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COURT OF APPEALS
DIVISION II
2012 JUL 30 AM 9:48
STATE OF WASHINGTON
BY 
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 43408-3-II

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

Appellants,

v.

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

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants PT Air Watchers, No Biomass Burn, Olympic Forest Council and World Temperate Rainforest (collectively “PT Air Watchers”), respectfully submit this Opening Brief in support of their appeal of a decision by the Thurston County Superior Court. The Superior Court upheld a decision by Washington’s Pollution Control Hearings Board (“PCHB”) granting summary judgment and dismissing PT Air Watcher’s challenge to the Washington Department of Ecology’s environmental review and issuance of a Notice of Construction permit to the Port Townsend Paper Company (“PTPC”) allowing for the installation of a “biomass” burning steam cogeneration unit at its Port Townsend mill.

This appeal focuses on whether Ecology erred in failing to consider the environmental impacts from the emission of increased levels of carbon dioxide resulting from burning woody “biomass” in order to generate energy as well as the environmental impacts on Northwest forests that will result from the increased demand for woody “biomass” needed to generate energy.

This appeal also challenges Ecology’s failure to require preparation of an Environmental Impact Statement (“EIS”) as required by

the State Environmental Policy Act, Ch 43.21C RCW (“SEPA”) and the Solid Waste Management Act, Ch. 70.95 RCW. Specifically, petitioners challenge the decision by Ecology (upheld by the PCHB) that an EIS was not required pursuant to RCW 70.95.700 despite PTPC’s project meeting the definition of an energy recovery facility burning solid waste.

This matter comes before the court pursuant to the Administrative Procedures Act, Ch. 34.05 RCW (“APA”). Under the APA, the appellate court reviews the decision of the PCHB directly based on the record created before the PCHB. In granting summary judgment, the PCHB erred both as a matter of law and in the application of law to the underlying facts. After reviewing the agency record, this court should reverse the PCHB and remand for preparation of an EIS.

II. ASSIGNMENT OF ERROR

The Thurston County Superior Court erred in upholding the decision of the PCHB granting summary judgment and dismissing petitioner’s challenge.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. SEPA requires full disclosure and actual consideration of environmental factors before issuance of a Determination of Non-

Significance. PTPC's project will more than double the output of CO₂ yet neither PTPC's SEPA checklist nor the DNS disclosed or considered the environmental impacts of an increase in CO₂ emissions. Did the PCHB error in granting summary judgment dismissing appellants' claim that an EIS was required?

2 Neither the SEPA checklist nor DNS disclosed or considered the environmental impacts of an increased demand for woody "biomass" on Northwest Forests. Did the PCHB error in granting summary judgment dismissing appellants' claim that an EIS was required?

3. RCW 70.95.700 requires preparation of an EIS for energy recovery facilities burning "solid waste." PTPC proposes to burn "solid waste" and recover energy.. Did the PCHB error in granting summary judgment dismissing appellants' claim that an EIS was required?

IV. STATEMENT OF THE CASE

Respondent PTPC owns and operates a kraft pulp and paper mill in Port Townsend (the "mill"). The mill is considered an existing "major source" under Ecology's air quality program and therefore operates under an Air Operating Permit. The mill's Air Operating Permit was issued by Ecology on January 17, 2007, and renewed on April 28, 2010. AR 108,

110-111.¹

In May, 2010, PTPC formed a partnership with Sterling Energy and applied to Ecology for a new “Notice of Construction” or “NOC” permit allowing it to construct a new “cogeneration project” at the existing mill.² PTPC proposes to install a new steam turbine generator to extract power from its existing Power Boiler 10 (“PB10”) and Recovery Furnace (the “Project”). *Id.* The Project will add up to 25 megawatts of electrical generating capacity to the mill and will sell this electricity to the power distribution system. *Id.* The Project will increase the firing efficiency in PB10 in order to burn primarily wood fuel or “biomass” in order to produce the increased steam for the new steam turbine. *Id.* “Biomass” is defined under the NOC to include a range of fuels, including hog fuel, forest biomass, and urban wood. AR 221, 223.³

The Project will increase the firing capacity of PB10 by about one-third. Wood fuel use will approximately double and oil use will be

¹ Notice of Construction Application, Port Townsend Mill, May, 2010 (“Application”).

² In general, “cogeneration” means the production of electricity using waste heat, in this case steam, from an existing industrial operation .

³ NOC Order No 7850 (“NOC Order”), p. 3.

reduced. AR 237, 247.⁴ To handle the doubling in wood fuel delivered, stored, and burned in PB10, the Project entails at least 8 new areas of “physical change” and “changes in the method of operation,” including: (1) changes to PB10 to increase its maximum firing rate by approximately one-third in order to achieve a maximum continuous rating of 250,000 lbs per hour of steam from burning wood only; (2) new fuel handling and storage systems; (3) modifications to the ash disposal system; (4) a new haul road for taking ash to the on-site landfill; (5) a new cooling tower; (6) a new haul road route for fuel delivery, (7) two new solid fuel storage piles; (8) a new steam turbine; and (9) an increase in the number of truck trips to deliver biomass, solid fuel and chemical materials needed for the Project operation. AR 110-111, AR 221-222.⁵

Increased firing in PB10 will result in increases of emissions of multiple pollutants. Even with planned additional pollution control equipment, discharges in volatile organic compounds (VOCs), carbon monoxide (CO), and carbon dioxide (CO₂) will increase. AR 254, 256,

⁴ Ecology’s Response to Comments at 11.

