

43876-3-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST, JERRY DIERKER,
Appellants

v.

PORT OF OLYMPIA, THE WEYERHAEUSER COMPANY,
Respondents.

RESPONDENT PORT OF OLYMPIA'S RESPONDENT'S
BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. RESPONDENT PORT OF OLYMPIA'S RESTATEMENT OF ISSUE.....	1
II. INTRODUCTION.....	1
III. RESTATEMENT OF FACTS.....	3
A. Trial Court.....	3
B. Division II.....	9
IV. PORT'S RESPONSE.....	16
A. Washington Trial Courts undisputedly have vested inherent authority to dismiss cases.....	17
B. Trial Court Expressly Ruled on & Found Each Criterion for Discretionary Dismissal Is	19
C. Sanction of Dismissal Warranted.....	32
D. Supreme Court of the United States Standard Met.....	34
E. Abuse of Discretion Standard of Review Applies to the Discretionary Dismissal.....	35
F. Land Use Non-PRA Issues.....	38
G. Appellant Dierker Not Entitled to PRA Relief.....	44
H. Naked Castings Into Constitutional Sea are Illegal	45
I. Appellate Court Decorum.....	46
J. Port Due Its Fees.....	48
V. CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases

<i>Ache v. Bloomquist</i> , 132 Wash. App. 784, 795 (Div. 2 2006).....	39
<i>Allied Financial Servs., Inc. v. Mangum</i> , 72 Wash. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993).....	23
<i>Anderson v. Dunn</i> , 6 Wheat. 204, 227, 5 L.Ed. 242 (1821).....	17
<i>Anderson v. Mohundro</i> , 24 Wn.App. 569, 575, 604 P.2d 181 (Div. 1 1979)	24
<i>Bennett v. Spear</i> , 520 U.S. 154, 175-76 (1997)	39
<i>Business Services of America II, Inc. v. Watertech LLC</i> , __ Wn.2d __, 274 P.3d 1025, 1028 (2012).....	17, 36, 38
<i>Chambers v. NASCO, Inc.</i> , 501 US 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)	19
<i>Chan v. City of Seattle</i> , 164 Wn.App. 549, 558 n. 6, 265 P.3d 169 (Div 1, 2011).....	44
<i>Chelan Co. v. Nykrem</i> , 146 Wn. 2d 904, 935, 52 P.3d 1, 16 (2002)	42
<i>City of Fircrest c. Jensen</i> , 158 Wn.2d 384, 395, 143 P.3d 776 (2006) ..	17
<i>City of Puyallup v. Hogan</i> , 168 Wn.App. 406, 423-424, 277 P.3d 49 (Div. 2, 2012)	36
<i>Coughlin v. Seattle School Dist. No. ,</i> 27 Wash.App. 888, 621 P.2d 183, Wash.App., 1980.....	40, 42
<i>Eugster v. City of Spokane</i> 139 Wash.App. 21, 156 P.3d 912 (2007) ..	50
<i>Germeau v. Mason Cnty.</i> , 166 Wn.App. 789, 803, 271 P.3d 932 (Div. 2, 2012).....	44
<i>Gonzales v. Surgidev Corp.</i> , 120 N.M. 151, 899 P.2d 594, 600 (1995)	18
<i>Gott v. Woody</i> , 11 Wn.App. 504, 508, 524 P.2d 452 (Div. 2, 1974).....	35
<i>Highland Sch. Dist. No. 203 v. Racy</i> , 149 Wn.App. 307, 311, 202 P.3d 1024 (Div. 3 2009), <i>reconsideration denied</i> (May 7, 2009)	30
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 268, 830 P.2d 646 (1992)	36
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).....	37
<i>In re Marriage of Zigler and Sidwell</i> , 154 Wn.App. 803, 815, 226 P.3d 202 (Div. 3, 2010)	35
<i>In re Mowery</i> , 141 Wn.App. 263, 281, 169 P.3d 835 (Div. 1, 2007)	17
<i>In re Recall of Feetham</i> , 149 Wn.2d 860, 872, 72 P.3d 741 (2003)	49
<i>In re Recall of Telford</i> , 166 Wn.2d 148, 206 P.3d 1248 (2009).....	2
<i>In re Salary of Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976)	17
<i>Jackson v. Standard Oil of California</i> , 8 Wn.App. 83, 505 P.2d 139 (Div. 2, 1972)	32
<i>Johnson v. Horizon Fisheries, LLC</i> , 148 Wn.App. 628, 639, 201 P.3d 346 (Div. 1, 2009)	18

<i>Jones v. Pers. Res. Bd.</i> , 134 Wash. App. 560, 568, 140 P.3d 636 (Div. 2 2006)	30
<i>Katare v. Katare</i> , 175 Wn.2d 23, 40-41, 283 P.3d 546 (2012) cert. denied, 133 S. Ct. 889, 184 L. Ed. 2d 661 (U.S. 2013)	45
<i>Kearney v. Kearney</i> , 95 Wn. App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022 (1999)	49
<i>Kleven v. City of Des Moines</i> , 111 Wn.App. 284, 291, 44 P.3d 887 (Div. 1, 2002)	44
<i>Link v. Wabash R. Co.</i> , 370 U.S. 626, 628-629, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)	34
<i>Mayer v. Sto Indu., Inc.</i> , 156 Wn.2d 677, 684 (2006)	37
<i>McDaniel v. Pressler</i> , 3 Wn. 636, 638, 29 P. 209 (1892)	32
<i>McNeil v. Powers</i> , 123 Wn. App. 577, at 585-586, 97 P.3d 760 (Div. 3, 2004)	29, 30
<i>Millers Cas. Ins. Co. v. Briggs</i> , 100 Wn.2d 9, 15, 665 P.2d 887 (1983)	50
<i>National City Bank of Seattle v. International Trading co. of America</i> , 167 Wn. 311, 316-317, 9 P.2d 81 (1932)	32
<i>Plummer v. Weill</i> , 15 Wn. 427, 430-431, 46 P. 648 (1896)	32
<i>Retired Pub. Employees Council</i> , 148 Wn.2d 602, 616, 62 P.3d 470 (2003)	39
<i>Rivers v. Washington State Conference of Mason Contractors</i> , 145 Wn.2d 674, 686, 41 P.3d 1175 (2002)	passim
<i>Rogerson Hiller Corp.</i> , 96 Wn.App. at 928	18
<i>Roshan v. Smith</i> , 615 F.Supp. 901, 905 (D.D.C.1985)	42
<i>Snohomish County v. Thorpe Meats</i> , 110 Wn.2d 163, 166, 750 P.2d 1251 (1988)	18
<i>State ex rel. Clark v. Hogan</i> , 49 Wn.2d 457, 464, 303 P.2d 290 (1956)	32
<i>State ex rel. Goodnow v. O'Phelan</i> , 6 Wn.2d 164, 154, 106 P.2d 1073 (1940)	23
<i>State ex rel. Washington Water and Power Co. v. Superior Court for Chelan County</i> , 41 Wn.2d 484, 494, 250 P.2d 536 (1953)	25, 32
<i>State v. Gilkinson</i> , 57 Wn.App. 861, 865, 790 P.2d 1247 (Div. 2, 1990)	17
<i>State v. Gunwall</i> , 106 Wn.2d 54, 62, 720 P.2d 808 (1986)	45
<i>State v. Johnson</i> , 77 Wn.2d 423, 426, 462 P.2d 933 (1969)	35
<i>State v. Rohrich</i> , 149 Wn.2d 647, 654, 71 P.3d 638 (2003)	37
<i>Stickney v. Port of Olympia</i> , 35 Wn.2d 239, 241, 212 P.2d 821 (1950)	32, 36
<i>Teter v. Deck</i> , 174 Wn.2d 207, 226, 274 P.3d 336 (2012)	38
<i>Thurston County v. Western Washington Growth Management Hearings Bd.</i> , 137 Wash. App. 781, 154 P.3d 959 (Wash. App. Div. 2 Apr 03, 2007)	42
<i>Tiger Oil Corp. v. Department of Licensing</i> , 88 Wash.App. 925, 938, 946 P.2d 1235 (1997)	48

<i>Trepanier v. City of Everett</i> , 64 Wash. App. 380, 383, 824 P.2d 524, 526 (Wash.App.,1992).....	39, 41
<i>United States v. Students Challenging Regulatory Agency Procedures (SCRAP)</i> , 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973)	40, 41, 42
<i>Wallace v. Evans</i> , 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997).18, 35	
<i>West v. Port of Olympia</i> , Case No. 67293-2-I (Division 1, 2012, Unpublished).....	2
<i>West v. Stahley</i> , 155 Wn.App. 691, 229 P.2d 943 (Div. 2, 2010)	2
<i>West v. Thurston County</i> , __Wn.App.__, 282 P. 1150 (Div. 2, 2012) .2	
<i>West v. Weyerhaeuser</i> , Case No. CO8-687-RSM (W. D. Wash., Dismissed April 8, 2008).....	2
<i>Will v. Frontier Contractors, Inc.</i> , 121 Wn.App. 119, 129, 89 P.3d 242 (Div. 2, 2004)	19
<i>Woodhead v. Discount Waterbeds, Inc.</i> , 78 Wn.App. 66, 68, 896 P.2d 66, (Div. 1 1995)	24, 36

Statutes

Chapter 36.70A RCW	42
RCW 36.70A.280(2)(b).....	43
RCW 4.84.185.....	48, 49
RCW 43.21C.....	40
RCW 70.84.....	40
WAC 197-11	40

Rules

CR 41 (b)(1).....	17
CR 52(b)	19
RAP 10.3.....	47
RAP 17(g)(1).....	10
RAP 17.4(g)(1)	13
RAP 18.1	48, 49
RAP 18.9.....	48, 49
RAP 3.3.....	10

Other Authorities

Americans with Disabilities Act (ADA) Title 42 USC § 12101, 12131, 12132, et seq.....	40
Article IV s. 6 of the Washington Constitution.....	17

I. RESPONDENT PORT OF OLYMPIA'S RESTATEMENT OF ISSUE

Whether under common law that establishes a trial court's "unquestionable," discretionary authority to manage its own affairs up to and including the dismissal of cases for unacceptable litigation practices, did the Trial Court here abuse its discretion when it dismissed a case for litigation abuse when the Plaintiffs willfully failed to comply with scheduling Order, failed to meet their burden to timely prosecute their case, failed to successfully note a show cause hearing in eight attempts, engaged in unacceptable litigation practices, and filed eight affidavits of prejudice targeting five judges? **NO.**

II. INTRODUCTION

Appellants seek review of the Trial Court's involuntary dismissal for abuse of process – also known in Washington State case law as a "discretionary dismissal." Discretionary dismissals are matters of judicial discretion and are reviewed for abuse of discretion.

