NO. 46130-7-II

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

COLUMBIA RIVERKEEPER; and
NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Petitioners,

v.

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

REPLY BRIEF FOR COLUMBIA RIVERKEEPER and NORTHWEST ENVIRONMENTAL DEFENSE CENTER

Miles B. Johnson, *admitted pro hac vice*
111 Third St., Hood River, OR 97031
Tel: (541) 490-0487
Email: miles@columbiariverkeeper.org

Smith & Lowney, pllc
Knoll Lowney, WSBA # 23457
Brian A. Knutsen, WSBA # 38806
Elizabeth H. Zultoski, WSBA # 44988
2317 E. John Street, Seattle, WA 98112
Tel: (206) 860-2883; Fax: (206) 860-4187
Email: knoll@igc.org; briank@igc.org;
elizabethz@igc.org

Attorneys for Plaintiffs Columbia Riverkeeper and Northwest Environmental Defense Center

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I. Argument

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

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

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

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

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

i. Riverkeeper is not seeking duplicative reviews.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iv. EFSEC Order No. 872 is irrelevant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Conclusion

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

RESPECTFULLY SUBMITTED this 10th day of October, 2014.

By: _____

Miles B. Johnson, *admitted pro hac vice*
111 Third St., Hood River, OR 97031
Tel: (541) 490-0487
Email: miles@columbiariverkeeper.org

Smith & Lowney, pllc
Knoll Lowney, WSBA # 23457
Brian A. Knutsen, WSBA # 38806
Elizabeth H. Zultoski, WSBA # 44988
2317 E. John Street, Seattle, WA 98112
Tel: (206) 860-2883; Fax: (206) 860-4187
Email: knoll@igc.org; briank@igc.org;
elizabethz@igc.org

Attorney for Columbia Riverkeeper and Northwest Environmental Defense Center

CERTIFICATE OF SERVICE

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

Washington State Court of Appeals, Division Two
c/o David Ponzoha, Clerk/Administrator
950 Broadway, Suite 300,
Tacoma, Washington 98402-4454

Markowitz, Herbold, Glade & Mehlhaf, P.C.
David B. Markowitz
Lawson E. Fite
Kristin M. Asai
1211 S.W. Fifth Ave., Suite 3000
Portland, Oregon 97204-3730
Email: LawsonFite@MHGM.com
KristinAsai@MHGM.com
BrendaAnthony@MHGM.com
SaraPomerening@MHGM.com
LynnGutbezahl@mhgm.com
Docket@MHGM.com

Attorneys for Defendants

Miles Johnson