Court of Appeals No. 46130-7-II

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

COLUMBIA RIVERKEEPER; and NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Appellants,

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.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
HONORABLE DAVID E. GREGERSON

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* in support of the ruling of the Clark County Superior Court's granting summary judgment to the Port of Vancouver USA ("Port") holding, *intra alia,* that RCW 80.50.180 exempts from the procedural requirements of State Environmental Policy Act ("SEPA") the decision by the commission of the Port of Vancouver USA to execute the October 22, 2013 lease (the Lease").[1] The Lease was for undeveloped Port real property on the Columbia River where Tesoro/Savage ("Tesoro") proposed the development of a crude oil rail facility (the "Project"). It is undisputed that the actual development of the Project would require environmental review and approval by Energy Facilities Site Evaluation Council ("EFSEC") created pursuant to chapter 80.50 RCW.

The Appellants have argued that SEPA should be read to create a distinction between the "proprietary" and the "regulatory" (to the extent they even exist) functions of the Port and that, using this newly created distinction, the trial court should have required two separate SEPA reviews in direct

[1] The Lease and all exhibits thereto are found at CP at 0-000000276 to 0-000000705.

contravention of RCW 80.50.180 and SEPA. The position of the Appellants, if adopted by this Court, moves well beyond the facts of this case, would read an "exception" into RCW 80.50.180 where none exists and would have far reaching and significant implications for the seventy-five (75) public port districts that are members of the WPPA and for the SEPA process that is used to evaluate private projects proposed for development on leased port district property.

The Appellants, without support or citation, erroneously claim that the approval by the Port "limited the reasonable choices" of EFSEC and thereby ignore the common sense reality that no project proponent would expend funds to move a project such as the one proposed by Tesoro through a significant regulatory process like the EFSEC process without some assurance that the project could be sited if a permit was obtained. Indeed, without a legal right to a specific site it would have been difficult for Tesoro to provide the necessary site specific project plans needed for EFSEC's SEPA review.

Simply stated, Appellants have ignored the terms of the Lease and role of the Port in granting a lease for undeveloped lands in the early stages of the Project so that Tesoro could

seek regulatory and permitting approval from regulatory authority and approval authority - EFSEC.

II. IDENTIFY AND INTEREST OF AMICUS CURIAE

The WPPA was authorized by statute in 1961 at RCW 53.06.030. Its members are seventy-five (75) Washington port districts located throughout the state who pay annual dues to provide the bulk of the WPPA budget. Each of the seventy-five (75) member port districts are a Washington municipal government created organized and operated pursuant to Title 53 of the Revised Code of Washington.

The WPPA and its members have a very strong interest in supporting economic development in their respective districts. In this regard, the Legislature has provided a wide range of powers to port districts to facilitate development in general, and transportation infrastructure in particular. See, Chapter 53.08 RCW. Port districts have broad power to lease undeveloped property to private parties for development projects consistent with the purposes of port districts. See, RCW 53.08.080. Prior to undertaking any activity port districts are required to adopt comprehensive schemes of harbor improvements. See Chapter

53.20 RCW. However, port districts lack substantive land use regulatory authority. See Chapter 53.08 RCW.

The WPPA and its member port districts are concerned that Appellants' entreaty to this Court to expand its decision beyond the narrow facts of this case will have an impact on the ability of this Port and all port districts to carry out their statutory purposes and will result in a early pre-leasing SEPA process that is not informative and which has the potential to be inconsistent with or preclude latter meaningful SEPA review by agencies when the full details and scope of the project has been developed.

III. ISSUES

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

2. Should this Court create a new SEPA distinction between "proprietary" and "regulatory" government functions thereby requiring separate SEPA reviews for each?

3. Was the public policy underlying SEPA and was the statutory mission of the Port achieved when the Port granted a lease for undeveloped land as a preliminary step in the

development of the project where the fully developed project plans would necessarily be subject to SEPA review by EFSEC, the permitting and regulatory authority?