In the early 2000s, the Port of Olympia (Port) and the Weyerhaeuser Company entered negotiations to lease Port marine terminal lands to the Weyerhaeuser Company (Weyco). The parties consummated the lease on August 22, 2005. Appellants has spent the last seven years filing a variety of *pro se* administrative, state, and federal lawsuits relating in some way or another to the existence of the Weyco operation on the Port Peninsula. At present count, Appellant West has filed or joined at least **five lawsuits**

pertaining to the Port-Weyco lease.¹ An undue amount of the Port's precious, taxpayer-funded public resources have been used to defend the Appellant's claims and procedures against the Port of Olympia. This is one such lawsuit.

Appellants' Complaint originally included both land use and public records issues.² Appellants (Mr West and Mr Jerry Dierker) filed **eight** affidavits of prejudice, a writ to the Supreme Court of Washington that resulted in sanctions to the Appellants, have scheduled sham hearing dates on dates where either the Court or counsel or both were unavailable, and caused the entire Thurston County Superior Court Bench to recuse itself by filing numerous affidavits of prejudice. Ultimately the Trial Court dismissed the SEPA/"land use" portion of this case more than five years ago due to Appellants' lack of standing, and dismissed the bifurcated Public Records Act issues for Appellants' abuse of process.

Earlier in this appeal, the Appellant's recently-retained attorney sought to disown the SEPA/land use portion of this appeal

¹In addition to the current matter, see also **West v. Thurston County**, ___ Wn.App. ___, 282 P. 1150 (Div. 2, 2012) (PRA suit regarding general non-compliance with PRA, dismissed, Appellant sanctioned for frivolous appeal prosecuted through counsel), **West v. Port of Olympia**, Case No. 67293-2-I (Division 1, 2012, Unpublished) (Appellant's counsel requested thirty eight million dollars of PRA damages for withholding of records of PRA damages for withholding of records involving lease negotiations with Weyerhaeuser on remand (denied), aff'd on appeal), **West v. Stahley**, 155 Wn.App. 691, 229 P.2d 943 (Div. 2, 2010) (Appellant's failed judicial LUPA appeal challenging Port and Weyerhaeuser Company lease, dismissed, Appellant sanctioned for frivolous appeal), **In re Recall of Telford**, 166 Wn.2d 148, 206 P.3d 1248 (2009). (Upholding the validity of Port actions with regards to Harbor Improvement Act & 2005 Weyerhaeuser Company lease against Appellant's legal challenge thereto under color of a recall petition against Port of Olympia Commissioners, aff'd on appeal.), **West v. Weyerhaeuser**, Case No. Co8-687-RSM (W. D. Wash., Dismissed April 8, 2008). See *Chart of West v. Port of Olympia* cases, **Ex 5**, attached to *Reply in Support of Dismissal*, Subjoined Declaration of Counsel dated June 22, 2012 (many of which also included co-Plaintiff Dierker). CP 719-725.

² Recently on appeal, Appellant Dierker has alleged that unfavorable court rulings violate the Americans with Disabilities Act.

by moving for separation, in which the Attorney would brief issues pertaining to the Public Records Act discretionary dismissal, and Appellant West would file his own, *pro se* briefing regarding the land use issues. The motion was later withdrawn; however, it forecasted the minimal role the land use issues would play in this appeal, where a mere three pages to briefing is devoted to land use issues, which originally made up six of seven of the Appellant's purported claims. And, on his third try to file an Opening Brief, *Pro Se* Appellant Dierker has intractably rambled for seventy-five narrow margin, one-and-a-half spaced pages. Any issues related to land use are clearly secondary. The Port respectfully requests that this Court affirm the Trial Court's dismissal and award attorney fees jointly and severally for the Appellants' pursuit of this frivolous appeal.

III. PORT'S RESTATEMENT OF FACTS³
A. Appellants' Trial Court Behavior

On June 18, 2007, Appellant West filed this case. *Compl.* CP 7-17. Appellant West sought relief under the Public Records Act, Harbor Improvements Act, Declaratory Relief, State Environmental Policy Act (SEPA) review concerning utility installations to serve the Weyco facility, and writ relief. *Id.* On July 6, 2007, West amended his Complaint to include Dierker as a co-plaintiff. CP18-32. On July 13, 2007, the Appellants filed a Second Amended

³ The Port also endorses the Facts as presented by Respondent Weyerhaeuser Company Brief filed 8/5/13.

Complaint. CP33-54. Also on July 13, 2007, the Port filed and served its Administrative Record which the Port had generated as the lead SEPA agency for the Weyco development. CP_4 and CP 2657-2662. On July 16, 2007, Appellant West filed an affidavit of Prejudice against Judge Tabor. *Affidavit of Prejudice*, CP 1062. On July 30, 2007, Weyco answered this lawsuit, stating in part:

Preliminary Averments:

Thurston County taxpayers have spent considerable sums from the public treasury to accommodate Plaintiffs' political, endless and multiple lawsuits filed regarding Weyerhaeuser's lease with the Port of Tacoma for the operation of a log export facility at the Port....The typical log handling activities proposed for the site have been reviewed and mitigated as necessary. Plaintiffs, however, continuously have attempted to act as private attorneys general, without either the benefit or burden of professional training and experience. Accordingly, Plaintiffs Second Amended Complaint, replete with the usual hyperbole, ad hominem attacks, and self-aggrandizement, becomes approximately the 14th lawsuit filed against the Port involving the Weyerhaeuser lease since January 1, 2006. The instant action is simply another in a long line of futile attempts to de-rail Weyerhaeuser's relocation to the Port of Olympia.

Weyco Answer 1-2, CP 1338-1646..

On August 24, 2007, the Public Records Act Issues were bifurcated from the rest of the case and were to proceed on a "separate track." *Order*, CP 71-72. On September 5, 2007, nonprofit Olympians for Public Accountability, one of the Appellants' other litigation bedfellows, filed the second Affidavit of Prejudice in this case on behalf of the Appellants. CP 1070-1071.

⁴ The Port simultaneously files a Supplemental Designation of Clerk's Papers to include this record.

On October 8, 2007, the Appellants filed a third affidavit of prejudice, this time against Judge Hicks. CP 1212-1213. On March 20, 2008, the Appellant filed a fourth affidavit of prejudice against Judge Wickham. CP1214-1215. Judge Wickham retained jurisdiction and then entered a Case Scheduling Order the next day CP 2125-2126, setting milestone deadline dates, which Appellants failed to follow. On April 2, 2008, the Port filed a Response to the Public Records Order of Show Cause. CP2270-2286 and 2255-2264. On April 25, 2008, a Summary Judgment Hearing took place, resulting in dismissal of all Appellants' non-Public Records Act Claims due to lack of standing. *Order of Dismissal*, CP 90 as amended May 30, 2008 CP94-95. On May 2, 2008, apparently dissatisfied with their summary Dismissal, the Appellants filed another, fifth affidavit of prejudice against Judge Wickham. *Affidavit of Prejudice*, CP1216-1227.

Following the April 25, 2008 dismissal, the Appellants did nothing to move along this case for a period spanning between CP 94-95 (the May 30, 2008 Amended Order of Dismissal) and CP 299-300 (October 16, 2009 Motion to Show Cause); **a delay of nearly eighteen months.** In fact, the Appellants-caused delay was so great, that on June 16, 2009, the Trial Court Clerk disposed of the Port's SEPA administrative records, under an apparent belief

that the matter was long resolved.⁵ *Receipt of Records Return*, CP2641. Thereafter, and as he later admits, Appellant did not attempt to note this bifurcated Public Records Act matter for hearing from August 24, 2007 until October 16, 2009, **a delay of over two years.** *West's Reply in Opposition to Dismissal* 3:15-28, CP_6. *Notice of Issue*, CP 299-300. Then, from that 2009 timeframe through 2011, each time that the Appellant West purported to set a hearing, each date was ultimately stricken, as a direct result of the Appellants' deliberate choice to set hearings which either conflicted with the Court's calendar or the Port Counsel's known unavailability, or which Appellants failed to confirm, or because the Appellant West filed an affidavit of prejudice against the then-assigned judge. For example:

- CP 299-300 October 16, 2009 Notice of Issue: Not approved as a Special Set. *See Dkt.*, "Notice of Issue Action Entry Oct. 16, 2009.
- CP 301-302 January 22, 2010 Notice of Issue: Hearing stricken due to Court unavailability. *Cancellation Notice*. CP _.⁷
- Passage of seven more months.
- CP 304-305 August 2, 2010 Notice of Issues: Hearing stricken due to concurrently filed **sixth Affidavit of Prejudice** and incorrect setting. *Affidavit* CP 306, *see also Dkt.* "Notice of Issue Action Entry Aug. 4, 2010.
- CP311-312 August 27, 2010 Notice of Issue: Not properly noted. *See Dkt.*, "Notice of Issue Action August 27, 2010.
- CP 315-316 October 26, 2010 Notice of Issue: Noted for day that Port Legal Counsel had excluded in Notice of Unavailability filed September 16, 2010. CP 313-314,
- CP 362-363 December 7, 2010 Notice of Issue: Hearing stricken for Appellant non-appearance. *Clerk's Memorandum*, CP 1228.

⁵ The Port's later return of the administrative record to the Court caused Appellant Dierker to file a flurry of motions in this Court and the Trial Court, accusing the Port and the Court of nefarious cover-ups.

⁶ The Port simultaneous files a Supplemental Designation of Clerk's Papers to include this record.

⁷ The Port simultaneous files a Supplemental Designation of Clerk's Papers to include this record.

- CP _ December 22, 2010 Notice of Issue: Hearing stricken for Appellant non-appearance. *Clerk's Memorandum*, CP303.
- Passage of four more months.
- CP 377-378 April 14, 2011 Notice of Issue: Hearing stricken for Appellant non-appearance. *Clerk's April 28, 2011 Memorandum* CP _.⁸

Each of these unsuccessful events required some combination of Port responsive efforts, wasted trips to the courthouse, and/or wasted time by the Trial Court. Concurrently with the above events, the Appellant West decided to file more Affidavits of Prejudice. On August 4, 2010, the Appellant filed his sixth Affidavit of Prejudice, again targeting Judge Wickham. CP 306. On June 10, 2011, the Appellant West filed a seventh Affidavit of Prejudice, this time against Judge McPhee. CP386.

On June 24, 2011, the Port filed its Motion to Dismiss for Abuse of Process. CP 487-503. Also on June 24, 2011, the Appellants filed their eighth Affidavit of Prejudice. CP530-532. This Affidavit resulted in the complete recusal of the entire Thurston County Superior Court Bench, while the Port's Motion to Dismiss for abuse of process was pending. *See Court's Letter of April 24, 2012*. CP_⁹.

On January 4, 2012, Appellant West retained an attorney. *Notice of Appearance*, CP _.¹⁰ On April 24, 2012, Thurston County District Court Judge Sam Meyer agreed to hear this case on a *pro tem* basis. *Id.* The parties agreed to Judge Meyer's appointment on

⁸The Port simultaneous files a Supplemental Designation of Clerk's Papers to include this record.

