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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Cause No. 36556-1-II

**COURT OF APPEALS DIVISION II
FOR THE STATE OF WASHINGTON**

JERRY DIERKER, et al

Appellants

v.

PORT OF OLYMPIA,

Respondents

**Appeal of the rulings of the Honorable Richard Hicks,
of the Thurston County Superior Court**

APPELLANT'S OPENING BRIEF

**ARTHUR WEST
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ASSIGNMENTS OF ERROR

I. The Court erred, in entering the orders of June 15 and 25, 2007, (CP 232-240, 142-143), in entering findings 1-9 (CP 233-4), and in determining that substantial evidence supported the findings of the agency, and in otherwise approving the agency action, when no substantial evidence of a verbatim record of an adjudicative hearing existed subject to review.

II. The Court erred in entering the orders of June 15 and 25, 2007, in denying standing based on Trepanier when petitioners environmental challenge to a structural transportation project was not comparable to a non project Trepanier type economic challenge, when air projects are uniquely subject to SEPA review, where the precedent cited by the court supported standing, where petitioners clearly and particularly asserted the potential for deterioration of their environment as a foreseeable result of the project. *Trepanier v. Everett* 64 Wn. App. 380, 824 P.2d 524 (1992).

III. The Court erred in upholding, ex post facto, a issued by the port for a single phase 7 month project when such finding was clearly erroneous in light of the evidence in the record that the project was actually a multi-phase 3 year long project with a point of commitment in 2005 prior to the commencement of the SEPA review process in 2006.

IV. The Court erred in approving the incorporation of a NEPA CE as an adequate environmental document when it was not adequate in a manner at variance with clearly established precedent of *Boss v DOT* and when and the project had substantially changed.

V. The Court erred, in the orders of June 15 and 25, 2007, in failing to take a hard look at the project and examine all evidence necessary to determine if the agency finding was arbitrary or clearly erroneous and in upholding the SEPA determination when it was inadequate and clearly erroneous, due to evidence of reasonably foreseeable impact and due to the deliberate exclusion and suppression of evidence.

VI The Court erred, in the orders of June 15 and 25, 2007, in approving a reconsideration process when it allowed multiple fees and failed to afford due process or require an administrative hearing or an underlying action.

VII The Court erred, in the orders of June 15 and 25, 2007, in determining any issues against appellants when defendants had failed to dispute the allegations in the complaint and when such failure to answer or deny required that all such allegations be regarded as true.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. Did the Court err in entering the orders of June 15 and 25, 2007, (CP 232-240, 142-143), in entering findings 1-9 (CP 233-4), and in determining that substantial evidence supported the findings of the agency, and in otherwise approving the agency action, when no substantial evidence of a verbatim record of an adjudicative hearing existed subject to review?

II. Did the Court err in entering the orders of June 15 and 25, 2007, in denying standing based on Trepanier when petitioners environmental challenge to a structural transportation project was not comparable to a non project Trepanier type economic challenge, when air projects are uniquely subject to SEPA review, where the precedent cited by the court supported standing, where petitioners clearly and particularly asserted the potential for deterioration of their environment as a foreseeable result of the project?

III. Did the court err in upholding, ex post facto, a MDNS issued by the port for a single phase 7 month project when such finding was clearly erroneous in light of the evidence in the record that the project was actually a multi-phase 3 year long project with a point of commitment in

2005 prior to the commencement of the SEPA review process in 2006?

IV. Did the Court err in approving the incorporation of a NEPA CE as an adequate environmental document when it was not adequate in a manner at variance with clearly established precedent of *Boss v DOT* and when and the project had substantially changed?

V. Did the Court err in the orders of June 15 and 25, 2007, in failing to take a hard look at the project and examine all evidence necessary to determine if the agency finding was arbitrary or clearly erroneous and in upholding the SEPA determination when it was inadequate and clearly erroneous, due to evidence of reasonably foreseeable impact and due to the deliberate exclusion and suppression of evidence?

VI. Did the Court err in the orders of June 15 and 25, 2007,, 2007, in approving a reconsideration process when it allowed multiple fees and failed to afford due process or require an administrative hearing or an underlying action?

VII. Did the Court err in the orders of June 15 and 25, 2007, 2007, in determining any issues against appellants when defendants had failed to dispute the allegations in the complaint and when such failure to answer or

deny required that all such allegations be regarded as true?

STATEMENT OF THE CASE

ADMINISTRATIVE PROCEEDINGS

On January 24, 2006, the Port of Olympia made a State Environmental Policy Act (SEPA) a Mitigated Determination of Non-Significance (MDNS) (AR 003039 - AR 003041), which the Port issued under File No. SEPA 06-1 for both the "taxi lane" and the "runway/line-of-sight" parts of this now piecemealed airport improvement project currently listed under the Port's Files No. SEPA 06-2 and SEPA 06-3.

Soon afterward, both Appellants requested public records and other information from the Port on this proposal, and both of the Appellants timely "Commented" on and administratively appealed this Port SEPA MDNS on this airport improvement project to the Port, and in response to these appeals, on March 7, 2006 the Port formally withdrew this SEPA MDNS (AR 003084 to AR 003085) that the Port had previously issued for this airport project under File No. SEPA 06-1. (See, e.g. AR 001601, AR 001619, and AR 001647).

On June 28, 2006 the Port of Olympia issued a SEPA DNS determination under the Port's File No. SEPA 06-2 on the "taxi lane" part of the Port's airport improvement project previously reviewed under File No. SEPA 06-1 (AR 000425 to AR 000427).

Soon afterward, Mr West, Mr. Dierker and others requested public records and other information from the Port on this proposal, Mr West, Mr. Dierker and others timely "Commented" on this Port SEPA DNS 06-2 on this airport improvement project to the Port; on July 18, 2006 Mr West, Mr. Dierker and others timely filed administrative Request for Reconsideration of this Port SEPA DNS 06-2 on this airport improvement project to the Port (AR 000422, AR 000458); and on August 30 and 31, 2006 Mr West, Mr. Dierker and others timely administratively appealed this Port SEPA DNS 06-2 on this airport improvement project to the Port Commissioners, and that administrative appeal was later denied by the Port (AR 001318, AR 001391).

On July 10, 2006, the FAA made an "unphased" NEPA Checklist and CE (AR 000179 to 000196) where both the SEPA 06-2 "taxi lanes" airport improvement project and the SEPA 06-3 runway/line of sight airport improvement project were reviewed as a single project in the FAA's June 10, 2006 Environmental Checklist and CE for this project, despite the fact that the Port had already issued the June 28, 2006 SEPA DNS on file No. SEPA 06-2.

On July 11, 2006, the Port of Olympia issued an "unphased" SEPA MDNS determination under the Port's File No. SEPA 06-3 (AR 000001 to AR 000003) on the Port's "runway/line-of-sight" piecemealed part of the Port's airport improvement projects previously listed and

reviewed as single project under Port File No. SEPA 06-1.

Soon afterward, Mr West, Mr. Dierker and others requested public records and other information from the Port on this proposal, and both of the Appellants timely "Commented" on this Port SEPA MDNS No. SEPA 06-3 on the Port's "runway/line-of-sight" airport improvement project to the Port.