⁵ Application at 1-1 to 1-2; NOC Order at 1-2.

260.⁶

On October 22, 2010, Ecology issued a SEPA determination of non-significance (“DNS”) and NOC Order 7850 approving construction of the Project. AR 221-235. On November 22, 2010, petitioners filed a timely appeal of Ecology’s SEPA DNS and the NOC to the PCHB.

After briefing, on May 10, 2011, the PCHB issued an Order on Summary Judgment in the case *PT Airwatchers et al, v. Department of Ecology et al.*, PCHB No. 10-160. The PCHB Order granted summary judgment to respondents on the primary issues in the underlying appeal. AR 1516-1541.

PT Air Watchers then filed a timely appeal under the APA to the Thurston County Superior Court. CP 5-46. After briefing and argument, the superior court denied the appeal and upheld the PCHB’s order granting summary judgment. CP 46-57. This appeal follows. CP 48-51.

V. ARGUMENT

A. Standard of Review

This court’s review of decisions by the PCHB is conducted

⁶ Supplemental Environmental Checklist (SEPA Checklist) at 3, 7.

pursuant to the APA. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004); RCW 34.05.514(3), RCW 34.05.518(1), (3)(a). This court sits in the same position as the superior court and reviews the Board's decision by applying the standards of review in RCW 34.05.570 directly to the agency record. *Postema v. Pollution Control Hearings Bd.*, 142 Wash.2d 68, 77, 11 P.3d 726 (2000). The court limits its review of the fact to the record that was created before the PCHB. RCW 34.05.558. Appellants have the burden of proof to demonstrate the invalidity of the PCHB's Order. RCW 34.05.570(1).

RCW 34.05.570(3) sets forth nine standards for granting relief from agency Orders. Relevant to this appeal, the court may grant relief where appellants demonstrate the PCHB "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Where statutory construction is necessary, the court reviews the statute *de novo*. *Port of Seattle*, 151 Wn.2d at 587. If the statute is ambiguous, the court must afford "great weight" to the agency's interpretation where the statute falls within the agency's expertise. *Id.*

The court may also grant relief where the PCHB's findings of fact are "not supported by substantial evidence when viewed in light of the

whole record before the court...;” RCW 34.05.570(3)(e). Substantial evidence is determined by whether the record contains “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Port of Seattle*, 151 Wn.2d at 588. As the *Port of Seattle* court summarized, “We should overturn an agency’s factual findings only if they are clearly erroneous, and we are definitely and firmly convinced that a mistake has been made.” *Id.* (internal citations and quotations omitted). The court does not weigh the credibility of witnesses or substitute its judgment for the PCHB on findings of fact. *Id.* While deference is afforded to the PCHB’s findings of fact, the application of law to those facts is a “question of law and is subject to *de novo* review.” *Id.* at 588, quoting *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

The PCHB decided this matter on summary judgment. In reviewing a summary judgment order, the court engages in the same inquiry as the PCHB and applies the standard of review directly to the record before the administrative agency. *Bowers v. PCHB*, 103 Wn.App. 587, 623, 13 P.3d 1076 (2000); *Clay v. Portic*, 84 Wn.App. 553, 557, 929 P.2d 1132 (1997). Summary judgment is appropriate only where there are

no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). All facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

B. The SEPA Checklist and DNS are Inadequate for Failing to Consider the Impacts of Increased Carbon Dioxide Emissions

1. Standard of review for SEPA DNS

Proposals such as PTPC's must be reviewed pursuant to SEPA. If a project is likely to have "significant adverse environmental impacts," SEPA mandates that the responsible official "*shall* issue a determination of significance requiring that an EIS be prepared." RCW 43.21C.030(2)(c)(emphasis added); RCW 43.21C.031; WAC 197-11-360. When there is doubt whether a significant adverse effect is probable⁷, the SEPA threshold determination must be in favor of preparing an EIS:

The policy of the Act, which is simply to assure via "a detailed statement" a full disclosure of environmental information, so that environmental matters can be given

⁷ A "probable significant adverse effect" exists whenever more than "a moderate effect on the quality of the environment is a reasonable probability."

proper consideration during decision making, is thwarted whenever an incorrect “threshold determination” is made.”

Norway Hill Preservation and Protection Association v. King County Council, 87 Wn.2d 267, 273, 552 P.2d 674 (1976). As one SEPA commentator has noted:

SEPA ultimately strives to avoid environmental degradation, to preserve and even enhance environmental quality by requiring the actions of state and local government agencies to be based on sufficient environmental information and to be in accord with SEPA’s substantive policies.

Settle, Richard; *The Washington State Environmental Policy Act*, § 14.01, p. 14-2 to 14-3 (Release 15, 2003) *citing* RCW 43.21C.010, .020, and .030.

Consistent with this purpose, “SEPA mandates governmental bodies consider the total environmental and ecological factors to the fullest in deciding major matters.” *Eastlake Comm’ty Coun. v. Roanoke Assocs.*, 82 Wn.2d 475, 490, 513 P.2d 36 (1973). These considerations must be integrated into governmental decision making processes so that “presently un-quantified environmental amenities and values will be given appropriate consideration in decision making along with economic and

technical consideration.” RCW 43.21C.030(2)(b); *Eastlake*, at 492. SEPA’s ultimate quest has been described as ensuring “environmentally enlightened government decision making.” Settle, Richard; *The Washington State Environmental Policy Act*, § 14.01(2)(b), p. 14-48 (Release 15, 2003).