⁹ The Port simultaneous files a Supplemental Designation of Clerk's Papers to include this record.

¹⁰ The Port simultaneous files a Supplemental Designation of Clerk's Papers to include this record.

the record. On June 22, 2012, Appellant Dierker, who had previously been absent since 2008, renewed interest in this case by filing a 28 page, rambling Response to the Port's Motions to Dismiss. CP626-654. Thurston County Local Rules limit such Motions to 25 pages. On June 25, 2013, Appellant Dierker filed a fourteen page Motion to Strike the Port's Reply to Dierker's June 22, 2012 pleading. *Motion to Strike and for Sanctions and Terms*. CP788-794.

On June 29, 2012, when the case was more than five years old and after argument on the abuse of process issue, Judge Meyer granted the Port's Motion to Dismiss. On July 6, 2012, post-dismissal and one day before a Motion for Reconsideration of the Dismissal Appellant Dierker filed a "Supplemental Declaration" in which Mr. Dierker claimed the Court's dismissal violated the Americans with Disabilities Act, and demanded retroactive accommodations: "I will need aid to more fully research and prepare my [now-dismissed] case..." CP833-872.

On July 27, 2013, the Trial Court signed the written Order dismissing the PRR issues. *Order of Dismissal, Findings of Fact and Conclusions of Law*, CP 932-940. In support of dismissal, the Court found:

- The Port prepared a Response to the Public Records Act issues raised by the Appellants on April 8, 2008. *FF* ¶ 5. CP 935.
- No show cause hearing has ever been held in this case. *FF* ¶ 6. CP 935.

- The Appellants let the case linger for seventeen months. *FF* ¶ 11. CP 935-936.
- Between October, 2009 and June, 2011, Mr. West unsuccessfully filed eight notices of issue for a show cause hearing on the Public Records Act issues that never took place. *FF* ¶ 12. CP 936.
- Those reasons included Mr. West noticing the hearing for a day he had previously been informed that counsel for the Port was not available, Mr. West noting the hearing for dates when the assigned judicial officer was not present and/or available and Mr. West failing to confirm the hearing in advance. **None of the delays were caused by the Port of Olympia and none of the reasons the show cause hearing was never held were caused by the Port of Olympia.** *FF* ¶ 13. CP 936. Emphasis Provided.
- The Appellants targeted five different Judges with Affidavits of Prejudice. *FF* 22. CP 937.
- Mr. West and Mr. Dierker have deliberately and willfully caused excessive delays in this case. And those delays have hindered the efficient administration of justice and prejudiced the defendant Port of Olympia. *FF* ¶ 5. CP 937.
- Delays in this case have severely prejudiced the Port of Olympia. *FF* 27. CP 937.
- Lesser sanctions than dismissal were considered and will not do. *Conclusion* ¶¶ 4, 7. CP 938.

On August 29, 2012, the Court denied the Appellants' two Motions for Reconsideration. CP 1004. On August 31, 2012, the Appellants filed a Notice of Appeal. CP1005-1016; *amended* September 17, 2012, CP 1020-1034.

B. Division II – Appellants' Delay Continues

This case, dismissed for abuse of process below, now has **one hundred thirty four appellate court** docket entries spanning a timeframe of just eleven months. Here is a sampling of what has occurred on appeal:

- On September 7, 2013, this Court *sua sponte* filed a motion to dismiss the case because the Appellants did not pay a

- filing fee for this appeal. Appellants later paid.
- On September 21, 2012, the two Appellants joined forces to file a so-called “Supplemental Notice of Appeal,” *pro se*. *On file*. This filing brought in the land use issues that had been dormant since April 25, 2008 dismissal.
 - On October 23, 2012, Appellant West’s Attorney and Appellant West co-signed a “Motion for Bifurcation.”¹¹ *On file*. West’s attorney attempted to distance herself from the land use portion of the appeal by proposing: Mr. West would Join Mr. Dierker to file *pro se* Appellant Briefs regarding the land use issues, and Mr. West’s attorney would represent Mr. West, but only on the Public Records Act issues. *Id*.
 - On November 1, 2013, the Port filed a Response opposing separation. The Port pointed out that the Petitioner’s requested relief had no basis in any case law, and cited concerns that the separation would cause the Port, Court and Weyco to respond doubly and triply anticipated vacuous and tardy pleadings from the *pro se* Appellants. *Port’s Answer in Opposition 2 on file*.
 - Later in the day on November 1, 2013, the Port’s prophecy fulfilled itself. The *pro se* Appellants joined forces to concurrently file a fifty page long Response covering the same October 11, 2012 Motion to Dismiss, where RAP 17(g)(1) allows just twenty pages. *On file*. The version of this same pleading which was actually served upon the Port mysteriously grew to **fifty seven pages**.
 - On November 6, 2012, the Port moved to strike the over-length and suspect briefing. *Port’s Motion to Strike Appellants’ Brief, Supporting Dec’l, Dec’l of West & to Extent Time*, on file. The Port requested fees for its responsive efforts thus far. *Id*.
 - On November 7, 2012, the Court issued a Ruling, denying Weyco’s Motion to Dismiss the land use issues, and denying Appellants’ Motion to Separate, pending Appellant West generating supplemental briefing regarding authority for the “hybrid representation” sought by West and Counsel.¹²
 - On November 19, 2012, Appellant West abandoned his pursuit of “hybrid representation.” *West’s Withdrawal of Intention to Proceed with Hybrid Representation, on file*.

¹¹ Mr. West’s attorney meant to request a RAP 3.3 “Separation;” relief that the Port’s research indicates has never been granted in the history of Washington State.

¹² Also on November 7, 2012, the Port moved to Clarify the Ruling, which stated that the Port missed a response date and requested a ruling on the fee request. *Port’s Motion to Clarify and or Reconsider, on file*. On November 15, 2013, the Court ruled that the Port had complied with the Briefing Schedule, and denied the Port’s fee request, without prejudice. *Ruling, on file*.

By this time, the Court's milestone dates in the September 25, 2012 Perfection Notice were severely delayed, but Appellants continued to issue filings ***other than*** an Appellant's Opening Brief:

- On December 1, 2012, Appellant Dierker filed a Declaration for some unintelligible purpose, for no apparent reason. *Dec'l on attached Ex., on file.*
- On December 3, 2012, Appellant Dierker requested an extension of time on the theory that he was unfamiliar with his own lawsuit. *Motion for Extension & Dec'l, on file.*
- On December 6, Appellant West filed a "Revised Response to Weyerhaeuser's Motion to Dismiss," which had been decided nearly a month earlier on November 7, 2012. *On file.*
- On December 17, 2012, Appellant West filed a Motion for leave to supplement the record and for an extension of time in which to file his opening brief. *On file.*

Thus Appellants successfully derailed this case until approximately March of 2013. More delays were in store. Appellant West apparently designated for the Clerk's Index the Administrative SEPA record generated by the Port in its role as the lead SEPA agency for Weyco's 2006 utility installation. That record had been filed on July 13, 2007, but which the Court returned to the Port on June 16, 2009, while Appellant West was in the middle of an eighteen-month "break" from prosecuting his case, and while Appellant Dierker enjoyed his four-year "hiatus." The return of the Administrative SEPA Record spurred off the next round of vexatious delay, mostly sourced from Appellant Dierker.

On January 22, 2013, at the request of the Court, the Port re-filed a copy of the Administrative record. *Dec'l of Counsel Re*

Filing, CP 2659-2662. Around January 2013, Appellant Dierker apparently made some contacts with the Thurston County Superior Court Clerk, in which he complained he had not been copied with the Administrative Record. On February 20, 2013, the Clerk issued Mr. Dierker a letter stating that (1) the Court inadvertently discarded the Administrative Record on June 16, 2009, and (2) the Superior Court did not retain a copy of the January 22 re-filing, and that the Superior Court passed the Administrative Records directly to this Division II Court. *Letter of Gould*, CP_¹³. Next, on February 20, 2013, Appellant Dierker returned to Thurston County Superior Court and demanded an “Ex Party Order Requiring Service of the Ports Recently Filed Administrative Record and Declaration in Support.” CP_¹⁴. In Dierker’s Motion, Mr. Dierker states that if any result other than granting requested relief “the Superior Court would be allowing the Port to violate other parties’ rights to redress of grievances, to discovery of relevant evidence, due process....” *Id.* at 2. On February 25, 2013, the Court denied Appellant Dierker’s request. *Court’s letter*, CP_¹⁵. Also on February 25, 2013, Appellant Dierker filed a “Motion for Extension of Time and/or Other Appropriate Relief” in Division II. *On file*. This Dierker Motion alleged *Motion 2* (“bad faith”) by the Port as to the administrative records *Motion 4* (conspiracy to deprive

¹³The Port simultaneous files a Supplemental Designation of Clerk’s Papers to include this record..

¹⁴The Port simultaneous files a Supplemental Designation of Clerk’s Papers to include this record..

¹⁵The Port simultaneous files a Supplemental Designation of Clerk’s Papers to include this record..

constitutional rights), and generally repeated Appellant Dierker's fiction that the parties had not been served with the Administrative Record on July 13, 2007. On February 26, 2013, as a result of the Dierker-caused confusion, the Court responded by issuing a request for clarification *Court's Letter, on file*. On March 26, the Port clarified the record status as described above.

On April 2, 2013, Appellant Dierker filed a twelve page reply document with this Court (where RAP 17.4(g)(1) permits only ten pages), in which Appellant Dierker purported to respond to "Port's 'Phantom' Motion/Joinder' (sic) of Relief Sought," and sought affirmative relief such as sanctions and striking. *Appellant Dierker's Reply to Respondents' Responses to the Court's Feb. 26 Letter & Motion Re the Agency Records, et al., on file*. On April 3, 2013, the Court struck Dierker's "phantom" Response *sua sponte*. *Court's Letter of April 3, on file*. Also on April 2, 2013, this Court ruled the record complete, the Administrative Record "not relevant to this appeal," and granted the Appellants an extension until April 19, 2013 to file briefs. *Court's Ruling of April 2, 2013, on file*. On April 13, 2013, despite the Court's April 2, 2013 ruling that Mr. Dierker's Administrative Record-derived grievance was "[ir]relevant," Appellant Dierker solicited this Court for a continuance of "10 days from the date the Superior Court serves me with a copy of the CD version of the Port's Administrative Record. *Motion for Extension of Time, on file*.