IV. ARGUMENT

A. The Issue on Appeal is Necessarily Limited to the Unique Facts of the Case Where RCW 80.50.150 Explicitly Exempts From SEPA the Decision of the Commission of the Port of Vancouver USA to Grant this Lease Contingent on EFSEC Approval of the Project.

The Washington State legislature determined that local government actions related to the approval, authorization, or permitting of energy facilities subject to certification by the EFSEC are exempt and precluded from local government SEPA review instead reserving that SEPA review to EFSEC. This statute then reserves and requires SEPA review by EFSEC. RCW 80.50.180 is remarkable in its clarity and intent.

> 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.
>
> RCW 80.50.180 (emphasis added)

As if RCW 80.50.180 was not clear enough, the SEPA rules adopted by the Department of Ecology ("Ecology") echo the statute by also clearly declaring EFSEC's primacy as the sole lead agency under SEPA for a proposal requiring certification by EFSEC.[2]

WAC 197-11-938 reads:

> ... 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)....

Following the mandate of statute and Washington Administrative Code, in the SEPA Handbook, Ecology provides further confirmation that EFSEC is the sole SEPA lead agency for all governmental actions related to energy facilities requiring EFSEC certification.

> If the proposal fits any of the criteria described in WAC 197-11-938, . . .Lead agencies for specific projects, the agency listed shall be lead.[3]

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[2] WAC 197-11-938

[3] The SEPA Handbook is a SEPA guidance document prepared by the Department of Ecology. It is available on line at http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbintro.html.See Ecology,

Here, the narrow issue on appeal is the application of the exemption from SEPA review to the Port commission's action to authorize the Lease where it was understood and required that the proposed development (i) was a "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 the EFSEC.

Appellants argue that the actions of the Port commission in approving the Lease do not fall within this definition. This is simply not true. The commission decision was an "action." RCW 42.30.020(3). Moreover, the action 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 Port's contingent approach was exactly what RCW 80.50.180 demanded in that Tesoro had to seek and obtain all required permits and approvals. 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

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SEPA Handbook, Section 2.4.1;
http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbch02.html#2.5

been obtained for the Permitted Use...." See Section 2.D of the Lease at CP at 0-000000288. 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...." See CP at 0-000000301. The failure to comply with these requirements is a default event under the Lease entitling the Port to terminate the lease if compliance cannot be reasonably achieved. See CP at 0-000000331-000000332. In essence, the Port had agreed with Tesoro that if EFSEC did not approve the proposed Project (EFSEC's approval process necessarily included SEPA review) the Port's property could not be developed. This contingent language in the Lease is typical of leases and is consistent with the authority granted to the Port commissions in RCW 53.08.080.

If the logic of Appellants' position is valid, it must necessarily be valid in all circumstances. It is not. The validity of Appellants' position can best be analyzed by reversing the position. Given the strong and clear language of RCW 80.50.180 it is not difficult to imagine the claim from Tesoro that would had ensued had the Port commission denied the Lease (because the denial is also an

"action") based upon a SEPA process conducted by the Port in violation of RCW 80.50.180.

In this case, RCW 80.50.180 is clear, broad and unequivocal. The Port took the only appropriate "action" in regards SEPA.[4] The Port commission used its authority under RCW 53.08.080 to grant a lease but specifically conditioned the Lessee's use of the property on complying with all applicable federal, state and local laws, ordinances, and regulations. See CP at 0-000000301. With this condition precedent, the Port subjected the Lessee's right to utilize the property on compliance with the provisions of Chapter 80.50 and EFSEC's SEPA process. 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, the regulatory agency.

B. There is No Distinction Between a "Proprietary" Action and a "Regulatory" Action Under SEPA. The Appellants' Attempt to Create Such a Distinction Should be Rejected, Because it Will Lead to Piecemeal and Duplicative SEPA Reviews Thereby Thwarting The Sound Public Policy Underlying SEPA.

