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NO. 43408-3-II

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,

Appellants,

v.

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

Respondents.

REPLY BRIEF OF APPELLANTS

David S. Mann, WSBA # 21068
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
(206) 621-8868
Attorneys for Appellants

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I. INTRODUCTION

Appellants Port Townsend Air Watchers, No Biomass Burn, Olympic Forest Council and World Temperate Rainforest (“Appellants”), respectfully submit this Reply in support of their challenge to a decision by Washington’s Pollution Control Hearings Board (“PCHB”) granting summary judgment and dismissing Petitioners’ challenge to the Department of Ecology’s (“Ecology”) environmental review and issuance of a Notice of Construction (“NOC”) to the Port Townsend Paper Company (“PTPC”).

This appeal focuses narrowly on whether Ecology fulfilled its responsibility under the State Environmental Policy Act, Ch. 43.21C RCW (“SEPA”), to ensure that it had sufficient information to carefully evaluate whether PTPC’s proposed new steam electrical generator would result in significant environmental impacts. Of significant concern is the project’s potential for an increase in carbon dioxide emission caused by PTPC’s proposal to significantly increase its burning of woody “biomass.”

Respondents claim that PTPC’s project will result in a net benefit to the environment, and in particular, a net reduction in the emission of greenhouse gases like carbon dioxide due to the proposal to reduce

burning fossil fuels. But this claim is based on pure speculation. In contrast with SEPA's requirement that the environmental checklist contain sufficient information to evaluate the project's impacts, PTPC's environmental checklist and Ecology's SEPA threshold determination avoided serious consideration of carbon dioxide emissions caused by burning biomass. Instead, Ecology and PTPC erroneously assumed that carbon dioxide emissions were exempt from environmental review by statute and therefore need not be discussed, much less evaluated. But the Legislature's decision to exempt biomass-produced carbon dioxide from State greenhouse gas caps did not create an exemption from review under SEPA. Ecology must still evaluate the effects of these emissions on climate change.

Because Ecology's SEPA threshold Determination of Nonsignificance ("DNS") failed to adequately consider the impacts of PTPC's project on climate change caused by increased emissions of carbon dioxide from burning woody biomass and on Northwest forest caused by increased demand for woody biomass, it is inadequate. This Court should reverse the Pollution Control Hearings Board decision and remand for preparation of an Environmental Impact Statement.

II. DISCUSSION IN REPLY

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

Ecology concedes that the decision to issue a DNS must be based on “information reasonably sufficient to evaluate the environmental impact of the proposal.” Ecology Response at 9, *quoting Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). But Ecology fails to acknowledge that the DNS must be based on its independent evaluation of the environmental checklist *and* that its independent review must be documented. WAC 197-11-330(1)(a)(i). Simple reliance on the applicant’s checklist is insufficient. The record must document that the applicant’s checklist included sufficient information and that Ecology independently evaluated that information before making its determination.

Here, there should be little dispute that the SEPA checklist did not contain sufficient information to determine the impacts associated with the production of greenhouse gases, specifically carbon dioxide, from PTPC’s project. *See*, Appellants’ Opening Brief at 14-25. Despite the lack of any quantitative analysis in the environmental checklist, Ecology somehow maintains its unsupported belief that PTPC’s project will not result in

significant impacts. Ecology Response at 9-26. But Ecology's belief is based on an improper balancing as well as speculation.

1. Ecology improperly balanced anticipated reductions in fossil fuel use to justify its determination

It should be readily apparent from Ecology's Response that the agency was heavily influenced by the positive benefit of PTPC's proposal to reduce the burning of fossil fuels. Ecology Response at 10-12. In doing so, however, it trades its required independent and quantitative analysis for speculation that a decrease in the burning of fossil fuels will result in a reduction in greenhouse gases, despite not knowing the quantity or timing of carbon dioxide releases from the increased burning of biomass. Indeed, Ecology cites the "rule of reason" to justify its failure to quantify and evaluate the amount of carbon dioxide that will be released by PTPC's significant increased burning of biomass. Ecology Response at 14-15. According to Ecology, simply knowing that PTPC will decrease the amount of fossil fuels it will burn relieves Ecology from needing to understand the quantitative change in emissions. *Id.*

In effect, Ecology has balanced the positive benefit of the project so as to ignore quantifying the negative impacts. But to the extent

Ecology is balancing the positive aspect of reducing emissions from burning fossil fuel against its decision not to address the emissions from burning biomass, such balancing is expressly forbidden by Ecology's own SEPA rules. WAC 197-11-330(5) makes clear that in making a threshold determination, the agency "shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts..." Ecology cannot rely on a "balance" or "rule of reason" to justify its failure to quantify the net change in carbon dioxide emissions. Ecology simply does not know how much carbon dioxide will be emitted by PTPC's significant increase in burning biomass. Thus, without comparative data, it is impossible to conduct a balance even if it were appropriate.

