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Nos. 78757-3; 79102-3

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SUPREME COURT OF WASHINGTON

ARTHUR WEST and

WALTER R. JORGENSEN et al., Appellants,

v.

PORT OF OLYMPIA, Respondent

DAVID KOENIG, Appellant,

v.

PORT OF OLYMPIA, Respondent

REPLY BRIEF OF APPELLANT WEST

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INTRODUCTION: RESPONDENTS FAIL TO ADDRESS THE ORIGINAL RECORDS REQUEST OF NOVEMBER 8 OR ANY REASONABLE PENALTY ARGUMENTS BASED UPON GROUPING OF RECORDS

In replying to the respondents the appellant is forced to clarify a number of factual representations made by the Port. Significantly, the port in it's argument fails to differentiate between the appellants, even when they make different arguments, and has failed to respond to the majority of West's arguments in any manner.

Also missing is any mention by the port of West's original public records request of November 8, 2005, or of the 6 supplemental responses to west from the port prior to January 17, 2006, including disclosure of some 38 records to West on January 10 of 2006. Further, by the use of the term "League" for most of it's argument, and its use of this term for arguments and specific to the league the port has failed to reply to the bulk of plaintiff West's arguments at all. This is especially significant where the port bases it's entire argument upon the league request for over two million dollars when West has repeatedly maintained that assessment of penalties per packet is more reasonable and consistent with precedent and the intent of the Court's March 29

order.

By setting up the false straw man of a two million dollar request for penalties, the port seeks to completely evade any reasonable discussion of division of the records into packets for the purpose of a reasonable penalty with a deterrent effect, and any consideration of the issues of appropriate public disclosure based upon a narrow reading of the exemptions in the act, the interrelation of SEPA and the PDA,

Contrary to the port's view, the actual factors that "dominate" or overshadow this case are the sheer number and volume of the records; those that were either "voluntarily" (after filing of the original action on January 3, 2005) disclosed after commencement of the litigation or which were deliberately grouped into a mind bogglingly large number of individual packets for which individual exemptions were asserted, and the respondent's motivations in failing to comply with the PRA; to evade the policy of disclosure and public comment and deliberation on the potential impacts of the project that gives rise to this entire controversy, the relocation of Weyerhaeuser operations from Tacoma to Olympia.

RESTATEMENT OF THE ISSUES

I Did the trial court err in failing to award penalties for the actual number of days that each separate group of records was retained unlawfully, and in failing to

award a reasonable penalty with actual deterrent effect?

II Did the trial court err in failing to construe exemptions to disclosure narrowly, and in expanding deliberative process beyond the conclusion of deliberations.

III Did the Court err in interpreting the Public Disclosure Act in a manner that limited the full disclosure policy of the State Environmental Policy Act?

ARGUMENT ISSUE I- PENALTIES

SINCE OCTOBER 8, 2005, WAS THE DATE OF WEST'S PUBLIC RECORDS REQUEST, THE COURT ERRED IN FINDING NON-DISCLOSURE LIMITED TO A TIME PERIOD AFTER JANUARY 27

Since it is the holding in Sheehan, (as adopted by the Court in both Koenig and Yousoufian cases) that the court lacks discretion to reduce the number of penalty days, and since it is undisputed that Appellant West received the first non-responsive response on October 16, 2005, the Trial Court in this case lacked discretion to reduce the penalty days below the actual number of days records were withheld.

Astoundingly, the trial court awarded penalties based upon a presumed date of non-disclosure commencing upon January 17, 2006, a full two months from the date of the actual denial of inspection, and a full two weeks from the date that plaintiff West filed the original suit for disclosure on January 3, 2006, and a week from the League's filing of their secondary suit on January 10.

Under any legal standard that this Court chooses to employ* the Trial Court erred, abused its discretion, ruled in a manner unsupported by substantial evidence, or inconsistent with established law when it failed to award penalties for the proper number of days each successive packet of records was withheld by the port from appellant West, and limited its penalties to an arbitrary date postdating both his request and the filing of both West and the League's actions for disclosure.