On April 16, 2013, three days before his Opening Brief was to be filed, Appellant West began exploring yet another mechanism of delay in this case: *Arthur West's Motion to Consolidate, on file*. By way of background to that Motion, Mr. West has been subjected to *three* discretionary dismissals recently. Two of the dismissals stemmed from Pierce County Superior Court PRR lawsuits involving the Port of Tacoma. All three appeals are currently pending before this Court. *See West v. Port of Tacoma*, Div. II Cause No. 43004-5; *West v. Connie Bacon*, Div. II Cause No. 43704-0. On April 16, 2013, the due date for Mr. West's Opening Brief in the *West v. Bacon* case was also approaching. Appellant West moved, three days before his due date in this case, to consolidate, rather than timely move the cases along or file an extension. This is likely because the Court expressly warned the Appellant's that future continuances were unlikely in light of the prior Appellant-caused setbacks. *See Court's Ruling of November 7, 2012, on file*. West's Motion to consolidate successfully delayed the Appellants' filing their Opening Brief until at least May, 2013, because the Port's Response to Motion was due April 26, 2013. *Court's Letter of April 16, 2013, on file*. On April 25, well after the Port began drafting its Motion Response due April 26 Appellant West withdrew his Motion to Consolidate. *Arthur West's Withdrawal of Motion to Consolidate, on file*. Then, on April 26, 2013, the Appellant filed a Motion for Extension of Time to file the

Opening Brief. *On file.*

On April 29, 2013, Appellant Dierker filed a “Statement of Arrangements, et al.” in which he essentially repeated his previously rejected grievances about “service” of the Administrative Record, and promised to “inform the court” when he was “served.” *On file.* On April 29, 2013, the Port filed its Response to Dierker’s Grievance and Motions for Extension. *Port’s Response in Opposition to Appellant Jerry Dierker’s Motion for Extension of Time, on file.* On May 1, 2013, Appellant Dierker filed *another* Motion for Extension, in which he re-treaded arguments that the Port withheld evidence, conspired, etc. *On File.* Also on May 1, 2013, Mr. Dierker apparently received the courtesy (second) copy of the Administrative Record the Port sent Mr. Dierker. *Notice and Declaration, on file.* On May 3, 2013, the Court set due dates of May 10 for West’s Opening Brief, and May 20, 2013 for the Dierker Brief. *Court’s Letter of May 3, 2013.* Appellants also stretched out their compliance with those dates as follows:

- On May 10, Appellant West filed an Opening Brief.
- On May 20, 2013, Appellant Dierker filed Appellant Dierker’s “May 20, 2013 Opening brief.”
- On May 20, 2013 , Appellant West filed a new Opening Brief without prior leave of Court.
- On May 23, 2013, the Court *sua sponte* struck Appellant Dierker’s Opening Brief as RAP-deficient and instructed that a new Brief be filed June 3, 2013 and comply with RAP.
- On June 3, 2013, Appellant Dierker filed a stack of paper approximately two inches thick, purporting to be his revised Opening Brief.

- On June 7, 2013, Appellant West filed a **second, new** Opening Brief without prior leave of Court.
- On June 10, 2013, the Court *sua sponte* struck Appellant Dierker's June 3, 2013 efforts, and identified four more RAP deficiencies. The Court instructed Mr. Dierker to file a new Brief by June 20, 2013.
- On June 17, 2013, the Court ruled that Appellant West could not file any more new Opening Briefs.
- On June 20, 2013, Appellant Dierker filed a seventy-five page long, one and a half spaced, narrow margin Opening Brief, which the Court accepted.

Also on June 20, 2013, Appellant Dierker filed a sixteen page long "Clerical Correction of Clerk's Papers," in the Superior Court, which ended: "missing key pieces of evidence from the incomplete and falsified Administrative Record filed by the Port's Attorney..." despite this Court's April 2, 2013 Ruling instructing that the Record was complete and also irrelevant to Appellant Dierker's purposes before this Court. CP 2666-2671. On June 27, 2013, the Court denied Mr. Dierker's Motion to supplement the record. This Port Respondent Brief follows.

IV. PORT'S RESPONSE¹⁶

The record in both the Trial Court and here on Appeal evidences that the Appellants expended efforts in every direction to diffuse, contest and obfuscate, rather than to timely prosecute this Public Records Act claim. The Trial Court properly exercised its discretion to dismiss and consistent with long standing recognition of this judicial authority. "Courts of justice are universally

¹⁶ The Port also adopts the Analysis presented by Weyerhaeuser in its Respondent's Opening brief 8/5/13.

acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.” *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821). Here, the Appellants have also extended their unacceptable litigation practices to this Appeals Court. This appeal should be denied and fees awarded to the Port.

A. Washington Trial Courts undisputedly have vested inherent authority to dismiss cases.

Washington Courts have “such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction.” *State v. Gilkinson*, 57 Wn.App. 861, 865, 790 P.2d 1247 (Div. 2, 1990). The courts derive authority to govern court procedures from Article IV, § 6 of the Washington Constitution. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 395, 143 P.3d 776 (2006). Additionally, “inherent power is authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties.” *In re Mowery*, 141 Wn.App. 263, 281, 169 P.3d 835 (Div. 1, 2007); quoting *In re Salary of Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976).

The Court’s power to discretionarily dismiss a case for unacceptable litigation practices is “inherent.” See *Business Services*, 174 Wn.2d at 308 (“...whether CR 41 (b)(1) applies to this

case to limit the trial court’s inherent discretion to dismiss.”); *Snohomish County v. Thorpe Meats*, 110 Wn.2d 163, 166, 750 P.2d 1251 (1988) (“A court of general jurisdiction has inherent power to dismiss actions for lack of prosecution...”); *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997) (“[T]he trial court’s inherent discretion [to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court’s rulings and observance of hearing and trial settings which are made] is not questioned by our interpretation.”).

The policy which drives the court’s inherent power to sanction by dismissal for bad faith and unacceptable litigation practices is to enforce the “integrity of the court” and prevent acts that “[if] left unchecked, would prevent further abuses.” *Rogerson Hiller Corp.*, 96 Wn.App. at 928, quoting *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 899 P.2d 594, 600 (1995). Appellants’ behavior clearly triggers the same policy protections as in *Rogerson*.

Dismissal is but one form of sanction. *Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628, 639, 201 P.3d 346 (Div. 1, 2009). Division 2 of the Washington Court of Appeals expressly holds that a finding of bad faith litigation properly invokes a trial court’s inherent authority to sanction litigation conduct. *Rogerson Hiller Corp.*, 96 Wn.App. at 928. “A party may demonstrate bad faith by, *inter alia*, delaying or disrupting litigation.” *Id.*, citing *Chambers*

v. NASCO, Inc., 501 US 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

This case meets those criteria in spades.

B. Trial Court Expressly Ruled on & Found Each Criterion for Discretionary Dismissal Was Met.

“Dismissal is an appropriate remedy where the record indicates that ‘(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.’” *Will v. Frontier Contractors, Inc.*, 121 Wn.App. 119, 129, 89 P.3d 242 (Div. 2, 2004); quoting *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). Here, the Trial Court was required to consider and meet the above criteria to justify dismissal. The Trial Court here did exactly that. The Court’s findings are necessary for this reviewing Court to see the appropriateness of the Court’s action¹⁷.

1. The first element is met; the Trial Court record expressly shows the Appellants refusal to obey a court order was willful or deliberate,

On August 24, 2007, the land use and public records issues in this case were bifurcated. Appellants/Plaintiffs were instructed to pursue the records issues on a separate track. CP 71-72. Nothing

¹⁷ The Appellant’s contention that the findings of fact here are “unnecessary” or “superfluous” must be rejected. The opposite is true. Cases, such as the *Will* case, *supra*, require “explicit” findings regarding the abusive plaintiff. Appellant West (incorrectly) argues based on common law interpretations of the precursor to modern CR 52(b), which provides findings of fact are unnecessary for dispositions on motions, should overrule the more modern contrary cases that require explicit findings to support a discretionary dismissal. Strangely, despite the Appellant’s incorrect insights regarding findings of fact, Appellant West decided to stake out literally pages of issues with the specific findings of fact in this case and then dedicate more pages of analysis to the propriety of the findings and conclusions. *See Br.* 5-9.

about the bifurcation prevented Plaintiffs from pursuing their alleged PRA issues on its separate track. West *concedes* in his Trial Court Reply that from the August 24, 2007 through October 16, 2009, he failed to note the PRA matter for any type of hearing at all – ***a delay of over two years.*** West *Reply* Opposing Dismissal at 3:15-28, CP ___¹⁸.

The Trial Court's Order Granting the Port's Motion to Dismiss CP 932-940 expressly concludes that the Appellants willfully and or deliberately disobeyed a court order to proceed with the case. Appellants instead caused delays by filing eight invalid Notices of Issue on days when the Appellants had "previously been informed that counsel for the Port was not available...when the assigned judicial officer was not present and/or available and...failing to confirm the hearing in advance. None of the delays were caused by the Port of Olympia and none of the reasons the show cause hearing were not held were caused by the Port of Olympia." *Order of Dismissal*, FF ¶¶ 12-13, CP 936. As is Port Counsel's routine practice, Counsel for West admits that Port Counsel filed a Notice of Unavailability predicting out *months in advance* any conflicting dates. West *Reply* Opposing Dismissal at 4:16, CP¹⁹. Port Counsel filed in *September* 2010 dates for which conflicts existed through *December* 2010. *Id* and Docket 231. CP

¹⁸ The Port simultaneous files a Supplemental Designation of Clerk's Papers to include this record.

¹⁹ The Port simultaneous files a Supplemental Designation of Clerk's Papers to include this record.

313-4. Yet, Mr. West continued to repeatedly and willfully set hearings on dates where Port's counsel's unavailability was clearly known. See also copy of email chain of correspondence between West & Port Counsel, **Ex 1**, attached to Dec of Counsel filed November 29, 2010. Docket 234, CP 320-28. The Port formerly objected to West's improperly set hearings at least twice and requested sanctions each time. Port Counsel memorialized one such abuse by West:

1. Mr West first set a hearing for 9 December 2010 on a date for which he has long had notice that Port counsel was unavailable.
2. After our written objection and request for terms were filed, Mr West merely compounded his waste of everyone's time by re-setting the hearing to yet another date for which he knew the Port Counsel was unavailable (23 December 2010).
3. We have offered repeatedly to work with Mr West to set a **mutually available** date and time, and remain willing to do so.
4. But Mr West's act of re-setting this long tardy hearing from one date where he knew Port counsel was unavailable to yet another date where he also knew counsel was unavailable, is just simply more waste of the Port, his and the Court's time.
5. The Port reiterates its request for sanctions, and for an order re-setting the hearing, and relies on the pleadings previously filed in advance of the 9 December 2010 hearing.

See *Third Declaration Of Port Counsel* dated December 17, 2010,

copy **Ex 2**, CP 364-366. Mr. West then waited another four months before he "feigned" to note the matter for hearing; this time he set a hearing for April 28 2011, but neglected to confirm it, so the hearing was stricken by the Court.

247 04- 14- 2011	NOTICE OF ISSUE ACTION	Notice Of Issue Show Cause @ Fjc	04- 28- 2011
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250 04- 28-	HEARING STRICKEN:IN	Hearing Stricken:in Court Nonappear
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Excerpt from Court docket, copy **Ex 3**, CP 715.

