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Supreme Court No. 92335-3

Court of Appeals No. 46130-7-II

**IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON**

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COLUMBIA RIVERKEEPER; and NORTHWEST  
ENVIRONMENTAL DEFENSE CENTER,

Petitioners,

v.

PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver  
USA Board of Commissioners President; BRIAN WOLFE, Port of  
Vancouver USA Board of Commissioners Vice President; and  
NANCY I. BAKER, Port of Vancouver USA Board of  
Commissioners Secretary,

Respondents.

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**BRIEF OF *AMICUS CURIAE*  
WASHINGTON PUBLIC PORTS ASSOCIATION**

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## I. INTRODUCTION

The Washington Public Ports Association (“WPPA”) submits this brief as *amicus curiae* requesting this Court to affirm the Court of Appeals’ decision upholding the Clark County Superior Court’s ruling granting summary judgment to the Port of Vancouver USA (“Port”) holding, *intra alia*, that RCW 80.50.180 exempts the Port Commission’s decision to execute the October 22, 2013 lease (the “Lease”) from the State Environmental Policy Act’s (Chapter 43.21C RCW (“SEPA”)) procedural requirements.<sup>1</sup>

The Lease was for undeveloped Port real property on the Columbia River where Tesoro/Savage (“Tesoro”) proposed to develop a crude oil rail facility (the “Project”). It is undisputed that the actual physical use of the leasehold and the Project development would require environmental review and approval by Energy Facilities Site Evaluation Council (“EFSEC”) created pursuant to Chapter 80.50 RCW.

In direct contravention of RCW 80.50.180, Petitioners argue that the trial court should have required a separate and

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<sup>1</sup> The Lease and all exhibits thereto are found at CP at 0-000000276 to 0-000000705.

early SEPA review by the Port in advance of the statutorily mandated EFSEC SEPA review. This position, if adopted by this Court, moves well beyond the facts of this case with far reaching and significant implications for the seventy (70) WPPA member public port districts and their economic mission throughout the State of Washington.

The Petitioners erroneously claim that the Port's approval of the Lease "limited the reasonable choices" of EFSEC in violation of WAC 197-11-070(1). In urging this Court to hold that the Port should have made an early SEPA determination on its Lease decisions before granting the Lease, Petitioners ignore the necessary preliminary steps Tesoro took prior to developing the details of the Project capable of SEPA review, including establishing the contingent right to access and use the Port's property. In this respect, the Petitioners ignore the "contingent" nature of the Lease which was and remains dependent on Tesoro obtaining EFSEC approval.

In the context of leasing, this Project is not unlike many other projects throughout the state where someone seeks to lease port property to develop a project. Like the Project and Lease here, it is a common practice to make the use of the

leased port property “contingent” on obtaining regulatory project permits from another agency. This is a common sense predicate step before a project proponent decides to expend funds and invests effort to develop the engineering plans and resource/impact studies necessary to move a project through the SEPA and regulatory permitting processes administered by different agencies—be it a city, a county, or EFSEC. Indeed, without a legal right to a specific site it would have been difficult, if not impossible for a project proponent, including Tesoro, to develop and provide the necessary site specific project plans and specifications needed for SEPA review by any other regulatory agency, including EFSEC.

Petitioners ignore the terms of the Lease and the Port’s role in granting a contingent lease for future use in the early stages of the Project allowing Tesoro to seek regulatory and permitting approval from the regulatory agency with authority—EFSEC.

## **II. IDENTIFY AND INTEREST OF AMICUS CURIAE**

The WPPA was authorized by statute in 1961 at RCW 53.06.030. The WPPA’s purpose is “To promote and encourage

port development along sound economic lines.”<sup>2</sup> Seventy (70) dues paying Washington port districts located throughout the state make up the WPPA’s membership. Each of the seventy (70) member port districts is a Washington municipal government created, organized, and operated pursuant to Title 53 RCW. The WPPA and its members have a very strong interest in supporting economic development in their respective districts.

