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Case No. 43408-3-II STATE OF WASHINGTON

BY 
DEPUTY

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

PT AIR WATCHERS; NO BIOMASS BURN; WORLD TEMPERATE
RAINFOREST NETWORK; OLYMPIC ENVIRONMENTAL
COUNCIL; and OLYMPIC FOREST COALITION,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and
PORT TOWNSEND PAPER CORPORATION

Respondents.

**BRIEF OF RESPONDENT PORT TOWNSEND PAPER
CORPORATION**

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I. INTRODUCTION

At issue in this case is whether the Washington Department of Ecology (“Ecology”) sufficiently analyzed the environment effects of a proposal by Port Townsend Paper Corporation (“PTPC”) to modify an existing steam-generating unit at its pulp mill in order to support mill operations and generate renewable energy for sale on the regional grid.

PTPC proposes to generate up to 25 megawatts (“MW”) of renewable energy by replacing significant volumes of fossil fuels (reprocessed fuel oil or “RFO”) with forest biomass. Under Washington law, electricity generated from combusting forest biomass is considered renewable. By decreasing the facility’s reliance on fossil fuels, the Port Townsend Cogeneration Project (the “Project”) will reduce greenhouse gas (“GHG”) emissions by over 89,000 tons per year.

The Project will have other environmental benefits resulting from the installation of new pollution control technology and improvements to waste handling operations. Indeed, most air pollutants currently emitted by the facility (including GHGs) will *decrease* as a result of the Project.

Appellants contend that PTPC’s and Ecology’s environmental review of the Project, including Ecology’s decision to issue a Determination of Nonsignificance (“DNS”), did not comply with State Environmental Policy Act (“SEPA”). At the heart of Appellants’ claim is

their objection to unambiguous Washington law that favors (and incentivizes) the combustion of forest biomass for renewable energy production. Washington law provides that carbon dioxide (“CO₂”) emissions from the combustion of biomass do not qualify as a GHG because biomass combustion is “carbon-neutral,” meaning that the carbon content of biomass would be emitted into the atmosphere through natural decay, forest fires, or as the result of forest practices if it is not used as biomass fuel. Washington law (in accord with the laws of other Western states) unambiguously provides that electricity generated by combusting biomass is renewable and can be used to satisfy state-level clean energy standards.

In light of the significant deference afforded to Ecology’s SEPA determinations, both the Pollution Control Hearings Board (“PCHB”) and the Thurston County Superior Court rejected Appellants’ protests, and upheld the DNS. Seeking a third bite at the apple, Appellants have once again appealed, and ask this Court to conclude that Ecology’s SEPA analysis is erroneous. However, as the PCHB and Superior Court unambiguously found, Ecology’s environmental review complies with SEPA, is supported by the administrative record, and should be affirmed.

II. ISSUES

1. Did Ecology and the PCHB correctly conclude that GHG emissions from the Project would not have significant environmental impacts based on RCW 70.235.020(3)?
2. Did Ecology and the PCHB correctly conclude that the Project would not result in adverse impacts to forest resources?
3. Did Ecology and the PCHB correctly conclude that an EIS is not required under RCW 70.95.700?

III. STATEMENT OF THE CASE

A. Factual Background

PTPC owns and operates a Kraft pulp and paper mill located in Jefferson County, Washington.¹ The mill was built in 1927 and is the largest private employer in Jefferson County.² The 300 full-time and contract employees run the mill on a 24-hour, 7-day a week basis producing over 300,000 tons per year of unbleached containerboard, market pulp, bag, and Kraft specialty papers for use by PTPC's converting plants in British Columbia and customers around the world.³

In 1996, PTPC installed a recycle pulping facility that uses the equivalent of approximately 30 percent of the State's recovered Old Corrugated Containers ("OCC") and recycles this fiber into new

¹ A.R. 0782.

² *Id.*

³ *Id.*

containerboard paper.⁴ The OCC plant processes over 112,000 tons per year of recycled fiber, making the mill the largest recycler on the Olympic Peninsula.⁵

PTPC has formed a partnership with Sterling Energy Assets (“SEA”) to generate renewable electricity that will be sold to the power distribution system.⁶ The Project involves upgrading two existing steam generating units that provide steam for mill operations – Power Boiler 10 and the Recovery Furnace.⁷ Both Power Boiler 10 and the Recovery Furnace have been in operation since 1976 and 1968, respectively.⁸

The additional steam produced as a result of the upgrades to Power Boiler 10 and the Recovery Furnace will be used to generate electricity from a new steam turbine generator.⁹ The new steam turbine generator will generate less than 25 MW of renewable electricity.¹⁰ The steam from Power Boiler 10 and the Recovery Furnace will also

⁴ *Id.*

⁵ *Id.*

⁶ A.R. 0783.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

continue to support pulp and paper production (which will not increase as a result of the Project).¹¹

The Project does not involve the introduction of new fuels. Power Boiler 10 currently combusts RFO, biomass, and wastewater residuals.¹² Following the Project, the primary fuel for Power Boiler 10 will be forest biomass, and the volumes of RFO will be significantly decreased.¹³ The Washington State Department of Natural Resources (“DNR”) defines “forest biomass” as:

[R]esidual branches, needles, and tree tops (slash) left over from ongoing logging operations; products of pre-commercial thinning (small saplings from overcrowded young forests); tree stems and tops thinned from forests that are at risk from wildfires, insects or diseases (forest health treatments) that are not currently utilized; clean, untreated wood construction and demolition waste (that would otherwise have gone to the landfill); and unused materials from lumber mills, such as sawdust, shavings, chips or bark.¹⁴

PTPC has traditionally and generically referred to the types of wood-derived fuels included in DNR’s definition of “forest biomass” as “hog fuel.”¹⁵ Increasing the amount of biomass fuel accomplishes two critical

¹¹ A.R. 0783-84.

¹² A.R. 0782-83.