2. There is no competent evidence to support Ecology's speculative belief that burning biomass will reduce carbon dioxide emissions

Ecology's assertion that the "burning of biomass does not add to the total amount of carbon dioxide in the atmosphere," Ecology Response at 11-12, is based on little more than speculation. Indeed, Ecology's only support for its belief comes from two documents prepared by Washington's Department of Natural Resources. The first document 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.

The second is a December 2010 “Forest Biomass Initiative, Update to the 2011 Washington State Legislature.” AR 412-455. While this “update” does include references, it also lacks an accredited author, lacks peer review, and perhaps more importantly fails completely to address the specific impacts, including the temporal impacts, to global warming caused by the immediate burning of biomass that would otherwise degrade over decades or even centuries. Moreover, this second document cannot provide the basis for Ecology’s “careful consideration” as it was created long *after* Ecology approved PTPC’s DNS.

Ecology’s assumption that burning biomass does not result in increased emission of carbon dioxide is hardly the type of “environmentally enlightened” government decision making required by SEPA. Settle, Richard; *The Washington State Environmental Policy Act*, § 14.01(2)(s), p. 14-56 (Release 23, 2011). This is particularly true where the decision concerns one of the most critical crises facing the planet

today – climate change.¹

3. Ecology's reliance on RCW 70.235.020(3) is misplaced

Ecology fully admits that it relied on RCW 70.235.020(3) as justification for not inquiring into, and carefully evaluating, the impact of carbon dioxide emissions caused by PTPC's proposed significant increase in burning woody biomass. Ecology Response at 13-15. But nothing in this statutory provision either eliminates the need for Ecology to actually understand the quantity of carbon dioxide emissions or amends SEPA to allow Ecology to ignore such impacts. 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. To the contrary, on its face, RCW 70.235.020(3) does not apply to the "reporting" of carbon dioxide emissions. Despite RCW 70.235.020(3), SEPA still requires that a DNS be "based upon information reasonably sufficient to evaluate the

¹ See "Endangerment Rule" 74 Fed. Reg. 66,496 (December 15, 2009).

environmental impact of a proposal.” *Moss v. City of Bellingham*, 109 Wn. App. at 14.²

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 Pres. & Prot. Ass’n v. Kitsap Cy. Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976) (emphasis added).

4. Ecology’s NOC Order does not preclude the cutting of new trees for fuel

Ecology’s assertion that the “forest biomass that PTPC can burn does not include trees cut down specifically for fuel” is not supported by its NOC decision. Ecology’s Response at 19. Ecology is mistaken. Nothing in the NOC Order prohibits the harvest of trees for biomass.

² *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 to Appellants’ Opening Brief.

Indeed, there are no conditions placed in the NOC that in any way limit the source of the biomass to be burned. AR 227-231.³

Ecology's reliance on Finding 6 of the NOC Order fails for at least three reasons. First, "findings" are not conditions – they are findings and they are not enforceable. Second, Finding 6 is not an exclusive list of sources of fuel. Finding 6 states only that "[f]uel types *include*:" Finding 6 does not state that fuel types are "limited to." Finally, the listing of "forest biomass" within Finding 6 includes not only "by-products" of forest management and forest health laws, but also specifically includes "current forest protection treatments authorized by the agency."⁴ While DNR agrees that biomass does not include wood from "old growth forests," it does include pre-commercial thinning as well as "tree stems and tops" thinned from forests that are "at risk" from fire, insect or disease. AR 278-279.

³ While Condition 9 requires "urban wood" meet an acceptance program, it is silent on whether forest biomass must also meet standards. AR 230.

⁴ The "agency" is not Ecology, but the Department of Natural Resources.

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

Despite evidence documenting that there may be an inadequate supply of mill and logging residue to feed the growing number of biomass operations proposed in Washington, AR 1283-1285, Ecology does not dispute that neither the SEPA checklist nor DNS discussed or evaluated the impact of PTPC's project and its inherent demand for biomass on Northwest forests. *See* AR 254 *et seq.* (SEPA Checklist); AR 392 (DNS). Indeed, in response to public concerns concerning forest biomass availability, Ecology's NOC concluded simply that "availability and supply issues are beyond the scope of this project and review." AR 389-390 (Response to Comments). Ecology similarly concluded that "forest environmental issues are outside the scope of the NOC Order and associated SEPA review." *Id.*

Instead, Ecology now rationalizes its lack of review, by positing that compliance with other state and federal laws will ensure that removal of biomass from forest lands will not adversely affect forest lands or endangered species. Ecology Response at 26-33. But reliance on future compliance with laws and regulations misses the point. Simply because

biomass is harvested in compliance with laws does not guarantee that the cumulative effect of the increased demand for biomass will not produce significant impacts. Ecology was required to review and independently evaluate information sufficient enough to determine whether the project would result in significant impacts. It failed to do so.