Pursuant to the Port's SEPA Policy of the time (see AR 000427), on July 31, 2006, Mr West, Mr. Dierker and others timely filed an administrative Request for Reconsideration of this Port SEPA MDNS No. SEPA 06-3 on the Port's "runway/line-of-sight" airport improvement project to the Port Executive Director (AR 000365, AR 000370, AR 000378), which were later denied on Oct. 5, 2006 (AR 000199 -- AR 000247). (See, e.g. -- AR 000203 to AR 000204)

On Oct. 12, 2006, Mr West, Mr. Dierker and others timely filed an administrative appeal of this Port SEPA MDNS 06-3 on the Port's "runway/line-of-sight" airport improvement project to the Port Commissioners (AR 001123, (AR 001126, (AR 001131), which were later denied on November 15, 2006 (AR 000320), while the Port continued to unlawfully, arbitrarily and capriciously withhold or conceal from Mr West, Mr. Dierker and others the Port's relevant agency records, public records and other information necessary for a proper review of the merits of this case.

In both of those administrative appeals on SEPA 06-2 and 06-3, Mr West, Mr. Dierker and others administratively appealed the Port's actions that lead to this Port's unlawful, arbitrary and capricious "piecemealed" SEPA review of these two connected and related airport improvement projects, while the Port withheld public documents and evidence relevant to this matter, which comprises most the Port's agency actions reviewed in this case.

After the dismiss of this administrative appeal on SEPA 06-3, Mr West and Mr. Dierker appealed in the Washington State Superior Court the administrative State Environmental Policy Act (SEPA), Chapter 43.21C RCW decision made by the Port of Olympia on this project. The Port's Airport 9 Runway 17/35 Improvement Project under File No. SEPA 06-3 had two primary components: (1) runway paving rehabilitation and strengthening; and (2) correction of required safety (line-of-sight) deficiencies. ("Project").

Other "phasing" of the SEPA 06-3 airport project was not disclosed to Appellants or the public until the Port's later disclosure of the FAA's April 2007 sent the Port the FAA's first "Letter of Intent" for an "AIP Grant Award" on this runway line of sight project, which occurred long after all environmental review had been individually completed by the FAA and the Port. (See FAA's first "Letter of Intent" for an "AIP Grant Award" on this runway line of sight project of April 2007).

On June 7, 2007, the FAA further "piecemealed" and "phased" this project letter on this runway line of sight project, when after all environmental review had been completed, the FAA again piecemealed even this portion of the FAA's and Port's larger project started in 2004 into at least two more smaller individual pieces, which again occurred long after all environmental review had been individually completed by the FAA and the Port. (See FAA's second "Letter of Intent" for an "AIP Grant Award" of June 7, 2007; and FAA's "AIP Grant Award" letter on this runway line of sight project of June 11, 2007).

On September 15, 2007 the plaintiffs filed a Superior Court action seeking judicial review of the Ports action. (CP3-21) The verified petition for Certiorari stated that no verbatim record of any adjudicative proceeding existed for the court to review (CP 12)

On April 6, 2007 the City of Tumwater was dismissed (CP 87-9) based upon incorrect representations by an insurance counsel representing the City that the City had not done anything in relation to the project. (CP 63-71)

On June 1, 2007, the Thurston County Superior Court, Judge Hicks presiding, in its appellate capacity reviewed the appeal, considered the extensive briefing submitted by the parties, heard extensive argument, and ultimately ruled to uphold the Port's decision by denying Appellants' judicial appeal. Judge Hicks also found that this SEPA 06-3 runway line

of sight project on the Olympia Airport would be strengthening the runway to allow heavier aircraft to be able to utilize the Olympia Regional Airport facilities. (See CP 236-204).

On June 15, 2007, the Superior Court issued a written order upholding the Port's SEPA Decision for the Project and denying the appeal (CP 232-204)

On June 25, 2007 the Superior Court issued a ruling denying reconsideration.(CP 241-242)

On July 10, 2007, construction on the "first" phase of this Port's SEPA 06-3 airport project started.

On July 16, 2007 Appellants' timely appealed the Superior Court Decision to this Washington State Court of Appeals Division II, where this appeal review is pending. (CP 243-257)

ARGUMENT

INTRODUCTION-SUMMARY OF ARGUMENT

This Appeal concerns the actions of the Port of Olympia Respondents (and the Federal Aviation Administration, FAA) to evade proper environmental and project review to conduct a major construction project, and the Superior Court review of a manifestly erroneous administrative determination of the Port, made without an adequate record or any verbatim record of a proceeding.

This construction, which directly made major upgrade improvements in the strength of the main runway pavement, was functionally and temporally linked to other related improvements in the airports other taxilanes, taxiways, hangars, warehouses, and related urban development on and near the Port of Olympia Respondents' Olympia Regional Airport in Tumwater, Thurston County, Washington.

The Port's actions were arbitrary and capricious and clearly erroneous since they failed to consider cumulative and off site impacts, were made without consultation with affected agencies and entities, were improperly based upon an inadequate and "unphased" FAA's National Environmental Policy Act (NEPA) Categorical Exemption (CE) and at least two of the Port of Olympia's State Environmental Policy Act (SEPA) "negative threshold" environmental determinations, a DNS and a MDNS, all which were issued **after** the FAA and the Port had committed and used about \$600,000.00 in public funds to construct this project, and all of which were issued **before** the FAA disclosed that this was actually a "phased" project.

In addition the port and the FAA changed and "phased" the project further at the last minute **after** the FAA's NEPA CE and the Port's SEPA DNS and MDNS were issued, and all while the FAA and the Port failed to even have a "Habitat Management Plan" for these agencies required protection of the known candidate, threatened, and endangered

species on and near the Olympia Regional Airport in Tumwater, Thurston County, Washington.

The circumstance also exists that in mid-2005, (as the FAA's and Port's agency records on this project and Appellant West's pleadings and admissions made by FAA's U.S. Attorney and exhibits filed in the underlying Federal District Court case in the Western District of Washington Case No. 05516-RBL) , show that about \$600,000 in federal public funds from the FAA's Airport Improvement Program (AIP) were committed and used for this project and used for the engineering and removal of trees on the Olympia Regional Airport property as part of this runway line of sight project **before** the FAA's National Environmental Policy Act (NEPA) "Categorical Exemption" (CE) was ever issued, in violation of the provisions of NEPA and SEPA.

This appeal concerns a 2005-2007 line of sight and runway strengthening project at the Olympia Airport, which is the most recent segment of a series of airport development projects.

Although the point of commitment for this project apparently occurred in June of 2005, without public notice or review, a Categorical Exemption was not issued by the FAA until over a year later, on July 10, 2006. An AIP grant award did not occur prior to the final order of the Court in this matter.

The prospect of any pretense of NEPA review of the project is

somewhat obstructed by the fact that the point of commitment occurred by means of an unorthodox "amendment" of a previous AIP grant to include work outside of its proper scope, two years prior to the "final" grant award under AIP 14 that the District Court considered to be the first action approving the project subject to review. (See order of June 6, Cause No. 05516-RBL, in *West v. Secretary of Transportation (II)*)

Further, the project actually funded and constructed in 2007 was markedly different from that which was assessed and approved in the NEPA CE of July of 2006, due to respondents arbitrary and capricious alterations and phasing of the project, again without notice to petitioners or the public.

The NEPA review, such as it was, appears to have been confined to a pro forma Categorical Exclusion issued in complete defiance of the FAA's own implementing regulations, despite their obvious bias in favor of Categorically excluded actions. (See AR 3- 6) **For a project involving major runway strengthening, FAA regulations require the preparation of at least an EA.** While there are many pages of actions considered categorically excluded by the FAA, runway strengthening is one of only 3 types of action not so excluded from NEPA.

Under these circumstances the real arbitrary and capricious action is the concerted pattern of activity of the FAA and project proponents to completely insulate all projects from even the possibility of any

comprehensive NEPA review, to the extent of delaying any "final" approval subject to review until after the projects are under construction. Significantly, it was not until after construction commenced that respondents revealed the substantial public safety issues posed by the project (in an attempt to evade an injunction).