¹³ A.R. 0784.

¹⁴ A.R. 0414.

¹⁵ A.R. 0782-83.

components of the Project. First, by combusting biomass, the electricity generated from the new steam turbine will qualify as renewable energy under regional renewable energy standards. *See, e.g.*, RCW 19.285.030(20) (definition of “renewable resource”); WAC 480-109-007(18)(i) (same). Second, by increasing the amount of biomass fuel, PTPC will be able to reduce the amount of RFO that is currently combusted in Power Boiler 10 by approximately 1.8 million gallons per year.¹⁶

Unambiguous Washington State policy favors the combustion of forest biomass (*i.e.* biogenic carbon) as a renewable alternative to fossil fuels (*i.e.* geologic carbon). For example, renewable energy credits (“RECs”) generated as a result of biomass combustion may be used to comply with Washington’s renewable portfolio standard (“RPS”). RCW 19.285.030(20); WAC 480-109-007(18)(i).¹⁷ The Legislature has found that “forest biomass is an abundant and renewable byproduct of Washington’s forest land management. Forest biomass can be utilized to generate clean renewable energy.” *See* House Bill 2165 (passed Apr. 22, 2009).

¹⁶ *E.g.*, A.R. 0784, 1029.

¹⁷ Passed by voter initiative in 2007 (I-937), Washington’s RPS requires large utilities to obtain 25% of their electricity from qualifying renewable resources by 2025.

The Legislature has similarly found that “the utilization of forest biomass materials located on state lands will . . . facilitate and support the emerging forest biomass market and clean energy economy.” RCW 79.150.010.¹⁸ To that end, the Legislature has authorized the DNR to enter into long-term contracts for the sale of forest biomass from DNR-managed lands. RCW 79.150.030. The Legislature has also incentivized the use of biomass for renewable energy generation through tax incentives. *E.g.* RCW 82.04.4494 (Establishing B&O tax credit and sales/use tax exemption for biomass “used for production of electricity, steam, heat, or biofuel. . .”).

The Project will result in numerous environmental benefits. Most relevant to this appeal, the transition of fuel from fossil fuel (i.e., RFO) to biomass will reduce the facility’s GHG emissions by over 89,000 tons per year.¹⁹ PTPC will also install new pollution controls, including a new dry electrostatic precipitator (“ESP”) and selective non-catalytic reduction (“SNCR”) system on Power Boiler 10 to control particulate matter and NO_x respectively.²⁰ PTPC will also add caustic solution to the existing Power Boiler 10 scrubber, which will increase SO₂ removal

¹⁸ *See also* A.R. 0731-33.

¹⁹ A.R. 1032.

²⁰ A.R. 0784 and A.R. 0916.

from that exhaust stream.²¹ Furthermore, PTPC will begin transporting ash waste to its on-site solid waste landfill via covered trucks rather than open front-end loaders.²² This will decrease the number of trips to the landfill and reduce fugitive particulate matter (“PM”) emissions.²³

As a result, emissions of numerous pollutants regulated under the Clean Air Act will *decrease*, including sulfur dioxide (“SO₂”), nitrogen oxides (“NO_x”), total reduced sulfur (“TRS”), hydrogen sulfide (“H₂S”), sulfuric acid mist (“H₂SO₂”); total suspended particulate (“TSP”), particulate matter with a diameter less than 10 microns (“PM₁₀”), and particulate matter with a diameter of less than 2.5 microns (“PM_{2.5}”).²⁴ While emissions of carbon monoxide (“CO”), and volatile organic compounds (“VOCs”) will increase, such increases are far below the regulatory thresholds that trigger additional permitting requirements under the Clean Air Act’s Prevention of Significant Deterioration (“PSD”) regulations.²⁵

²¹ *Id.*

²² A.R. 0785.

²³ *Id.*

²⁴ A.R. 0785; A.R. 0934; and A.R. 0943.

²⁵ A.R. 0786; and A.R. 0943.

PTPC prepared and submitted an Environmental Checklist under SEPA.²⁶ The SEPA Environmental Checklist described the Project and identified environmental impacts associated with the Project. On September 22, 2010, PTPC supplemented its Environmental Checklist.²⁷

Ecology has taken a number of steps to approve the Project, and those actions form the basis of this lawsuit. On July 7, 2010, Ecology accepted PTPC's analysis that a PSD permit was not required for the Project.²⁸ On October 10, 2010, Ecology issued NOC Order No. 7850, which approved the Project, and imposed enforceable emission limits on PTPC.²⁹ On September 23, 2010, Ecology issued a DNS under SEPA, finding that the Project would not have significant environmental impacts, and that further evaluation in an environmental impact statement ("EIS") was not required.³⁰

B. Procedural Background

This appeal was initiated on November 24, 2010, when PT Air Watchers, No Biomass Burn, World Temperate Rainforest Network, Olympic Environmental Council, and Olympic Forest Coalition

²⁶ A.R. 0786; and A.R. 0966-82.

²⁷ A.R. 0786; and 1026-39.

²⁸ A.R. 0786 and 1041-42.

²⁹ A.R. 0786 and A.R. 1044-55.

³⁰ A.R. 0786 and 1058.

(collectively, “Appellants”) filed their Notice of Appeal with the Pollution Control Hearings Board (“PCHB”). Following summary judgment briefing, the PCHB granted summary judgment in favor of Ecology and PTPC on all but two legal issues.³¹ The parties subsequently stipulated to withdraw the remaining two legal issues.³²

Appellants’ appealed the PCHB’s decision to the Thurston County Superior Court.³³ Following briefing and argument by the parties, the Superior Court denied the petition for review.³⁴ This appeal followed.³⁵

IV. ARGUMENT

A. Standard of Review

1. APA Standard of Review

The Administrative Procedure Act (“APA”), RCW Ch. 34.05, governs judicial review of the PCHB’s decision. RCW 90.58.180(3). When reviewing the PCHB’s decisions, the Court stands “in the same

³¹ See A.R. 1516-41.