[4] Under RCW 53.08.080, the Port commission could have denied the Lease on a myriad of other grounds unrelated to SEPA but in this particular case the Port commission could not have denied the Lease based on a SEPA analysis.

In a rather transparent attempt to avoid the clear language of RCW 80.50.180, SEPA, the SEPA rules[5], and the SEPA Handbook, Appellants' attempt to broaden the issue on appeal and request that the Court discern new definitions and concepts under SEPA that are not located in SEPA, or in the SEPA rules and that are wholly unrelated to the narrow issue before the Court. Without in any way conceding the limited nature of the issue at hand dictated by RCW 80.50.180, this Port and port districts throughout the state are subject to SEPA and are required to conduct a SEPA review when there is sufficient information to allow for meaningful environmental analysis unless such a decision is exempt as is the case here. See, WAC 197-11-055(2)(a)(ii). There are no special rules for "proprietary" actions that would require or allow this Port or port districts throughout the state to conduct a SEPA review of a project at a preliminary stage without "sufficient information" merely because it is "proprietary."[6] Here, since the Port commission's decision was exempt, the Court need not evaluate the sufficiency of

[5] The SEPA rules have been promulgated by the Department of Ecology through rule making and are found at WAC 197-11.

[6] SEPA does defines and distinguish types of "actions" as (i) project actions and as (ii) non-project actions. There are private projects, as distinguished from public proposals. However, neither the legislature nor Ecology have established or defined a distinction between a proprietary action versus governmental action distinction under SEPA or the SEPA Rules.

the information available to the Port when the decision was made.[7] If the Legislature had wanted to create an "exception" in RCW 80.50.180 to the exemption from local governments conducting SEPA review for leases or other "proprietary" actions, it could have, but it did not, and this Court should not.

To hold otherwise, would require this Port and port districts throughout the state to conduct SEPA without regard to the available level of project detail and in advance of the agency that will conduct a meaningful SEPA review using a complete and detailed project application.[8] 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. Or, it would require this Port and port districts throughout the state to somehow consider only the "proprietary" nature of their leasing action leaving further SEPA review for other agencies. All of these potential approaches to a new "proprietary" standard would violate the clear SEPA mandate

[7] 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).

[8] For the Port's own projects, one would expect a sufficient level of detail to conduct SEPA.

and policy against piecemealing SEPA review and would be inconsistent to SEPA's long standing structure favoring SEPA review at the earliest opportunity but only when the full scope of a project is defined. The State Supreme Court has 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" *Carpenter v. Island County*, 89 W. 2d 881, 888 (1978). Moreover, the Appellants' proposed "proprietary" review requirement defies common sense and the common understanding of project development. 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 property where the project could be developed. To require a project proponent to act this way would not only do real damage to the SEPA process, but thwart this Port's and the port districts' throughout the state ability to achieve their statutory purposes. The work necessary to lease public property would either become markedly different and more expensive for project proponents (hence lessening the demand and value for public property) or would encourage ports to enter into leases for with very

vague project use descriptions such as "for any project allowed by applicable zoning" which would also thwart this Port's and the port districts' throughout the state ability to achieve their statutory purposes. Simply stated, the Appellants' proposal for a new "proprietary" classification would do real harm to SEPA and the statutory purpose of this Port and port districts throughout the state.

C. The Port of Vancouver USA's Process of Making the Use of the Property Contingent on Obtaining All Required Permits and Approvals is Consistent with the Public Policy Underlying SEPA and Consistent with the Statutory Purposes of Port Districts.

In *ILWU Local 19 v. City of Seattle, 176 Wn. App 511, 309 P. 3d 654 (2013)* the court determined that an 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. There 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 implementing" are not "actions" requiring NEPA environmental review.

ILWU, at 525-526.