Respondent FAA's conduct reflects concerted a pattern of Arbitrary and capricious conduct, including ;

Committing resources covertly without notice or any procedure.

Altering the project after the environmental determination had been made and in a manner not disclosed to appellants.

Granting a Categorical Exemption without a proper record subject to review.

Mis-characterizing a major project as "minor" in violation of FAA regulations.

Failing to conduct any extraordinary circumstance analysis.

Failing to consider cumulative impacts and connected actions.

Concealment of records necessary to evaluate agency action.

Misrepresentation of the project to the District Court in a (successful) attempt to evade district court review, and incorporating the improper Categorical exclusion into a State SEPA proceeding to short circuit State environmental review.

These acts combined to produce a situation where the actual

commitment of resources was done secretly without any review, where no record subject to review was compiled prior to a “rubber stamp” Categorical Exclusion, which then was wrongly incorporated to evade any thorough review under SEPA by the port in a private reconsideration meeting, and where the final project actually funded and constructed was completely different from the project reviewed.

Even more disturbing is the timing of the AIP award to coincide with the FAA motion to dismiss in the District Court, and the phasing and acceleration of the project to evade State Court review, evident from the E-mail correspondence in the Administrative record.

The appellants and the public had no notice when resources were committed, were unable to obtain records necessary to evaluate the project, which was approved with a pro forma exemption. Where this is the extent of public notice and review, and the project is altered after the SEPA “review” is completed so as to accelerate construction and make any timely review impossible, there can be no question of compliance with SEPA or law.

ARGUMENT ERROR I

The Court erred in finding substantial evidence in entering the orders of June 15 and 25, 2007, in determining that substantial evidence supported the findings of the agency, and in otherwise approving the

agency action, when no substantial evidence of a verbatim record of an adjudicative hearing existed subject to review under the clearly established precedent of *Weyerhaeuser v. Pierce County*, 124 Wn. 2d 26 (1994), at 38.

It is beyond dispute that a verbatim record is required for review by certiorari. In plaintiff's verified petition for the writ to issue, they attested to the lack of a record subject to review.

It was error for the court to fail to remand the matter back to the port and/or grant the writ of certiorari or mandamus when the port never denied, and even conceded that no record subject to review existed in the first place.

In the order of June 16 including findings 1-9, the court erred in ruling when no verbatim record that supported the agency action was available for review.

The "clearly erroneous" standard provides a broader review than the "arbitrary or capricious" standard because it mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision. *Department of Ecology v. Kirkland*, 8 Wn. App. 576, 580, 508 P.2d 1030 (1973), *aff'd* on other grounds, 84 Wn.2d 25, 523 P.2d 1181 (1974); *Norway Hill v. King County Council*, 87 Wn. 2d 267, at 272, 552 P. 2d 674 (1976); *Williams v. Young*, 6 Wn. App. 494, 497, 494 P.2d 508 (1972).

A court's review of the reasonableness of an administrative determination necessitates scrutiny of the administrative record to determine if it was reached through a process of reason. **Judicial review cannot take place when the record is silent as to what actually was the basis for the agency's decision.** Neah Bay Chamber of Commerce v. Department of Fisheries, 119 Wn.2d 464, 468, 832 P.2d 1310 (1992); Weyerhaeuser v. Pierce County, 124 Wn. 2d 26 (1994). Washington Courts have long held that review of administrative action requires a verbatim record. Beach v. Board of Adjustment, 73 Wn.2d 343, 438 P.2d 617 (1968). This requirement is even more crucial to SEPA certiorari proceedings. As the Supreme Court has repeatedly held "the necessity of an adequate record is especially acute when the court is called upon to review adjudicatory proceedings."

The court has also said, "[t]he city is required to present a verbatim record of adjudicatory zoning procedures in order to permit the parties to have a full and complete review. This was not done and it should have been done in line with the Kitsap County case." Barrie v. Kitsap County, 84 Wn.2d 579, 527 P.2d 1377 (1974). We agree. The writ of certiorari requires the same. Parkridge v. Seattle, 89 Wn.2d 454, (1971)

In the absence of a verbatim record of an adjudicative proceeding, the only conclusion that the Superior Court could properly make in this case is that the Port erred and acted arbitrarily and capriciously in making

its determinations without a proper administrative record subject to review. The determination that the ports process was free from defect was also erroneous when no administrative hearing with a verbatim record was provided. The Court erred and violated any standard of review in ruling absent a verbatim record to rule upon.

Plaintiff specifically objects to each and every one of the findings and conclusions No. 1-9 on the order of June 15, (CP 233- 4) as set forth in appendix 1, incorporated herein by reference.

ARGUMENT ERROR II

The Court erred in the orders of February 9 and 21 in denying standing based on Trepanier when petitioners environmental challenge to a structural transportation project was not comparable to a non project Trepanier type economic challenge, when air projects are uniquely subject to SEPA review, where the precedent cited by the court supported standing, and where petitioners clearly and particularly asserted the potential for deterioration of their environment as a foreseeable result of the project.

In the order of June 15, (CP 233-4) the court erred in finding 1 (b), that plaintiffs failed to meet the particular harm of the standing test based upon a complete misunderstanding of the Trepanier case and the standing case law. Trepanier v. Everett 64 Wn. App. 380, 824 P.2d 524 (1992).

The Superior Court's "Trepanier based" ruling failed to recognize that while the plaintiff in Trepanier was asserting a wholly economic challenge to an ethereal ordinance, Petitioners West and Dierker's claims concern the actual project construction and operation elements and impacts of the increased air traffic by larger planes in this area, and related development of a air freight transportation project, leading from this Port project's improvement of Airport facilities and strengthening of the Airport's runway to accommodate greater numbers of larger aircraft to use this Airport.

Unlike a non-project zoning decision the effects of which are necessarily speculative in some degree, the approval of a transportation infrastructure project such as SEPA 06-3 is the type of action which is reasonably projected by both common sense and established precedent to produce substantial impacts to noise, traffic, and degradation of air and/or water quality that provide standing to those residing in or connected to the general project vicinity.

It is no mere coincidence that the impact of burgeoning Highway development in the early 70s was one of the principal factors behind the adoption of NEPA, upon which SEPA is based. However, the transportation related origins of environmental policy in general are beyond the scope of this memorandum, and it will merely be noted that the review of airport, marine, and especially highway and road related

transportation projects make up the majority of NEPA cases adjudicated.

It is beyond argument that projects related to motor vehicle, and especially marine and air transportation present potential significant impacts are a type of readily reviewed by the Courts.

Kucera v. Department of Transportation, 140 Wn.2d 200, 212, 995 P.2d 663, is an illustrative case, where there was no “project” at all but merely an issue of impact from the speed of a single marine vessel, the Chinook. In analyzing the “injury in fact” element the court noted that “a variety of transportation decisions” have been subject to review under NEPA, and that it was not unprecedented to require review of even nonstructural transportation actions. Significantly, of the five examples cited by the Court in *Kucera*, four (4) involved impacts from the operation of Aircraft.

Recognizing the extraordinary potential for impact from transportation related actions, the *Kucera* Court stated that “it is not unprecedented to require environmental review of nonstructural transportation actions.”

In another illustrative transportation related case, (Despite the fact that the petitioners failed to allege that they lived adjacent to the project), the *Kucera* Court found substantial evidence:

“to support the trial court’s finding that the petitioners are adversely affected by the noise and noxious fumes from the

proposed highway, and as persons directly affected they therefore have standing to raise the SEPA issues". Leschi v. Highway Commission 84 Wn.2d 271, at 280, 525 P.2d 774 (1974) citing Loveless v. Yantis, 82 Wn. 2d 754, 513 P. 2d 1023 (1973).