³² See A.R. 1542-44.

³³ Clerk’s Papers (“CP”) 5-25.

³⁴ CP 26-29.

³⁵ CP 30. Petitioners raised 13 issues on appeal to the PCHB, all of which were either resolved in favor of PTPC and Ecology or withdrawn by stipulation. See A.R. 0047-51, A.R. 1516-41, and 1542-44. Appellants raised only three of those issues on appeal before the Superior Court and this Court. The remaining issues not presented in Appellants’ Opening Brief are abandoned. *In re Guardianship of Lamb*, 173 Wn.2d 173 n.8, 183, 265 P.3d 876 (2011) (en banc) (“Washington courts have consistently held that a party waives issues not fully argued in appeals briefs. . .”).

position as the superior court.” *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998) (en banc). Review is based on the record before the PCHB. RCW 34.05.558; *Batchelder v. City of Seattle*, 77 Wn. App. 154, 158, 890 P.2d 25 (1995).

Appellants bear the burden of demonstrating that the PCHB “erroneously interpreted or applied the law.” *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 515, 137 P.3d 31 (2006); RCW 34.05.570(3)(d). While courts “are not bound by an agency’s interpretation of a statute,” they afford “deference to an agency interpretation of law where the agency,” like the Ecology in the instant case, “has specialized expertise in dealing with such issues.” *City of Redmond*, 136 Wn.2d at 46, 959 P.2d 1091; *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004) (en banc) (“However, if an ambiguous statute falls within the agency’s expertise, the agency’s interpretation of the statute is ‘accorded great weight, provided it does not conflict with the statute.’”) (quoting *Pub. Util. Dist. No. 1, of Pend Oreille Cnty. v. Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002)).

2. SEPA Standard of Review

SEPA establishes a process for evaluating the reasonably foreseeable environmental consequences of proposed projects. SEPA is

procedural in nature and is “not designed to usurp local decision making or to dictate a particular substantive result.” *See Save Our Rural Env’t v. Snohomish Cnty.*, 99 Wn.2d 363, 371 (1983) (citing *Norway Hill Preserv. & Protec. Ass’n v. King Cnty. Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976)). In reviewing agency action under SEPA, courts are to review only whether the agency engaged in a reasoned assessment of the environmental consequences of the proposed action, not the wisdom of the proposed action. *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn. App. 493, 446, 832 P.2d 503 (1992).

At issue in this proceeding is Ecology’s “threshold” determination that the Project will not have significant impacts and that an EIS is not required. Ecology makes this threshold determination based on an Environmental Checklist prepared by project proponent. WAC 197-11-315 and -330. If an Environmental Checklist reveals that a project will have significant impacts, then an EIS is required. RCW 43.21C.030(2)(c). If, as is the case here, the Environmental Checklist reveals that a project *will not* have significant environmental impacts, then Ecology issues a Determination of Non-Significance (“DNS”), and the project may proceed without additional environmental review. WAC 197-11-340.

The Legislature has expressly mandated that Ecology’s threshold SEPA determinations are entitled to “substantial weight.” RCW

43.21C.090; *Norway Hill*, 87 Wn.2d at 275, 552 P.2d 674. The Court must affirm Ecology’s determination unless it has been “left with a definite and firm conviction that a mistake has been committed.” *Ancheta v. Daly*, 77 Wn.2d 255, 259, 461 P.d 531 (1969) (en banc) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L.Ed. 746 (1948)); *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977) (“The appropriate standard by which to review [SEPA threshold] decisions is the ‘clearly erroneous’ test.”) (en banc).

B. Ecology Correctly Concluded that the Project will Result in Reduced GHG Emissions

Appellants first argue that PTPC’s SEPA analysis and Ecology’s DNS inadequately considered the Project’s GHG emissions. Appellants specifically argue that “PTPC provided no information about the release of carbon dioxide or other greenhouse gas air pollutants from its facility.”³⁶ This argument ignores record evidence and is entirely predicated on Appellants’ misguided belief that GHG emissions will increase as a result of the Project. The SEPA Checklist, however, demonstrates that the Project will result in a net *decrease* in GHG emissions as a result of decreasing the combustion of fossil fuels while increasing the combustion of biomass.

³⁶ Petitioners’ Brief at 14.

1. The DNS Correctly Concluded that the Project will Result in a Net Reduction in GHG Emissions

Contrary to Appellants' arguments, the SEPA Checklist expressly evaluated GHG emissions, including quantifying pre-Project and post-Project emissions. The SEPA Checklist expressly discloses that following completion of the Project, the facility's annual GHG emissions will be reduced by over 89,000 tons – due in large part to the expected reduction in the combustion of RFO.³⁷ Indeed, PTPC anticipates that its post-Project fossil fuel (i.e., RFO) usage will *decrease* by 1.8 million gallons.³⁸ The SEPA Checklist also discloses that emissions from biogenic carbon sources will increase, and explains the difference between biologic and geologic carbon sources.³⁹

The SEPA Checklist also disclosed the increased combustion of diesel fuel that will result from transporting increased volumes of woody biomass to the PTPC mill.⁴⁰ As the SEPA Checklist demonstrates, the increased diesel fuel usage will be more than offset by the tremendous

³⁷ A.R. 1032. The SEPA Checklist demonstrates that pre-Project GHG emissions totaled 151,661 metric tons of carbon dioxide equivalents (“MtCO₂e”), while post-Project emissions will be reduced to less than 62,000 MtCO₂e. *Id.*

³⁸ A.R. 1029.

³⁹ A.R. 1032.

⁴⁰ A.R. 1029.

decrease in RFO usage in Power Boiler 10.⁴¹ The quantification of GHG emissions in the Environmental Checklist is precisely the type of analysis that SEPA requires, and Ecology's determination that an EIS was not required with respect to GHG emissions should be afforded "substantial weight." RCW 43.21C.090; *Norway Hill*, 87 Wn.2d at 275, 552 P.2d 674.

