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

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; PORT
TOWNSEND PAPER CORPORATION; and STATE OF WASHINGTON,
POLLUTION CONTROL HEARINGS BOARD,

Respondents.

AMICUS CURIAE BRIEF OF
WASHINGTON ENVIRONMENTAL COUNCIL

Brian C. Gruber, WSBA # 32210
ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM
2101 Fourth Avenue, Suite 1230
Seattle, WA 98121
(206) 448-1230
bgruber@zcvbs.com

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INTRODUCTION

Washington Environmental Council (“WEC”) appears as *amicus curiae* to address a narrow legal question presented by Appellants’ challenge of the Department of Ecology’s (“Ecology”) Notice of Construction (“NOC”) order issued to Port Townsend Paper Corporation (“PTPC”) and the accompanying determination of nonsignificance (“DNS”) under the State Environmental Policy Act (“SEPA”). In issuing the DNS, Ecology erred by relying on RCW 70.235.020(3) to exempt from analysis carbon dioxide emissions from PTPC’s proposed biomass cogeneration facility at the Port Townsend mill (“Project”).

Ecology’s erroneous legal interpretation violates SEPA and undermines its core purpose – providing full disclosure of environmental information as part of the decisionmaking process. The agency’s “head in the sand” approach resulted in an inadequate analysis that fails to fully inform decisionmakers and the public of the potential impacts of the Project, ignores the risks of human-caused climate change, and oversimplifies the complexities of biomass energy in the carbon cycle. When, as here, construction of a power generation facility and a shift in fuel source would double a facility’s greenhouse gas (“GHG”) emissions, SEPA requires a thorough analysis of all potential impacts of the Project, including those caused by the increase in carbon dioxide emissions.

Notwithstanding the obvious need for such information, Ecology did not quantify or conduct any other analysis of the impacts of the Project's biomass-generated carbon dioxide emissions. The agency's use of RCW 70.235.020(3) to limit the scope of SEPA review for industrial biomass projects is contrary to the provision's plain language and legislative intent, undermines fundamental state policy, and trivializes the urgent threat posed by climate change.

This Court should reverse the order of the Pollution Control Hearings Board ("PCHB") and remand the DNS to Ecology for a full evaluation of carbon dioxide emissions from the Project.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

WEC hereby incorporates the statement of interest in WEC's concurrently filed Motion for Leave to File *Amicus Curiae* Brief.

RESTATEMENT OF THE ISSUE

Does RCW 70.235.020(3) exempt carbon dioxide emissions resulting from industrial combustion of biomass from review under SEPA?

STATEMENT OF THE CASE

WEC incorporates Appellants' Statement of the Case and supplements it with the following information.

I. BIOMASS AND THE CARBON CYCLE

A. Biomass as an energy source.

Biomass is organic matter such as woody and agricultural residues and animal wastes that can be converted to energy. Kelsi Bracmort, Cong. Research Serv., R41603, *Is Biopower Carbon Neutral?* at 1 (2013) (“CRS”).¹ Under Washington law, biomass includes organic by-products of pulping and wood manufacturing processes, solid organic fuels from wood, forest residues, and untreated wooden demolition or construction debris; it excludes wood pieces treated with chemical preservatives, wood from old growth forests, and municipal solid waste. RCW 19.285.030(3).² PTPC proposes to burn “primarily” wood fuels. AR 1519.

There are important distinctions between biomass and fossil fuels as an energy source. Biomass is a renewable energy source because trees and other organic material can be regenerated in a relatively short timeframe compared to fossil fuels. Biomass can also be locally sourced in many areas, including the Pacific Northwest, which lack fossil fuels and certain renewable sources.³

Other considerations offset these potential advantages, including the significant scientific debate over biomass’s carbon-neutrality and

¹ Available at <http://www.fas.org/sgp/crs/misc/R41603.pdf>.

² See also WAC 173-441-020(1)(a) (definition of biomass in GHG reporting rule).

