NO. 46130-7-II

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

COLUMBIA RIVERKEEPER; and
NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Petitioners,

v.

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

COLUMBIA RIVERKEEPER and NORTHWEST ENVIRONMENTAL DEFENSE CENTER'S ANSWER TO BRIEF OF AMICUS CURIAE

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I. Introduction

Appellants Columbia Riverkeeper and the Northwest Environmental Defense Center (collectively "Riverkeeper") file this brief, in compliance with RAP 10.1(e) and RAP 10.3(f), to answer *amicus curiae* the Washington Public Ports Association ("WPPA").

II. EFSEC will prepare the oil terminal's only SEPA document.

Riverkeeper does not want, nor could a court require, multiple SEPA reviews of the oil terminal. (Riverkeeper's Reply Br., pp.2–3; Riverkeeper's Opening Br., pp.1–2, 4–5, 13, 14; Clerks' Papers (hereinafter "CP"), p.932; Report of Proceedings (hereinafter "RP"), pp.14–16.) Riverkeeper only ask that the Port of Vancouver, USA ("Port") be required to execute the lease *after* the Energy Facility Site Evaluation Council ("EFSEC") prepares the Environmental Impact Statement ("EIS"), so that the Port can make a fully informed decision. This is the sort of look-before-you-leap decision-making that SEPA demands. *See Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 511, 522, 309 P.3d 654 (2013) (SEPA's "fundamental idea" is "to prevent government agencies from approving projects and plans before the environmental impacts of doing so are understood.").

Despite Riverkeeper's explanations to the contrary (*e.g.* Riverkeeper's Reply Br., pp.2–3), WPPA insists that Riverkeeper seeks

duplicative, sequential SEPA processes—first by the Port and then by EFSEC. For instance, WPPA claims that "Appellants have argued that . . . the trial court should have required two separate SEPA reviews" (WPPA Br., p.5) and that Riverkeeper seeks an "early pre-leasing SEPA process" (*id.* at 8) in addition to EFSEC's EIS. (*See also id.* at 13, 15.) Similarly, the hypothetical lawsuit by Tesoro against the Port (*id.* at 12), and WPPA's parade of horribles (*id.* at 15), are premised on multiple SEPA reviews. WPPA's fears are groundless. EFSEC is the lead SEPA agency[1] for this project and nothing authorizes, let alone requires, the Port to prepare its own SEPA document in advance of EFSEC's EIS.

Additionally, WPPA's assertion that complying with SEPA would impair a port's ability to lease property (WPPA's Br., p.21) is misguided. These so-called impairments to development exist regardless of the relief Riverkeeper seeks, and can be mitigated. WPPA claims that:

> "It is unrealistic to expect a project proponent to spend the resources necessary to define a project in sufficient enough detail for SEPA review before they even know if they have a legal right to property where the project could be developed."

(WPPA Br., p.16). As explained below, this superficially attractive argument does not withstand close inspection.

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[1] SEPA's lead agency regulations give EFSEC the sole authority to prepare an EIS for an energy facility. WAC 197-11-938(1). But WPPA's argument about EFSEC being the "sole lead agency" (*see* WPPA Br., p.10) misconstrues the SEPA review process. In cases like this—where the Port and EFSEC have independent decision-making authorities—SEPA "lead agency" status merely determines which agency writes the EIS. After the EIS is written, the lead and non-lead agencies must both use the EIS to inform their decisions. (*See* Riverkeeper's Opening Br., p.4.)

First, because executing a lease is an "action" triggering SEPA review, *see* WAC 197-11-704(2)(a)(ii), when a port is the lead SEPA agency, project proponents must *always* provide that port with sufficient information to conduct SEPA *before* the port can execute the lease. The arrangement that WPPA describes as an impairment is actually the status quo under SEPA. Second, in rare instances when EFSEC is the lead SEPA agency for a port project, prospective lessees are *always* required to "spend the resources necessary to define a project . . . for SEPA review before they even know if they have a legal right to [the] property . . . ." (WPPA Br., p.16.) The extensive studies required for EFSEC review, which are prepared at the applicant's expense, precede the Governor's decision granting or denying the applicant the legal right to operate an energy facility at a particular location. *See* WAC 463-58-020 *and* WAC 463-58-030 (assigning study and review costs to applicants). Third, as Riverkeeper has explained (Riverkeeper's Reply Br., p.4), the Port and Tesoro could have mitigated the risk WPPA describes with a non-binding Memorandum of Understanding, *see Int'l Longshore*, 176 Wn. App. at 516, 309 P.3d 654, or by extending the existing exclusive bargaining agreement. (*See* CP, p.0011.) Ultimately, WPPA's claim that complying with SEPA will cause port development to be "impaired" or "blunted" (WPPA Br., p.21) is misguided. Riverkeeper is not asking the Port to do anything out of the ordinary, and SEPA exists partly to 'blunt' an agency's

ability to commit public resources before the agency, and the public, understand the environmental consequences.