Appellants contend, in the face of record evidence to the contrary, that the SEPA Checklist and DNS did not adequately consider GHG emissions. Appellants' position seems to be that GHG emissions will increase due to the increased combustion of biomass and other wood-derived fuel, and that the resultant increase is a significant impact requiring further evaluation in an EIS. That argument, however, misconstrues unambiguous Washington law.

In 2008, the Washington Legislature expressly exempted CO₂ emissions from the combustion of biomass as being considered a GHG:

Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood byproducts, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

⁴¹ *Id.*

RCW 70.235.020(3).⁴² This is not a simple “reporting” requirement, as Appellants suggest. Instead, RCW 70.235.020 established Washington’s GHG reduction targets⁴³ and unambiguously establishes that GHG emissions from the combustion of biomass “shall not be considered a greenhouse gas.” Put another way, while GHG emissions from biomass combustion are not exempted from mandatory reporting requirements, they *are* exempted from determining whether Washington is achieving its GHG reduction targets.

In adopting this policy, the Legislature recognized that CO₂ emissions from the combustion of biomass (as opposed to the CO₂ content of fossil fuels) do not increase atmospheric GHG concentrations and will not impede Washington’s efforts to meet its GHG reduction goals. The carbon content of biomass will be released into the atmosphere as part of the natural carbon cycle regardless of whether the

⁴² The Washington Legislature unambiguously favors biomass combustion over fossil fuel combustion. *See* RCW 19.285.030(20) (Defining biomass combustion as a renewable energy source); House Bill 2165 (Apr. 22, 2009) (Declaring that “forest biomass is an abundant and renewable byproduct of Washington’s forest land management. Forest biomass can be utilized to generate clean renewable energy”); RCW 79.150.010 (Finding that “the utilization of forest biomass materials located on state lands will . . . facilitate and support the emerging forest biomass market and clean energy economy”); RCW 79.150.030(1) (Authorizing DNR to enter into long-term contracts for the sale of forest biomass from DNR-managed lands); and RCW 82.04.4494 (Establishing B&O tax credit and sales/use tax exemption for biomass “sold, transferred, or used for the production of electricity, steam, heat, or biofuel . . .”).

⁴³ This provision requires state-wide reduction in GHG emissions to 1990 levels by 2020, to 25% below 1990 levels by 2035, and 50% below 1990 levels by 2050. RCW 70.235.020(1)(a).

biomass is burned in a cogeneration project or not.⁴⁴ If biomass is not combusted as part a cogeneration project, its CO₂ content will nonetheless be released as the result of decomposition, forest fires, or forest management practices (*e.g.* controlled burns of forest slash).⁴⁵ Because the CO₂ content of biomass will be released into the atmosphere regardless of whether it is combusted as part of a cogeneration project, biomass combustion is not a “but-for” cause of atmospheric CO₂ concentrations. This stands in stark contrast to the CO₂ content of fossil fuels (*i.e.* RFO), which will not be released into the atmosphere but-for intentional human combustion.⁴⁶

The gravamen of Appellants’ argument is that PTPC and Ecology incorrectly relied on RCW 70.235.020(3) when concluding that the Project would result in a net decrease in GHG emissions. Appellants have, in effect, erected a straw man – namely, that “CO₂ is CO₂” regardless of whether it comes from the combustion of biomass or the combustion of fossil fuels.⁴⁷ Indeed, Appellants would require an “apples-to-oranges” analysis – that is, a comparison of emissions from

⁴⁴ A.R. 0408, 0415, and 0437-38.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Appellants’ Brief at 18.

the combustion of fossil fuels (which qualifies as a GHG) with emissions from the combustion of biomass (which *does not* qualify as a GHG).

Appellants' argument is driven solely by their disagreement with the Legislature's unambiguous directives rather than by evidence. Appellants have failed to offer any specific evidence demonstrating that replacing RFO combustion with biomass combustion will result in a net increase in GHG emissions in a manner that is consistent with Washington law. Appellants' simple disagreement with the Legislature does not render Ecology's DNS clearly erroneous. *ASARCO v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979) (en banc) ("the standard of review for a 'negative threshold determination' (DNS) is also whether the agency's decision is 'clearly erroneous.'"); *see also State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("When the plain language is unambiguous-that is, when the statutory language admits of only one meaning-the legislative intent is apparent, and we will not construe the statute otherwise.").

Appellants' criticism of Ecology's analysis is baseless. During the PCHB proceedings, Ecology submitted the Declaration of Marc Heffner – the Ecology official who issued the DNS.⁴⁸ Mr. Heffner's declaration (sworn under penalty of perjury) details the steps he took to

⁴⁸ See A.R. 0356-60.

review the Environmental Checklist prepared by PTPC.⁴⁹ The Environmental Checklist is the actual evidence upon which Ecology must make its threshold determination. WAC 197-11-315; *San Juan County v. Dep't of Natural Res.*, 28 Wash. App. 796, 801, 626 P.2d 995 (1981) (the environmental checklist “provides a reviewable record on appeal and evidences ‘actual consideration of environmental factors’ before the negative determination.”).

Rather than constituting a “post hoc” argument (as suggested by Appellants⁵⁰), Mr. Heffner’s sworn declaration simply explains the steps he took when reviewing the Environmental Checklist, and demonstrates that Ecology undertook an “actual consideration of environmental factors.” Specifically, Mr. Heffner testified that he based the DNS on information in the Environmental Checklist, including the reduced volumes of RFO (1.8 million gallons annually) that will be combusted as a result of the Project, and the additional fuel that will be consumed as a result of increased transportation of biomass fuels.⁵¹ Mr. Heffner’s declaration also explains that his analysis relied on the Legislature’s

⁴⁹ *Id.*

⁵⁰ Appellants’ Br. at 20.