³ C. Larry Mason et al., *Report to the Washington State Legislature on Wood to Energy in Washington: Imperatives, Opportunities, and Obstacles to Progress* 4, 43, 50 (June 2009), available at http://www.igert.org/system/content_item_assets/files/300/Wood_to_Energy_full_report.pdf.

comparisons of the climate impacts of biomass combustion to those of fossil fuel combustion. More GHGs are emitted per unit of energy produced from forest biomass than from fossil fuels. CRS at 10. This is reflected in PTPC's SEPA Checklist, which states that carbon dioxide emissions from the project are "expected to increase by more than double." AR 400. Also, demand for biomass could outstrip the available supply from waste-type materials, resulting in increased harvest of whole trees solely for energy use. *See* AR 434 (Dep't of Natural Resources, *Forest Biomass Initiative: Update to the 2011 Washington State Legislature* 23 (Dec. 2010) ("Legislative Update")); CRS at 10.

A. **The carbon-neutrality of biomass is a complex issue that is the subject of ongoing and vigorous scientific debate.**

While biomass is recognized as a "renewable" energy source, its status as "carbon-neutral" remains controversial. An energy production activity is classified as carbon-neutral if it produces no net increase in GHG emissions on a life-cycle basis. CRS at 1. To assess biomass's carbon-neutrality, it is necessary to understand the global carbon cycle and the life cycle of bioenergy production.

Carbon is cycled between various atmospheric, oceanic, biotic, and mineral reservoirs; one of the largest fluxes of carbon occurs "between the atmosphere and terrestrial biota," including plants. U.S. EPA, *Inventory*

of US Greenhouse Gas (GHG) Emissions and Sinks: 1990-2008, EPA 430-R-10-006 at 1-3 (Apr. 15, 2010).⁴ Plants absorb carbon dioxide from the atmosphere as they grow, storing this carbon while alive. Carbon sequestration also occurs in soils. When plants decompose or burn, or the soil is exposed to air, carbon is re-released into the atmosphere.⁵

Proponents of woody biomass as carbon-neutral emphasize that 1) the carbon dioxide released from combustion would be released anyway during decomposition or forest fires, and 2) by replanting all biomass that is harvested, the forest's carbon sequestration capacity is maintained so that the forest continues to remove atmospheric carbon dioxide as before. AR 408-11. They contend that because burning woody biomass to generate energy will emit the same amount of carbon as if the biomass was left to decompose, and replanting the same amount of trees will result in the sequestration of all the released carbon, woody biomass is a carbon-neutral energy source as long as forest stocks remain constant.

Evaluating the actual carbon effect of biomass is far more complex and relies on many unproven assumptions. It depends on many variables including the applicable timeframe, type of biomass burned, and land and

⁴ Available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0560-0002>.

⁵ U.S. Environmental Protection Agency, *Land Use, Land-Use Change, and Forestry Sector Emissions*, <http://www.epa.gov/climatechange/ghgemissions/sources/lulucf.html> (last visited April 3, 2013).

forest management after biomass harvest. *See* CRS at 12. These factors and other assumptions are critical to an accurate assessment of biomass as a carbon-neutral fuel source. *See* AR 439-40.⁶

The timeframes relevant to assessing biomass emissions include the time for biomass regrowth and re-sequestration of released carbon. Burning biomass releases all of its carbon into the atmosphere instantly, while natural decomposition is a very slow process on the order of years or decades. CRS at 10-11. Indeed, analysis by the Olympic Region Clean Air Agency of emissions from various fates of forest biomass used a 100-year period for the on-site decomposition of biomass.⁷ Regrowth of forests, allowing resumption of carbon sequestration, will remove atmospheric carbon dioxide, but the timeframe needed to achieve a true zero net-carbon-emission level “will nearly always take many decades, and in some cases centuries.” AR 1284 (Letter from Mark Harmon et al.