In a local Olympia case where non-project plat approvals were concerned , in Loveless v. Yantis the court found that "With the members of the association here (the Cooper Point Association) all residents of the area affected, the association has a direct enough interest to challenge the administrative action." citing a Federal NEPA case, Sierra Club v. Morton, 405 U. S. 727, 31 L.Ed. 2d 636, 99 S.Ct. 1361 (1972)

It is interesting to note that the very precedent cited by the trial Court as controlling precedent, West v. Secretary of Dept. of Transportation, 206 F.3d 920, at 931 (2000) specifically supports the petitioners standing in this case and establishes the element of injury in fact.

Washington Courts have adopted "the federal approach to the requirements of standing" in environmental cases under SEPA. SAVE v. Bothel, 89 Wn. 2d 862, at 868, 576 P.2d 401(1978) See also Asarco Inc. V. Air Quality Coalition, 92 Wn.2d 685, 709, 601 P.2d 501(1979) " While NEPA and SEPA are substantially similar in intent and effect,...the public policy behind SEPA is considerably stronger than that behind NEPA",

citing Kucera at 216.

The “federal approach” to the particular standing of petitioner West to challenge a transportation project was as follows:

The dissent’s focus on harm to Mr. West also seems misplaced. 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 (with public comment) 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).

The Court’s ruling on standing failed to recognize the actual harm that SEPA is intended to protect against. 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 (PRA) 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)

More recently, in *Ocean Advocates v. U. S. Army Corps of Engineers*, 402 F.3d 854 the Ninth Circuit, in finding that allegations of “increased tanker traffic, the discharge of pollutants, and the risk of oil spills” posed a sufficient injury in fact adopted the following standard...

“ An individual can establish “injury in fact” by:

"Showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable-that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction-if the area in question remains or becomes environmentally degraded." *Ocean*, at 860.

Since West and Dierker have adequately shown an aesthetic and recreational interest in the particular area affected by the project, and that the interest is impaired by defendant's project approval, the injury in fact requirement has been satisfied beyond reasonable dispute. See *Ocean*, at 860.

As the Court stated...

"To require actual evidence of environmental harm, rather

than an increased risk based upon a violation of (a) statute, misunderstands the nature of environmental harm, and would unduly limit the enforcement of statutory environmental protections." Ocean, at 860.

Both petitioner west and Dierker have resided in the Olympia area for over a decade. West's allegations of residence in Tumwater in the vicinity of the project are undisputed. Dierker's declarations stating his residence within the flight path, (and noise contour) as well as his particular susceptibility to toxic contaminants have not been controverted. Both petitioners have attested to employing the vicinity of the project area and the areas impacted by aircraft for recreation and leisure activities, and have identified their connections to the area and the animals and protected and threatened species that inhabit and pass through the project's vicinity-species which will be impacted by the effects of construction and the greater air traffic resulting from the project.

Petitioner West, in particular has been judicially recognized to have standing in regional transportation related environmental matters for over 7 years. It is unreasonable to suggest that while West has standing to contest one transportation project over 17 miles from his residence, he lacks standing to contest another within the boundaries of the municipality in which he has his residence.

In addition, had the Court continued on further from the portion of

the case it cited out of context, a careful reading of the West case demonstrates that a NEPA CE is inappropriate for a project (Such as the 3 phase SEPA 05-3) that has uncertain temporal and spatial parameters. See West, at 930.

In addition, the Court erred in failing to find that the project was of a type that called for relaxed standing requirements

"Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer. *Washington Natural Gas Co. v. PUD 1*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969); accord, *Volvos v. Grant*, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976). Where an "issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials. *Cathcart Community Council. v. Snohomish County*, 96 Wn.2d 201, 208, 634 P.2d 853 (1981).

A determination of the merits of Petitioners' claims in this case is a perfect example of a controversy the outcome of which will have a direct bearing on the commerce, finance, labor, industry or agriculture generally.

Such a direct expenditure provides a direct and particularized

injury in fact required under even the most restrictive and exclusive test for standing.

It should also be noted that Petitioners' standing was specifically plead in the complaint and never denied. Further, a request for admission that Petitioners had the requisite standing was not denied and the issue must therefore be considered proven by Petitioners. See CR 36, *Melby v. Hawkins Pontiac*, 13 Wn. App. 745, 537 P.2d 807 (1975)

As a further standing argument, Petitioners have a special relationship and particularized standing based upon the Port and others failing to disclose records until after the filing of the suit and then charging him over \$100 for public records disclosure. By failing to disclose records prior to suit, and then charging Petitioners for public records disclosure, the Port has established a "special relationship" with Petitioners or the Port or the law controlling such matters have established other relationships which provide a particularized effect upon Petitioners required for providing Petitioners with standing to proceed. See Petitioner West's Standing Memo in the Port's Agency Record (AR).

SEPA ARGUMENT

If a plaintiffs lack particular standing to defend their fundamental and inalienable right to a healthful environment standing to determine if an agency is public to begin with, then the entire enforcement of the SEPA is

jeopardized. If such a ruling were allowed to set precedent, then any agency could deny citizen standing based upon a lack of particular impact for the most widespread and harmful projects, so long as they harmed everyone indiscriminently, and the citizenry would be entirely without recourse. Such a result is so absurd as to make a mockery of the entire concept of the right to a healthy environment.

The goal in construing a statute is to effectuate the legislative intent, which we ascertain "from the statutory text as a whole, interpreted in terms of the general object and purpose of the legislation." *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 401, 722 P.2d 787 (1986)

The broad remedial mandate of SEPA must be construed to effectuate the remedial intent of the legislature. The narrow and hyper-technical standing determination by the Trial Court is completely at odds with all principles of construction of remedial statutes, and SEPA in particular.

It was also error to deny standing when issues of statewide importance existed justifying relaxed standing requirements, when defendants had informational standing based upon records expressly refused to disclose public records at the time of the filing of the original complaint, and due to their frequent communication with the media on records and environmental matters, and when the port had entered into a

special relation with the plaintiff by withholding records illegally.

In addition there is the technical point that the issue was not raised before the administrative tribunal, which if the de novo review under the writ of certiorari was not available, would bar such issue being raised.

Issues not before the administrative agency may be raised on appeal to superior court only where statute provides for de novo review of the agency action. *Kitsap County*, 99 Wn.2d at 392. In the absence of the verbatim review of the Certiorari process, which could not occur due to a lack of a verbatim record, it was error for the Superior Court to allow new issues to be argued in what was not a de novo review.

It is a basic tenet of administrative law that "Issues not raised before the agency may not be raised on appeal In *King County v. Washington State Boundary Review Board*, our Supreme Court held that King County could not raise an issue before the court because it had failed to raise that issue before the boundary review board. King County never made its argument that proposed annexations were prohibited by ordinance, despite opportunities to do so. The court rejected King County's argument that the annexation issue was before the boundary review board despite the fact that the ordinance appeared in materials before the boundary review board and the city proposing the annexation argued that the ordinance had no preclusive effect. In doing so, the court stated: "In order for an issue to be properly raised before an administrative

agency, there must be more than simply a hint or a slight reference to the issue in the record." *Wells v. Hearing Board*, 100 Wn. App. 656, 684 (2000) citing *King County v. Boundary Review Bd.*, 122 Wn.2d at 670.

However, even if the de novo review allowed such an issue to be raised procedurally at the Superior Court appeal level, the Superior Court still erred substantively.

ARGUMENT ERROR III

The Court erred in upholding, ex post facto, a MDNS issued by the port for a single phase 7 month project when such finding was clearly erroneous in light of the evidence in the record that the project was actually a multiphase 3 year long project with a point of commitment in 2005 prior to the commencement of the SEPA review process in 2006.