The clear and undisputed evidence of West's original request on November 8, and the port's original denial of inspection of records on November 16, (not to mention the League's request of January 5, 2006) require remand for a correct determination of the number of days records were withheld.

COURT'S DISCRETION IS LIMITED BY STATUTE AND PRECEDENT TO PENALTY AMOUNT, NOT TO DETERMINATION OF NUMBER OF DAYS OR NUMBER OF RECORDS, WHICH ARE MATTERS OF FACT AND LAW

It is indicative of the complexity of public records litigation that even the standard of review of the various determinations made by the trial court in assessing penalties is itself subject to debate. Thus the port may be excused for its confusion as to the limits of the application of the abuse of discretion standard under the public records act.

However, an examination of the actual wording of the statute and recent precedent of this court demonstrates that while the dollar amount of per diem penalties

is committed to the discretion of the court, the issues of the number of days the records were withheld and the number of records that were withheld are matters of fact and law which are subject to the substantial evidence and de novo standards of review.

This is the most consistent interpretation of the holdings in King County v. Sheehan, 114 Wn. App. 325, 350-51, 57 P.3d 307 (2002), and more recently, Koenig and Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2005). While the setting of the amount of the penalty is admittedly committed to the discretion by the statute, such discretion is confined within a mandatory range of between \$5 and \$100 per day for each record that is determined to have been withheld.

In Sheehan, the Division I of the Court of Appeals determined that

"by so amending the statute, the legislature limited trial court discretion, so that a penalty of at least \$5 per day is now mandatory where an agency erroneously withholds a public record." Sheehan, 114 Wn. App. at 355.

Significantly, in both of the most recent Koenig and Yousoufian opinions this Court has repeatedly followed the reasoning of the Sheehan Court to hold that the determination of the number of days the records were withheld is most certainly not subject to the exercise of Trial Court discretion. As was noted in Yousoufian...

We agree with the Sheehan court's resolution of this issue. The PDA plainly states that the trial court has "discretion" in setting the penalty at not less than \$5 but not more than \$100. If the trial court refuses to assess any penalty, then it is setting the penalty at less than

\$5, which is contrary to the unambiguous language used in RCW 42.17.340(4). As stated in Sheehan, the legislature limited the trial court's discretion by amending RCW 42.17.340 in 1992 to set a minimum penalty, which the trial court must assess if the agency is found to have violated the PDA.” Yousoufian, at 431

While it is clearly established precedent that the PDA "grants discretion to the trial court, not to this appellate court, to set the amount of the penalty within the minimum and maximum ranges." (See Sheehan, at 350), it is equally clear that the determination of the number of days and grouping of records is not a discretionary determination.

Therefore, in the instant case, since the port and Weyerhaeuser have never disputed that the original request for disclosure of records was made on November 8, 2005, (with the first non responsive response made by the port on November 16) the trial court, under any standard of review, erred in failing to assess the mandatory penalty for each day after November 16, 2005 that the records were withheld.

Since the plaintiff's evidence of filing a request on the 8th of November is uncontested, no substantial evidence supports the court's determination that disclosure was only withheld from January 17, under the substantial evidence standard of review.

Since the rulings of Sheehan, Yousoufian and more recently Koenig are clear that a penalty is required for each day the records were withheld, the court committed clear error of law under the De novo standard of review in arbitrarily limiting the number of days.

Finally, since the ruling on the number of days exceeded the bounds of discretion granted under statute, and was based upon untenable grounds and a manifestly false standard of law, the court also abused discretion under the abuse of discretion standard, in the unlikely event that it is found to apply in the determination of the number of days records were withheld.

Unlike the amount of the penalty which is (within the \$5 to \$100 range) discretionary, the number of days and number of records withheld is subject to evidenciary enumeration and is best reviewed under the “substantial evidence” or “consistent with existing law” rule. Appellant West respectfully requests that the Court add the clear enunciation of the proper standard of review for these determinations to the issues that it intends to clarify in ruling on this case.