⁶ The Department of Natural Resources’ 2010 Legislative Update states: “As forest biomass utilization has increased . . . , the previously accepted assumption of ‘carbon neutrality’ of forest biomass in bioenergy production has been questioned. All conclusions related to the carbon neutrality (or not) of forest biomass as an energy feedstock ultimately stem from the boundaries in time and space used in an evaluation. When these parameters are not consistently applied, confusion ensues. Where these parameters are set largely determines whether forest biomass utilization in bioenergy production is, or is not, considered carbon neutral. . . . Each perspective on relevant time periods and geographic areas, and combinations of the two, results in significantly different conclusions about neutrality.”

⁷ Carrie Lee et al., Stockholm Env’t Inst., *Greenhouse gas and air pollutant emissions of alternatives for woody biomass residues* 47 (Nov. 2010), available at <http://data.orcaa.org/reports/all-reports-entries/woody-biomass-emissions-study/> (last visited Apr. 17, 2013).

to Wash. State Legislature 3 (Feb. 2, 2011)). Disturbances during the regrowth period such as additional harvest or natural forest decline add further complexity. Changes in climate and land management may also affect the applicable timeframes, ratcheting up the uncertainty in the biomass emissions analysis. U.S. EPA, *Scientific Advisory Board Review of EPA's Accounting Framework for Biogenic CO₂ Emissions from Stationary Sources* 2, 5, 18 (Sept. 2011) (“SAB Report”);⁸ IPCC, *Special Report on Renewable Energy Sources and Climate Change Mitigation* 19 (2011).⁹

The type and source of biomass fuel plays a major role in determining its carbon-neutrality.¹⁰ Thus, the wide range of potential feedstocks for the Project could have different emissions profiles depending on many factors over the entire bioenergy life-cycle. *See, e.g.*, SAB Report at 19-20.

EPA has highlighted the many uncertainties and variables associated with biomass GHG emissions accounting.¹¹ In deferring its

⁸ Available at [http://yosemite.epa.gov/sab/sabproduct.nsf/57B7A4F1987D7F7385257A87007977F6/\\$File/EPA-SAB-12-011-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/57B7A4F1987D7F7385257A87007977F6/$File/EPA-SAB-12-011-unsigned.pdf).

⁹ Available at http://www.ipcc.ch/pdf/special-reports/srren/SRREN_Full_Report.pdf.

¹⁰ SAB Report at 18 (“Carbon neutrality of biomass cannot be assumed for all biomass energy a priori; it is a conclusion that should be reached only after considering a particular feedstock production and consumption cycle.”).

¹¹ *See Call for Information on Greenhouse Gas Emissions Associated with Bioenergy and other Biogenic Sources*, 75 Fed. Reg. 41,176 (July 15, 2010)

rulemaking regarding GHGs from biomass-burning facilities,¹² EPA recognized the complexity of the carbon-neutrality issue and concluded that “[b]oth a default assumption of carbon neutrality and a default assumption that the greenhouse gas impact of bioenergy is equivalent to that of fossil fuels may be insufficient because they oversimplify a complex issue.” 75 Fed. Reg. 41,176. In short, “[s]imply declaring biomass power to be carbon neutral does not make it so.” AR 1285.

II. THE ROLE OF SEPA IN PUBLIC DECISIONMAKING.

Since its enactment in 1971, SEPA has required public officials to incorporate environmental values into decisionmaking processes formerly dominated by economic and technical considerations. Washington State Legislature, *Ten Years' Experience with SEPA: Final Report of the Commission on Environmental Policy on the State Environmental Policy Act of 1971* at 33 (June 1983) (“Ten-Year Report”). This Court has interpreted SEPA as a “legislative mandate of the ecological ethic strongly declar[ing] our state environmental policy.” *Stempel v. Dep't of Water Resources*, 82 Wn.2d 109, 117, 508 P.2d 166 (1973) (citation omitted); *see also Eastlake Cmty. Council v. Roanoke Assoc.*, 82 Wn.2d 475, 487, 513 P.2d 36 (1973) (SEPA dictates an “unusually vigorous

¹² See *Deferral for CO₂ Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs*, 76 Fed. Reg. 43,490 (July 20, 2011).

statement of legislative purpose . . . to consider the total environment and ecological factors to the fullest . . .”).