The Court in ILWU provided useful direction when it determined that an action is not SEPA action when the agency retains the ability to issue final approval.

> The city and county remain free to change course. The memorandum of understanding does not commit them to action. In summary, the trial court properly concluded that the memorandum of understanding is not an "action" within the meaning of SEPA and judicial review is not available.

ILWU, at 526.

"A primary mission of the SEPA Rules is to minimize wasteful duplication of effort and gaps in compliance by assigning responsibility for SEPA compliance to the "lead agency" and, within that agency, to its "responsible official." See The Washington State Environmental Policy Act, Professor Richard Settle, Section 10.1. Instead, requiring a different scheme based upon whatever distinction there is between "proprietary" and "regulatory" actions would be contrary to SEPA's mission.

The SEPA Rules recognize this timing issue regarding preliminary steps, such as the action of the Port here, and that decisions by an agency may be necessary prior to environmental analysis under SEPA.

> Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.
>
> WAC 197-11-055(2)(a)(ii).

Indeed, it is common sense that in many cases, the approval of a lease by a port district is often just that type of preliminary step required before a meaningful environmental analysis can be conducted. Public policy, the goals of SEPA and the statutory purpose of this Port were all well served when this Port told Tesoro that it could secure a lease at an agreed price for a specific use but such a commitment was specifically contingent on obtaining all necessary licenses, permits and approvals. See Section 2.D of the Lease at CP at 0-000000288. Like the actions of the city council in ILWU, the Port commission did not allow the Project to be built or indeed permit the property to be put to any use until a complete SEPA review is conducted by EFSEC. Indeed, the Lease in its 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. See Ex F to the Lease, Port of Vancouver's Rules and Regulations,

No. 8, CP 0-000000386. Given the statutory authority of the Port and the role, a 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.

V. CONCLUSION

RCW 80.50.180 is clear. EFSEC conducts the SEPA review for energy facilities such as this Project and all other agency actions are exempt. On this basis, the decision of the trial court ought to be sustained.

Faced with that clear and unequivocal language in RCW 80.50.180 and similarly strong statements in the Washington Administrative Code and the Department of Ecology guidance, Appellant makes a plea to this Court to rewrite SEPA moving away from knowledge based SEPA review to a piecemeal review based upon a new status category of "proprietary" functions.

Such a departure would do harm to a carefully constructed and well understood SEPA by creating an entirely new type of SEPA "proprietary" review which neither the legislature nor Ecology

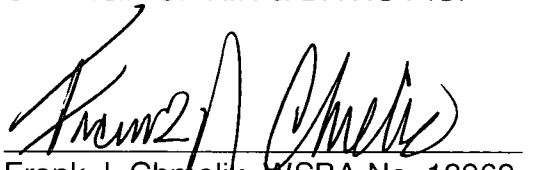
have determined necessary or proper under SEPA. Moreover, such a departure will serve to thwart SEPA and the statutory mission of this Port and port districts throughout the state. The SEPA process will drift into improper piecemeal review and Washington port districts' ability to lease property will be impaired or, at best, blunted.

The Port of Vancouver USA's approach of issuing a contingent lease subject to regulatory agency environmental review was mandated by RCW 80.50.180, complied with SEPA and allowed the Port to accomplish its statutory purposes.

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 2ND day of April, 2015

CHMELIK SITKIN & DAVIS P.S.



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DECLARATION OF SERVICE

I, Heather M. Nash, declare under penalty of perjury under the laws of the State of Washington that I am employed by Chmelik Sitkin & Davis P.S. and that on April 2, 2015, I have made service of the foregoing documents:

- THE WASHINGTON PUBLIC PORTS ASSOCIATION'S MOTION FOR LEAVE TO PARTICIPATE AS AN AMICUS CURIAE, and;
- BRIEF OF AMICUS CURIAE OF WASHINGTON PUBLIC PORTS ASSOCIATION

on the parties listed below in the manner indicated:

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