Since the trial court failed to award penalties for each day records were withheld, a remand is necessary for the court to do so, and for it to set the appropriate penalty for the period between November 16 and January 17 for such number of records that may have been withheld during said period.

THE TRIAL COURT IGNORED SUBSTANTIAL EVIDENCE AND CLEAR PRECEDANT IN FINDING ONLY ONE RECORD TO HAVE BEEN WITHHELD WHEN EVIDENCE OF VOLUNTARY DIVISION OF RECORDS AND MULTIPLE SEPARATE DISCLOSURES OF SEPARATE GROUPS OF RECORDS ON VARIOUS DATES WAS APPARENT

One compelling reason for this Court to require the Trial Court to award penalties based upon groups of records is the clear evidence in the record and the port's own admission that the records were disclosed upon various different dates. Significantly, even a recounting of the various responses by the Port occupies 5 pages. (See brief of Port Page 2-7) As this court noted in Yousoufian v. Office of King County Executive, 152 Wn.2d 421, at 428, (2004)

«6» The trial court arrived at 5,090 days by adding together the number of days each of the 10 groups of records was wrongfully withheld and subtracting 527 days from each group that was produced after the lawsuit was filed. Each group of records was assigned a letter from A to J and a number of penalty days as follows: Group A was 4 days late; Group B was 49 days late; Group C was 76 days late; Group D was 126 days late; Group E was 843 days late; Group F was 651 days late; Group G was 855 days late; Group H was 663 days late; Group I was 887 days late; and Group J was 936 days late. Through this formula, the overall number of days late totaled 5,090.

By coincidence, the number of distinct dates of disclosure of packets by the port also apparently adds up to 10, the precise figure employed by the Yousoufian Court.

Since the first release of 38 records by the port occurred on January 10, the Trial Court erred, failed to follow substantial evidence or established precedent, and abused its discretion in failing to award penalties at all for this discreet grouping of records, and for each of the 9 successive discreet releases ending in May of 2006.

PORT'S RESPONSE FAILS TO DENY ISSUES AND FACTS RAISED BY WEST AS TO DIVISION OF RECORDS INTO 342 DISCREET PACKETS WITH SPECIFICALLY INTERPOSED EXEMPTIONS

The port completely fails to address West's argument that by voluntarily grouping the records into 342 packets and accepting the benefits of such individual and painstaking review, they subjected themselves to a mandatory penalty for each specific grouping that was withheld.

This argument is deemed waived by the port and plaintiff requests that a ruling issue in his favor that the trial court erred (under any standard of review) in failing to award penalties for each grouping of records that were withheld, in accord with the terms of its March 29 order which specified that penalties were to be assessed based upon discreet packets of records.

The trial court's March 29 ruling describes at length the unreasonable burden placed upon the limited resources of the court by the sheer number of packets of records and voluminous specific exemptions interposed by the port.

No reasonable person would disregard the evidence of unreasonable burdens placed upon the Court(s) and the appellants by the individual grouping of records and the assertion (in voluminous privilege logs of mind-boggling length) of specific exemptions for each specific grouping by the port.

No reasonable person, in reviewing the (51 page long) order of March 29 with literally hundreds of specific rulings as to individual records and exemptions, (in

addition to expanded privilege logs of telephone book-like proportions) would conclude that the sum of all of the months of review and consideration (of specific records voluntarily and willfully grouped into discreet classes) was a single record.

No reasonable person would reverse their own determination,(See the march 29 order of the trial court, Page 51) based upon the above considerations, that the records at issue were voluntarily divided into 342 separate packets with review sought individually for each packet.