It is a basic axiom of due process that adequate notice be given sufficient to appraise interested parties to allow their participation in the proceedings.

The Ninth Circuit Court has held that changes in a proposed action that deprive the public of the ability to reasonably anticipate a the final action compromise the public's ability to comment. *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, at 1189 (9th Cir. 2002)

In this case the Port's SEPA No. 06-2 and SEPA 06-3 SEPA determinations and the Northwest Mountain Region Airports Division

Environmental Checklist of April 1, 2004, and the Categorical Exemption issued on 7-10-06 represented a single phase project where construction was to be completed in a "Seven Month period" between April - November 1, 2007.

However, by the time the actual grant approval for AIP #3-53-0041-041 issued on June 11, 2007, substantial changes had been made, resulting in some type of phased project over a two year duration.* even without the pre-review phase of the project.

This is shown in AR 82, AR 88, which demonstrate that the FAA and project proponent deliberately scheduled the project around Court proceedings to allow for the construction of an alternate project without the possibility of review.

As late as 4-25-07, Mr. Winter was still commenting upon the Phase I final design, when the Port's SEPA 06-2 and the NEPA Categorical exclusion had issued 9 months previously on a project without any phases at all.

These alterations were inconsistent with SEPA 06-2 project description and checklist, and the specific terms of the 7-10-06 Northwest Mountain Region Environmental Checklist, which did not contemplate a phased project with at least a two year duration. (See Checklist, page 1-2, 4, 6, and 15), and which found effects to be minimal due to the limited time frame of the project.

Obviously, this significant alteration in the project should have required some form of supplemental SEPA and NEPA documentation, such as an accurate checklist and determination that considered the cumulative impacts of the entire phased project, including the Port "engineering" and the actual ground breaking work that the FAA had apparently already conducted prior to the 2005 project approval. No updated Environmental Documentation exists that accurately describes the actual project funded in AIP #3-53-0041-041 for the Court of Appeals to review

The failure of the Port or FAA to give notice of the specifics of the actual project funded, and the repeated changes to the phasing and duration (See *Zoena Club v. County of Sonoma*, 6 Cal App. 4, 1304) completely violated the requirement of public notice and opportunity to comment on the project. See also *Bert L. Bargmann, Jr., et ux v. The City of Ephrata*, Washington Court of Appeals unpublished opinion in No. 22062-1-III, 07/08/2004, a case counsel should be aware of as they were the representatives of Mr. Bargman.

The Superior Court erred when it failed to find the Port's determination on the SEPA 06-3 MDNS to be clearly erroneous, and when it previously failed to find the related but piecemealed SEPA 06-2 DNS to be clearly erroneous, when these rulings were undeniably based upon a substantially different project description than that which was actually

approved and constructed.

The Central intent of both SEPA and NEPA is to require agencies to assess the effects that may flow from their decisions at a time when they retain a maximum range of options. *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985); *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852-53, (9th Cir. 1979), CFR 1501.2, 1501.1

Toward this end, the Courts have attempted to define a "point of commitment" at which the filing of an Environmental Impact Statement or other environmental determination is required. See *Sierra Club v. Peterson*, 717 F.2d 1409, at 1414, (D.C. Cir. 1983).

This State's State Environmental Policy Act's WAC 197-11-055,

Timing of the SEPA Process states in part:

(2) (c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action." (Emphasis added).

The Ninth Circuit holds that environmental review must be prepared before any irreversible and irretrievable commitment of resources. *Conner v. Buford*, 836 F.2d 1521, (9th Cir. 1988) As this Court noted in *Buford*, at 1527.

SEPA's public comment and notice procedures are at the heart of the environmental review process. (See *Nisqually Delta Association v. DuPont*, 103 Wn.2d 720, 738, 696 P.2d 1222 (1985). SEPA requires that

all responsible opposing viewpoints be given an opportunity to be included in the decision making process. (Id.).

This is especially true in such "negative-threshold determination" situations such as the two piecemealed MDNS and DNS SEPA determinations on this project, where no formal review of the foreseeably likely significant environmental impacts leading from a project has been done and where verbatim records of adjudicative hearings, especially formal ones, are not present to substantiate the adequacy of a threshold determination, like has occurred in this case.

"In essence, what SEPA requires, is that the 'presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.' RCW 43.21C.030(2)(b). It is an attempt by the people to shape their environment by deliberation, not default." See *Norway Hill*, at 272, quoting *Stempel v. Dept. of Water Resources*, 82 Wn. 2d 109, at 118, 508 P. 2d 166 (1973); see also *Loveless v. Yantis*, 82 Wn. 2d 754, at 765, 513 P. 2d 1023 (1973).

The Port's decision to issue a SEPA negative threshold determination (a categorical exemption, a DNS or an MDNS) must be based on information sufficient to evaluate the proposal's environmental impact. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997); WAC 197-11-335.

If appealed, the Port must demonstrate that they both actually considered relevant environmental factors before reaching their decision. See WAC 197-11-444, which lists relevant environmental elements.

The Port's Agency record must demonstrate that the City and the Port adequately considered the environmental factors "in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA." *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978); see also *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997) (citing *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn 2d 267, 274, 552 P.2d 674 (1976)).

However, "(i)n the absence of a record sufficient 'to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with SEPA', NEPA and other applicable laws in this case, such a "negative threshold determination" to not do the legally "integrated" and/or "combined" NEPA/SEPA/ and other law review of this project, "could not be sustained upon review even under the 'arbitrary and capricious standard' because the determination would lack sufficient support in the record." (*Norway Hill*, supra at 276, quoting *Juanita Bay Valley Community v. Kirkland*, 9 Wn. App. 59, 510 P. 2d 1140 (1973); *Stempel v. Dept. of Water Resources*, 82 Wn. 2d 109, at 114, 508 P. 2d 166 (1973)).

Obviously, this requirement only makes sense if the EIS (or other document) is prepared prior to the commitment of resources, which did not happen in this case.

The Port erred and acted unlawfully in making an irretrievable commitment prior to environmental review, (AR 25) and in maintaining a litigation posture in the State Superior and District Court which delayed review until the project was substantially underway.

Although the FAA and the Port realized the need for an environmental document as early as 4-20-05, (AR 19), and over a half a million dollars irretrievably committed on 6-8-05, to this project, and the document represented to be a Categorical exclusion was not issued until 7-10-06, in a clear an undeniable violation of the established common sense requirement that environmental review precede commitment of resources.

ARGUMENT ERROR IV

The Court erred in approving the incorporation of a NEPA CE as an adequate environmental document when it was not adequate in a manner at variance with clearly established precedent of *Boss v DOT* and when and the project had substantially changed.

Because the CE was not a "previously prepared" and adequate NEPA EIS document it was not properly subject to adoption to satisfy SEPA's requirements..

To avoid "wasteful duplication of environmental analysis and to reduce delay," the SEPA Rules encourage and facilitate reusing existing environmental documents. RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS § 15, at 209 (2001). Under certain circumstances, "existing documents may be used to meet all or part of an agency's responsibilities under SEPA."...

Adoption of an existing EIS is explicitly authorized when "a proposal is substantially similar to one covered in an existing EIS. "If an agency adopts an existing document, it must independently assess the sufficiency of the document, identify the document and state why it is being adopted, make the adopted document readily available, and circulate the statement of adoption. Thornton Creek Legal Def. Fund v. City of Seattle 113 Wn. App. 34, 50 (2002).

As the Supreme Court ruled in Boss v. Dep't of Transp. 113 Wn. App. 543, 551 (2002) SEPA provides as follows:

The requirements of RCW 43.21C.030(2)(c) pertaining to the preparation of a detailed statement by branches of government shall not apply when an adequate detailed statement has been previously prepared pursuant to the national environmental policy act of 1969, in which event said prepared statement may be utilized in lieu of a separately prepared statement under RCW 43.21C.030(2)(c).