⁵¹ *Id.*

determination in RCW 70.235.020(3) that emissions from biomass combustion do not qualify as GHGs due to their carbon neutrality.

Appellants also contend that Ecology should have considered the Project's efficiency in its SEPA analysis.⁵² Appellants exclusively rely on a letter from Peter Goldmark, the Commissioner of Public Lands, that expresses concern about the efficiency of the Adage biomass project. The Adage project, however, is distinguishable from the PTPC Project. The Adage project (since abandoned) would have combusted biomass solely for purposes of electricity production, while PTPC will combust biomass as a combined heat and power project (*i.e.*, generating steam that will both generate electricity and support mill operations).⁵³ Whereas the Adage project had an estimated efficiency of 27-percent, EPA has estimated that combined heat and power units (like those involved in the Project) typically achieve total system efficiencies of 60 to 80 percent.⁵⁴ Thus, the Project will involve a highly efficient use of forest biomass, and the Court should ignore Appellants' readily-distinguishable arguments to the contrary.

⁵² Appellants' Brief at 20.

⁵³ A.R. 0783-84.

⁵⁴ A.R. 1475-77.

In light of the Legislature’s unambiguous pronouncement, Ecology’s determination that an EIS was not required with respect to GHG emissions should be accorded substantial weight and upheld. *Indian Trail Prop. Owner’s Ass’n v. City of Spokane*, 76 Wn. App. 430, 441, 886 P.2d 209 (1994) (“An agency’s decision to issue [a DNS] and not require an EIS is accorded substantial weight”); see also *Norway Hill*, 87 Wn.2d at 274, 552 P.2d 674 (holding that a DNS will be overturned only when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed”).

2. Appellants Have not Offered any Evidence Indicating that the Region’s Silvicultural Sequestration Capacity is Decreasing.

It is true that RCW 70.235.020(3) states that CO₂ emissions from biomass combustion will not be considered a GHG as long as “the region’s silvicultural sequestration capacity is maintained or increased.” Record evidence unequivocally demonstrates that “the capacity of the region’s forests to absorb CO₂ is increasing.”⁵⁵ While Appellants may not care for the evidence upon which Ecology’s determination is based,

⁵⁵ A.R. 0359; A.R. 0408 (“Currently in North America and specifically in Washington State, forest stocks are increasing in volume”); A.R. 0415 (“The Department of Natural Resources supports the approach wherein a neutrality determination for a state’s [GHG] emissions from forest biomass energy production is made so long [as] the state’s forest carbon stocks are either stable or increasing. This is the case in Washington’s forests.”); and A.R. 0443 (The DNR has further explained that: “Washington’s existing Forest Practice rules require that forest be replanted after harvest, thus ensuring the continued sequestration capacity of forests. . . .”).

they have not provided a single shred of evidence to the contrary – despite the fact that they bear the burden of proof. *Pres. Our Islands*, 133 Wash. App. at 515, 137 P.3d 31.

In the absence of specific evidence demonstrating that the “region’s silvicultural sequestration capacity” is diminishing, the Court should defer to Ecology’s reliance on RCW 70.235.020(3) to conclude that the Project will result in a net decrease in CO₂ emissions, *Port of Seattle*, 151 Wash. 2d at 587, 90 P.3d 659 (an “agency’s interpretation of the statute is ‘accorded great weight’”), and should accord Ecology’s decision to issue a DNS “substantial weight.” RCW 43.21C.090; *Norway Hill*, 87 Wn.2d at 275, 552 P.2d 67.

C. The SEPA Checklist and DNS Adequately Considered the Impacts of Biomass Fuel

Appellants also argue that Ecology failed to adequately consider impacts on forest resources resulting from the removal of biomass.⁵⁶ But Appellants have once again fail to squarely address a key fact – namely, that any biomass fuel generated in Washington will be subject to both the wide-ranging protections set out in the Forest Practices Act and other Washington and federal laws, and SEPA itself.

⁵⁶ Appellants’ Br. at 15-27.

Appellants have failed to produce any concrete and specific evidence demonstrating that the production of biomass fuel from forest practices that conform with Washington law will result in significant environmental impacts – despite the fact that Appellants bear the burden of proof in this appeal. *See Pres. Our Islands*, 133 Wash. App. at 515, 137 P.3d 31 (“The burden of demonstrating the [PCHB] erroneously interpreted or applied the law rests with the party asserting the error.”).

**1. Biomass Fuel Projects are Subject to
Washington’s Forest Practices Act and
Other Regulations**

Numerous laws and regulations are currently in place that govern forest practices and will prevent the removal of biomass from forests to supply fuel for the Project in a manner that will result in an adverse impact. Those provisions include Washington’s Forest Practices Act (RCW Ch. 76.09), the Forest Practices Habitat Conservation Plan, and the Northwest Forest Plan. Additional regulations include provisions to protect wetlands and endangered species (*e.g.*, WAC 222-16-080, WAC 222-30-020); restrict the manner and location of harvest (*e.g.*, WAC 222-30-060); post-harvest erosion control (*e.g.*, WAC 222-30-080); the disposal and burning of slash (*e.g.*, WAC 222-30-100); and post-harvest reforestation (RCW 76.09.070). The Forest Practices Board recently amended its regulations to clarify that the collection of biomass is a forest

practice subject to Washington law. WAC 222-16-010 (definition of “forest practice”).