Again, under any standard of review the determination as to the number of records or packets was based upon untenable grounds and false application of law (abuse of discretion, see Marriage of Combs 169 105 Wn. App. 168, (2001), was unsupported by substantial evidence(substantial evidence), and was contrary to the established precedent in the Yousoufian case where respondent also voluntarily grouped records into discreet packets.(De novo-error of law)

When this case is remanded back with instructions that penalties be awarded for the correct number of days , it should also be remanded back with instructions for the trial court to determine that the court's own March 29 ruling, as well as the port's division of the records into specific groupings and the discreet dates of disclosure, require a finding that there were multiple records withheld.

THE COURT ERRED IN FAILING TO DETER FUTURE NONDISCLOSURE

EWITH AN APPROPRIATE PUNITIVE SANCTION

The Court also erred and abused discretion in assessing penalties so small that they failed to have a deterrent effect upon the port or other agencies, as the Amici point out, if an agency can be assured that the maximum it will pay for nondisclosure of records is 36,500 a year, they may very willingly pay this amount to stifle public knowledge of and interference with projects amounting to many millions of dollars.

In the case of the Port the penalty has failed to have a deterrent effect since they continue to withhold records necessary for participation in the SEPA process from public inspection. Clearly, the Court's failure to apply the PRA strictly to assure an adequate deterrent effect was an abuse of discretion, violated accepted standards of law and was counter to substantial evidence.

ARGUMENT ISSUE II EXEMPTIONS

APPELLANT INCORPORATES ARGUMENT OF THE LEAGUE, KOENIG, AND THE AMICI IN THE INTEREST OF ECONOMY

In the interest of judicial economy, appellant West incorporates all of the arguments asserted regarding the respondent's exemptions to disclosure made by the League, Koenig, and the Amici in their opening and reply briefs.

DE MINIMUS EXEMPTION IS UNSUPPORTED BY EITHER RESPONDENT'S ARGUMENT OR ANY CLEARLY ESTABLISHED LAW

As a preliminary matter, neither respondent has even attempted to defend the

Trial Court's sua sponte catch all "de minimus" exemption to disclosure, relied upon by the trial court in the March 29 order to approve various redactions.

In the absence of any authority or argument to the contrary, this Court must rule as a matter of law that the Court's use of a "de minimus" exemption is completely at variance with all accepted precedent and inconsistent with the spirit, letter, and recognized intent of the PDA.

Thus, because the statute is undisputedly unambiguous and does not contain a de minimus use exception, we decline to impose one. Herbert vs. Wa State Public Disclosure Commission, (2006) NOS. 57502-3-I, 57503-1-I, citing See State v. Bostrom, 127 Wn.2d 580, 586-87, 902 P.2d 157 (1995)

The trial court's determination as to de minimus exemptions must be overturned and all such purportedly "de minimus" records released in unredacted form

LIMITED ATTORNEY CLIENT EXEMPTION ONLY APPLIES TO RECORDS PREPARED FOR PURPOSE OF COMMUNICATION WITH COUNSEL OR ATTORNEY WORK PRODUCT

As a preliminary consideration, while the league fails to dispute the attorney-client exemption in its opening brief, appellant West specifically raises this issue in his opening brief (See brief at p.**)

A close examination of the appropriate and severely limited scope of this exemption reveals that it is completely inapplicable for the vast bulk of records at issue in this case, where the vast majority of the requested records were not prepared

for the purpose of communicating with counsel, and are neither work product or attorney-client privileged.

In Dawson v. Daily, 120 Wn. 2d 782, 845 P.2d 995 , (1993), the Supreme Court explained the operation of the specific exemption claimed by defendants in this case, formerly codified as RCW 42.17.310(1)j, noting that “This exemption incorporates the work product doctrine as a rule of pretrial discovery.”

As the Supreme Court noted in Lindstrom v. Ladenburg, 136 Wn. 2d 595, at 613, 963 P.2d 869, (1998), “We find it unnecessary to broadly interpret the work product exemption...