C. An EIS Was Required Pursuant to RCW 70.95.700

1. The Project will burn “solid waste”

Because PTPC’s project will burn sludge from its wastewater treatment plant, it is undisputed that the PTPC’s cogeneration facility will burn defined “solid waste.” Ecology Response at 36. Respondents continue to insist, however, that despite forest biomass and demolition waste also fitting within the definition of “solid waste,” these materials are exempt because PTPC plans to burn these waste materials in order to produce energy. Because the bulk of the material proposed for burning in PTPC’s cogeneration facility is wood waste, the Court should confirm that wood waste, including forest biomass and demolition waste, is “solid waste” under RCW 70.95.030(22).

While PTPC urges deference to Ecology’s interpretation of its own regulations, it misstates the applicable rule. PTPC Response at 36. The

Court only defers to an agency's interpretation of a statute or regulation where the statute or regulation is ambiguous. An administrative determination "will not be accorded deference if the agency's interpretation conflicts with the relevant statute." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814-815, 828 P.2d 549 (1992) (rejecting Ecology's interpretation of "development"). *See also, Littleton v. Whatcom County*, 121 Wn. App. 108, 116-117, 86 P.3d 1253 (2004) (rejecting Ecology's interpretation of "solid waste" under the Solid Waste Management Act). Here, because the definition of "solid waste" is not ambiguous no deference is due.

Ecology's assertion that biomass, including wood waste and demolition waste, is *not* "solid waste" fails for at least three reasons. First, Ecology's position that *reusable* waste is not solid waste simply because it is being put to another purpose conflicts with the plain language of the statute. Nothing in the definition of "solid waste" supports a finding that materials are no longer solid waste simply because they can be burned or reused. Indeed, "recyclable materials" are specifically included within the definition of "solid waste." RCW 70.95.030(22). Simply because a material, like paper, food waste, or in this case wood waste, *could* be

resold and burned does not convert the material to something other than solid waste. It remains solid waste under the definition.

Second, and similarly, Ecology's assertion that "solid waste" ceases to be "solid waste" if it can be burned for fuel ignores that virtually everything listed under the definition of solid waste can be burned (except perhaps abandoned vehicles and parts).

Finally, Ecology's assertion that "solid waste" that is burned to produce energy ceases to be "solid waste" ignores that the Solid Waste Management Act specifically recognizes that burning solid waste for energy production is a type of "solid waste management." By definition "solid waste handling" includes "the recovery of energy resources from *solid wastes* or the conversion of the energy in *solid wastes* to more useful forms... ." RCW 70.95.030(23). If "solid waste" ceases to be "solid waste" because it is burned for energy, then it would not be included as part of "solid waste handling."

Respondents cite *Littleton v. Whatcom County*, 121 Wn. App. 108, 116-117, 86 P.3d 1253 (2004) for the proposition that a "reusable" substance is not waste. PTPC Response at 36, Ecology Response at 34-35. Reliance on *Littleton* is misplaced for two reasons. First, the

specific question before the *Littleton* court was whether Ecology had erred in concluding that chicken manure being reused in a worm farm was a “solid waste” under the definition of “solid waste” in RCW 70.95.030(22). The *Littleton* court focused on the legislative history in order to reach its conclusion that Ecology was in error. The court noted that the original 1969 version of the Solid Waste Management Act included “*manure, vegetable or animal solid and semisolid wastes*” within the statutory definition of “solid waste.” *Id.* at 114 (emphasis added). But because the Legislature removed “manure” from the list of “solid waste” in its 1970 amendments the court “presume[d] that [the legislature] did not want manure to be so classified.” *Id.* Thus, the court held specifically that manure did not fit within the definition of solid waste.

While the court summed up its decision by stating that “manure, as a *reusable* substance, does not constitute *waste*,” the court did not hold that *all* reusable substances are not solid waste. *Id.* at 117 (emphasis in original). Because the court was addressing only manure, to the extent that the court intended to conclude that all reusable materials are not waste, the statement is at best *dicta*. More importantly, in reaching the conclusion that reusable materials were not waste, the *Littleton* court

focused on the dictionary definition of waste and concluded that waste was material like garbage or rubbish that was “incapable of reuse.” But as discussed above, simply burning materials that are otherwise “solid waste” does not render the materials into something other than solid waste. The only conclusion supported by *Littleton* is that manure is not solid waste.