While SEPA requires the preparation of an environmental impact statement for all “major actions significantly affecting the quality of the environment,” RCW 43.21C.030, the normal first step is the “threshold determination process.” A threshold determination *not* to prepare an EIS requires a determination that the action is not major and will not significantly affect the environment. *Juanita Bay Valley Community Ass’n. v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973). The threshold determination process is set forth in WAC 197-11-330 and requires the SEPA responsible official to review and independently evaluate the information in the SEPA checklist and then make an actual threshold determination as to whether the action will result in probable significant adverse effects and if so, any mitigation that might be necessary and implemented. WAC 197-11-330(1).

Simple reliance on the applicant’s checklist is insufficient –

especially where, as here, the checklist fails to address significant topics. SEPA requires that the threshold determination be “based on information reasonably sufficient to evaluate the environmental impact of a proposal.” WAC 197-11-335(1). “The SEPA policies of full disclosure and consideration of environmental values *require actual consideration of environmental factors* before a determination of no environmental significance can be made.” *Norway Hill*, 87 Wn.2d at 275 (emphasis added). Furthermore, a DNS must be “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” *Moss v City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). The record must demonstrate that Ecology adequately considered the relevant environmental factors “in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA.” *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137 (2002) (internal citation omitted).

2. The release of increased greenhouse gases, including carbon dioxide, can have a significant impact on the human and built environment

On December 15, 2009, the U.S. EPA issued its final rule: “Endangerment and Cause or Contribute Findings for Greenhouse Gases

under Section 202(a) of the Clean Air Act. 74 Fed. Reg. 66,496 (December 15, 2009)(“Endangerment Rule”). EPA confirmed that “greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.” *Id.* EPA’s finding was based on a “compelling” body of scientific evidence including major assessments by the U.S. Global Climate Research Program; the Intergovernmental Panel of Climate Change and the National Research Council. *Id.* EPA determined that emission of greenhouse gas air pollutants are “reasonably anticipated to endanger public health for both current and future generations. 74 Fed. Reg. at 66,524. Impacts to public health include: (1) direct temperature effects; (2) air quality effects; (3) extreme weather events; and (4) effects on climate sensitive diseases and aeroallergens. *Id.* at 66,525-66,526. EPA similarly determined that emission of greenhouse gas air pollutants would endanger the public welfare for both current and future generations. These impacts include negative impacts to (1) food production and agriculture; (2) forestry; (3) water resources; (4) sea level rise and coastal areas; (5) energy, infrastructure and settlements; and (6) ecosystems and wildlife. *Id.* at 66,531-66,535.

In issuing its “Endangerment Rule” EPA identified carbon dioxide (CO₂) as one of the six greenhouse gases at the root cause of human induced climate change. 74 Fed. Reg. at 66,615.⁸

3. The SEPA checklist and DNS do not contain sufficient information to evaluate the impacts from emission of carbon dioxide

The SEPA environmental checklist includes two relevant questions designed to elicit information regarding the release of air pollutants.

Question B.2(a) asks:

[w]hat types of emissions to the air would result from the proposal (i.e., dust, automobile, odors, industrial wood smoke) during construction and when the project is completed? If any, generally describe and give approximate quantities if known.

AR 256.⁹ Despite a requirement to answer “each question accurately and carefully,” in response to Question B.2(a) PTPC provided no information about the release of carbon dioxide or other greenhouse gas air pollutants from its facility. AR 256-57.¹⁰

⁸ EPA identified six key greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. 74 Fed. Reg. at 66,516.

⁹ SEPA Checklist at 3-4.

¹⁰ SEPA Checklist at 3-4. PTPC’s response discussed only “PSD” pollutants, noting that while there would be increases, they would be below SER levels.

Question B.6(a) to the SEPA Checklists asks:

What kinds of energy (electric, natural gas, oil, wood stove, solar) will be used to meet the completed project's energy needs? Describe whether it will be used for heating, manufacturing, etc.

AR 260.¹¹ In response to this question, PTPC provided the following statement:

The displacement of fuel oil with wood will increase the mill's use of energy that is already part of the forest carbon cycle and reduce the plant's emission of carbon dioxide from geologic (petroleum) sources. For example PTPC's annual GHG emissions were estimated to be 151,661 EPA CO₂e MTs in 2007, which is based on the combustion of hydrocarbon fuels. After this project they are expected to be less than 62,000 CO₂e MTs *from burning hydrocarbons*. Under RCW 70.235.020, carbon dioxide emitted from the combustion of biomass is not considered a greenhouse gas. *The mill's CO₂ emissions from burning additional wood are expected to increase by more than double.* This CO₂ would be released at forest sites through slash burning without pollution controls and through natural decay.

Id. (emphasis added).

¹¹ SEPA Checklist, p 7.

This response, while admitting that CO₂ emissions from burning additional wood are “expected to double,” fails to provide *any* analysis of the overall net change in greenhouse gases, nor the impacts of any net change.¹² This obviously fails to meet the basic SEPA standard that a threshold determination be “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” *Moss* 109 Wn. App. at 14.

Instead of identifying the quantity of carbon dioxide expected to be discharged, PTPC’s checklist instead relied on RCW 70.235.020(3) – a single subsection within the reporting requirements of Washington’s statutes concerning the limitation of greenhouse gases. RCW 70.235.020(3) provides a legislative declaration that:

[e]xcept for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas so long as the region’s silviculture sequestration capacity is maintained or increased.

