of their preferred control technology). *See also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588-89, 90 P.3d

[7] No case cited by the Tribe on this point involved a situation like this one in which the allegedly better technology was never even brought to the permitting authority's attention.

659 (2004) (overturning an agency's factual findings requires "substantial evidence").

Leakless/sealless technology. The Tribe's complaints regarding leakless and sealless components boil down to a disagreement with the PCHB's factual finding based on conflicting evidence. Tribe Pet. 34-36. The Court of Appeals noted the evidence from both sides on whether such components were available for the cryogenic valves that the TLNG facility would have. A-85.[8] Then it detailed the intensive LDAR program the Agency required for fugitive emissions. *Id.* at 86. Based on that analysis, the Court of Appeals applied the appropriate deference to hold that "substantial evidence in the record supports the PCHB conclusion that PSCAA conducted a BACT analysis in compliance with regulatory requirements" on this

[8] This was a contested issue because while these types of components had been used in other settings, the Tribe still has not cited an example of their use in or availability for the special context of cryogenic valves. None of its citations on this point deal with cryogenic valves.

point. A-87. The Tribe may have wished that PCHB and the Agency decided those factual matters differently,[9] but that is not a sufficient basis for overturning a factual agency determination.

IV. CONCLUSION

The Court of Appeals appropriately applied principles of administrative review and made no holdings that constitute a "new doctrine" or that conflict with its prior precedent. The Tribe has failed to explain why an unpublished opinion in a routine case involving a fact-specific, technical finding made by the Agency, and reviewed *de novo* by the PCHB, warrants this Court's review. Because there is no basis for review under either RAP 13.4(b)(1) or RAP 13.4(b)(4), this Court should deny the Tribe's petition for review.

[9] Similarly, the Tribe argues that the Agency failed to explain why a more stringent limit used by a California agency should not be BACT for TLNG. Tribe Pet. At 35. The Tribe forgets that a BACT determination is based on numerous factors, not just the maximum amount of reduction technically feasible.

Respectfully submitted this 24th day of April, 2024.

I certify that this Answer to Petition contains 3,597 words in compliance with RAP 13.4(f) and RAP 18.17(c)(10).

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CERTIFICATE OF SERVICE

I, I'sha Willis, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as legal assistant in the office of Van Ness Feldman LLP, caused true and correct copies of the following documents to be delivered as set forth below:

1. Puget Sound Energy, Inc.'s Answer to Petitioner Puyallup Tribe of Indian's Petition for Review;
2. Certificate of Service;

and that on April 24, 2024, I caused the foregoing documents to be e-filed and e-served electronically through Washington State Appellate Courts' Secure Portal as follows:

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Dated this 24th day of April, 2024.

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I'sha Willis, Legal Assistant

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