After years of such antics, the Port contacted the Court to properly set a hearing date, an action which should fall to Plaintiffs. See Email to Court, copy **Ex 4**, **CP 716**. On April 29, the Port noted a hearing for June 9, 2011, for the combined purpose of **Plaintiffs'** Show Cause and hearing on Port's Motion to Dismiss.

252	04-29-2011	NOTICE OF ISSUE ACTION	Notice Of Issue Show Cause/dismissal @ Fjc	06-09- 2011
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See excerpt from Court docket, copy **Ex 3**, CP 715. However, due to Mr. West's continued antics – the Court was delayed in hearing that same Port Motion to dismiss – until over a year later!

The Order also finds the Appellant delayed the case by subjecting five judges to affidavits of prejudice. CP 936 FF ¶ 16. Mr. West and co-Plaintiff Dierker also directly controlled the delays caused by the excessive and multiple Affidavits of Prejudice, some of which were filed as late as 2010 and 2011- three and four years into the case – during the same time period where present counsel attempts to whitewash West's actions as attempting to move forward. See (Judge Tabor – 2007) CP1062, (Judge Pomeroy – 2007)CP 1070-1, 130 (Judge Hicks - 2007) CP1212-3, (Judge Wickham – 2008) CP 1214-5, (Judge Wickham – 2008)CP1216-1227, (Judge Wickham - 2010) CP3006, , (Judge McPhee - 2011) CP386 and (Judge McPhee - 2011) CP 530-532.

Appellants' last affidavit of prejudice was filed against Judge

McPhee in 2011. The record plainly shows it was Appellants' deliberate and transparent attempt to forestall the hearing the Port's Motion to

Dismiss:

269	06-24-2011	MOTION TO DISMISS	Motion To Dismiss
270	06-24-2011	DECLARATION	Declaration Carolyn Lake
271	06-24-2011	AFFIDAVIT OF PREJUDICE	Affidavit Of Prejudice Mcphee

See CP 716. A motion for recusal of a judge cannot forestall an involuntary dismissal. *State ex rel. Goodnow v. O'Phelan*, 6 Wn.2d 164, 154, 106 P.2d 1073 (1940) (dismissal of action sustained for want of noting matter for trial within one year, despite plaintiff timely filing motions for recusal of presiding judge). Appellants' strategically timed so-called "affidavits of prejudice," are simply more support for the Trial Court's exercise of its inherent authority to dismiss this case. Here, the Trial Court concluded:

The Obligation of going forward in an action always belongs to the plaintiff and this Court concludes that Mr. West and Mr. Dierker have deliberately and willfully caused excessive delays in this case....
Id. Conclusion ¶ 5.

Disregard of a court order without reasonable excuse or justification is deemed willful. *Allied Financial Servs., Inc. v. Mangum*, 72 Wash. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993) (citing *Lampard v. Roth*, 38 Wash. App. 198, 202, 684 P.2d 1353 (1984); *Anderson*, 24 Wash.App. at 574, 604 P.2d 181). Where a court finds that a party has acted in willful and deliberate disregard of reasonable and necessary court orders **and the efficient**

administration of justice and has prejudiced the other side by doing so, **dismissal is justified.** *Anderson v. Mohundro*, 24 Wn.App. 569, 575, 604 P.2d 181 (Div. 1 1979). “[A] party’s disregard of a court order without reasonable excuse or justification is **deemed willful.**” *Rivers*, 145 Wash.2d at 686-87, 41 P.3d 1175. *See also Woodhead*, 78 Wash.App. at 131, 896 P.2d 66 (dismissal for willful and deliberate failure affirmed where trial court relied on combination of plaintiff’s counsel purposefully misleading the court with false claims, ignoring specific court orders to effect service, and failing to follow the case schedule); *Rivers*, 145 Wash.2d at 691-92, 41 P.3d 1175 (dismissal for willful and deliberate noncompliance with court orders upheld counsel failed to comply with court order requiring Rivers to submit complete answers to interrogatories, provide requested documents to the defendants, and timely file status reports).

In *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 66, 68, 896 P.2d 66, (Div. 1 1995), the Trial Court exercised its inherent jurisdiction to impose terms on both the attorney and client and dismissed the action with prejudice in light of its findings with respect to willful disobedience of court orders and rules. On appeal the dismissal was upheld. In sanctioning the dismissal, ***the Appeals Court looked at not just one instance of non-compliance but the entire spectrum of the litigant’s conduct:*** “The issue before us is whether such a failure, *together*

with the other conduct referenced in the trial court's findings, warrants dismissal with prejudice." The first element for dismissal willful failure to follow court orders is satisfied.

2. The record expressly shows the Appellants' actions substantially prejudiced the Port, the second element is met.

Before the Trial Court, the Port explained how it has been prejudiced and that no lesser sanction will do.

a. West-Caused Delays Expand Risk of Per Day Penalty.

First, Mr. West has repeatedly violated court orders and rules, and his dilatory scheduling of sham hearings in this PRA case unacceptably extended this matter and added to the risk of the Port incurring a daily penalty. Under existing law, any penalty that accrues in this action accrues on a daily basis. Although the Port is confident West has no basis to allege a PRA violation occurred, the Port theoretically risks a per day penalty. Thus West's pattern of delay represents real potential for substantial prejudice against the Port.

b. Passage of Time Impacts Witnesses

Second, the Port is further prejudiced by the passage of time, for which West alone bears responsibility. The obligation of going forward always belongs to the plaintiff and not to the defendant. *State ex rel. Washington Water Power Co. v. Superior Court for Chelan County*, 41 Wn.2d 484, 489, 250 P.2d 536 (1952). PRA cases are by nature very fact dependant. Over the five plus years Appellants allowed this case to languish, Port personnel changes and witness memories fade. Appellants

should not be allowed to benefit from their protracted and varying fits of inaction and disruption.

c. West's Multiple Proceedings Against Port/WEYCO Has Wasted Substantial Tax Dollars

Third, during Appellants willful and protracted failure to pursue this case, Mr. West pursued extensive and expensive multiple unsuccessful litigation all directed at the Port of Olympia. Mr. West's denial of Port prejudice wholly ignores again the consequences of the fanciful (and expensive) "detours" he and Mr. Dierker pursued during the five year term this case, i.e. filing no less than 35 separate and frivolous appeals and or lawsuits in City, Port, state and federal forums which required the Port taxpayers to defend each. See *Chart of West v. Port of Olympia* cases, CP 719-25, **Ex 5**, (many of which also included co-Plaintiff Dierker). The publically-funded price tag paid directly due to Mr. West's antics is no small sum. For "just" the 19 cases reflected on the Chart **Ex 5**, CP719-25, the combined totals paid by the Port of Olympia for these West matters comes to: **Attorney fees: \$547,866.80 and Costs: \$30.321.24.**

d. West Antics Mirror Precisely His Abuses in Two Other Port PRA cases, Both Now Dismissed

Nor have Mr. West's litigation tantrums been confined to this Port of Olympia cases. In two, near identical PRA cases with time frames which parallels Mr. West's bizarre antics here, Mr. West similarly let his PRA claims languish for spans of 18 months to three years. Each case resulted in involuntary dismissal based on the Court's inherent authority, one as recent as June 12, 2012:

- *Arthur West v. Port of Tacoma*, Case No. 08-2-042312-1 (Pierce County Super. Ct.): **Dismissed January 2011**, Copy of Order, **Ex 6** CP 726-729. The Port incurred attorney fees for 555.5 hrs @ \$146,984.50 and Costs: \$17,160.40.
- *Arthur West v. Port of Tacoma*, Case No. 09-2-14216-1 (Pierce County Super. Ct.): **Dismissed June 12, 2012**, Copy of Order, **Ex 7** CP 730-744. The Port incurred attorney fees 576.5 hrs @ \$150,294.00 and Costs: \$17,160.40.

Mr. West also filed two additional PRA related cases against the Port of Tacoma during this timeframe. The combined totals paid by the Port of Tacoma for all these West matters came to: **Attorney fees: \$320,377.00 Costs: \$24692.35.** CP 685.

In its Order Granting the Port’s Motion to Dismiss, CP932-40, the Court made findings and conclusions as to the substantial prejudice experienced by the Port, which lead to termination of the case.²⁰

27. This Court finds that delays in this case have severely prejudiced the Port of Olympia, since the Public Records Act requires a mandatory daily penalty in the event that a court finds an agency to have violated the act and does not vest a court with discretion to reduce the number of days for which a penalty may be imposed. Mr. West and Mr. Dierker should not be allowed to benefit from the delays that they themselves have caused.

Order at FF ¶ 27. CP 935-936

5.And those delays have hindered the efficient administration of justice and prejudiced the Port of Olympia.
 6. This Court concludes that the delays caused by Mr. West and Mr. Dierker have prejudiced the Port of Olympia, since the Port of Olympia, if found to have violated the Public Records Act, will be subject to a daily penalty.

Id. at Conclusion ¶ 5-6. CP 936.

²⁰ The Appellants’ practice before this Court further expanded the prejudice described by the Trial Court.

On Appeal, the Appellants first argue that findings of fact are unnecessary and “superfluous,” and then goes on attempt to leverage the supposedly “superfluous” findings of fact to somehow argue that the Port was not prejudiced on these facts. Despite the passage of six years or more years since the complained of-events, Appellant West brazenly states that his own delay “is not damage or detriment to one’s legal claims.” *Id.* at 37. However, the Trial Court correctly found prejudice because Appellant-caused extensive delay in this case hinders the Port’s ability to defend. Therefore, the second element justifying dismissal- prejudice to the Port --is met.

3. The Trial Court expressly considered – and previously imposed - a lesser sanction, the third and final element is met.

The Port pointed out to the Trial Court that monetary sanctions had already been considered, imposed and paid by West in various cases contemporaneous to this present matter (including \$1500 paid by West only months prior to the hearing on dismissal in the *Arthur West v. Port of Tacoma*, Pierce County Case No. 09-2-14216-1), and those sanctions did nothing to curb Plaintiffs’ disruption and delay. No lesser sanction than dismissal will do. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). Thus, the Trial Court’ expressly considered lesser sanctions, and concluded that a lesser sanction would not do:

This Court concludes that lesser sanctions than dismissal will not suffice....

Order Granting Port Motion to Dismiss at Conclusion ¶ 6. CP 936.

The third and final element is satisfied.

a. Trial Court properly Considered Appellant West's Extensive History Of Abuse Of Process.

Case law bears out that the Trial Court also properly considered Appellants' acts of being previously barred from federal Court and labeled vexatious by other courts when determining whether lesser sanctions would do; See *McNeil v. Powers*, 123 Wn. App. 577, at 585-586, 97 P.3d 760 (Div. 3, 2004), (Washington Court dismissed McNeil's defamation action in *McNeil* after considering McNeil's status as a federally-labeled vexatious litigant.