The Court cited to Professor Orland’s suggested “bright line” rule for determining the scope of such exemptions as contained in his Observations on the Work Product Rule, as follows;

This encompasses (1). legal research and opinions, mental impressions, theories and conclusions of an attorney... (2) Notes and memoranda of factual statements or investigation: and, (3). Formal or written statements of fact and other tangible facts gathered by an attorney in anticipation of litigation.

In Kleven v. King County Prosecutor, 112 Wn. App 18, 53P.3d 516, (2002), the court ruled that “This (work product) doctrine protects the mental impressions, conclusions, and legal theories of an attorney from disclosure.”

Significantly, the records at issue here are not mental impressions, nor are they

prepared from oral communications, nor are they factual written statements or other items **gathered by an attorney** in the process of investigation. Instead they are diverse records relating to a lease and related developments required by the lease.

While it is conceivable that some very minor portion of the whole may have been prepared by an attorney and subject to the rule, the wholesale withholding of thousands of pages of records under this exemption is at variance with established law and patently unreasonable.

The attorney client exemption is equally unavailing, in that...

“The attorney-client privilege protects confidential attorney-client communications...so that clients will not hesitate to speak freely and fully inform their attorney of all relevant facts. It is not an absolute privilege, however, and must be strictly limited to its purpose.” Overlake Fund v. Bellvue, 60 Wn. App. 787 at 796, 810 P.2d 507, (1991).

In addition, “The attorney client privilege is a narrow privilege and protects only “communications and advice between attorney and client”; it does not protect documents that are prepared for some other purpose than communicating with an attorney. Hangartner v. Seattle, 151 Wn.2d 439 at 452, 90 P.3d 26, (2004)

Since

The documents at issue in this case cannot reasonably be represented to have been prepared for this purpose.

It is to be noted that the Hangartner Court determined that the assertion of the attorney-client exemption for documents not properly within its scope could be tantamount to an act of bad faith for which might “cost the agency dearly”.

The records withheld under the transparent pretext of attorney client privilege must be disclosed, and an instruction issue that respondents be required to “pay dearly” for the inappropriate interposition of such spurious exemption.

UNIFORM TRADE SECRETS ACT WAS NOT SPECIFIED BY THE TRIAL COURT AS A BASIS FOR WITHHOLDING RECORDS, AND IS INAPPLICABLE IN ANY CASE TO DIVERSE RECORDS NOT MEETING THE RESTRICTIVE DEFINITION OF TRADE SECRET

Weyerhaeuser’s arguments concerning the UTSA are misplaced, since the Trial court, in its orders fails to identify any records as trade secrets.

If the respondents wished to take exception to the ruling they had every opportunity to appeal, but their remedy is not to argue failed theories on appeal. The trial court’s enunciated ruling was based upon a broad reading of servais reaching far beyond the identification of trade secrets.

In any event it is evident from the plaintiff’s reply to Weyerhaeuser’s motion for reconsideration that the bulk of the information sought to be withheld by Weyerhaeuser was readily available on Weyerhaeuser’s own web site and in no way qualified as a trade secret. As far as the port’s records are concerned, there is no fair reading of the UTSA which exempts general lease and development related records.

THE DELIBERATIVE PROCESS EXEMPTION SHOULD NOT EXTEND PAST THE DELIBERATIVE PROCESS, AND DOES NOT APPLY WHEN DISCLOSURE IS NECESSARY FOR THE DELIBERATIVE PROCESS

By definition, the deliberative process exemption is intended to promote ongoing deliberative process, and is not available for deliberations that have long since concluded. In addition, a requirement for exemption under deliberative process exemption is that the disclosure would inhibit the deliberative process.

The assertion of this exemption for records related to a development project is completely at variance with the “deliberative process” that the State Environmental policy is intended to promote. It is this deliberative process, and the paramount right to a healthful environment that tips the scale in favor of disclosure. By artificially postulating an on going deliberative process of speculative future negotiations that did not exist, the court stifled the only actual deliberative process that was still ongoing, the public deliberative process of the State Environmental Policy Act.