RCW 43.21C.150 (emphasis added). See also WAC 197-11-600 et seq. (regulations governing use of existing environmental documents). When the legislature adopted this section in 1974, it referenced an EIS that "is prepared" pursuant to NEPA. LAWS OF 1973-74, 1974 1st Ex. Sess., ch. 179, § 12.«4» The purpose of the 1974 legislation was "to establish methods and means of providing for full implementation of [SEPA] in a manner which reduces duplicative and wasteful practices, establishes effective and uniform procedures, encourages public involvement, and promotes certainty with respect to the requirements of the act." LAWS OF 1973-74, 1974 1st Ex. Sess., ch. 179, § 1.

The requirements of RCW 43.21C.030(2)(c) pertaining to the preparation of a detailed statement by branches of government shall not apply when an adequate detailed statement is prepared pursuant to [NEPA], in which event said prepared statement may be utilized in lieu of a separately prepared statement under RCW 43.21C.030(2)(c)

The plain language of RCW 43.21C.150 and its corresponding regulations suggest a legislative intent that this section apply only where there is an existing EIS. Here, the two lead agencies, the Port and the Federal Aviation Administration, together prepared piecemealed SEPA DNS, SEPA MDNS and NEPA CE that they intended would comply with both NEPA and SEPA.... Consequently, as the FAA's NEPA CE and Port's SEPA 06-2 MDNS were prepared **before** the Port's final 06-3

SEPA MDNS was issued separately.

Since the NEPA CE was not an adequate prepared EIS it was improperly adopted to satisfy SEPA requirements it was erroneous for the Superior Court to find the MDNS and DNS were both not clearly erroneous or that they were based on substantial evidence.

ARGUMENT ERROR V

The Court erred, in the orders of June 15 and 25, 2007, in failing to take a hard look at the project and examine all evidence necessary to determine if the agency finding was arbitrary or clearly erroneous and in upholding these SEPA MDNS and DNS determinations, when these SEPA MDNS and DNS determinations were piecemealed, inadequate and clearly erroneous, due to the failure of the port to take a hard look at or consider evidence of reasonably foreseeably likely cumulative impacts leading from this project, failed to consult with other agencies, and due to the deliberate exclusion, withholding, and suppression of evidence by the Port and Tumwater.

In determining the adequacy of a negative threshold determination, the primary consideration is whether the agency record demonstrates that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.

The Superior Court erred in upholding the Port's SEPA

determinations in this case when the agency record failed to meet this threshold requirement:

“The procedural provisions of SEPA constitute an environmental “full disclosure” law. Norway Hill Preservation and Protection Ass’n v. King County, 87 Wn.2d 267, 552 P.2d 674, (1976),

It (SEPA) is an attempt by the people to shape their environment by deliberation, not default. See Norway Hill, at 272, quoting Stempel v. Dept of Water Resources, 82 Wn.2d 109, at 118, 508 P. 2d

The record in this case clearly demonstrates that the Port has not only failed to adequately consider environmental factors, it has refused to consider them at all, by means of **failing to include even one page of input from the City of Tumwater**, and by adoption of a defective “phantasmagorical categorical” exemption that it falsely purports to be an “adequate” and final NEPA document subject to adoption.

This aberrant procedure has not resulted in a record that demonstrates that actual consideration was given to the environmental impact of the proposed action. Lassilla v. City of Wenatchee, 89 Wn. 2d 804, 576 P.2d 54, (1978). No “convincing statement of reasons” has been produced to explain why the project’s impacts are insignificant. National Audubon Society v. Butler, 160 F. Supp.2d 1180. (W.D. Wash. 2001)

The map attached to the administrative record at (AR 2935), and the existing Prologis Mega Warehouse project clearly demonstrate future

airport related development is probable as a result of Airport expansion and the resulting use of the facility by larger cargo bearing aircraft.

A proposed land use related action is not insulated from EIS requirements simply because there are no existing specific proposals to develop the land or because no immediate land use changes will result from the proposal. Instead, an EIS is required if, based on the totality of the circumstances, future development is probable following the action and if that development will have a significant adverse effect upon the environment. King County v. Boundary Review Bd., 122 Wn.2d 648, 860 P.2d 1024 (1993)

Based upon the Port's own map, future development is probable following the proposed action.

One of the fundamental requirements of the State Environmental Policy Act is that **environmental concerns be addressed prior to the commitment of resources** to a project.

However, as noted above, it is also disclosed by the U. S. Attorney that **over a half a million dollars has already been spent** on the "design and engineering" of the project, prior to any review whatsoever. (See First Supplemental Declaration of Jeffrey Winter, May 26, 2007).

Complicating this matter still further is the bizarre circumstance that the Port of Olympia, on April 4, 2007, "reimbursed" the FAA for **\$905,396.00** for airport project related costs. While it is uncertain at this

point what this post litigation reimbursement represents, it does not appear to be a normal practice in the lawful administration of public funds.

The design and engineering expenditures on this project clearly constitute an irreversible commitment of funds prior to SEPA review, and violate the terms of SEPA. This also demonstrates the intent of the Port of Olympia to construct this project irregardless of any required legal or environmental constraint.

For the port to have continued to expend resources without compliance with SEPA during the course of this case, while concealing such expenditure from the court and plaintiffs demonstrates a complete disregard for the entire concept of lawful environmental review. It is entirely possible that the port has actually commenced construction of elements of the project at issue, and is merely awaiting the Court's rubber stamp to belatedly legitimize the project which they are apparently already irreversibly committed to, which is in violation of state law and is an unconstitutional and improper ex post facto justification for prior agency action.

However, the courts have held that such a later environmental review of a project should not merely be an ex post facto justification of official action. See *Mentor v. Kitsap County*, 22 Wn. App. 285, 588 P.2d. 1226 (1978).

Further, under SEPA's WAC 197-11-060(3)(b), "proposal or parts

of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document.”

It clearly appears from evidence of official and judicial notice within the Port's, the Corps' and others' files on this and the related matters here, these two Airport infrastructure enhancement projects and other project at the Airport and near it are physically or functionally integral, related or connected parts of one “whole” combined project here, and that there is other development in this area that is physically or functionally integral, related or connected to these airport improvement projects of the Port, the FAA, and others, which were not considered by the Port's and FAA's piecemealed and inadequate environmental review of the impacts leading from this project as the record in this case shows. (Id.; see SEPA's WAC 197-11-060(3)(b), et seq., and NEPA's 40 CFR § 1508.27(b)(7); see *King County v. Boundary Review Board*, 122 Wn. 2d 648, at 664 (1993); see *Indian Trail Property Owner's Association v. City of Spokane*, 76 Wn. App. 430, 886 P. 2d 209 (1994); see *Blue Mountains Biodiversity Project v. Blackwood*, 161 F. 3d 1208, at 1215 (9th Cir. 1998); see Petitioners' SEPA Comments on these Airport projects; see Audubon Society's Sue Danver's SEPA Comments on these Airport projects; supra; see also below; and see evidence of official and judicial notice of these matters).

These issues of ripeness, the failure of the Port to properly coordinate with affected agencies (including the City of Tumwater which did not have any input whatsoever into this review process), the Port's deliberate refusal to make any reasonable examination of the reasonably foreseeably likely significant adverse environmental impacts leading from the construction and operation of this project, the other physically and functionally related and connected airport projects, and the projected airport related development revealed by the Port's own records, renders the Port's environmental determination defective, if it is properly subject to review at all.