SEPA makes environmental protection “a mandate to every state and local agency and department,” *Stempel*, 82 Wn.2d at 118, and also requires agencies to “[r]ecognize the worldwide and long-range character of environmental problems” and make available to individuals “information useful in restoring, maintaining, and enhancing the quality of the environment,” RCW 43.21C.030(2)(f), (g). Agencies must “utilize a systematic, interdisciplinary approach . . . in decision making which may have an impact on man’s environment.” *Stempel*, 82 Wn.2d at 118 (quoting RCW 43.21C.030(2)(a)). In short, SEPA requires a thorough review of the environmental consequences of proposed actions to achieve its goal of “better decisions, not better paperwork.” Ten-Year Report at 6.

SEPA’s procedural requirements, while not mandating a particular substantive result, are rigorous in and of themselves. *Norway Hill Preservation & Prot. Ass’n v. King Cnty. Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976) (“[T]he procedural provisions of SEPA constitute an environmental full disclosure law.”). These “procedural duties” require “full consideration to environmental protection” to ensure that the “attempt by the people to shape their future environment by deliberation, not default’ will be realized.” *Eastlake Cmty. Council*, 82 Wn.2d at 490

(quoting *Stempel*, 82 Wn.2d at 118). SEPA commands that agencies interpret and administer state policies, regulations, and laws in accordance with SEPA's policies "to the fullest extent possible." RCW 43.21C.030(1); see also *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 65, 510 P.2d 1140 (1973) ("All regulations and laws of the state must be read in light of the provisions of SEPA"). This direction "goes beyon[d] substantive authorization to substantive mandate. The policies of SEPA become standards to which the agency actions must conform." Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, Ch. 3, § 3.01[3] (Matthew Bender, Dec. 2012) ("Settle Treatise"). Thus, SEPA policies provide a basis for "challenging the specific manner or spirit in which required SEPA procedures are carried out." *Id.*, Ch. 3, § 3.01[1].

III. RCW 70.235.020 AND THE 2008 GREENHOUSE GAS EMISSIONS LAW.

RCW 70.235.020(3) was enacted on March 13, 2008 as part of Engrossed Second Substitute House Bill 2815. The 2008 Greenhouse Gas Emissions law ("2008 Act") was intended to achieve a variety of clean energy objectives, including reducing GHG emissions and developing a clean energy sector of the state economy. Laws of 2008, ch. 14 § 1; RCW 70.235.005. The 2008 Act also established limits for GHG emissions

between 2020 and 2050 and a system for monitoring and reporting such emissions. Laws of 2008, ch. 14 §§ 3(1)(a), 3(1)(d)(i). The law defined GHGs broadly to include carbon dioxide – irrespective of its source. Laws of 2008, ch. 14 § 2(7); RCW 70.235.010(6).

House Amendment 1293 added language to Section 3 of the bill regarding carbon dioxide emissions from industrial combustion of biomass.¹³ This new sub-section, on which Ecology relied to exclude carbon dioxide emissions from its SEPA analysis of the Project, provides that “[e]xcept for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass . . . shall not be considered a greenhouse gas” Laws of 2008, ch. 14 § 3(3) (codified at RCW 70.235.020(3)).