Here West's access to courts has been Ordered curtailed for violating the basic prerequisites of court demeanor. See Vexatious Litigant Order CP 731-777. Yet West continued to engage in procedural bad faith litigation and flaunting of court rules. Thus, West's vexatious litigant status **reinforced** that he was on notice not to engage in unacceptable litigation practices throughout the years these proceedings dragged on. The Trial Court properly considered that status, rejected lesser sanctions than dismissal, and determined that no lesser sanction would do. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). Therefore, the Trial Court properly took into account Appellant West's well-deserved status as a vexatious litigant, as a relevant factor supporting dismissal.

b. Appellants' Extensive History of Abuse of Process.

The Trial Court also did not abuse its discretion when it held Appellants accountable here for the bad acts committed in other judicial forums. Courts may consider a plaintiff's status as a labeled vexatious litigant in exercising discretion. *See McNeil v. Powers*, 123 Wn.App 577, 591, 97 P.3d 760 (Div. 3 2004) (the court considered that the nature of the plaintiff's suit was to harass the defendant and "as many parties as possible in as many legal forums as possible," dismissal granted, at 585). Vexatious litigation continues to be contrary to public policy. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn.App. 307, 311, 202 P.3d 1024 (Div. 3 2009), *reconsideration denied* (May 7, 2009), *Yurtis v. Phipps*, 143 Wn.App. 680, 694, 181 P.3d 849 (Div. 3 2008), *Jones v. Pers. Res. Bd.*, 134 Wash. App. 560, 568, 140 P.3d 636 (Div. 2 2006).

Not surprisingly, Mr. West is a ***thrice-over*** labeled vexatious litigant. See two Federal Orders Cause Nos. MC11-5022RBL²¹ & C10-5275BHS ; *see also* Order from Thurston County Superior Court Cause No. 11-000384-9, CP 731-777. Below is just a representative selection of Plaintiff's recent outrageous abuses of process observed by other courts **and** used as a basis for imposing against Mr. West sanctions, dismissal or both. All below West's outrageous acts are memorialized in Court Orders which issued in 2010 or 2011, thus occurring ***while this present case was being stalled by West.***

- "Plaintiff has filed an unusually large number of cases related, in one

²¹ In which the Federal Court noted: "Arthur West has filed or joined **at least forty-nine** cases in Washington State Courts. He has been a party to **eighteen** cases in the Western District of Washington since 1999, four in the last year alone. The vast majority of those cases were dismissed."

way or another, to the Activities of the Port of Olympia and its redevelopment of the Port Peninsula” Court’s *Order Granting Sanctions and Entering Vexatious Litigant Order* 2:16-19 in *Arthur West v. Washington Public Ports Association*, Thurston County Superior Court Cause No. 11-2-000384-9 (2011). CP 759

- “Plaintiff also demonstrates the same level of abusive practice towards other parties and counsel in [cases related to the activities of the Port of Olympia].” Plaintiff sues judges and court staff, threatens to file bar complaints, threatens criminal and civil actions against counsel, and sues port and city employees in their personal capacity.” *Id.* CP 760
- “Following dismissal of one of Plaintiff’s lawsuits, Plaintiff sent an email to the Presiding Judge, Hon. Heller of Thurston County Superior Court, and opposing counsel “stating that Judge Heller was an ‘entity unlawfully exercising the office of Thurston County Judge’ and that ‘bar complaints, tort claims, and judicial conduct commission claims will issue all around.’” *Order* at 5 in *Arthur West v. State ex rel Marti Maxwell*, No. C10-5275BHS (W.D. Wash., 2010). CP 743
- “West asserts that “King County and Thurston County Prosecutors have a duty to arrest and prosecute Judge Heller and attorney Patterson for impersonation of a public officer.” *Id.* at 6. CP 744
- “West has filed at least one suit in the U.S. District Court for the District of Columbia. The named defendants include John Roberts, Jeffrey Atkins, William Suter, Anthony Kennedy Bruce Rifkin, Benjamin Settle, Sam Reed and Rob McKenna.” *Id.* at 12. CP 750
- “West’s complaints rarely articulate a cognizable injury. Instead, West appears to use these pleadings to vent outlandish frustrations with federal and state authority.” *Bar Order Against Plaintiff Arthur West in the Western District of Washington* 2:19 Case No. MC11-5022RBL (W.D. Wash. 2011). CP 732
- “Further, West rarely, if ever, makes a claim supported by fact or law.” *Id.* at 3:13. CP 733
- “Even under the most generous reading of any of Arthur West’s endless complaints, this court concludes that West is a vexatious litigant that has abused his privilege to request judicial relief.” *Id.* at 3:3-3:6.

In sum, when viewed through clear and not rose colored glasses, the facts supported by the Trial Court record are that West had their chance to pled their case, but squandered that opportunity in this Court through their outrageous antics, sanctionable conduct, failure to timely prosecute and the resulting prejudice to defendants. The Trial Court did not abuse discretion in dismissing the case.

C. Sanction of Dismissal Warranted

The dismissal of Appellants is well-supported by and consistent with the very lengthy history of Washington Court sanctions for litigant malfeasance, dating back to statehood. A Trial Court's inherent authority to dismiss will be upheld for a variety of conduct that positively pales in comparison to the machinations of Appellants West and Dierker:

- *McDaniel v. Pressler*, 3 Wn. 636, 638, 29 P. 209 (1892): Courts have authority to dismiss lawsuits for abandonment and also for plaintiff's disobedience of an order concerning the proceedings in an action.
- *Plummer v. Weill*, 15 Wn. 427, 430-431, 46 P. 648 (1896): Where the character of the attorneys and parties are not of issue, party's brief that refers to the opposing party in language that is grossly improper and unseemly [as here] warrants discretionary dismissal effectuated through the striking of the offensive brief.
- *Jackson v. Standard Oil of California*, 8 Wn.App. 83, 505 P.2d 139 (Div. 2, 1972); *Rev. denied*: Plaintiff expresses dissatisfaction with court order, leaves courtroom, dismissal with prejudice granted.
- *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 464, 303 P.2d 290 (1956): Inherent dismissal due to refusal to plead further an incoherent complaint.
- *State ex rel. Washington Water and Power Co. v. Superior Court for Chelan County*, 41 Wn.2d 484, 494, 250 P.2d 536 (1953): Court's inherent dismissal powers upheld despite stipulation to waive CR 41-governed dismissal among the parties.
- *National City Bank of Seattle v. International Trading co. of America*, 167 Wn. 311, 316-317, 9 P.2d 81 (1932): Court holds in dicta that CR 41 precursor does not forbid exercise of the inherent power of a court to dismiss an action "whenever in the interests of justice he may deem that the proper course to pursue."
- *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950): Parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of [CR 41

predecessor Rule] because plaintiff failed to continue making filings in the case for a protracted period, then noted a trial to escape operation of CR 41-predecessor.

In *Stickney*, The Supreme Court of Washington granted dismissal in favor of the Port of Olympia. The *Stickney* court held that the Port of Olympia was entitled to a discretionary dismissal for lack of diligent prosecution regardless of whether the language in CR 41 was satisfied - because the lack of noted trial date served to preserve all of the Court's discretion to dismiss the case. 35 Wn.2d at 241. ("The parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of Rule 3²²"). Emphasis provided. The Port here is entitled to the same outcome. The Appellant failed to note the case in eight tries, failed to timely pursue his "claims", targeted five judges, and then pursued a poorly executed, frivolous appeal of this matter of judicial discretion. The Appellants' misbehaviors far exceed the conduct of prior litigants in other Washington State cases that resulted in discretionary dismissal. One Appellant admits to failing to note this issue for hearing for more than two years between August 24, 2007 and October 16, 2009. *West's Reply in Opposition to Dismissal* 3:15-28. The Appellant does and cannot deny that "Beginning in October, 2009, and running through to June 2011, Mr. West filed eight notices of issue for a show cause hearing on the Public Records Act issue that

²² The precursor rule to CR 41.

never took place for one reason or another.” *Order of Dismissal* FF ¶ 12 CP 936. “Those reasons included Mr. West noting the hearing for a day he had previously been informed that counsel for the Port was not available, Mr. West noting the hearing for dates when the assigned judicial officer was not present and/or available and Mr. West failing to confirm the hearing in advance.” *Id.* at FF ¶ 13. On the other hand, on April 2, 2008, the Port filed pleadings responsive to the Public Records Act issue, which the court concludes “demonstrated its readiness to show cause.” *Id.* at FF ¶ 5. CP933. This Appeals Court should leave undisturbed the Trial Court’s valid exercise of discretion; discretionary dismissal is both supported and richly deserved on these facts.

D. Supreme Court of the United States Standard Met

The Appellant’s misconduct also far exceeds the standard for discretionary dismissal set forth in the landmark United States Supreme Court case on point, *Link v. Wabash R. Co.*, 370 U.S. 626, 628-629, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). In *Link*, the plaintiff, through counsel, had been in telephonic contact with the court twice pertaining to a status conference; once the day before a scheduled conference and once on the morning of the missed status conference. *Link*, 370 U.S. at 627. The afternoon prior to the conference, counsel first informed the court that he might have a conflicting deposition to attend. *Id.* Counsel phoned the morning of the conference and still prior to the conference, and confirmed to

the court that the he would not attend, and suggested two make-up dates that same week, including the following day. *Id.* Despite this, the Link court dismissed the case just two hours after the scheduled status conference. *Id.* at 628-629. Here, the Link plaintiff's conduct pales in comparison to that of the instant Appellant. The Appellant's brief speaks for itself in attesting to the Appellant's vexatious conduct. The Appellant no-showed, mis-noted and or dishonestly noted **eight** show cause hearings, where missing one conference by just two hours will do under *Link*. *Link* is good law in Washington State. *Gott v. Woody*, 11 Wn.App. 504, 508, 524 P.2d 452 (Div. 2, 1974); *approved Wallace v. Evans*, 131 Wash. 2d 572, 578, 934 P.2d 662, 664 (1997). Therefore, this Court should affirm the dismissal.

E. Abuse of Discretion Standard of Review Applies to the Discretionary Dismissal

Trial courts have broad discretion to manage their courtrooms and conduct trials in order to achieve the orderly and expeditious disposition of cases. *In re Marriage of Zigler and Sidwell*, 154 Wn.App. 803, 815, 226 P.3d 202 (Div. 3, 2010); citing *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). When reviewing a dismissal due to unacceptable litigation practices, also referred to interchangeably as a "discretionary dismissal" or "inherent dismissal" throughout Washington case law, the standard of review is abuse of discretion: "When the Court's

inherent power to dismiss for want of prosecution is at issue the trial court's decision is reviewed under the abuse of discretion standard." *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950); see also *Business Services of America II v. Waftertech, LLC*, 174 Wn.2d 304, 316 274 P.3d 1025, 1031 (2012, C.J. Madsen, dissenting). The sole dispositive issue in this appeal is whether the trial court abused its discretion in dismissing the case due Appellant's lack of Prosecution. It did not.