The ports of Washington State play a unique role amongst governments in promoting economic development. The Legislature provided port districts a wide range of powers to facilitate development in general, and transportation infrastructure in particular.<sup>3</sup> However, port districts lack substantive land use regulatory authority.<sup>4</sup> Ports do not have the authority under Title 53 RCW to adopt shoreline regulations,

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<sup>2</sup> RCW 53.06.030(3).

<sup>3</sup> Port districts have broad power to take the following activities, among other authority granted by the State Legislature: (a) to develop property for commercial and industrial purposes; (b) to lease undeveloped property to private parties for development projects consistent with the purposes of port districts; (c) to engage in programs of economic development; (d) to sell property, only after modifying its comprehensive schedule of harbor improvements; (e) to re-develop marginal lands; (f) adopt comprehensive schemes of harbor improvements to guide development of Port property; and, (g) conduct SEPA review for its own projects. See RCW 53.08.040, RCW 53.08.080, RCW 53.08.245, RCW 53.08.090, Chapter 53.25 RCW, and Chapter 53.20 RCW, respectively.

<sup>4</sup> See WAC 197-11-926. A port may conduct SEPA review for its own project proposals.

critical areas ordinances, zoning regulations, traffic or other impact fees.<sup>5</sup>

Where a port executes a preliminary agreement with a prospective tenant, such as a contingent lease, the proper balance is for the applicable regulatory authority<sup>6</sup> to conduct the SEPA review for a proposed project at the time the proponent submits project permit applications to that regulatory body supported by the studies and reports required by that agency. This balance is supported by SEPA and by Title 53 RCW.

Petitioners' entreaty to this Court to expand its decision beyond the narrow facts of this case will have a significant adverse impact on the ability of all port districts to carry out their statutory purposes. Such an expansion will result in premature SEPA analysis that is duplicative<sup>7</sup>, is not informative, and which has the potential to be inconsistent with or preclude later

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<sup>5</sup> These powers have been granted to cities and counties pursuant to Chapter 90.58 RCW (Shoreline Management Act), Chapter 36.70A RCW (Growth Management Act-Critical Areas), Chapter 36.70 RCW (Planning Enabling Act and Growth Management Act), and RCW 82.02.020 and RCW 82.02.050-.110 (Impact Fees, respectively). See also, Chapter 53.08 RCW.

<sup>6</sup> A county, city or state agency, such as the Department of Ecology, the Department of Fish and Wildlife, or EFSEEC.

<sup>7</sup> Thus undermining the clear legislative directive adopted through the Regulatory Reform Act. See 1995 Session Laws-ESHB 1724.

meaningful SEPA review by agencies when the full details and scope of the project has been developed.<sup>8</sup>

### III. ISSUES

A. Is this case necessarily limited to its facts, where the Port granted a lease for a potential project that RCW 80.50.180 mandated and reserved SEPA review by the EFSEC?

B. Does the Port's Lease establish Conditions Precedent recognizing EFSEC's regulatory role making the effectiveness of the Lease contingent on EFSEC approval of the Project?

C. Is the Port's process of making a prospective tenant's use of Port property contingent on obtaining all required permits and approvals consistent with SEPA, the public policy underlying SEPA, and the statutory purposes of port districts?

D. Where The Port's Actions Consistent with The Economic Development Mission of a Port Under Title 53 RCW, Did It Limit the Choices of Alternatives by The Regulatory Authority, And Did It Assure That Timely SEPA Review Was Meaningful? Agency?

### IV. ARGUMENT

**A. The Issue on Appeal is Necessarily Limited to the Unique Facts of the Case Where RCW 80.50.150 Explicitly Directs that SEPA Review Be Conducted by EFSEC.**

The Washington State legislature determined that local government actions related to the approval, authorization, or permitting of energy facilities subject to certification by EFSEC are

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<sup>8</sup> A primary mission of the SEPA Rules is to minimize wasteful duplication of effort and gaps in compliance....” See The Washington State Environmental Act, Professor Richard Settle, Section 10.1.

exempt and precluded from local government SEPA review. In those cases, EFSEC has sole authority to conduct SEPA review. RCW 80.50.180 is remarkable in its clarity and intent, to wit:

Except for actions of the council [EFSEC] under chapter 80.50 RCW, all proposals for legislation and other actions of any branch of government of this state, including state agencies, municipal and public corporations, and counties, to the extent the legislation or other action involved approves, authorizes, permits, or establishes procedures solely for approving, authorizing or permitting, the location, financing or construction of any energy facility subject to certification under chapter 80.50 RCW, shall be exempt from the "detailed statement" required by RCW 43.21C.030. Nothing in this section shall be construed as exempting any action of the council from any provision of chapter 43.21C RCW. (emphasis added)

As if RCW 80.50.180 was not clear enough, the Department of Ecology's ("Ecology") adopted SEPA rules echo the statute by also clearly declaring EFSEC's primacy as the sole lead agency under SEPA for any proposal requiring EFSEC certification, specifically:

... the lead agency for proposals within the areas listed below shall be as follows:

(1) For all governmental actions relating to energy facilities for which certification is required under chapter 80.50 RCW, the lead agency shall be the energy facility site evaluation council (EFSEC)....<sup>9</sup>

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<sup>9</sup> WAC 197-11-938

Here, the narrow issue on appeal is how these exemptions from SEPA review apply to the Port's action authorizing the Lease with the Conditions Precedent where it was understood and required that the proposed development (i) was an "energy facility subject to certification under chapter 80.50 RCW", and (ii) that as such it would be subject to SEPA review and certification by EFSEC.

The Port's decision set in place a contingent authorization whereby the Project proponent and Lessee, Tesoro, could apply for EFSEC review for the Project, which if approved could be located on the undeveloped Port property. The Court of Appeals properly determined that EFSEC was the sole agency authorized to conduct SEPA review of the Tesoro Project under the plain statutory and regulatory language discussed above.

**B. The Lease is Contingent on EFSEC's Approval of the Project.**

The Port's obligations under the Lease are subject to a number of contingencies, referred to as "Conditions Precedent," including the Lessee's satisfaction of the following Conditions Precedent: "(1) all necessary licenses, permits and approvals have

been obtained for the Permitted Use....”<sup>10</sup> Further, Section 10 of the Lease provides, “In its use of the Premises, Lessee agrees to comply with all applicable federal, state and municipal laws ordinances and regulations....”<sup>11</sup> The failure to comply with these requirements is a default event under the Lease entitling the Port to terminate the Lease if compliance cannot reasonably be achieved.<sup>12</sup> In essence, the Port and Tesoro agreed that if EFSEC did not approve the Project (EFSEC’s approval process necessarily included SEPA review), Tesoro could not develop the Port’s property. This contingent language is typical of leases and is consistent with the Port’s authority granted in RCW 53.08.080.

In this case, RCW 80.50.180 is clear, broad, and unequivocal. The Port used its authority under RCW 53.08.080<sup>13</sup> to grant a lease specifically on compliance with all applicable federal, state and local laws, ordinances, and regulations.<sup>14</sup> With this Condition Precedent, the Port subjected the Lessee’s right to utilize the property on compliance with the provisions of Chapter 80.50

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<sup>10</sup> See Section 2.D of the Lease at CP at 0-000000288.

<sup>11</sup> See CP at 0-000000301.

<sup>12</sup> See CP at 0-000000331 to 0-000000332.

<sup>13</sup> Under RCW 53.08.080, the Port could have denied the Lease on a myriad of other grounds unrelated to SEPA but, in this particular case, the Port could not have denied the Lease based on a SEPA analysis due to RCW 80.50.180.

<sup>14</sup> See CP at 0-000000301.

RCW and EFSEC's SEPA process, assuring the required robust SEPA review. The Court's analysis need go no further.

Indeed, had the Port conducted an independent SEPA analysis it would have violated the law and frustrated the strong public policy favoring a comprehensive SEPA review by EFSEC. To hold otherwise, would require this Port and port districts throughout the state to conduct SEPA review without regard to the available level of project detail and in advance of the agency that will conduct a meaningful SEPA review based upon a complete and detailed project application.<sup>15</sup> Or, it would require this Port and port districts throughout the state to demand that a prospective tenant develop and submit complete SEPA compliant project details before a lease even is considered.<sup>16</sup>

All of these potential approaches would violate the clear SEPA mandate and policy against piecemealing SEPA review and would be inconsistent to SEPA's longstanding structure favoring

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<sup>15</sup> For the Port's own projects, one would expect a sufficient level of detail to conduct SEPA.