The 2008 Act, in addition to creating a new chapter in Title 70 RCW, amended and repealed a number of other state laws. It added new reporting requirements under the Clean Air Act,¹⁴ directed the Department of Transportation to establish statewide goals for the reduction of vehicle miles traveled,¹⁵ established a “comprehensive green economy jobs growth

¹³ H. Amendment 1293 to Second Substitute H. Bill 2815, 60th Leg., Reg. Sess. (2008), available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Amendments/House/2815-S2%20AMH%20UPTH%20FORD%20159.pdf>. The full legislative history for E2SHB 2815 is available at *History of Bill: HB 2815*, <http://dlr.leg.wa.gov/billsummary/default.aspx?year=2007&bill=2815> (last visited Apr. 17, 2013).

¹⁴ Laws of 2008, ch. 14 §§ 5-6 (amending RCW 70.94.151, .161).

¹⁵ *Id.* § 8 (adding a section to RCW ch. 47.01).

initiative,”¹⁶ and repealed greenhouse gas emissions reduction targets established in 2007.¹⁷

SEPA is not mentioned in any version of the bill, House Amendment 1293 (or any other amendment), or any other documents in the 2008 Act’s legislative history. The amendment’s “effects” statement also makes no reference to SEPA:

Emissions from agriculture and forestry practices and their directly associated operations are not considered greenhouse gases. Specifies that emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood byproducts, and wood residuals are not considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

H. Amendment 1293 to Second Substitute H. Bill 2815 at 2-3.

STANDARD OF REVIEW

This case involves multiple standards of review under two statutes – the Washington Administrative Procedures Act, RCW 34.05 (“APA”), and SEPA. The Court must set aside the PCHB’s decision if the agency “has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). Where, as here, statutory construction is necessary, “this

¹⁶ *Id.* § 9 (adding a new section to RCW ch. 43.330).

¹⁷ *Id.* § 13 (repealing RCW 80.80.20).

court will interpret statutes de novo,” but “if an ambiguous statute falls within the agency’s expertise, “the agency’s interpretation of the statute is ‘accorded great weight’” *Port of Seattle*, 151 Wn.2d at 587 (quoting *Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002)). Under SEPA, an agency’s negative threshold determination must be given “substantial weight,” and courts apply the “clearly erroneous” standard of review. RCW 43.21C.090; *Norway Hill*, 87 Wn.2d at 274-75.

Notwithstanding the deference that this Court accords to agencies in certain circumstances, “both history and uncontradicted authority make clear that it is emphatically the province and duty of the judiciary branch to say what the law is.” *Overton v. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981). When interpreting Washington law, this Court has unambiguously stated that it “is the final arbiter, and conclusions of state law entered by an administrative agency or court below are not binding on this court.” *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting *Leschi Improvement Council v. State Highway Comm’n*, 84 Wn.2d 271, 286, 525 P.2d 774, 804 P.2d 1 (1974)).

Where, as here, Ecology’s erroneous interpretation of a statute has a substantial bearing on the agency’s threshold determination, this Court’s

review of that interpretation should be guided by the APA's *de novo* standard for questions of law rather than the clearly erroneous standard better suited for findings of fact under SEPA.¹⁸

ARGUMENT

I. ECOLOGY ERRED IN EXCLUDING THE PROJECT'S CARBON DIOXIDE EMISSIONS FROM SEPA REVIEW.

A. RCW 70.235.020(3) does not exempt the Project's carbon dioxide emissions from SEPA review.

Ecology's reliance on RCW 70.235.020(3) to avoid analyzing carbon dioxide emissions in its threshold determination was based on an erroneous interpretation of that statute. Mark Heffner, the author of the threshold determination, explained the agency's rationale as follows:

RCW 70.235.020(3) provides that, under Washington law, emissions of carbon dioxide (CO₂) resulting from the combustion of biomass do not constitute GHGs. Because the cogeneration project replaces the burning of fuel oil with the burning of biomass, I determined that emissions of GHG from fuel combustion at PTPC would decrease as a result of this project.

AR 358 (Heffner Decl. ¶ 10). This interpretation is contrary to fundamental principles of statutory construction.