In reliance on these comprehensive forest protection provisions, Ecology considered (and ultimately rejected) requests that it evaluate biomass availability and supply issues during the public notice and comment period. Specifically, in its response to comments, Ecology concluded that:

Forest biomass availability and supply issues are beyond the scope of this project and review. Also, forest environmental issues are also outside the scope of the NOC Order and associated SEPA review. Forest environment concerns are addressed outside the NOC Order in that suppliers must comply with applicable portions of the WA Forest Practices Act (Chapter 76.09 RCW and WA Forest Practices Rules (title 222 WAC)).⁵⁷

Appellants contend that this analysis is insufficient. As an initial matter, it should be noted that Appellants mischaracterize Ecology’s reliance on forest practice regulations as a “post-hoc explanation.”⁵⁸ In fact, Ecology submitted this analysis in response to public comments and *before* it issued its DNS. Thus, Ecology’s reliance on forest practice regulations is not a “post-hoc explanation,” but rather, it is Ecology’s actual decision on whether additional analyses of biomass availability and supply issues must be undertaken.

⁵⁷ A.R. 0755.

⁵⁸ Appellants’ Brief at 25.

Appellants mistakenly criticize Ecology on grounds that “neither the SEPA checklist nor DNS contained information or analysis of the impacts of yet another ‘biomass’ project on nearby forests.”⁵⁹ In effect, Appellants contend that Ecology should prepare a cumulative impact analysis that reviews biomass availability and supply issues for not only the Project, but other existing and proposed biomass facilities. But Appellants’ brief here (like their briefs before the PCHB and Superior Court) are utterly void of any evidence demonstrating what precise impacts should be considered. This absence of evidence is particularly egregious, since Appellants bear the burden of persuading the Court that the SEPA analysis is clearly erroneous. *See Norway Hill*, 87 Wn.2d at 274, 552 P.2d 674 (“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”); *Juanita Bay Valley Cmty Ass’n v. City of Kirkland*, 9 Wn. App. 59, 74, 510 P.2d 1140 (1973) (holding that parties challenging a SEPA analysis bear the burden of demonstrating non-compliance).

For example, Appellants suggest that “nearby forests” should be evaluated, but offer no evidence as to the demand for biomass from those forests, much less identify those forests they consider to be

⁵⁹ *Id.*

“nearby”.⁶⁰ The only “evidence” offered by Appellants is a generic and speculative assessment of biomass supply and demand.⁶¹

Unlike Appellants’ arguments, Ecology’s determination that biomass removal will not result in a significant environmental impact is supported by record evidence. For example, it is undisputed that the NOC Order governing the Project provides that the forest biomass combusted by the Project will be the “by-product of current forest management activities, current forest protection treatments authorized by the agency, or the by-products of forest health treatment prescribed or permitted under Washington’s forest health law.”⁶²

This conclusion is further supported by other record evidence, namely public comments submitted by John M. Calhoun, the Director of

⁶⁰ *Id.*

⁶¹ Appellants’ Brief at 26 (citing A.R. 1283-85). Washington law is clear that SEPA documents need not consider remote or speculative impacts. SEPA requires the evaluation of “probable” impacts, meaning those impacts that are “likely or reasonably likely to occur,” as opposed to those impacts that “merely have a possibility of occurring, but are remote or speculative.” RCW 43.21C.031; RCW 43.21C.110(d); WAC 197-11-060(4)(a), (c); and WAC 197-11-782. The SEPA regulations further clarify that “it may be impossible to forecast the environmental impacts with precision[.]” WAC 197-11-330(3)(d). While forest biomass will undoubtedly be supplied for the Project, any analysis as to where precisely that biomass will come from (and what the resulting impacts will be) over the Project’s lifespan is highly speculative at best. Courts have consistently upheld SEPA analyses (including DNS determinations) against challenges based upon speculative impacts. *See, e.g., San Juan Cnty*, 28 Wn. App. at 802, 626 P.2d 995 (DNS regarding proposed boat destination site was not clearly erroneous because of possibility of future additional campsites).

⁶² A.R. 1046.

the University of Washington's Olympic Natural Resources Center.⁶³ Mr. Calhoun concluded that "timber harvesting on the Olympic Peninsula is sustainable and that adequate safeguards are in place to ensure ecological sustainability as woody debris is collected from logging sites."⁶⁴ Mr. Calhoun also noted that he was not aware of any biomass combustion facility that is "contemplating special harvest activities primarily to produce feedstock."⁶⁵ Rather than factually rebutting Mr. Calhoun's testimony, Appellants attempt to discredit it with unfounded assertions that it is "preliminary."⁶⁶

2. Biomass Fuel Projects are Subject to Analysis under SEPA

Biomass fuel projects will also be subject to the review under SEPA. With respect to SEPA, the forest practices that result in biomass fuel will either be categorically exempted from review under SEPA, or forest practice permitting for those activities will be subject to their own review under SEPA. SEPA regulations authorize DNR to identify categories of forest practices that will not result in significant impacts, and

⁶³ A.R. 0485-88.

⁶⁴ A.R. 0488.

⁶⁵ A.R. 0485.

⁶⁶ Appellants' Brief at 27.

categorically exclude those activities from review under SEPA. WAC 197-11-830.

DNR has adopted such regulations, which exempt from SEPA certain types of forest practices, including small timber sales and certain types of thinning and salvage sales, based on DNR's determination that those activities will not result in significant impacts. WAC 332-41-833. Those forest practices that are not otherwise exempt are subject to SEPA review. Contrary to Appellants' arguments, forest practices that result in biomass feedstocks will not evade review under SEPA.

Under Appellants' proposed standard, any facility proposing to combust biomass would be required to prepare a programmatic EIS evaluating the cumulative impacts of forest practices that may, at some future date, generate biomass feedstocks. SEPA, however, does not require such remote and speculative analyses – particularly when Appellants have failed to identify (much less qualitatively or quantitatively describe) any specific forest resources that will be impacted as the result of the Project. *See Boehm v. City of Vancouver*, 111 Wn. App. 711, 714, 47 P.3d 137 (2002) (“Further, we hold that SEPA review need not address cumulative impacts when speculative, and that when the [Appellants] can point to no specific impact, those impacts are speculative.”). Thus, the appropriate venue for assessing the impacts of

forest practices that produce biomass is the SEPA analysis for such site-specific practices, as opposed to a speculative cumulative impact evaluation for the Project.