<sup>16</sup> Consistent with the SEPA mandate to conduct a SEPA review when there is sufficient information to allow for meaningful environmental analysis, a basic premise of the EFSEC is "[t]o avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." RCW 80.50.010(5).

SEPA review at the earliest opportunity, but only when the full scope of a project is defined by the project applicant.

**C. The Port's Contingent Lease Process Is Consistent with SEPA, SEPA's Underlying Public Policy, and the Port Districts' Purposes.**

Typically, where SEPA review is required for permits issued by other governments, a port district lease is "contingent" on obtaining the regulatory approval given the port's limited regulatory authority. With a "contingent lease" the applicant/tenant is not allowed to develop or use the property until such time as it complies with the regulatory processes and obtains all required approvals. SEPA is typically conducted by an agency with regulatory authority, a city, county, state or federal agency, and only after the applicant develops full project components to a degree necessary to measure and analyze the project's impacts sufficient for SEPA review.

A contingent lease informs an applicant/tenant of the terms under which they may develop and utilize the port property should they successfully complete the regulatory processes. This provides the tenant with the necessary information to make a business decision as to the terms and conditions of the lease, which affect the lease price, and the total cost to develop and use the port

property prior to investing in the often lengthy and costly permit application and impact analysis process. However, an applicant/tenant will not undertake studies, develop plans, or building elements as a part of or during the lease negotiation stage because there is no right to use the port property. Typically, at the time of leasing, a project is not sufficiently developed to allow meaningful environmental review, because the tenant is unwilling to invest significant expenses in project development until they are assured they have a real property right.

The contingent lease is a necessary tool for ports to lease their property to tenants such that those tenants can invest capital necessary to prepare a complete proposal for review by regulatory authorities with assurance that they would have the right to use the property should they obtain the required regulatory approvals. In this instance, the Port charged a fee for the right to use the land should EFSEC grant the permits. Importantly, the applicant/tenant retains the right to terminate the lease if they fail to obtain the permits.

It is unrealistic to expect a project proponent to spend the resources necessary to define a project in sufficient enough detail for SEPA review before they even know if they have a legal right to

the property where the project could be developed. This unrealistic paradigm, which Petitioners would have this Court adopt, would not only significantly damage the SEPA process, but would likewise thwart this Port's and port districts throughout the state from furthering their primary statutory purposes. The economic and time investments necessary to lease port property would become so onerous when compared to private property that demand and value of public property would decline drastically or, alternatively, would encourage ports to enter into leases with very vague project use descriptions such as "for any project allowed by applicable zoning" which would also thwart port districts' ability to achieve their statutory purposes. Simply stated, the Petitioners' proposal to require a SEPA review of a preliminary step necessary for future utilization of leased property, such as a Port's review of a contingent lease here, would do real harm to SEPA and the statutory purpose of port districts throughout the state.

**D. The Port's Actions Are Consistent with Economic Development Under Title 53 RCW, Do Not Limit the Reasonable Choices of the Regulatory Authority, and Assure That the Timely SEPA Review is Meaningful.**

A port's decision to approve a contingent lease does not limit the ability of an entirely separate and independent government with

regulatory jurisdiction to make choices amongst reasonable alternatives for SEPA review.<sup>17</sup> The leasing port district has no control over the other governments with regulatory authority.<sup>18</sup> It is disingenuous to suggest that a port district has such authority.

Neither the existence of the port lease or the SEPA rules do limit these regulatory agency's choices of alternatives to those alternatives that could feasibly attain or approximate a proposal's objectives on the same site.<sup>19</sup> A private proposal to lease property from a port district does not limit the reasonable alternatives of a private proposal's objectives to develop property that is subject to a contingent lease.<sup>20</sup>

Moreover, the SEPA Rules at WAC 197-11-055(2) (a) (ii) recognize that preliminary actions and decisions by a government may be necessary prior to environmental analysis under SEPA:

Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow

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<sup>17</sup> See WAC 197-11-070(1).