RCW 70.235.020(3).

¹² PTPC similarly refused to answer discovery requests seeking projected actual emissions of greenhouse gases from the Project. *See* AR 284-85.

But simply because the legislature chose not to consider carbon dioxide from biomass in the greenhouse gas limitations statute, does not mean that PTPC is exempt from identifying the quantity of emissions in its SEPA checklist. Nothing in RCW 70.235.020(3) amended SEPA to exempt facilities from reporting the quantity of CO₂ in its emissions. Indeed, on its face, RCW 70.235.020(3) does not apply to the “reporting” of CO₂ emissions. Despite RCW 70.235.020(3), SEPA still requires that a DNS be “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” *Moss v City of Bellingham*, 109 Wn. App. 6, 14 (2001).¹³

Nor does RCW 70.235.020(3) amend SEPA to exempt Ecology from taking a critical look at the environmental impacts of a proposal. SEPA still “*require[s] actual consideration of environmental factors* before a determination of no environmental significance can be made.” *Norway Hill*, 87 Wn.2d at 275 (emphasis added). Indeed, RCW 70.235.900 confirms that “except where explicitly stated otherwise,

¹³ See also Veto Statement for Second Engrossed Substitute Senate Bill 6406 (May 2, 2012)(confirming that “the subjects of climate change and greenhouse gases will be considered in the environmental analysis required at the threshold determination stage of the SEPA process.”) Copy Attached.

nothing in [Ch. 70.235 RCW] alters or limits any authorities of the department as they existed prior to June 12, 2008.”

While the pre-decisional record was void of evidence of Ecology’s actual consideration of the effects of CO₂ emissions, Ecology made two arguments before the PCHB in support of its DNS. Ecology argued first that the legislature made the determination that biomass carbon dioxide emissions should not be considered greenhouse gases because they are “part of the natural forest cycle” and that therefore even if not burned in PTPC’s mill, the CO₂ would be ultimately be released into the atmosphere through natural decomposition, forest fires or slash burns. AR 336.

Assuming, *arguendo*, that legislature’s analysis is relevant to SEPA, it flies in the face of both common sense and scientific literature showing that carbon dioxide emissions from burning biomass have the same impact on climate change as carbon dioxide emissions from burning fossil fuels. This scientific literature shows that “CO₂ is CO₂” regardless of whether it is from burning wood waste and forest slash or urban wood waste, or from fossil fuels. *See* AR 1281-1282 (explaining serious flaw in climate legislation for failing to account for emissions from smokestacks

when bioenergy is used);¹⁴ AR 1283-1285 (explaining serious flaw in conclusion that burning biomass is “carbon neutral.”);¹⁵ AR 1286-1294.¹⁶ EPA has also called for additional analysis on this question. AR 1295-1300.¹⁷

Ecology further asserted that pursuant to RCW 70.235.020(3) carbon dioxide from industrial biomass burning is not a GHG “as long as the region’s silvicultural sequestration capacity is stable.” Ecology then asserted that this requirement was met based on two documents – Exhibits F and G. Exhibit F is an undated, public relations “fact sheet” prepared by DNR. AR 408-411. This promotional flier does not contain a single citation or scientific reference. Nor is there any evidence as to who prepared it, whether they were qualified, or whether it was subject to even basic peer review.

Exhibit G, is a December 2010 “Forest Biomass Initiative, Update to the 2011 Washington State Legislature.” AR 412-455. While this

¹⁴ *Searchinger, Timothy D., et al.*, “Fixing a Critical Climate Accounting Error” *Science*, V. 326, p. 527 (October 23, 2009).

¹⁵ Letter from Mark E. Harmon, Timothy D. Searchinger and William Moomaw to Washington State Legislature (February 2, 2011).

¹⁶ Letter from Scientists to Nancy Pelosi and Harry Reid (May 17, 2010).

¹⁷ 75 Fed. Reg. 41173 (July 15, 2010); 75 Fed. Reg. 45112 (August 2, 2010).

“update” does include references, it also lacks an accredited author, lacks peer review, and perhaps more importantly cannot provide the basis for Ecology’s “careful consideration” as it was created long *after* Ecology approved PTPC’s MDNS.

Moreover, the Washington Commissioner of Public Lands has recently expressed concern about the low efficiencies of using wood to generate electricity. AR 1304-1305. There is no indication in the SEPA determination that Ecology took into account the efficiency of the Project using biomass to generate commercial electricity. This is despite recognition from at least PTPC that because Power Boiler 10 was approximately 16% more efficient burning oil than wood, the reduced burning of oil would require “a higher BTU input of wood than oil... to produce a given level of steam.” AR 1306-1307.¹⁸

Ecology’s second argument was based on a post-decision declaration of staff environmental engineer Marc Heffner. AR 356-360. Heffner explained that, despite no evidence in the record, he did analyze greenhouse gas emissions by conducting a review that included the

¹⁸ April 14, 2011, Letter from Trinity Consultants to Robert Burmark, P.E.