In interpreting any statute, a court's "primary duty" is to "discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444,

¹⁸ See AR 1529 at 5-6 (PCHB recognizing that "the dispute around the effect of RCW 70.235.020(3) is a legal one.").

450, 69 P.3d 318 (2003) (citation omitted). The starting point is always the statute's plain meaning, which "may be discerned 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). The context of a statutory provision is critical to the Court's interpretation. *See Snoqualmie Valley Sch. Dist. No. 410 v. Van Eyk*, 130 Wn. App. 806, 811, 125 P.3d 208 (2005).

The plain language of RCW 70.235.020(3) does nothing more than carve out an exception to the carbon dioxide emissions reductions scheme established by the 2008 Act. The Act defines "greenhouse gases" to include carbon dioxide, RCW 70.235.010(6), and RCW 70.235.020(3) provides a specific exception to that definition for industrial biomass emissions, save for reporting of such emissions. Exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions, *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999), and an exception generally is considered as a limitation only upon the matter directly preceding it, *State v. Hazzard*, 43 Wn. App. 335, 338, 716 P.2d 977 (1986) (citation omitted). Neither the plain language of RCW 70.235.020(3) nor the 2008 Act as a whole expand this exception to the GHG definition beyond the Act's GHG accounting scheme – whether for a SEPA threshold determination or any other purpose. Accordingly,

Ecology erred in relying on “the definition of GHG in RCW 70.235.020” to exempt Project carbon dioxide emissions from SEPA review. AR 357.

The statutory context likewise provides no support for Ecology’s overbroad interpretation. The 2008 Act established a framework to account for and reduce GHG emissions in Washington. RCW 70.235.005. It was modeled after the Intergovernmental Panel on Climate Change (“IPCC”) GHG accounting approach, which directs nations to count GHG emissions from biomass burning at the time the biomass is harvested and allocate those emissions to the forestry sector (rather than the energy sector). *See* AR 437; AR 1284-85. Thus, RCW 70.235.020 counts statewide aggregate emissions and distributes the burden of reducing emissions across the economy; it is not a method of assessing the overall impact of the emissions – whether statewide or from a particular facility.¹⁹ Because the 2008 Act counts statewide emissions, it is irrelevant to the analysis required under SEPA for emissions and environmental impacts at the source level. Viewed in this context, RCW 70.235.020(3) cannot justify Ecology’s failure to conduct such analysis.²⁰

¹⁹ *See* IPCC Task Force on National Greenhouse Gas Inventories, *Frequently Asked Questions* at Q2-10, <http://www.ipcc-nggip.iges.or.jp/faq/faq.html> (last visited April 15, 2013) (“[T]he IPCC approach of not including these emissions in the Energy Sector total should not be interpreted as a conclusion about the sustainability or carbon neutrality of bioenergy. Applying the IPCC Guidelines to estimate carbon dioxide emissions from bioenergy at sub-national levels, including from individual industries or facilities, may require additional data to ensure that relevant emissions and removals due to harvesting and regrowth of perennial bioenergy crops, land use changes, fertilisation and liming, processing and transportation are considered at the appropriate level.”)

²⁰ *See* SAB Report at 17 (IPCC approach is a reporting convention only and the resulting

Even if it were necessary for the Court to go beyond the statute’s plain language – and it is not – the legislative history of the 2008 Act makes clear that RCW 70.235.020(3) was not intended to have any effect on the scope of review under SEPA. Neither the original bill, the many amendments proposed, nor any of the legislative reports make any reference to SEPA. Even the sponsor of House Amendment 1293 failed to mention SEPA in his explanation of the amendment’s effect.²¹

The interpretative rule *expressio unius, exclusio alterius* provides additional support for full consideration of carbon dioxide emissions from the Project in Ecology’s SEPA review.²² The 2008 Act, in addition to creating a new chapter in Title 70 RCW, amended and repealed other statutes, including the Washington Clean Air Act. *See* Laws of 2008, ch. 14, §§ 5, 6, 8, 9, 10, 13. Yet the absence of an amendment – let alone any reference – to SEPA makes it clear that the Legislature did not intend to modify SEPA when it enacted the 2008 legislation. In contrast, SEPA has been amended expressly on at least 15 occasions to exempt certain agency

“inventories do not . . . provide a mechanism for measuring changes in emissions as a result of changes in the building and operation of stationary sources using biomass.”).