ARGUMENT SECTION III SEPA-PDA DISCLOSURE

SINCE DISCLOSURE IS ESSENTIAL TO BOTH THE PRA AND SEPA’S CENTRAL INTENT, THE PRA SHOULD BE INTERPRETED TO OBSTRUCT FULL DISCLOSURE UNDER SEPA

Respondents SEPA arguments miss the central point of both SEPA and the PDA, that both statutes were intended to further disclosure of records. Based upon this skewed perspective, the requirements that some limited number of SEPA records be

available as public records and even the term “to the fullest extent possible” is read as limiting rather than furthering the ends of complete disclosure of all information rationally related to reasonably foreseeable impacts to the environment. Giving the words of statute their reasonable and ordinary meaning PRA must be viewed as intended to promote disclosure, not to limit it, and the statutes must be read in harmony to further disclosure.

It is also to be remembered that the PRA was not drafted by the legislature but was the result of a popular initiative. It is not reasonable to believe that the members of WASHCOG, when drafting I 142 intended it to limit disclosure required under the State Environmental Policy Act. Rather, their manifest intent was to make records more public and available than before. The clear intent of the public in passing I-142 was to make government more accountable to the people, not less.

Nor does an examination of the specific sections of the statutes and administrative regulations cited by defendants support their arguments.

Counsel for Weyerhaeuser even tries to explain that the use of the term “the fullest extent possible” is intended to limit the application of SEPA.

Port counsel attempts to assign a broad legislative directive to a mere administrative rule requiring that “SEPA documents required by these rules shall be retained by the lead agency and made available in accord with Chapter 42.17 RCW.”

While this underscores the point made earlier that violations of the PDA

constitute violations of SEPA as well, it does little to deny the public policy that complete environmental information necessary to a prompt and thorough evaluation be available to the public well in advance of final determinations by agencies and the courts. Washington Courts have repeatedly held that SEPA is concerned with

“broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources.”, Kucera v. Department of Transportation, 140 Wn.2d 200, 212, 995 P.2d 663, Snohomish County Property Rights Alliance v. Snohomish County, 76 Wn. App. 44, 52-3, 882 P. 2d 807 (1994) citing Deweese v. City of Port Townsend, 39 Wn. App. 369, 375, 693 P.2d 726 (1984)

It is beyond reasonable dispute that to promote these goals SEPA focuses upon full disclosure of information and consideration of potential impacts to the environment. This court has repeatedly described SEPA as **an environmental full disclosure law**, Sisley v. San Juan County, 89 Wn.2d 78, Swift, v. Island Count, 87 Wn.2d 348, Polygon Corporation v. Seattle, 90 Wn.2d 59, Asarco v. Air Quality Coalition, 92 Wn.2d 685, (further citations omitted)

Appellant is uncertain how a law that is based upon “full disclosure” can be interpreted to require less than full disclosure of records related to massive projects such as those required by the Weyerhaeuser lease.

THE INALIENABLE RIGHT TO A HEALTHY ENVIRONMENT REQUIRES A GREATER WEIGHT IN THE BALANCE OF COMPETING INTERESTS

Defendant Weyerhaeuser’s counsel is correct when he cites the case of Spokane

Liquor Control Board for the proposition that “Though tensions between (these) competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, **balances**, and appropriately protects all interests, while placing emphasis on responsible disclosure.

However, under the express terms of SEPA... “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.”

Plaintiff is not aware of any decision where this fundamental and inalienable right has been addressed in the context of balancing interests of disclosure. However, it is his opinion that attorney-client privilege, deliberative process, trade secrets, or any of the other exemptions relied upon by the defendants in this matter should not be weighed as heavily as rights that are recognized to be fundamental and inalienable.

To do so would allow withholding the records necessary for a full and fair review under the pretext of technical exemptions which do not rise to the level of inalienable rights.