“expected emissions of GHGs from combustion at the plant as well as increases in emissions of GHG from transporting biomass fuel to the plant.” *Id.*, ¶¶ 7 and 11. Heffner claims to have compared how much diesel fuel would be used in transporting and collecting biomass to the decrease in use of fuel oil that is currently burned at the mill to run the turbines. Mr. Heffner provided no worksheet, memorandum, report or analysis created contemporaneously with his “environmentally enlightened” greenhouse gas analysis. He simply refers back to the SEPA checklist, which itself contains nothing other than a statement in Question 6(a) that the project will decrease greenhouse gas emissions from burning fossil fuels. These six sentences, and Mr. Heffner’s post-hoc calculation, are the sum total of what Ecology argues constitutes compliance with SEPA. But Mr. Heffner’s purported analysis ignores diesel emissions from processing, hauling, and disposing of at least three times as much ash. *See* AR 1276-77.¹⁹ Heffner has failed entirely to take the diesel

¹⁹ PTPC’s responses to Appellants’ Interrogatory Nos. 12 and 13 show that after the Project ash from Power Boiler 10 will be 14,892 dry tons per year, compared to a high of 7,989 dry tons per year in 2005 and a low of 6,230 dry tons in 2009. However, Table B-37 of the Trinity Consultant Report, “Material Transportation Information”, states in column 3 that “future potential material throughput tons/year” will be 22,238 dry tons per

emissions into account from hauling these around the site using heavy equipment.²⁰

Heffner's post-hoc explanation also lacks credibility in light of conflicting contemporaneous statements by Ecology staff on the issue of greenhouse gases from the Project. For example, staff had no idea how much wood or how many BTU's would be needed in order to produce the proposed increase of 25 MW of electricity:

How much biomass will the new PTPC boiler use? The mill wouldn't comment. We can understand the reasons or part of the reason the mill did not want to comment. If they did I would be very surprised. How much biomass they will use dependent of the BTU contents (a measurement of the energy content in the wood) and this is highly variable of the wood species. We might know the maximum BTUS needed for generating 25 MW electricity with numerous assumptions (hemlock, pine, brush, madrone, boiler efficiency, flame temperatures) associated with the highly complex operation. We won't have any

year "post project." The Table says "fly ash will be hauled to the landfill in trucks." Table B-37, n. a. Thus, PTPC's own ash generation numbers conflict with each other.

²⁰ Mr. Heffner's post-hoc attempt to explain that Ecology did conduct an assessment of the greenhouse gas impacts of the Project is also contradicted by internal agency documents. On December 22, 2010, Ecology staff person Kim Schmanke stated in an email regarding "anticipated CO₂ emissions" "the mill wasn't required to estimate its expected CO₂ emissions because the new requirements weren't in place when the mill applied for its permits (tailoring rule). So we don't have this information." AR1303.

concrete amount here.

AR 1313-1314.²¹

Not surprisingly, since Ecology had no idea how much wood would be needed to produce the desired electrical output, it similarly had no idea the level of CO₂ emissions:

Anticipated CO₂ emissions. The mill wasn't required to estimate its expected CO₂ emissions because the new requirements weren't in place when the mill applied for its permits (tailoring rule). So we don't have this information.

Amount of feedstock/biomass for the new boiler. Similarly, the mill didn't provide us information about how much feedstock it will use to fuel the boiler. This isn't a figure we can really guess at either.

AR 1303.²²

Finally, despite accepting PTPC's statement that CO₂ would double, Ecology staff knew that this was simply someone's back of the envelope calculation:

The estimated CO₂ emissions from PTPCs boiler...He said the paperwork on line indicted emissions would double but didn't

²¹ Email from Le to Schmanke (12/22/2010).

²² Email from Schmanke to Kim (12/22/2010).

see a numerical figure. I think this is the one that Al Newman did a **pencil and paper calculation...**"

AR 1313-1314 (emphasis added).²³

Needless to say, this is hardly an "enlightened" environmental analysis of the impact of the Project on one of the most critical crises facing the planet today – climate change.²⁴ SEPA requires that the threshold determination be "based on information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335(1). To comply with SEPA, Ecology should have required PTPC to conduct a "full disclosure" of the environmental information relating to its carbon dioxide emissions. Full disclosure of the environmental information relating to the greenhouse gas emissions of burning enough biomass to generate 25 MW of electricity for the life of the project would require a lifecycle analysis and full accounting of each type of fuel to be burned and its greenhouse gas impacts. Instead, this issue was totally ignored.

Further, there is no evidence that Ecology actually considered the effects of carbon dioxide emissions, nor even knew what those emissions

²³ Email from Le to Schmanke (12/22/2010).

²⁴ See "Endangerment Rule" 74 Fed. Reg. 66,496 (December 15, 2009).

might be, before issuance of its DNS. The PCHB erred in its application of law to facts in granting respondents motions for summary judgment.

C. The SEPA Checklist and DNS are Inadequate for Failing to Consider the Impacts of Removing Biomass From Forests

Issue 7 before the PCHB addressed petitioners' claim that the SEPA review failed to address effects of an increased demand for biomass on Northwest forest in order to burn this material for energy production. Ecology moved for summary judgment on Issue 7. AR 338-340. While again tacitly admitting that neither the SEPA checklist nor DNS contained information or analysis of the impact of yet another "biomass" project on nearby forests, Ecology offered another post-hoc explanation that "it relied on compliance with state and federal laws and regulations to ensure that removal of biomass from forest lands would not adversely affect forest lands or endangered species." AR 338. Ecology's "analysis," however, failed to explain the effects of increased competition for the hypothetical forest "wood waste" and whether an increase in the number of projects seeking to burn this waste will increase harvest or increase removal of forest debris necessary for forest health.