²¹ *See* H. Amendment 1293 to Second Substitute H. Bill 2815 at 2-3. Representative Upthegrove’s interpretation of the amendment’s effect without mentioning SEPA is instructive because it is plainly broader than the interpretation Ecology has afforded it. While his explanation would exclude from the definition of GHGs all carbon dioxide emissions from “directly associated operations” of forestry practices, Ecology’s analysis of the Project included GHG emissions from transporting biomass and waste ash. AR 358-59; Ecology Br. at 22-23.

²² *See In re Detention of Lewis*, 163 Wn.2d 188, 196, 177 P.3d 708 (2008) (defining the *expressio* canon of statutory construction).

actions or subjects from review. *See* Settle Treatise, Ch. 12, § 12.01[1] (listing amendments creating exemptions to SEPA). Moreover, Ecology and other agency rulemaking has exempted still more actions from SEPA review. *See* WAC 197-11-800 through -880. No statutory or regulatory exemption under SEPA applies to carbon dioxide emissions from biomass combustion projects such as the PTPC facility.

Governor Gregoire’s May 2012 signing statement accompanying Engrossed Second Substitute Senate Bill 6406 illustrates the correct “plain language” approach to construing a statute that might have been interpreted broadly to affect the scope of SEPA review. Section 301(2)(c) of E2SSB 6406 directed Ecology to “not include any new subjects into the scope of the [SEPA] checklist, including climate change and greenhouse gases.” Veto Statement on E2SSB 6406 at 1 (May 2, 2012).²³ The governor confirmed the view of legislators and the state’s executive branch that “the intent of this language is confined to its plain meaning,” *i.e.* a limitation on Ecology’s authority to modify the checklist itself. *Id.* The bill “does not impact in any way the scope of the environmental analysis required” by agencies under SEPA, including “at the threshold determination stage.” *Id.* The governor’s interpretation was based on the bill’s specific reference to the checklist, but no other aspects of SEPA. *Id.* at 2. Thus, the signing statement both confirms that climate change and

²³ *See* Appellants’ Br. at 17 n.13 & Attachment.

GHGs remain a critical part of SEPA analysis, including the threshold determination, after the 2008 Act and reinforces the plain language construction of RCW 70.235.020(3) and the 2008 Act as having no effect on SEPA or Ecology's obligation to fully analyze the impacts of the Project's carbon dioxide emissions.

B. Ecology's interpretation is contrary to SEPA's purpose.

Although the statutory construction principles set forth above are sufficient to reverse Ecology's interpretation of RCW 70.235.020(3), this Court should also reject the agency's reliance on the statute because it undermines SEPA's core purpose of fostering fully informed agency decisionmaking and public participation.

Ecology's duty to give "full consideration to environmental protection," *Eastlake Cmty. Council*, 82 Wn.2d at 490, applies equally to its threshold determination, which if made incorrectly, thwarts SEPA's core purpose of fostering environmentally enlightened decisionmaking.²⁴ Ecology's unilateral decision to exclude from consideration all carbon dioxide emissions from the Project fundamentally undermines SEPA's purpose of informing decisionmakers and the public, and sets a dangerous precedent for future biomass projects, *see* WAC 197-11-330(3)(e)(iv). If

²⁴ *See also* Settle Treatise, Ch. 6, § 6.01 ("The purpose of threshold review, the EIS process, and SEPA's other mandatory procedures is full disclosure and consideration of environmental consequences and values *prior to government action.*") (emphasis added).