Appellants have failed to meet their burden of demonstrating that Ecology's DNS determination was clearly erroneous. Indeed, Appellants have offered no evidence demonstrating that supplying biomass for the Project will result in adverse impacts. If the Court were to accept Appellants' argument, then a detailed (and ultimately speculative) EIS evaluating biomass availability and supply would be required for every project that proposes to combust biomass fuel. Such a result would be inconsistent with "the intent or spirit of SEPA." *Richland Homeowner's Pres. Ass'n v. Young*, 18 Wn. App. 405, 414 n.4, 568 P.2d 818 (1977). The Court should accordingly reject Appellants' arguments and uphold Ecology's DNS.

**D. An EIS was not Required under RCW 70.95.700
Because the Facility was an "Energy Recovery"
Facility Prior to January 1, 1989**

**1. The Project Does Not Involve a New
"Energy Recovery" Facility**

Ecology properly determined that an EIS need not be prepared for the Project under RCW 70.95.700, and Ecology's decision is entitled to deference. *Port of Seattle*, 151 Wn.2d at 587 ("the [PCHB's] interpretation of the statute is accorded great weight, provided it does not conflict with

the statute.”) (internal quotations and citations omitted).

RCW 70.95.700 requires an EIS before a new “solid waste” or “energy recovery” facility is operated.⁶⁷ That requirement, however, “does not apply to a facility operated prior to January 1, 1989, as a solid waste incineration facility or energy recovery facility burning solid waste.” *Id.* The Project does not trigger that requirement because Power Boiler 10 and the Recovery Furnace were in operation as an “energy recovery” units long before January 1, 1989.

Unrebutted record evidence demonstrates that the combustion units involved in the Project have been operated for over thirty years (i.e., long before the January 1, 1989, trigger for an EIS under RCW 70.95.700). Power Boiler 10 was installed in 1976 and has been burning wastewater residuals (a solid waste) and biomass since that time.⁶⁸ Power Boiler 10 will continue to burn wastewater residuals (a solid waste) and biomass (not a solid waste) after the Project is complete.⁶⁹ These fuels were combusted (and will continue to be combusted) in Power Boiler 10 to

⁶⁷ RCW 70.95.700 states:

No solid waste or energy recovery facility shall be operated prior to the completion of an environmental impact statement . . . prepared pursuant to [SEPA] This section does not apply to a facility operated prior to January 1, 1989, as a solid waste incineration facility or energy recovery facility burning solid waste.

⁶⁸ A.R. 0782; A.R. 0792; A.R. 1361.

⁶⁹ A.R. 0782; A.R. 0784.

produce steam (*i.e.*, “energy recovery”) to support mill operations and produce power (approximately 3.5 aMW).⁷⁰

The Recovery Furnace was installed in 1968 and has been burning black liquor and RFO ever since.⁷¹ The Recovery Furnace is an integral part of the Kraft pulping cycle, and produces steam (*i.e.* energy recovery) while recovering the inorganic matter that is reused in the pulping process.⁷²

Appellants nonetheless argue that the “facility was not operating as an energy recovery facility prior to January 1, 1989.”⁷³ Despite bearing the burden of proof, Appellants make no effort to demonstrate that “solid waste” was not burned in Power Boiler 10 for purposes of “energy recovery” prior to 1989. Instead, Appellants simply contend that the modifications to an existing “energy recovery” facility trigger the requirements of RCW 70.95.700. Those arguments fly in the face of both the facts and the law.

Contrary to Appellants’ assertions, the Project does not involve the construction and operation of a new energy recovery facility or the use of

⁷⁰ A.R. 0782.

⁷¹ A.R. 0782; A.R. 0790.

⁷² A.R. 0782.

⁷³ Appellants’ Br. at 32. *See also* Appellants’ Br. at 34 (“In summary, the proposed ‘energy recovery facility’ did not exist prior to January 1, 1989.”).

new fuels.⁷⁴ Instead, it involves modifications to the existing Power Boiler 10 and the existing Recovery Furnace, both of which have been in use for over thirty years specifically for purposes of “energy recovery.”⁷⁵ Power Boiler 10 and the Recovery Furnace will continue to generate power (via “energy recovery”) for the mill, as well as generate surplus renewable power for sale.⁷⁶

It is true that the Project involves the construction of a new turbine for generating renewable energy. The turbine itself, however, is not an “energy recovery” unit, and RCW 70.95.700 is not triggered by its construction. “Energy recovery” is not, as Appellants suggest, the production of electricity, and there is no basis in the statute for such a conclusion. Instead, “energy recovery” is defined as “a process . . . for converting solid waste into useable energy and for reducing the volume of solid waste.” RCW 70.95.030(7). Here, “energy recovery” (*i.e.* the conversion of materials into useable energy) occurs in Power Boiler 10 where biomass, wastewater residuals, and other fuels are combusted to produce steam that has been used (and will continue to be used) to support

⁷⁴ A.R. 0783.

⁷⁵ A.R. 0782-83.

⁷⁶ A.R. 0783-84.

mill operations and produce electricity. Argument that the construction of the turbine itself triggers RCW 70.95.700 is nothing but a red herring.

Similarly, it is also true that the Project involves the construction of new fuel handling and storage systems, a new haul road for disposing of fly ash, a new cooling tower, and new fuel storage piles. But the construction of new roads and new methods for providing the same types of fuel that have historically been combusted in Power Boiler 10 are simply irrelevant to the issue of when “energy recovery” first began in Power Boiler 10.