As Professor Mark Harmon explained to the Legislature:

The number and scale of biomass facilities proposed in Washington strongly suggests that new trees will have to be cut to provide fuels for these plants, because mill residues and logging residues are inadequate. A National Renewable Energy Laboratory report establishes that there is only a negligible amount of mill residues in Washington left unused. As for forestry residues, a recent state level biomass inventory estimates that there are about 3.5 million green tons of residues generated annually in Washington State. However, only about half of this, or 1.75 million tons, is really collectable due to the need to retain material onsite for soil fertility and the logistical constraints of collection. In contrast, the combined wood demand of just the biomass power facilities proposed in Washington is more than 3 million tons of wood per year; and new wood pellet plants and biofuel plants will require another several hundred thousand tons per year, for a combined demand that is currently two to three times the realistically available supply of logging residues in the state.

AR 1283-1285(citations omitted).²⁵

In contrast to Professor Harmon's letter to the Legislature, Ecology's Marc Heffner cites an unsigned and obviously draft "comment"

²⁵ See also Map produced by Appellant PT Air Watchers documenting location of operating and proposed biomass projects near the Olympic Peninsula. AR 1315.

letter discussing preliminary and undocumented analysis. AR 483-488.²⁶ Heffner cites also to the unsupported anonymously written public relations piece from DNR. AR 489-93. Neither of these documents supports Ecology's conclusion that there will be no significant impacts on surrounding forest lands.²⁷

The SEPA checklist and DNS are not "based upon information reasonably sufficient to evaluate the environmental impact of a proposal." *Moss*, 109 Wn. App. at 14. Nor can Ecology demonstrate that it actually considered the environmental effects on forest lands before making its determination. *Norway Hill*, 87 Wn.2d at 275 (emphasis added). At a minimum, there remain genuine issues of material fact making summary judgment in favor of Ecology not appropriate. The PCHB erred in granting summary judgment.

D. An EIS Was Required Pursuant to RCW 70.95.700

Washington's solid waste management act requires preparation of an EIS for "energy recovery facilities" burning solid waste:

²⁶ Heffner Dec., Exhibit I.

²⁷ As discussed above, the Commissioner of Public Lands has expressed concern that that use of biomass be done in a manner that "assures the ecological health of our forests and avoids negative impacts to forest product businesses." AR 1304-1305.

No solid waste incineration or energy recovery facility shall be operated prior to the completion of an environmental impact statement containing the considerations required under RCW 43.21C.030(2)(c) and prepared pursuant to the procedures of chapter 43.21C RCW. This section does not apply to a facility operated prior to January 1, 1989, as a solid waste incineration facility or energy recovery facility burning solid waste.

RCW 70.95.700.

In response to public comments raised during the permitting, Ecology asserted that it did not consider RCW 70.95.700 applicable because the “wood fuels that PTPC is burning are a purchased commodity and are therefore not solid waste. AR 250.²⁸ Ecology further asserted that even if the wood waste was “solid waste” the PTPC mill was exempt because RCW 70.95.700 “exempts facilities that operated prior to January 1, 1989.” *Id.* Both arguments fail.

1. The Project is an “energy recovery facility”

An “energy recovery” is defined by statute as “a process operating under federal and state environmental laws and regulations for converting

²⁸ Response to Comments at 15.

solid waste into usable energy and for reducing the volume of solid waste.” RCW 70.95.030(7). The project, without question, will operate under federal and state environmental laws and regulations. The project will also, without question, result in the installation of a new turbine generator and produce usable energy.

Thus, the only remaining question is whether the Project will burn “solid waste.” “Solid waste” or “waste” is defined as “all putrescible or nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials.” RCW 70.95.030(22). The PTPC mill proposes to burn hog fuel, “forest biomass,” “urban wood”, “primary sludge from the process wastewater treatment plant and “burnable rejects from the mill and the old corrugated container recycling facility. AR 240, 223.²⁹ Each of these products meets the definition of “waste” or “solid waste.”

“Forest biomass” is defined to include “the byproduct of current forest management activities...” *Id.* In other words, waste material,

²⁹ Response to Comments at 4; NOC Order at 3.

including slash, currently left over from industrial logging operations. As explained by the Washington Department of Natural Resources (“DNR”), “the use of forest biomass as an energy feedstock is helping create a market for a product previously seen as ‘waste.’” AR 278, 279.³⁰ In short, there can be no reasonable dispute that much, if not all, forest biomass is “waste.”

As PTPC’s promotional literature confirms:

The Project will use available *wood waste* collected from the Olympic Peninsula for fuel. Much of the waste wood is underutilized and is currently left in the woods as “slash” after logging operations and is often piled up and burned in the field.

... This project will upgrade the existing boiler to reduce use of fossil fuels and *increase the consumption of waste wood.* ..

AR 1272.³¹ Such “wood waste” is certainly “solid” and certainly at least similar to “industrial waste” – an identified type of “solid waste.” RCW 70.95.030(22).

There is also no reasonable dispute that “urban wood,” which can contain uncontaminated wood recovered from construction, renovation

³⁰ Washington DNR: *Forest Biomass Hot Topic*.