carbon dioxide emissions from the mill will increase appreciably, this is a critical fact in evaluating the Project's environmental consequences. Moreover, given the ongoing scientific debate about the carbon-neutrality of biomass – especially regarding the critical assumptions of temporal and spatial points of comparison – this complex issue cannot be adequately analyzed by reference to general legislative findings or distilled to overly simplistic arguments. AR 1285. Instead, it requires the detailed evaluation that is at the heart of the SEPA process. Ecology must take a hard look at the difference in emissions between combustion at the facility and the fate of the biomass if it were not utilized for the Project. Whether burned as slash or left to decompose for 100 years on the forest floor, the agency has not done the analysis and has failed to fulfill SEPA's "full disclosure" mandate. *Juanita Bay*, 9 Wn. App. at 73. ("SEPA requires the [agency] *actually to consider* the various environmental factors.") (emphasis added). This unenlightened decisionmaking cannot stand.

CONCLUSION

It is ultimately for this Court "to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law." *Overton*, 96 Wn.2d at 555 (citation omitted). Accordingly, the PCHB's decision should be reversed and the DNS remanded for full compliance with SEPA.

Dated this 22nd day of April, 2013.

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM



Brian C. Gruber, WSBA # 32210

*Attorneys for Washington Environmental
Council*

CERTIFICATE

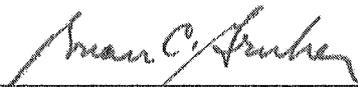
I certify that, on April 22, 2013, I mailed a copy of the foregoing *Amicus Curiae Brief of Washington Environmental Council*, postage prepaid, to:

David S. Mann
Attorney for Appellants
1424 Fourth Avenue, Suite 715
Seattle, WA 98101

Katharine G. Shirey, Asst. Attorney General
Attorney for State of Washington Dep't of Ecology
P.O. Box 40117
Olympia, WA 98504-0117

Svend Brandt-Erichsen
Dustin T. Till
Attorneys for Port Townsend Paper Corp.
1191 Second Avenue, Suite 2200
Seattle, WA 98101

Diane L. McDaniel, Sr. Asst. Attorney General
Attorney for Pollution Control Hearings Board
P.O. Box 40110
Olympia, WA 98504-0110



Brian C. Gruber, WSBA # 32210

*Attorney for Washington Environmental
Council*

OFFICE RECEPTIONIST, CLERK

To: Cara Hazzard
Cc: mann@gendlermann.com; svendbe@martenlaw.com; dtill@martenlaw.com;
dianem@atg.wa.gov; kays1@atg.wa.gov; Brian Gruber; Beth Baldwin
Subject: RE: Case No. 88208-8; WEC Amicus Brief

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From: Cara Hazzard [<mailto:chazzard@zcvbs.com>]
Sent: Monday, April 22, 2013 11:13 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: mann@gendlermann.com; svendbe@martenlaw.com; dtill@martenlaw.com; dianem@atg.wa.gov;
kays1@atg.wa.gov; Brian Gruber; Beth Baldwin
Subject: Case No. 88208-8; WEC Amicus Brief

Please find attached Washington Environmental Council's Motion for Leave to File Amicus Brief and Amicus Brief to be filed in Case Number 88208-8, PT Air Watchers, et al., Appellants, v. State of Washington, Department of Ecology, et al., Respondents. The above documents are filed by Brian Gruber, WSBA #32210, bgruber@zcvbs.com, of Ziontz, Chestnut, Varnell, Berley & Slonim, 206-448-1230. Thank you.

Respectfully,

Cara Hazzard
Paralegal/Legal Assistant
Ziontz, Chestnut, Varnell, Berley & Slonim
Attorneys at Law
2101 Fourth Avenue, Suite 1230
Seattle WA 98121
Ph: 206-448-1230
Fax: 206-448-0962