<sup>18</sup> A county, city, state or federal agency.

<sup>19</sup> "When a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site." WAC 197-11-440(5)(d). See also the definition of Reasonable Alternative at WAC 197-11-786: "Reasonable alternative" means an action that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.

<sup>20</sup> A "Private project means any proposal primarily initiated or sponsored by an individual or entity other than an agency." WAC 197-11-780.

meaningful environmental analysis.

The State Supreme Court confirmed that “WAC 197-11-055 recognizes that in many cases, ‘preliminary decisions’ must be made upon a proposal before the proposal is sufficiently definite to permit meaningful environmental analysis”.<sup>21</sup>

In *ILWU Local 19 v. City of Seattle*, 176 Wn. App. 511, 309 P. 3d 654 (2013), the court determined that a Memorandum of Understanding (“MOU”) related to a proposed new Seattle sports arena was neither a project action or a non-project action under SEPA because the commitments of the City of Seattle were expressly and sufficiently contingent on future decisions of the City and King County to proceed with the MOU prior to SEPA review. The court determined that the MOU did not bind or control future decisions of the regulatory authorities—the City or the County, and as such it was a preliminary decision to an action requiring SEPA Review.<sup>22</sup>

In *ILWU* the court using NEPA as guidance for interpreting SEPA noted that:

Preliminary steps that retain an agency's authority to “change course or to alter the plan it was considering

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<sup>21</sup> *Carpenter v. Island County*, 89 W. 2d 881, 888 (1978)

<sup>22</sup> *ILWU v. Seattle*, at 522-523.

implementing” are not “actions” requiring NEPA environmental review.

*ILWU*, at 525-526.

It is common sense that the approval of a contingent lease is that type of preliminary step required to facilitate meaningful environmental analysis by the agencies with the expertise and regulatory authority. Moreover, a contingent lease serves the same purpose and intent as the MOU at issue in *ILWU*. The approval of a contingent lease or similar agreement that provides certainty to land access allows the project applicant to expend the necessary time and considerable capital required to develop the project specifics such that meaningful permitting and environmental review can occur. Regardless of a contingent lease being in place, the SEPA responsible official still has the ability to assess the full scope of reasonable alternatives for the leased site as part of its environmental review.

“Under NEPA, agencies must complete environmental review prior to the “go-no go” stage of the project, which is to say before any “irreversible and irretrievable commitment of resources.” *Metcalf v. Daley*, 214 F.3d 1135, 1142, 1143 (9th Cir.2000), quoting *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir.1988), *cert.*

*denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989). Preliminary steps that retain an agency's authority to "change course or to alter the plan it was considering implementing" are not 'actions' requiring NEPA environmental review. *WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir.2008).

A contingent lease approval by a port district is similar in nature to the No Surface Occupancy (NSO) lease addressed in *Conner v. Burford*. These NSO leases included a stipulation that required compliance with laws and permits including NEPA, and preparing an EIS if appropriate. *Conner v. Burford* found support for its conclusion in *Sierra Club v. FERC*, 754 F.2d 1506, 1509 (9th Cir.1985) where a preliminary permit for construction and maintenance of hydroelectric facilities was for the sole purpose of maintaining an applicant's priority of application for a license, and the applicants could only enter the federal land *after* obtaining Forest Service and Bureau of Land Management (BLM) special use permits.

Similarly, leases that are contingent on subsequent land use approvals from a county, city or other regulatory agency, including EFSEC, are precursors to a go-no go stage of a project. At the time

of the approval of a contingent lease, an irreversible and irretrievable commitment of resources has not been made.

The primary policy for requiring early SEPA review is to avoid a process of government action that can “snowball” and acquire virtual unstoppable administrative inertia. *King County v. Washington State Boundary Review Board for King County*, 122 Wash.2d 648, 860 P.2d 1024 (1993). However, a port approving a contingent lease is not the same governmental entity that would ultimately conduct project SEPA review.<sup>23</sup> There is no risk of “snowball” or administrative inertia because a port district has no land use or other regulatory authority related to a project.