Appellants have failed to produce a single shred of evidence rebutting the dispositive facts – namely that Power Boiler 10 was engaged in energy recovery long before the January 1, 1989, trigger in RCW 70.95.700. That statute is unambiguous and applies only to *new* solid waste and energy recovery facilities. Had the Legislature intended RCW 70.95.700 to apply to existing facilities that were modified after January 1, 1989, they would have drafted RCW 70.95.700 accordingly. *See, e.g., Davis v. State ex rel. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (en banc) (“[T]he first rule [of statutory interpretation] is the court should assume that the legislature means exactly what it says. Plain words do not require construction.”) (internal quotations and citations omitted).

Simply put, the Project does not involve the construction of a new “solid waste” or “energy recovery” facility, and does not involve the introduction of new fuels.⁷⁷ Rather, it involves modifications to combustion units that were placed into operation long before January 1, 1989.

2. Woody Biomass does not Qualify as “Solid Waste”

In an effort to distract the Court’s attention from the dispositive facts, Appellants focus their argument on establishing that woody biomass and other wood-based fuels currently combusted in Power Boiler 10 (and that will be burned in Power Boiler 10 after the Project is complete) constitute “solid waste,” and that the PTPC is thus an “energy recovery” facility.⁷⁸ Undisputed evidence in the record demonstrates that Ecology has correctly determined that woody biomass and other wood-based fuels do not constitute “solid waste” because they are commodities for which there is a robust and growing market.⁷⁹

Ecology has evaluated if and when new or modified biomass combustion facilities trigger the EIS requirements found in RCW 70.95.700, concluding that “feedstocks may originate as solid waste but

⁷⁷ A.R. 1361.

⁷⁸ Appellants’ Br. at 29-32.

⁷⁹ See, e.g., A.R. 0755 (“[T]he wood fuels that PTPC is burning are a purchased commodity and are therefore not solid waste.”).

solid waste handling activities convert the material into a recycled material that is a marketable product.”⁸⁰ Ecology determined that “forest biomass is not a solid waste and its handling is not subject to solid waste handling standards.”⁸¹

Ecology’s based its conclusion on actions by the Washington legislature that provided commodity status to forest biomass.⁸² More specifically, the Legislature has authorized the DNR to enter into long-term contracts for the sale of forest biomass from DNR-managed lands. RCW 79.150.030. The Legislature has also incentivized the use of biomass for renewable energy generation through tax incentives. *E.g.* RCW 82.04.4494 (Establishing B&O tax credit and sales/use tax exemption for biomass).

Ecology also determined that other woody material (storm debris, land clearing debris, yard wastes, and clean construction and demolition waste) are initially solid waste, but are converted to a marketable commodity as part of the recycling process (*e.g.*, chipping and grinding).⁸³ As Ecology explained, “[r]ecycling results in conversion of solid waste into a product no longer considered a solid waste provided legitimate

⁸⁰ A.R. 1083.

⁸¹ A.R. 1084.

⁸² A.R. 0755.

⁸³ A.R. 1085.

markets exist . . . [i]n the case of fuel made from these materials, robust markets exist and demand appears to be increasing.”⁸⁴ Thus, “[o]nce recycled, fuel produced is no longer solid waste and the facility utilizing this fuel is not engaged in energy recovery.”⁸⁵

Ecology’s position is consistent with Washington case law. *See Littleton v. Whatcom County*, 121 Wn. App. 108, 116-17, 86 P.3d 1253 (2004) (“[T]he County argues that although manure is not specifically mentioned in the statutory definition of solid waste, it nevertheless qualifies because solid waste is ‘all putrescible and nonputrescible solid and semisolid wastes [.] But this argument again overlooks the fact that manure, as a *reusable* substance, does not constitute *waste*.”) (emphasis in original). Because Ecology has specialized expertise in addressing solid waste issues, the Court should defer to Ecology’s interpretation of its own regulations. *City of Redmond*, 136 Wn.2d at 46, 959 P.2d 1091 (“[Courts] accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency’s interpretation of a statute.”).

Ultimately, determining whether or not forest biomass and other wood-based fuels constitute “solid waste” is unnecessary for resolution of

⁸⁴ *Id.*

⁸⁵ *Id.*

this appeal. It is undisputed that at least one fuel combusted in Power Boiler 10 (residuals from the facility's process wastewater treatment plant) is considered by Ecology to be a solid waste under Washington law.⁸⁶ Thus, the analysis of whether or not an EIS is required under RCW 70.95.700 turns not on whether the Project involves an "energy recovery" facility, but whether the "energy recovery" facility was operating prior to January 1, 1989.

That issue is cleanly resolved by undisputed record evidence. As detailed above, Power Boiler 10 and the Recovery Furnace were operational "energy recovery" units (and were combusting the same types of fuel that will be combusted under the Project) prior to January 1, 1989. Appellants have the burden of proof in this appeal, and have failed to demonstrate that Power Boiler 10 and the Recovery Furnace were not combusting "solid waste" for purposes of "energy recovery" prior to 1989. Accordingly, Ecology correctly determined that an EIS was not required under RCW 70.95.700, and Appellants' arguments to the contrary should be disregarded.

V. CONCLUSION

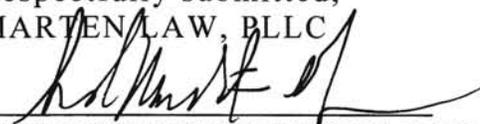
For the reasons set forth above, PTPC respectfully requests that the Court affirm Ecology's decision to issue a DNS and to not require an EIS

⁸⁶ A.R. 1086.

pursuant to RCW 70.95.700.

Dated this 4th day of September, 2012.

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CERTIFICATE OF SERVICE

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DEPUTY

I certify under penalty of perjury under the laws of the state of Washington that on September 4, 2012, I caused to be served the Brief of Respondent Port Townsend Paper Corporation in the above-captioned matter upon the parties herein as indicated below:

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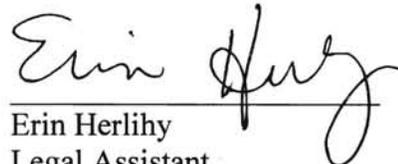
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