To find abuse of discretion in this involuntary dismissal for unacceptable litigation practices requires the high standard of finding the trial court decision to dismiss was "manifestly unreasonable" or "based on untenable grounds." *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 131, 896 P.2d 66 (Div. 1, 1995); citing *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). The criteria cannot be met here. "We do not reverse a discretionary decision absent a clear showing that the trial court's exercise of its discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *City of Puyallup v. Hogan*, 168 Wn.App. 406, 423-424, 277 P.3d 49 (Div. 2, 2012).

A discretionary dismissal will be reviewed for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002); see also *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 129, 896 P.2d 66 (1995) (a court has the discretion to dismiss an action

based on a party's willful noncompliance with a reasonable court order). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A trial court's exercise of discretion is manifestly unreasonable if no reasonable person would concur with the Court's view when the Court applies the correct legal standard to supported facts. *Mayer v. Sto Indu., Inc.*, 156 Wn.2d 677, 684 (2006); quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A trial court's exercise of discretion rests upon untenable grounds if the trial court relies upon unsupported facts or applies the wrong legal standard. *Id.* The Appellant has pending in this Court not one, but at least two discretionary dismissals issuing from independent trial courts. *See April 16, 2013 Motion to Consolidate, on file.* (Appellant attempts to consolidate this case with Div. II Cause No. 43004-5, due to "important factual similarities" and "in each case the trial court granted dismissals to pursuant to its own powers.") These multiple dismissals, along with the record below, eviscerate the "no reasonable person would concur" argument the Appellant might proffer to advance untenable grounds exist for this dismissal. Therefore, this dismissal passes abuse of discretion review.

The Supreme Court of Washington recently held appellate substitution of judgment to be reversible error. *Teter v. Deck*, 174

Wn.2d 207, 226, 274 P.3d 336 (2012) (“We will not substitute our own judgment in evaluating the scope and effect of that misconduct”). Here, the Appellant West asks that this Court engage in exactly the judgment substitution that the Supreme Court expressly prohibits. Prior courts have “allowed discretionary dismissals for failures to appear, filing late briefs, and similarly egregious sorts of behavior.” *Business Services of America*, 174 Wn.2d 304, 311, 274 P.3d 1025 (2012). Here, the Appellants have demonstrated all of the *Business Services* behaviors. “Such dilatoriness also occurs, for example, when there is a failure to appear at a pretrial conference in combination with general dilatoriness.” *Business Services of America*, citing *Link*, 370 U.S. 626. Here, the Appellant failed to attend numerous hearings, filed eight Affidavits of Prejudice, and used a variety of mechanisms to drag the case over four years after the Port prepared responsive materials to the Public Records Act issues in April 2008. *Business Services of America* is directly on point and reinforces the propriety of the Trial Court’s discretionary dismissal.

F. Court properly Dismissed Land Use Issues Because Appellants Lacked Standing.

The Trial Court properly found that Appellants lacked the requisite standing to maintain their SEPA challenges, and thus properly dismissed all “land use” issues in 2008. CP 90. That ruling should remain undisturbed. Courts apply a two part test to determine whether a party has standing to challenge a SEPA determination: (1) the interest that the

aggrieved party is seeking to protect must arguably be within the zone of interests protected or regulated by the statute; and (2) the aggrieved party must allege an injury in fact that is immediate, concrete and specific. See *Trepanier v. City of Everett*, 64 Wash. App. 380, 383, 824 P.2d 524, 526 (Wash.App.,1992) (rejecting “bald” assertions of harm). When determining whether an alleged injury is within the zone of interests, Courts look to the specific substantive provisions of the code alleged to be violated, not the overall purpose of the code or act. See *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997) (rejecting lower Court’s reliance on general purpose of statute); see also *Ache v. Bloomquist*, 132 Wash. App. 784, 795 (Div. 2 2006) (looking to specific provisions in the County Code showing County was required to consider view impacts). The alleged interest must be something more than an interest commonly shared with other citizens. *Retired Pub. Employees Council*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003).

To satisfy the injury in fact requirement, the injury must be immediate, concrete and specific, not merely conjectural or hypothetical. See *Trepanier v. City of Everett*, 64 Wash.App. 380, 383, 824 P.2d 524, 526 (Wash.App.,1992), (“Trepanier's [standing] argument is **fatally flawed** because his bare assertion that the new code will likely create serious adverse impacts on unincorporated Snohomish County has absolutely no factual support in the record.”) West’s and Dierker’s entire allegation of injury are contained in two paragraphs of their complaint:

2.1.1 Petitioners West and Dierker are citizens living within about 1 mile from this project areas. They travel through this area every day, with a particular special relationship established between themselves and the Defendants concerning the subject matters of this case. Plaintiffs West and Dierker are citizens with a particular established connection to the project location, including but not limited to a particular established connection to the animals and plants that inhabit the project area and the land and water in the vicinity, which they often protect by such legal actions as this one. They have standing to maintain this action.

2.1.2 Mr. Dierker is also a severely disabled person with certain serious life threatening “service connected” disabilities from being exposed to airborne toxic materials in the Air Force, and foreseeably likely increased impacts to his disabilities leading from the construction and operation of these projects must be considered by the Port and other agencies with jurisdiction under the State Environmental Policy Act (SEPA) RCW 43.21C and WAC 197-11, under the Washington State Blind, Handicapped, and Disabled Persons “White Cane Law” RCW 70.84 and under the Americans with Disabilities Act (ADA) Title 42 USC § 12101, 12131, 12132, et seq.

CP 35. These allegations, even if taken as true, do not support Appellants’ standing to maintain this action. Appellants have not alleged **facts** that if true, would demonstrate that they have an immediate, concrete and particularized injury in fact that is within the zone of interests of SEPA. Appellants’ bald assertions will not suffice. Pleadings challenging an administrative action are insufficient if they merely reveal **imagined circumstances** in which plaintiff could be affected. *Coughlin v. Seattle School Dist. No. ,* 27 Wash.App. 888, 621 P.2d 183, Wash.App., 1980. If the injury is merely **conjectural or hypothetical, there can be no standing.** *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973).

Standing is a *constitutional* doctrine designed to assure that the

plaintiff has a direct stake in the controversy. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973), as quoted in *Trepanier v. City of Everett*, 64 Wash.App. 380, 824 P.2d 524 (Wash.App. Div. 1 Feb 24, 1992), review denied, *Trepanier v. City of Everett*, 119 Wash.2d 1012, 833 P.2d 386 (Wash. Jun 03, 1992).

West's and Dierker's claims of "special relationships" and "particular established connections" also do not satisfy standing. Even assuming that these are within the zone of interests of SEPA, these "connections" do not meet the injury in fact requirement – principally because they do not make good faith allegations that that these connections will be harmed by the Port's SEPA determination. In other words, ¶ 2.1.1, liberally construed, at best asserts some sort of interest, but it does not even allege that that interest will be harmed. West and Dierker were required to assert good faith allegations of a concrete, specific, and particularized injury. The assertion of an interest alone cannot satisfy the injury in fact requirement without some kind of injury. Nor does their invocation of the word "particular" create a particularized injury.

Only Mr. Dierker comes close to alleging an injury of any kind at Complaint ¶ 2.1.2 , CP35, when he states: "a foreseeably likely increased impacts to his disabilities leading from the construction and operation of these projects must be considered by the Port and other agencies with jurisdiction." Liberally construed, Mr. Dierker appears to be alleging that he will be harmed by the construction and operation of the log yard.

Nonetheless, this is little more than a bald assertion of harm – Mr. Dierker makes no effort to explain *how* the construction or operation activities are likely to impact him or what those impacts (if any) will be. Instead, he simply states that he will be harmed. Such unsupported assertions of harm do not satisfy the injury in fact requirements for standing. When a person alleges a **threatened** injury, as opposed to an existing injury, he or she must show an **immediate, concrete, and specific** injury to him or herself. *Chelan Co. v. Nykrem*, 146 Wn. 2d 904, 935, 52 P.3d 1, 16 (2002) *Roshan v. Smith*, 615 F.Supp. 901, 905 (D.D.C.1985). Emphasis added. If the injury is merely conjectural or hypothetical, there can be no standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973).

In *Coughlin v. Seattle School District*, 27 Wn App. 888, 621 P2d 183, (1980) (appeal alleging failure to require EIS as error dismissed based on lack of standing) the Trial Court’s dismissal was upheld in an appeal of a school district’s failure to require an EIS based on the appellant’s lack of standing. “These standing requirements **preclude** standing based solely upon the harm claimed by Coughlin in her capacity as a **concerned and active citizen, taxpayer and resident** of the District. Such harm is too remote to establish standing in a SEPA case.” *Coughlin* at 893-4.²³

²³ The Court of Appeals’ decision in *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wash. App. 781, 154 P.3d 959 (Wash. App. Div. 2 Apr 03, 2007) is **not** applicable to this case. There, the Court reviewed the standing requirements of the Growth Management Act, (“GMA”), Chapter 36.70A RCW. The Port is not a jurisdiction to which the Growth Management Act applies, and instead standing is determined pursuant to the Administrative Procedures Act (APA).

Courts previously found these exact Appellants lacked standing to appeal a previous Port SEPA decision. In Thurston County Cause No. 06-2-02116-6, these same Appellants filed suit for “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”. Port Motion to Dismiss CP_.²⁴ By Order dated June 15, 2007, the Honorable Judge Hicks agreed with the Port that **these same Petitioners lacked standing** to bring an appeal of the Port’s environmental determination.

Neither Mr West nor Mr Dierker have legal "standing" to challenge the Port's SEPA decision. Under Washington law, to have standing to bring an environmental SEPA appeal, the appellant must show 2 things:

- a) That the appellant falls within the zone of interest (this prong may be met), and
- 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.

See June 15, 2007 Order and Order Denying Reconsideration dated June 25, 2007. CP__²⁵. In sum, Mr. West did not even make an allegation of injury, and as such his SEPA issues were properly dismissed for lack of standing. Mr. Dierker arguably makes an allegation of injury, but his allegation is little more than a bald assertion, that is not specific, immediate, or particularized, and the Trial Court also properly dismissed

The Thurston County v. Western Washington Growth Management Hearings Bd., Court distinguished between GMA “appearance” standing and the traditional APA standing. “Under the Act, participation standing and APA standing are distinct. RCW 36.70A.280(2)(b), (d)²³.” The Court found the standards for standing under GMA to be more relaxed. “A person need **not** meet the requirements of APA standing to have participation standing before the Board...” Id at 792. Emphasis added.

²⁴ The Port simultaneously files a Supplemental Designation of Clerks Papers to include this record.

²⁵ The Port simultaneously files a Supplemental Designation of Clerks Papers to include this record.

his SEPA claims for lack of standing as well.