³¹ Port Townsend Paper: *Biomass Cogeneration Project*

and/or demolition debris,” is “waste” as it is “demolition or construction waste.” RCW 70.95.030(22). In its “Urban Wood Acceptance Program,” PTPC describes the “urban waste” it intends to burn as including: “waste and building materials that result from the construction or demolition operations on houses and commercial and industrial buildings....” The definition of solid waste specifically includes such “demolition and construction wastes,” even if otherwise recyclable. RCW 70.95.030(22). Thus, even if PTPC pays for some of its fuel, it remains “solid waste” by definition.³²

Finally, there is no reasonable dispute that sludge from the wastewater treatment plant and “burnable rejects from the old corrugated container recycling facility” meet the definition of “solid waste” or “waste.” RCW 70.95.030(22).

PTPC’s facility is an “energy recovery” facility under RCW 70.95.700 because it converts “solid waste into useable energy” and reduces “the volume of solid waste.” RCW 70.95.030(8). Because the project will burn solid waste and produce usable energy for sale, it meets

³² Nothing on the face of RCW 70.95.030(22) precludes purchased products from the definition of “solid waste.”

the definition of an energy recovery facility under RCW 70.95.030(7).³³
Thus, and EIS is required pursuant to RCW 70.95.700.

2. The facility was not operating as an energy recovery facility prior to January 1, 1989

While RCW 70.95.700 includes a narrow exemption for energy recovery facilities that “operated prior to January 1, 1989” this exemption is not applicable here. Ecology asserts that because PTPC constructed and operated its “two steam-generating units (PB10 and the Recovery Furnace)” prior to January 1, 1989, the exception in RCW 70.95.700 applies. This assertion ignores the plain language of the statute. The statute only provides that the EIS requirement “does not apply to a *facility* operated prior to January 1, 1989, as a solid waste incineration facility or *energy recovery facility burning solid waste*. RCW 70.95.700 (emphasis added). Thus, it is irrelevant whether PTPC operated PB10 or the Recovery Furnace prior to 1989. What is relevant is whether PTPC

³³ A similar project is proposed for the Nippon paper mill in Port Angeles. The Nippon mill project proposes to replace an existing wood burning boiler at the mill with a new boiler with increased capacity, operation temperature and operation pressure. The new boiler will continue to supply steam for mill operations but will also supply steam to a new turbine generator to produce electricity for sale. The Nippon facility was required by the City of Port Angeles to prepare an EIS based on the City’s determination that RCW 70.95.700 applied. AR 270-276.

operated PB10 or the Recovery Furnace *as an energy recovery facility* prior to January 1, 1989. The answer is “no.”³⁴

As confirmed by Ecology’s NOC Order, the proposal includes a significant increase in the firing rate of PB10 and the addition and operation of a “new steam generator.” AR 221-222.³⁵ The new generator will in turn produce up to 25 MW of electricity for sale to the grid. *Id.* While the mill has produced up to 3.5 MW per hour of electricity at its existing turbines Nos. 4 and 6, this power was used only for the mill’s purposes in order to supplement its own power purchases from BPA. AR 1273-74.³⁶ Completion of the project will result in new electricity production from the new steam generator up to 25 MW/hour for sale. *Id.*

In addition to the new steam generator, PTPC will also increase its firing rate for PB10 by over one-third and add a new and significant use for the steam – changing it from use for internal operations to use for generating electricity. Currently PTPC fires PB10 only for the mill’s

³⁴ There is no dispute that PTPC was not operating a “solid waste incineration facility prior to January 1, 1989.

³⁵ NOC Order, at 1-2.

³⁶ PTPC Responses to Appellants’ Interrogatory Nos. 6-7.

steam needs. *Id.* AR 1275.³⁷ Over the six-year period from 2004-2009, PB10 was fired at approximately an average rate of 2,250,000 MMBtu/yr. *Id.* After addition of the new steam generator PB10 will be increased to an annual firing rate of 3,626,640 MMBtu/yr. *Id.*

In summary, the proposed “energy recovery facility” did not exist prior to January 1, 1989. PTPC is spending approximately \$56.4 million to install extensive new equipment including a new steam generator, and is significantly increasing the burn rate of PB10 so it can begin selling up to 25 MW/hour of electricity to the grid. *Id.*³⁸ The exception to RCW 70.95.700 does not apply. An EIS is therefore required. The PCHB’s decision to the contrary was an erroneous application or interpretation of the law and an erroneous application of the law to the facts.

VI. CONCLUSION

For the foregoing reasons, the court should reverse the decision of the superior court and PCHB. The application should be remanded to the Department of Ecology for preparation of an EIS that includes full and complete consideration of the environmental impacts of the emission of

³⁷ PTPC Response to Appellants’ Interrogatory No. 8.

³⁸ Response to Interrogatory No. 10.

carbon dioxide caused by the burning of woody biomass as well as the environmental impacts on Northwest forests caused by the increased demand for woody biomass.

DATED this 27th day of July, 2012.

Respectfully submitted,

GENDLER & MANN, LLP

By:



David S. Mann

WSBA No. 21068

Attorneys for Appellants

CHRISTINE O. GREGOIRE
Governor



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May 2, 2012

To the Honorable President and Members,
The Senate of the State of Washington

Ladies and Gentlemen:

I am returning herewith, without my approval as to Sections 305 and 306, Second Engrossed Substitute Senate Bill 6406 entitled:

“AN ACT Relating to modifying programs that provide for protection of the state’s natural resources.”

This bill streamlines regulatory programs for managing and protecting the state’s natural environment while increasing the sustainability of program funding and maintaining current levels of natural resource protection.