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 PTPC’s cogeneration facility will burn solid waste and produce usable energy, it meets the definition of an energy recovery facility under RCW 70.95.030(7).

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

RCW 70.95.700 mandates preparation of an EIS for all energy recovery facilities except “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). The “facility” at issue is PTPC’s proposed new cogeneration facility. PTPC did not operate a cogeneration facility prior to 1989 – it operated a Kraft pulp and paper mill. This is confirmed by both PTPC’s application and Ecology’s NOC

Order. AR 110-111; AR 221. For example, Ecology's NOC Order confirms that PTPC currently "owns and operates a Kraft pulp and paper mill" and that Ecology's Order "approves a cogeneration project to produce the electricity." AR 221.

PTPC's cogeneration project will increase the firing capacity of PB 10 by about one-third. Wood fuel use will approximately double. AR 237, 247.⁵ To handle the doubling in wood fuel delivered, stored, and burned in PB 10, the Project entails at least nine new areas of "physical change" and "changes in the method of operation:" (1) changes to Power Boiler 10 to increase its maximum firing rate to 414 MMBtu/hour from the pre-project firing rate of 317 MMBtu/hour, an approximately 1/3 increase, 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

⁵ Ecology's Response to Comments at 11.

trips to deliver biomass, solid fuel and chemical materials needed for the Project operation. AR 110-111, AR 221-222.⁶

Respondents assert that PTPC's facility has produced approximately 3.5 MW per hour electricity for internal use since before 1989. While that may be true, Respondents ignore that previous electricity production was from PTPC's existing turbines 4 and 6 which PTPC asserts are "*not part of the project.*" AR 286 (PTPC Response to Interrogatory No. 6). Completion of the project will result in installation of a wholly new generator and new electricity production up to 25 MW/hour for sale. AR 286 (PTPC Response to Interrogatory No. 7). 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 PB 10 so it can begin selling up to 25 MW/hour of electricity to the grid.

Because the exception to RCW 70.95.700 does not apply an EIS is required.⁷

⁶ Application at 1-1 to 1-2; NOC Order at 1-2.

III. CONCLUSION

For the foregoing reasons and the reasons set out in Appellants' Opening Brief, the court should reverse the decision of the PCHB and remand for preparation of an EIS.

Dated this 14th day of November, 2012.

Respectfully submitted,

GENDLER & MANN, LLP

By: 
David S. Mann
WSBA No. 21068
Attorneys for Appellants

PT Air Watchers\Pleadings\COA 43408-3-IF20121113 Appellants Reply Brief FINAL

⁷ 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.

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STATE OF WASHINGTON,
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STATE OF WASHINGTON)
)
COUNTY OF KING) ss.

I, DENISE BRANDENSTEIN, under penalty of perjury under the laws of the State
of Washington, declare as follows:

I am the legal secretary for Gendler & Mann, LLP, attorneys for appellants herein.
On the date and in the manner indicated below, I caused Reply Brief of Appellants to be
served on:

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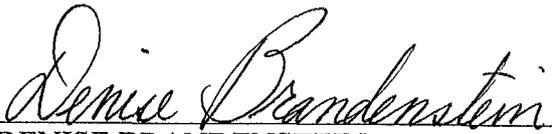
1 Katharine G. Shirey
2 Assistant Attorney General
3 Attorney General of Washington
4 Ecology Division
5 (Street address)
6 2425 Bristol Court S.W.
7 Olympia, WA 98502
8 (Mailing address)
9 P.O. Box 40117
10 Olympia, WA 98504-0117
11 (Attorneys for State of Washington
12 Department of Ecology)

13 By United States Mail
14 By Legal Messenger
15 By Facsimile (360-586-6760)
16 By Federal Express/Express Mail
17 By Electronic Mail
18 (kays1@atg.wa.gov)

19 Diane L. McDaniel
20 Assistant Attorney General
21 Attorney General of Washington
22 Licensing & Administrative Law
23 Division
24 800 Fifth Avenue, Suite 2000
25 Seattle, WA 98104
26 (Attorneys for Respondent Pollution
27 Control Hearings Board)

28 By United States Mail
 By Legal Messenger
 By Facsimile (206-389-2800)
 By Federal Express/Express Mail
 By Electronic Mail
(LALSeaEF@atg.wa.gov)

DATED this 14th day of November, 2012, at Seattle, Washington.


DENISE BRANDENSTEIN

Svend Brandt-Erichsen
Dustin T. Till
Marten Law PLLC
1191 Second Ave., Suite 2200
Seattle, WA 98101
(Attorneys for Respondent Port
Townsend Paper Corporation)

By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express Mail
 By Electronic Mail
(svendbe@martenlaw.com,
dtill@martenlaw.com)