Such a state of affairs undercuts the stated core intent of the legislature in adopting SEPA, to enable the people to shape their future **by deliberation, not default**. Where commercial concerns are elevated to the level of fundamental and inalienable rights, and relevant records are veiled behind a duplicitous cloak of technical

objections, it is simply impossible for the average citizen to fulfil their responsibility to contribute to the preservation and enhancement of the environment.

In the present case, while this court was painstakingly weighing the exemptions asserted by defendants, the contours of the public's right to a healthful environment were being decided by default in an adjoining courtroom by a magistrate and parties who were unable to review the relevant evidence.

In the required balancing of interests, the fundamental and inalienable right to a healthful environment (i.e. the right to life) must be of a greater order of magnitude than mere commercial concerns. Only in this manner will the central intent of SEPA- to determine the future by deliberation instead of default- be ensured.

ASSESSMENT OF REASONABLY FORESEEABLE IMPACTS OF DEVELOPMENT REQUIRES EXAMINATION OF THE ENTIRE ADMINISTRATIVE RECORD BEFORE THE AGENCY

Perhaps the most straightforward argument for heightened disclosure of records related to administrative environmental determinations is the dual requirement that the agency administrative record must be sufficiently complete for the public to evaluate and the courts to review "the entire record and all evidence relevant to an agencies' determination."

An agencies' determination also requires an analysis of ultimate probable consequences, including those secondary and cumulative, whether social and economic. It also mandates that extra jurisdictional effects be addressed and mitigated, when

possible. Cathcart v. Snohomish County, 96 Wn. 2d 201, 209 (1981)

Cumulative and regional impacts of proposed development must also be considered procedurally in determining whether an EIS will be required.

Juanita Bay Valley Association v. Kirkland, 9 WAP 59 (1973), SAVE v. Bothel, 99 Wn. 2d 862.

The adequacy of a SEPA determination involves the legal sufficiency of the data in the record and is assessed under the rule of reason which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision. Weyerhaeuser v. Pierce County, at 38, R. Settle, the Washington State Environmental Policy Act, a legal and policy analysis. @ 14(a)(i) (4th Ed. 1993)

It has also been conclusively established that consideration of environmental factors must occur "at the earliest possible stage to allow decisions to be based upon complete disclosure of environmental consequences." King County v. Boundary Review Board, 122 Wn. 2d 648, at 663-4 (1993).

Appellant is uncertain how these comprehensive objectives can be attained when the vast majority of the agency records concerning a project are concealed from public oversight behind a veil of technical objections to disclosure until after the legal proceedings for review are concluded.

Even where some SEPA related records are eventually disclosed as occurred here

(after it was too late for the court to consider them in the cargo yard paving case) the mere fact that their disclosure can be delayed until it is too late for them to be considered in a SEPA review argues strongly against the presence of any such barriers to disclosure.

SEPA review should not become a process where project proponents race toward a final approval of their project while dragging their heels to obstruct disclosure of the records necessary for their opponents.

Significantly, in respondent counsel's own interactions with the Weyerhaeuser Corporation they are on record as preferring **“an open discovery process, with information freely exchanged.”**

In the absence of a record sufficient to demonstrate that environmental factors have been considered sufficiently to amount to prima facia compliance with SEPA an agencies' environmental determination cannot be sustained on review because the determination lacks sufficient support in the record. See Norway Hill at 276, citing Juanita Bay, at 65.

Appellant believes that the partial release of the agency records previously ordered by this court is not sufficient to amount to prima facia compliance with the mandate of full disclosure under SEPA, and that compliance with the binding precedent of the Weyerhaeuser and Norway Hill cases requires disclosure of all remaining records.

PORT'S FAILURE TO DISCLOSE RECORDS PREJUDICED SEPA REVIEW PROCESS OF WEYERHAEUSER CARGO YARD PROJECT

While counsel for both the Port and Weyerhaeuser have been outspoken in their assertions that SEPA does not require more disclosure of records than the PDA, it is significant to note that neither do they argue that SEPA requires any **less** disclosure, and it should be recognized that the failure to make disclosure prior to March 29, 2006 prejudiced the SEPA review process.