Section 301 of the bill requires the Department of Ecology to prepare rules to update the categorical exemptions for environmental review under the State Environmental Policy Act (SEPA), revise the SEPA environmental checklist, and improve integration of SEPA with the provisions of the Growth Management Act. In updating the checklist, Section 301(2)(c) of the bill directs the Department of Ecology to “not include any new subjects into the scope of the checklist, including climate change and greenhouse gases.”

I have been assured that the intent of this language is confined to its plain meaning: This subsection addresses only how the Department of Ecology may modify the environmental checklist in its update of WAC 197-11-960. This language does not impact in any way the scope of the environmental analysis required at the threshold determination stage of the SEPA process or the scope of the environmental analysis required in an environmental impact statement. Letters I have received from legislators involved in the drafting of this language confirm that the Legislature’s intent was to address only the scope of the environmental checklist and not to amend any substantive SEPA requirements.

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This understanding and interpretation of the bill are set forth in letters to me from legislators directly involved in passage of the legislation, including an April 23, 2012, letter from Senator Sharon Nelson and Representative Dave Upthegrove, respective chairs of the Senate and House.

Environment Committees; an April 26, 2012, letter from Representatives Richard DeBolt, Joel Kretz, Bruce Chandler, Shelly Short, David Taylor, J.T. Wilcox, and Ed Orcutt; and an April 27, 2012, letter from Senators Jim Honeyford and Mark Schoesler.

This is also the understanding and interpretation set forth in an April 19, 2012, letter to me from Representative Joe Fitzgibbon, the prime sponsor of House Bill 2253, where this language first appeared. I have also received letters from stakeholders who participated in legislative proceedings related to this provision. These stakeholders include the Association of Washington Cities, Washington State Association of Counties, Futurewise, Association of Washington Business, and the Washington Chapter of the American Planning Association. These letters affirm that the intent of Section 301 was to eliminate existing duplication between state natural resource programs, and not to amend any substantive SEPA requirements. An April 20, 2012, joint letter from representatives of four environmental organizations notes that ESSB 6406 was the product of “a long and ultimately constructive negotiation amongst a diverse set of stakeholders,” including their organizations: People for Puget Sound, Washington Conservation Voters, the Washington Environmental Council, and Climate Solutions. This letter quotes the language of Section 301(2)(c)(ii) and states: “Throughout the bill negotiations, there was agreement amongst all parties that the intent of this subsection was to ensure simply that no new line items were added to the SEPA checklist in the process of the checklist update directed by section 301.” However, the letter indicates that after the passage of this bill by the Senate and House, advisers to these organizations raised concerns that the language could be read to make broader changes in SEPA law.

After careful review, I have concluded that these assurances that the Legislature did not intend to limit the scope of SEPA review of adverse effects of climate change and greenhouse gases are fully supported. Section 1 of the bill expresses the Legislature’s intent to maintain current levels of natural resource protection. Additionally, Section 301(2)(c) specifically references the environmental checklist found in WAC 197-11-960. The Legislature did not reference other steps in the SEPA process such as the threshold determination addressed in different sections of chapter 197-11 WAC. Nothing in the letters I have received or in the legislative discussions of this provision negates this understanding.

My action in approving Section 301 is taken with the intent that it will operate only to prohibit inclusion of any new subjects in the scope of the checklist, and that the subjects of climate change and greenhouse gases will be considered in the environmental analysis required at the threshold determination stage of the SEPA process and in the environmental analysis required in a SEPA environmental impact statement. After consulting legal advisers, it is my understanding that this is the proper reading of this section of the bill and that this understanding will be

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considered by the courts when ascertaining legislative intent, as outlined in *Lynch v. State*, 19 Wn.2d 802 (1944). Without this understanding, I would have vetoed Section 301.

Concern has also been raised that there is a need for a meaningful civil enforcement capacity to support the state's Hydraulic Project Approval (HPA) program. I share this concern and have asked the Washington Department of Fish and Wildlife to clarify the current enforcement mechanisms through rule revision within the ongoing HPA rule update, and to implement an effectiveness survey to measure results.

I am also asking the Department to deliver the survey results to the Office of Financial Management, the Governor's Office, and the Legislature, with the intent to inform actions needed to create a more effective civil enforcement HPA program.

Amendments to the bill in the final day of the 2012 1st Special Session removed the explicit authority for local governments to collect a fee to recover their costs for a SEPA environmental impact statement prepared in support of certain land use plans. However, remnants of the original fee proposal that are no longer meaningful were left in the bill. Section 305 allows local governments to recover the costs of a SEPA environmental impact statement for certain land use plans from either state funds or private donations. Local governments are already authorized to accept funding from these sources. Section 306 refers to fees that are no longer authorized in Section 305. These two sections of the bill have the potential to create confusion with the existing authorities of local governments.

For these reasons, I have vetoed Sections 305 and 306 of Second Engrossed Substitute Senate Bill 6406.

With the exception of Sections 305 and 306, Second Engrossed Substitute Senate Bill 6406 is approved.

Respectfully submitted,

/s/

Christine O. Gregoire
Governor

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

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

NO. 43408-3-II

Appellants,

DECLARATION OF SERVICE

v.

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

Respondents.

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, MARY BARBER, under penalty of perjury under the laws of the State of
Washington, declare as follows:

I am the legal assistant for Gendler & Mann, LLP, attorneys for appellants herein.

On the date and in the manner indicated below, I caused the Opening Brief of Appellants
to be served on:

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13 [x] By United States Mail
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DATED this 27th day of July, 2012, at Seattle, Washington.

Mary Barber

MARY BARBER

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