G. Appellant Dierker Not Entitled to PRA Relief

Appellant Arthur West concedes he personally made all of the Public Records Requests at issue in this case: “Appellant and Plaintiff Arthur West filed a public records request with Defendant and Respondent Port of Olympia on March 17, 2007.” *West’s Br.* 1. Appellant Dierker lacks standing to judicially enforce Arthur West’s public records request. The doctrine of standing requires that a claimant must have a personal stake in the outcome of a case in order to bring suit. *Germeau v. Mason Cnty.*, 166 Wn.App. 789, 803, 271 P.3d 932 (Div. 2, 2012). A plaintiff with standing cannot confer the same upon a co-plaintiff by virtue of association in a legal action to enforce the claims of the plaintiff. *Chan v. City of Seattle*, 164 Wn.App. 549, 558 n. 6, 265 P.3d 169 (Div 1, 2011). In order to find standing to sustain a PRA lawsuit when the record requestor and PRA plaintiff are not the same person, the court must find the plaintiff to have a “personal stake” in seeking relief under the PRA. *Kleven v. City of Des Moines*, 111 Wn.App. 284, 291, 44 P.3d 887 (Div. 1, 2002) [emphasis provided]. For instance, an attorney’s client may bring a public records act lawsuit when the public records request was submitted to by their attorney. *Id.*, at 290-291. Or, a workers’ union representative may seek enforcement when the real party in interest is a member of the representative’s workers’ union. *Germeau*, 166 Wn.App. at 804. Here, nothing in the record

shows an agency, professional, associational or conceivable relationship between Appellants West and Dierker. Dierker lacks standing to seek judicial enforcement of West's PRA claim. West's PRA claim was the only claim retained in this case after the May 30, 2008 dismissal motion in this case. Any Dierker briefing about PRA issues should be ignored.

H. Naked Castings Into Constitutional Sea are Illegal

Appellant Dierker's Opening Brief thematically includes broad and superficial averments that his State and Federal Constitutional rights are being tarnished in some way or another. Constitutional allegations, with nothing more, are illegal "naked casting into the constitutional sea" which occurs when a party asserts constitutional grounds without thorough briefing and discussion, *State v. Gunwall*, 106 Wn.2d 54, 62, 720 P.2d 808 (1986), and is expressly prohibited by a long line of Washington cases. *Katara v. Katara*, 175 Wn.2d 23, 40-41, 283 P.3d 546 (2012) cert. denied, 133 S. Ct. 889, 184 L. Ed. 2d 661 (U.S. 2013) (" "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." " Some of the Dierkers' naked Castings include:

- *Br 70-71*: In this State, an essential corollary of State Constitution's and U.S. Constitutions [sic] First Amendment's rights freedom of speech and to petition...is...right to receive information...Prior restraints of first amendment rights, like to Port's piecemealing....

- BR 72: Clearly, the record shows in this case that Appellants were clearly denied all fundamental and substantive due process rights by the Port's withholding of these records and falsification of the Port's Administrative Record.

What little "analysis" Appellant Dierker submitted to this Court consists of ad hominem insults and accusations hurled at the Port Counsel, the Court and the Court's Staff. For example: "The record in the Superior Court in this case shows that most of time the Courts judges and staff blindly followed any and all misrepresentations of fact or law made by the attorneys of Respondents Port and its partner Weyerhaeuser, just like someone's "lap dog" would." *Br. 8*, grammar original.

I. Appellate Court Decorum

The Appellants' decorum before this Court is symptomatic of the vexatious, ham-fisted litigation techniques that resulted in involuntary dismissal in the first place. This appeal lists 134 docket entries in a period of eleven months. Fault for the bloated docket rests with the Appellants. The Port has had to read, receive, and in some cases file length responses to at least **thirty-two²⁶ (32)**

²⁶See (1) September 7, 2012 Court's Motion to Dismiss for Appellant non-payment of appeal fee; (2) September 21, 2012 Supplemental Notice of Appeal; (3) October 23, 2013 Motion for Bifurcation; (4) November 1, 2012 *pro se* fifty-seven page Response; (5) November 19, 2012 Abandonment of October 23, 2012 Bifurcation; (6) December 1, 2012 Declaration; (7) December 3, 2012 Motion for Extension of Time for Dierker to self-familiarize his own lawsuit; (8) December 6, 2012 Revised Response to already-decided Motion to Dismiss; (9) February 20, 2013 Superior Court Letter addressed to Dierker Regarding Administrative Record; (10) February 20, 2013 Dierker Motion for Ex Parte Order; (11) February 25, 2013 Court Letter declining to entertain Dierker's February 20, 2013 Motion; (12) February 25, 2013 Motion in Div. II re-Administrative record and "other relief;" (13) February 26, 2013 Division II Request for Clarification requiring affirmative response by Port and Weyco; (14) April 2, 2013 "Phantom Joinder Reply;" (15) April 2, 2013 Div. II Ruling upholding the record and Port's practices with the same; (16) April 16, 2013 eleventh-hour Motion to Consolidate; (17) April 13, 2013 Motion for Extension re- Admin

unfounded and or dilatory motions. Appellant Dierker accused the Port of tampering with the Administrative Record in both this Court and the Trial Court, long after the Court's April 2, 2013 ruling that (1) the Administrative records was complete and (2) express Ruling that the Record was "not relevant" to Appellant Dierker's appeal. Most recently, Appellant West failed even minimal compliance with GR 14 citation requirements throughout his Third Opening Brief, and repeatedly passes off as "fact" conclusory legal statements, followed by a naked "CP" citations. For example:

CP 1177-1178. On June 12, 2007, the Port disclosed to Mr. West that it had been silently withholding records in response to his request, and specified for the first time 15 records it was withholding. CP 543-544.

Appellant Br. 11. This lack of precision takes a lot of effort and time to "reverse engineer" what the Appellant thinks he is trying to say. Appellant West's purported "facts" section is riddled with these incomplete, defective references in violation of GR 14.²⁷ It is impossible or extremely time-consuming to truth-test Appellant West's conclusory remarks masquerading as "Facts." In addition, Appellant Dierker appears incapable of fielding a proficient Opening Brief. Appellant Dierker has not made a serious effort to comply with RAP 10.3 citation rules, despite two personal

Record; (18) April 25, 2013 Withdrawal of Motion to Consolidate; (19) April 26 Motion for Extension of Time due to Consolidation machinations; (20) April 29, 2013 Statement of Arrangements; (21) May 1, 2013 Motion Re-Port Conspiracy; (22) May 1, 2013 Declaration; (23 – 31) Three Opening Brief Drafts for Both Appellants and accompanying Rulings; (32) June 20, 2013 Clerk Paper Motion in Trial Court re-Records.

²⁷ (d) Citation Format. Citations shall conform with the format prescribed by the Reporter of Decisions. (See Appendix 1.)

invitations from the Court's Commissioner. Dierker also foisted a 75 page over-length brief of one-and-a-half spaced, one-inch margin conspiracy theories upon the Court and Respondents. *Br.* 6-9.

J. Port Due its Fees

The Port requests attorney fees and costs based on this frivolous appeal. RAP 18.1 RCW 4.84.185 and RAP 18.9. A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts. *Tiger Oil Corp. v. Department of Licensing*, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997). No rational person could look at a case in which the putative Appellants filed **eight** Affidavits of Prejudice, failed to note, show up or calendar a simple show cause hearing despite **eight tries** over a period of **years**, submitted inflammatory work product for a period spanning five years, attempted numerous carry-on issues from previous unsuccessful lawsuits, and took protracted "breaks" from prosecution, and then filing an appeal of the ensuing discretionary dismissal represents a good, or even incorrupt matter for appeal and further legal proceedings. But, that is exactly what the Appellants have done.

The Appellants failed to timely and properly prosecute their case below, and failed to identify, raise, and brief the proper legal issues on appeal, requiring scarce Port taxpayer dollars to be spent once again defending against off topic and baseless claims. The Port

requests this Court to jointly and severally order Appellants West and Dierker to pay its attorney fees and costs for having to respond yet again to these frivolous matters. RAP 18.1, RAP18.9 and or RCW 4.84.185.

An appeal is clearly without merit if the issues on review: (1) are clearly controlled by settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency. *State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985). Although any one prong under *Rolax* will suffice to entitle the Port to a fee award, this appeal meets all three prongs. It is well settled since, literally, ancient times that courts have the ability to discretionarily dismiss cases. The docket here clearly demonstrates that the prerequisites for a discretionary dismissal are met. Under RAP 18.1 (a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes the Court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022 (1999).

An appeal is frivolous if there are “no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility’ of success.” *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d

887 (1983)). This appeal is frivolous. The Appellants present no debatable point of law, their appeal (yet again) lacks merit, and the chance for reversal is nonexistent. Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages.

Eugster v. City of Spokane 139 Wash.App. 21, 156 P.3d 912 (2007).

Additional grounds for a fee award also were suggested by the Commissioner's November 15, 2013, Ruling which denied ***without prejudice*** the Port's fee request for having to respond to inappropriate pleadings. Since then, Appellant raised more unnecessary preliminary matters which the Port received, read, and or responded to -- at least 32 in number. The Port reasserts its fee request for responsive efforts exerted in the preliminary phases of this matter; in which the Port responded to practically impossible relief requests such as the (abandoned) October 23, 2012 Motion for Separation of frivolous issues into "hybrid representation," and deficient pleadings, such as the November 1, 2012, pro se, fifty-seven page Response Brief concerning Weyco's Motion to Dismiss. This fee request is cumulative to relief otherwise due on these facts.

V. CONCLUSION

For the above reasons, the Appeal should be denied as to all issues. The Port should be awarded its costs and fees.

Dated this 6th day of August 2013.

GOODSTEIN LAW GROUP PLLC

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Seth Goodstein, WSBA # 45901

Attorneys for Respondent Port of Olympia

FILED
COURT OF APPEALS
DIVISION II

2013 AUG -6 PM 1:56

STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST

Plaintiff,

v.

PORT OF OLYMPIA,
WEYERHAEUSER, dba WEYCO,
EDWARD GALLIGAN, BILL
MCGREGGOR, ROBERT VAN
SCHOORL, PAUL TELFORD

Defendants.

NO. 43876-3-II

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. RESPONDENT PORT OF OLYMPIA'S MOTION FOR EXTENSION
2. RESPONDENT PORT OF OLYMPIA'S RESPONDENT'S BRIEF

was served on August 6, 2013 on the following parties and in the manner indicated below:

Stephanie Bird
Cushman Law Offices, P.S.
924 Capital Way South
Olympia, WA 98501

by United States First Class Mail
 by Legal Messenger
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ORIGINAL

Jerry Dierker, Jr.
2826 Copper Point Road NW
Olympia, WA 98502

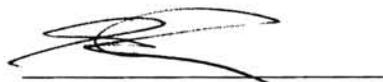
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Kimberly Hughes, Senior Legal Counsel
Weyerhaeuser Company
Law Department, CH 1J28
PO Box 9777
Federal Way, WA 98063-9777

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 by Legal Messenger
 by Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of August 2013 at Tacoma, Washington.


Seth S. Goodstein