It is clear that the expanded use of the Air terminal and the use of larger aircraft is a driving force in the warehouse and Air terminal related developments contemplated in the vicinity of the project. Under these circumstances there is no question that reasonably foreseeable significant impacts precluded a MDNS and a DNS, and the Court erred in ruling that the Port SEPA review was adequate.

ARGUMENT ERROR VI.

The Court erred, in the orders of June 15 and 25, 2007, in approving a reconsideration process when the Port's SEPA procedure was flawed since, as shown by the agency record on this matter and above, Port's SEPA procedure:

- a) allowed multiple unlawful administrative SEPA appeal fees;

- b) failed to afford due process;
- c) failed to require any verbatim recorded transcript of administrative hearing;
- d) failed to have an underlying action;
- e) when it provided for multiple unlawful fees; and
- f) allowed for an "orphan" judicial review in the absence of an agency record.

Further, SEPA does not provide a specific authorization for any agency to charge even one "SEPA appeal fee", let alone the multiple "SEPA appeal fees" the Port charges appellants here. (Id.; supra).

Clearly, the Port's SEPA Appeal "Fee" Policy violates SEPA's Appeal statutes and regulations, and therefore, the Port's SEPA Appeal Policy are unfair, unlawful, unconstitutional, arbitrary, capricious, unreasonable and erroneous, which thereby violates Appellants' fundamental due process rights under state, federal, and common law. (Id.; supra).

The Port's Citizen's Guidebook to the Port's SEPA Appeal Policy shows that the Port has a "three step" "SEPA administrative appeal" procedure, while the administrative appeal provisions of SEPA's RCW 43.21C.075 and .080 and SEPA's WAC 197-11-680, absolutely require that there be only one (1) procedural administrative appeal of a project and only one judicial appeal of both the SEPA action and the underlying

agency action together, not merely a judicial appeal of only an "orphaned" SEPA action as occurred in this case.

Under the doctrine of "Dillon's Rule", municipal laws must have a specific grant of authority to act in a specific manner to the municipality for that municipality to be able to legally take such actions, and SEPA does not specifically grant "SEPA appeal fee" authority to ports or to the Port of Olympia.

The starting point for any examination of whether the port is authorized to do or perform a specific act is a concept often called "Dillon's Rule" after a famous treatise on municipal law, which states that all municipal corporations are creations of the state and their authority "is limited to those powers expressly granted and to powers necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the [municipal] corporation. . . . If there is a doubt as to whether the power is granted, it must be denied." Our courts have explicitly adopted this rule of law in a case called *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wash. 2d 679 (1987).

Thus before the Court may enact resolutions, it must point to something somewhere in state legislation that puts such SEPA appeal fee making authority in a Port's hands. If in fact the legislature puts certain authority in another's hands explicitly, the Port may not exercise that

authority.

The second principle that the Court must bear in mind is that when a statute makes a positive statement of process or procedure, you must look to the purpose of that enactment, and you may not enact a resolution that contravenes that purpose even if you can find a linguistic formula to "get around" the statute.

The Port has no authority or power to require reconsideration before appeal. And when fairly read SEPA statutes and regulations actively and specifically forbid it. The statute on SEPA appeals is found at RCW 43.21C.075, and the regulation is found at WAC 197-11-680. Both define the contents of review proceedings and neither authorize anyone to pass an ordinance or resolution that invents a new review proceeding whether it be called request for reconsideration or anything else.

But more than this, both specifically and explicitly limit appeal proceedings to one within your agency. The reason for this is plain and inherent in the limitation: to provide inexpensive and expedited review of decisions. Calling one of the review proceedings a "reconsideration" rather than an appeal doesn't render it less of an "appeal proceeding" as the statute terms it, and is therefore a frontal assault on this statute. Petitioners cannot imagine that a judge will allow the Port to get away with this.

The Port, the Superior Court and this Court cannot require citizens

to jump through two hoops and charge for each separately and then claim it is only one "appeal proceeding" according to statute.

The "reconsideration meeting" with Port Executive Director Ed Galligan, etc., was only the first step of the Port's apparently unlawful and unconstitutional "three step" "SEPA administrative appeal" procedure, appears will lead to even more administrative appeal "steps" where city and/or county development permits and/or land use decisions are required for this Port project or others which affect the surrounding communities who have legal authority and jurisdiction over land use decisions and development permits in this area, since Appellants here would have to go through the "steps" "administrative appeal" procedure of the city and/or county to "administrative appeal" city and/or county land use decisions and development permits issued for this project.

The Port has proposed a charge of Eight Hundred Dollars to perfect an appeal. There may be some statute or regulation somewhere that allows a Port or anyone to charge appeal fees for SEPA appeals, but I have not been able to find it. And just because one collects \$300.00 at one time and \$500.00 at another does not make the total less than \$800.00. Normal practice is for cities and counties (not including Port Districts) to charge fairly nominal appeal fees for reviewing substantive action on which SEPA is being challenged so that a fee covers both the action and the SEPA appeal. Although they may exist, Petitioners have never heard of a

separate appeal fee for a SEPA appeal ever being charged by a state agency.

In any case, Petitioners find no authority for a Port District to charge either. Before this Court allows the Port to charge such SEPA administrative appeal fees, the Court had better have the Port make explicit whence the Port's authority to do so comes. What port districts can charge for is set forth in a port enabling statute (RCW 53.08.070) and it does not include appeal fees.

More than this, however, both the amount and the structure of the fees will make clear to any reviewing court that at least the reconsideration fee is simply imposed as a burden to make it more expensive or difficult for persons to appeal decisions of the Port. The size of the appeal fee is similarly burdensome and probably not constitutional. The Port's resolution does not even suggest that any official must do anything with the reconsideration fee other than enrich the coffers of the port. Large fees cannot be used to burden lawful activity, they must be directly tied to costs of a regulatory activity funded by the fee. Otherwise they are simply an illegal and unconstitutional violation of due process rights of citizens. *Acorn Investments Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989).

Clearly, as Petitioners have previously noted to the Court and the Port, the Port's SEPA Appeal Policy violates SEPA's Appeal statutes and regulations, and therefore, the Port's SEPA Appeal Policy are unfair,

unlawful, unconstitutional, arbitrary, capricious, unreasonable and erroneous, which thereby violates Appellants' fundamental due process rights under state, federal, and common law.

ARGUMENT ERROR VII.

The Court erred, in the orders of June 15 and 25, 2007, in determining any issues against appellants when defendants had failed to dispute the allegations in the complaint and when such failure to answer or deny required that all such allegations be regarded as true.

The Court further erred when all of the issues it determined adversely to the plaintiffs had been properly alleged in the amended complaint without any answer filed by defendants contesting their veracity, and it was therefore required to consider them as true for the purposes of a CR 56 determination.

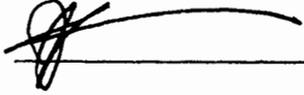
The Court erred and failed to rule in accord with substantial evidence, (and abused discretion) in the order of February 9 and 21 in entering findings 1-9 when defendants were in default of responding to the complaint. *Hill v. King County*, 41 Wn. 2d 592, 250 P. (2d) 960, (1952).

CONCLUSION AND RELIEF SOUGHT

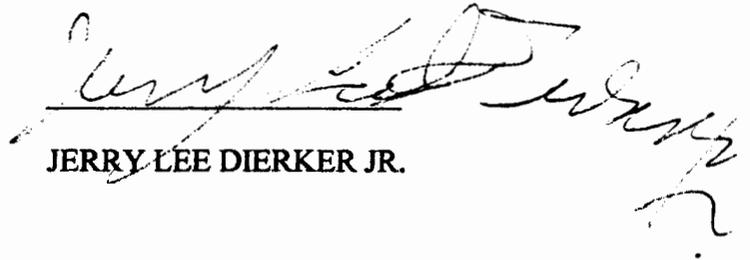
This court should act in accord with the clear letter of the law and existing precedent, and remand this case back to the Trial Court with

instructions to vacate the orders of June 15 and 25, 2007, issue judgment on all plaintiffs' claims, and award costs to plaintiffs in the Trial Court and on appeal.