Mr. Beaver has even gone so far as to state that

“Unlike Norway Hill, here the Port followed appropriate procedures, holding hearings and disclosing documents related to the Weyerhaeuser lease in accord with a Court order. As such, pursuant to Norway Hill, the Port’s compliance with the statutory and regulatory procedures constitutes full disclosure under SEPA, and West has received all of the documents to which he is entitled.”

This damning admission clarifies the central misfeasance of the Port- the **failure to make required SEPA disclosures in the actual SEPA process**. Instead, the Port unlawfully withheld records until after the ruling of Judge Tabor of March 29 on the repaving segment of the Weyerhaeuser Cargo Yard project, and even managed to withhold records for some time after having been ordered in this case to disclose them. This also has obstructed proper review of the dredging, rail and conduit appeals, and prevented the initial comprehensive review required under SEPA.

Under such circumstances, there is no reasonable argument to be made that the required disclosures pursuant to Norway Hill occurred in time for the SEPA related information to be considered by Judge Tabor as required by the clearly established procedural disclosure requirements of the State Environmental Policy Act. This deliberate violation of the procedural requirements of SEPA mandates a finding that defendant port deliberately obstructed access to records to evade the required environmental analysis of their expansive terminal development project.

As the aforementioned ruling of Judge Tabor demonstrates, and the memo of Port counsel underscores, the ruling of March 29 was issued **“Under the facts that have been presented to me here today.”** (See port brief at P. 7, lines 20-21)

The fact that the Port knowingly and willfully withheld records relevant to the issues before Judge Tabor corrupted the entire SEPA review process and obstructed the lawful environmental review required under the State Environmental Policy Act. The facts necessary for the due process of environmental review were simply not available to Judge Tabor as they were still concealed in apple boxes and being laboriously examined by this court.

Neither the required disclosure under Norway Hill or the PDA occurred in time for the relevant records to be evaluated in the SEPA review process. The extensive violations of the PDA manifest in this present case constitute equally manifest violations of SEPA in all of the Marine Terminal Expansion Projects related to the

weyerhaeuser lease.

Irregardless, if the disclosure requirements of SEPA are found to be equal to or greater than those of the PDA, **it is beyond any reasonable dispute that the defendant's withholding of records related to the Weyerhaeuser lease and related developments constituted not only a substantive violation of the Public Disclosure Act but a serious procedural violation of the State Environmental Policy Act as well.** As the 9th Circuit has ruled in defining the harm that environmental laws protect against.

West has surely been harmed by the application of a DCE since it precluded the kind of public comment and participation NEPA requires in the EIS process. But the core harm NEPA protects against is harm to the environment. See Sierra club v. Marsh, 872 F.2d 497, 500 (1st Cir 1989) (“the harm consists of added risk to the environment that takes place when governmental decision makers make up their minds without having before them an analysis of the likely effects of their decision upon the environment. NEPA’s objective is to minimize that risk, the risk of uninformed choice...”) West v. Secretary of Dept. of Transportation, 206 F.3d 920, at 931 (2000)

Even if further disclosure of records is not found to be required under SEPA, this court should at least recognize the harm to both public records and environmental policy caused by defendant's deliberate conduct in this case. This is also a compelling argument for a reasonable sanction with actual deterrent effect.

CONCLUSION

For the above reasons, and for those argued by the League, Koenig, and the Amici, incorporated herein, this case should be remanded with instructions to release all records now being withheld, and for the court to assess reasonable penalties based upon the actual number of groups of records withheld.

I certify the foregoing to be correct and true under penalty of perjury of the laws of the State of Washington. Done this 24th day of June, 2006.

_____ @ _____

FILED AS ATTACHMENT
TO E-MAIL