III. WPPA misconstrues the key statutory interpretation question before the Court.

A central issue in this case is whether the lease was an "action" that "approves, authorizes, [or] permits" an energy facility, as those terms are used in RCW 80.50.180. (*See* Riverkeeper's Opening Br., pp.14–22.) WPPA quotes RCW 80.50.180 in its entirety (WPPA Br., p.9) and asserts variously that RCW 80.50.180's language is: "clear" (*id.* at 14, 20); "remarkable in its clarity and intent" (*id.* at 9); "strong and clear" (*id.* at 12); "clear, broad and unequivocal" (*id.* at 13); and "clear and unequivocal . . . ." (*Id.* at 20.) But when attempting to explain *why* the Port's proprietary lease is an "action" that "approves, authorizes, [or] permits" the oil terminal as those terms are used and understood in the Energy Facility Site Location Act ("EFSLA"), WPPA simply asserts: "The Commission decision was an 'action.'" (WPPA Br., p.11.) WPPA's statutory interpretation argument fails. The real question is not whether the Port's proprietary lease is an 'action,' but whether that action was an approval, authorization, or permit *for the purposes of EFSLA*, a statute devoted entirely to preempting regulatory authority. *See* WAC 463-28-020.

Additionally, WPPA's description of ports' leasing and land use regulatory authorities lends perspective to Riverkeeper's argument. A port's authority is a mirror image of EFSEC's. WPPA explains that ports "have broad power to lease . . . property to private parties," (WPPA Br., p.7 (citing RCW 53.08.080)), but ports "lack substantive land use regulatory authority." (*Id.* at 8.) EFSEC, by contrast, has exclusive land use regulatory authority, WAC 463-28-020, but no proprietary authority to lease land. *See* RCW 80.50.040 (listing EFSEC's powers). Because EFSEC and the Port have independent, non-overlapping authorities, it makes no sense for the Port to exercise its authority without sufficient information about the crude oil terminal's environmental impacts and human health risks. This would contradict SEPA's goals and policies. *See* RCW 43.21C.030(1) (requiring that all Washington laws "shall be interpreted . . . in accordance with the policies set forth" in SEPA).

Finally, Riverkeeper agrees with WPPA that there is no distinction between a proprietary action and a regulatory action *under SEPA* (WPPA Br., pp.5, 13, 14); Riverkeeper is not trying to create such a distinction. Under SEPA, all government actions—both proprietary and regulatory, *see* WAC 197-11-704(2)(a)—are invalid unless preceded by the requisite level of SEPA review or otherwise exempt. Riverkeeper is not asking the Court "to discern new definitions and concepts under SEPA" (WPPA Br., p.14); Riverkeeper is asking the Court to interpret EFSLA. WPPA fails to

grasp or grapple with this distinction. Specifically, Riverkeeper is asking the Court to define the scope of RCW 80.50.180's exemption from SEPA, and whether the Port's proprietary lease is outside of that exemption. This is a straightforward exercise in statutory interpretation that will not alter the established interpretations of SEPA or any of its implementing regulations.

IV. Execution of the detailed and binding lease is precisely the type of decision that requires SEPA review.

But for EFSEC's involvement, there would be no serious argument about whether executing the lease triggered the Port's SEPA responsibilities. *See* WAC 197-11-704(2)(a) (defining SEPA actions to include "agency decisions to . . . lease . . . publicly owned land"). The Port's lease describes in detail the oil terminal's design, location, payment and financing terms, and even the required amount of pollution liability insurance. (*See* Riverkeeper's Opening Br., pp.7–8.) Accordingly, meaningful SEPA review (by EFSEC) could have preceded the Port's lease, because the "principal features of [the] proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2) (describing the proper timing for SEPA analysis).

Carpenter v. Island County (*see* WPPA's Br., p.16), actually requires SEPA review for actions like the Port's lease. 89 Wn.2d 881, 884–85, 577 P.2d 575 (1978). There, the Supreme Court held that a sewer

district's annexation of new service territory was not an "action" triggering SEPA because the annexation did not result in a "delineated change in environment" or "make any change in the uses to which the land might be put." *Id.* at 883–85. In contrast, the Port's lease delineates where the oil terminal's facilities will be constructed (CP at 0273–74, 0279–80, 0337–43) and specifically designates a new use of the Port's property. Under *Carpenter v. Island County*, SEPA review should have preceded the Port's lease.

WPPA argues generally that executing the lease before the EIS was permissible either because the lease was not an action subject to SEPA (*see* WPPA Br., pp.17–18) or because the lease was a "preliminary step[]" necessary before the "action [was] sufficiently definite to allow meaningful environmental analysis." (WPPA Br., p.19 (citing WAC 197-11-055(2)(a)(ii)).) WPPA's unsupported assertion that leases like the Port's must occur "*before* meaningful environmental analysis can be conducted" (WPPA Br., p.19 (emphasis added)) ignores the lease's highly-specific text. In essence, WPPA argues that before analyzing a potential project, a port must enter into a specific, binding agreement compelling the port to host that project. This defies "common sense," and the "goals of SEPA . . . ." (WPPA Br., p.19.)

V. Conclusion

Riverkeeper is not asking the Port to do anything but wait until EFSEC completes the EIS. Then the Port can make a fully informed decision about whether to lease public land for a crude oil terminal. The relief Riverkeeper seeks is straightforward and non-disruptive, despite WPPA's predictions. More importantly, the relief rests on a reasonable interpretation of RCW 80.50.180 and would advance SEPA's goals of informed and transparent government decision-making.

RESPECTFULLY SUBMITTED this 27th day of April, 2015.

By: _____

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CERTIFICATE OF SERVICE

I, Jessie Sherwood, declare under penalty of perjury of the laws of the United States, that I am a citizen of the United States, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on April 27, 2015, I caused the foregoing Columbia Riverkeeper and Northwest Environmental Defense Center's Brief in Answer to Washington Public Ports Association's *Amicus Curiae* Brief to be served on the following by depositing it with United States Postal Service, postage prepaid:

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