A port’s decision to allow an applicant/tenant to secure the real property right to use the land has no influence, control, or direction over the land use approval process, nor does such action limit the choices of alternatives of a regulatory agency, including denial of permits. The approval, denial, or conditioning of a

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<sup>23</sup> A port can conduct SEPA review for its own projects prior to submitting permit applications to a regulatory authority, if permits are required. However, a port district may only pursue such projects if it is consistent with the port’s Comprehensive Scheme of Harbor Improvements, which must undergo SEPA review prior to adoption. As a result, there is complete assurance that any port project on port property will undergo SEPA review prior to any regulatory permit review.

regulatory approval is entirely between the applicant and the regulatory agency, not the port district as landlord.

Here, the goals of SEPA and the statutory purpose of the Port were all well served when the Port approved the Lease at an agreed price for a specific use but such commitment was specifically contingent on Tesoro's receipt of all necessary licenses, permits, and approvals.<sup>24</sup> Like the actions of the city council in *ILWU*, the Lease did not allow the Project to be built, or indeed permit the property to be put to any use, until EFSEC conducts its full SEPA review.

Indeed, the Lease's Rules and Regulations even provides for a second look by the Port commission after SEPA review. "... [A]ll tenant improvements...shall be first approved in writing by Lessor prior to the commencement of construction."<sup>25</sup>

## V. CONCLUSION

Here, RCW 80.50.180 is clear. EFSEC conducts SEPA review for energy facilities such as this Project and all other agency

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<sup>24</sup> See Section 2.D of the Lease at CP at 0-000000288.

<sup>25</sup> See Ex. F to the Lease, Port of Vancouver's Rules and Regulations, No. 8, CP at 0-000000386.

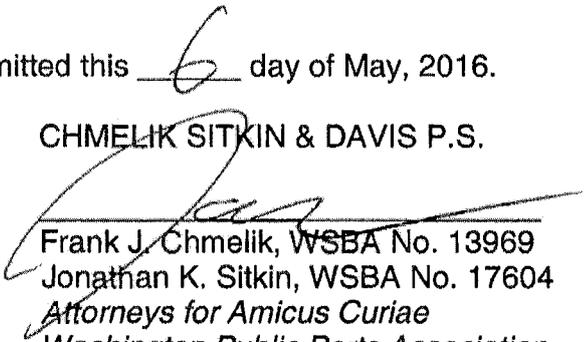
actions are exempt. On this basis alone, the decision of the trial court ought to be sustained.

The Port's issuance of a contingent lease with a condition precedent requiring regulatory agency environmental review as mandated by RCW 80.50.180 complied with SEPA and allowed the Port to accomplish its statutory purposes. Such a contingent lease did not limit the choices of alternatives for review by the applicable regulatory agency. Given the statutory authority of the Port and the role a contingent lease plays in the normal sequence of project development, the Port acted appropriately and carefully to fulfil its statutory mission set forth in Chapter 43.21C RCW and Chapter 53.08 RCW. To do otherwise would have done damage to these laws.

The Court should limit its review to the narrow issue related to the SEPA exemption under RCW 80.50.180 and thereafter deny this appeal.

Respectfully submitted this 6 day of May, 2016.

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**DECLARATION OF SERVICE**

I, Jonathan K. Sitkin, declare under penalty of perjury under the laws of the State of Washington that I am one of the attorneys for Amicus Curiae Washington Public Ports Association, and that on May 6, 2016, I caused the foregoing BRIEF OF *AMICUS CURIAE* WASHINGTON PUBLIC PORTS ASSOCIATION to be served on the following in the manner indicated:

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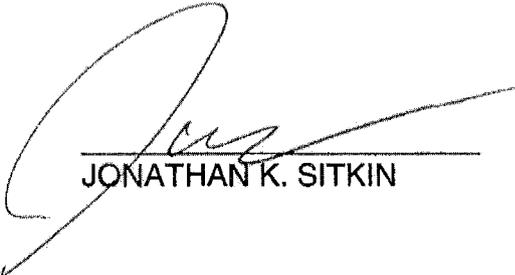
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DATED this 6 day of May, 2016, at Bellingham,  
Washington.

  
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JONATHAN K. SITKIN