Done August 22, 2008.

A handwritten signature in black ink, appearing to be 'Arthur West', written over a horizontal line.

ARTHUR WEST

A large, stylized handwritten signature in black ink, appearing to be 'Jerry Lee Dierker Jr.', written over a horizontal line.

JERRY LEE DIERKER JR.

1-253 779-4411
1-253 593-2806

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AUG 29 2008

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Cause No. 36556-1-II

*Note - Exhibits
to plaintiff/Appellant's
Brief attached*

**COURT OF APPEALS DIVISION II
FOR THE STATE OF WASHINGTON**

JERRY DIERKER, et al

Appellants

v.

PORT OF OLYMPIA,

Respondents

**Appeal of the rulings of the Honorable Richard Hicks,
of the Thurston County Superior Court**

APPELLANT'S OPENING BRIEF

**ARTHUR WEST
Olympia, Washington 98501
(360) 292-9574**

*C/S plad 06-21
C/S*

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THURSTON COUNTY WA

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EXPEDITE
 HEARING - JUNE 15, 2007
re: Rulings at Hrgs previously held on June 1, 2007
JUDGE Richard Hicks

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

JERRY DIERKER and ARTHUR WEST,
et al,

NO. 06-2-02116-6.

Petitioners.

ORDER DENYING
PETITIONERS' APPEAL

v.

PORT OF OLYMPIA, CITY OF
TUMWATER, EDWARD GALLIGAN,
STEVE POTTLE, ROBERT VAN
SCHOORL, PAUL TELFORD, and
RALPH OSGOOD

Respondents.

These matters came regularly before the Court on June 1, 2007 for hearing on Petitioners' appeal of the Port of Olympia "action for review under the State Environmental Policy Act of the determination of the Port of Olympia under SEPA 06-3 to issue a DNS". Appearing at the June 1, 2007 substantive appeal hearing were Petitioners Arthur West and Jerry Dierker, pro se; Respondent Port of Olympia represented by Carolyn A. Lake of Goodstein Law Group PLLC. The City of Tumwater represented by Counsels Jeff Myers and Karen Kirkpatrick was previously dismissed as a party to these proceedings.

ORDER DENYING PETITIONERS'
APPEAL - 1

070608 Port's Proposed Order Denying Appeal (XX)

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1 The Court considered the argument of the parties, reviewed the
 2 administrative record on file and the following pleadings:

Date Filed	Pleading
02-09-2006	Administrative Record
04-19-2007	Brief by Plaintiffs
04-20-2007	Notice of Plaintiffs Excerpt
04-23-2007	Motion To Strike
04-23-2007	Declaration In Support
04-23-2007	Motion To Strike
05-03-2007	Reply In Opp To Mt To Strike
05-03-2007	Affidavit/dclr/cert Of Service
05-03-2007	Reply
05-04-2007	Order Denying Motion/petition
05-18-2007	Brief Petitioner In Response
05-18-2007	Brief Petitioner Reply
05-18-2007	Motion To Strike
05-25-2007	Motion To Strike
05-30-2007	Response Of Petitioner
05-30-2007	Response Of Petitioner
05-31-2007	Reply In Support

16 Based on the records, pleadings, the file and arguments of the parties,
 17 the Court makes the following:

18 **ORDER.**

19
 20 1. Neither Mr West nor Mr Dierker have legal "standing" to challenge the Port's
 21 SEPA decision. Under Washington law, to have standing to bring an
 environmental SEPA appeal, the appellant must show two things:

22 a) That the appellant falls with in the zone of interest (this prong may be
 23 met), and

24 **ORDER DENYING PETITIONERS'
 APPEAL.**

25 070608 Port's Proposed OrderDenying Appeal.DOC'

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b) That appellants have a "particularized injury" personal to them, and not suffered by the public at large.

The Court finds that neither Mr Dierker nor Mr West meet the second prong of this test.

2. In reviewing the Port of Olympia Executive Director Mr Galligan's Findings of Fact, the Court finds that substantial information in the record supported the Findings of Facts. **AND THE DECISION AS A WHOLE IS NOT CLEARLY ERRONEOUS**

3. The Court finds no errors in the Port's Conclusions of Law.

4. The Port is the proper SEPA Lead Agency for this Project.

5. There was no conflict of interest by the Port acting as Project proponent and SEPA Lead Agency; the Port complied with the required degree of separation under SEPA. The Port's Reconsideration process and the Court's judicial review provide an additional measure of independent review.

6. The Port's Reconsideration process ~~is not flawed~~ **WAS NOT IMPROPER IN THIS CASE**

7. The Port may lawfully require appeal and reconsideration fees.

8. ~~To the extent that Petitioners argued the NEPA decision was flawed, the Court found the Project was ^{INITIALLY} determined to be "categorically exempt" such that UNDER no further NEPA EIS or environmental review was needed. BY THE FAA,~~

9. This Project was not improperly "piecemealed," and the Port did not err in ~~failing to address cumulative impacts.~~

10. ~~A copy of the Transcript of the Court's oral ruling is attached. However, the Transcript of this Court's ruling, Pages 10, line 7 through page 14, line 9 is Ordered. Stricken or is clarified to be Dicta. (Applicable language circled).~~

Dated this 15th day of June, 2007.


Judge RICHARD HICKS

Presented By:
GOODSTEIN LAW GROUP PLLC

By: 
Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port

ORDER DENYING PETITIONERS'
APPEAL-3

070608 Part's Proposal OrderDenying Appeal DOC

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6/15/07

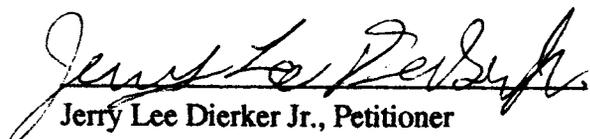
**IN THE COURT OF OF APPEALS OF THE STATE
OF WASHINGTON DIVISION II**

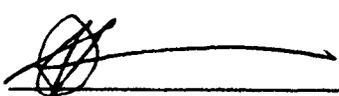
JERRY L. DIERKER JR., &)	Appeals Court No. 36556-1-II
ARTHUR S. WEST, et al,)	Superior Court No. 06-2-02116-6
Petitioners/Appellants;)	Affidavit of Service of
v.)	
PORT OF OLYMPIA, et al,)	
Defendants/Respondents.)	
)	

Comes now the Petitioners, the undersigned, who declare and make the following Affidavit of Service.

1. Pursuant to the Court Clerk's August 12, 2008 ruling in this matter and the Clerk's August 25, 2008 phone conversation with Mr. West concerning both Appellants being seriously ill last week, I, the undersigned, served the Court of Appeals and the Respondents attorney of record by mail at their address of record with copies of Petitioners/Appellants' corrected Opening Breif and this Affidavit of Service for this appeal.

We certify the foregoing to be true and correct to the best of our knowledge, beliefs and/or abilities, under penalty of perjury of the laws of the State of Washington and the United States of America, this 25th day of August, 2008, in Olympia, Washington.


Jerry Lee Dierker Jr., Petitioner
1720 Bigelow Ave. NE
Olympia, WA 98506
Ph. 360-943-7470


Arthur S. West
120 State Ave. NE #1497
Olympia, WA 98501

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DIVISION II
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STATE OF WASHINGTON
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