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Washington State
Court of Appeals
Division Two

December 26, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADVOCATES FOR A CLEANER TACOMA; SIERRA CLUB; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON PHYSICIANS FOR SOCIAL RESPONSIBILITY; STAND.EARTH, AND THE PUYALLUP TRIBE OF INDIANS, Appellants, v. PUGET SOUND CLEAN AIR AGENCY, PUGET SOUND ENERGY, AND THE WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD, Respondents.	No. 56938-8-II PART-PUBLISHED OPINION

LEE, J. — Appellants Advocates for a Cleaner Tacoma, Sierra Club, Washington Environmental Council, Washington Physicians for Social Responsibility, Stand.Earth (collectively ACT), and the Puyallup Tribe of Indians (Tribe) appeal the Pollution Control Hearings Board's (PCHB) dismissal on partial summary judgment the claim that the Puget Sound Clean Air Agency's (PSCAA) "Notice of Construction (NOC) Order of Approval" for the Tacoma Liquefied Natural Gas (TLNG) facility was issued ultra vires. Appellants[1] also appeal the PCHB's Final Order affirming the PSCAA's Supplemental Environmental Impact Statement (SEIS) and the NOC Order of Approval for the TLNG facility.

[1] When discussing ACT and the Tribe together, this opinion will refer to them as the Appellants.

Appellants argue that the Washington Clean Air Act (WCAA)[2] authorizes only the PSCAA board, and not staff members, to issue orders of approval. Appellants also claim that the SEIS was inadequate because (1) it found the TLNG facility would not have a "significant" adverse impact on greenhouse gas emissions; (2) the use of a static baseline in the "No Action Alternative" was unreasonable; and (3) the use of a 0.32 percent methane emissions/leak loss rate was unreasonable. Finally, Appellants claim that the PCHB erred in affirming the NOC Order of Approval because PSCAA did not conduct a sufficient best available control technology (BACT) analysis and the NOC Order of Approval was based on an inaccurate air dispersion model, the updated version of which was never provided to the public for comment.[3]

Because the WCAA authorizes PSCAA staff members to issue orders of approval, the PCHB did not err in dismissing the Appellants' ultra vires claim on partial summary judgment. And because we find no error in the PCHB's conclusion that the SEIS was adequate or in the PCHB affirming the NOC Order of Approval, we affirm.

FACTS

Puget Sound Energy (PSE), a state-regulated entity, provides natural gas services to Washington customers. In anticipation of future demand and long-term needs, PSE proposed constructing the TLNG facility at the Port of Tacoma with access to the Puget Sound. The TLNG facility would sit on the west shore of the Hylebos Waterway on an approximately 30-acre site. The site is adjacent to the Puyallup Indian Reservation.

[2] The WCAA is codified at chapter 70A.15 RCW.

[3] We address in the published portion of the opinion the issue of whether the NOC Order of Approval was issued ultra vires; the remainder of the issues will be addressed in the unpublished portion of the opinion.

In May 2017, PSE submitted a NOC permit application to PSCAA for the TLNG facility. In 2019, PSCAA issued NOC Order of Approval No. 11386.[4] PSCAA Reviewing Engineer, Ralph Munoz, and PSCAA Compliance Manager, Carole Cenci, signed the NOC Order of Approval.

On December 19, 2019, ACT appealed to the PCHB, challenging the NOC Order of Approval issued by PSCAA to PSE for the construction of the TLNG facility. On the same day, the Tribe also filed an appeal of PSCAA's NOC Order of Approval to the PCHB. The PCHB consolidated ACT's and the Tribe's appeals into a single appeal.

In January 2020, ACT filed a motion for a stay of the effectiveness of the NOC Order of Approval. The Tribe filed its own motion for stay and joined ACT's motion. The Appellants' main arguments included (1) PSCAA's NOC Order of Approval was issued ultra vires, and therefore invalid, because it had been issued by PSCAA staff instead of the PSCAA board; (2) the SEIS violated the State Environmental Policy Act (SEPA); and (3) the NOC Order of Approval violated various provisions of the federal Clean Air Act. PSE opposed both motions. The PCHB denied the motions for stay.

In May 2020, PSE filed a motion to dismiss and for partial summary judgment. PSCAA joined PSE's motion. Among the issues the Respondents[5] sought to dismiss was the Appellants' ultra vires argument. PSE argued that "PSCAA staff's authorization to issue Order of Approvals is consistent with the plain language and the underlying framework of the [Washington] Clean Air Act and PSCAA's regulations, and with PSCAA's longstanding application of the statutes and regulations, which must be given deference." Admin. R. (AR) at 3500 (footnote omitted).

[4] The NOC Order of Approval is also often referred to as the "Permit" in the record.

[5] When discussing PSE and PSCAA together, this opinion will refer to them as the Respondents.

The PCHB granted Respondents' motion in part and dismissed the ultra vires claim. The PCHB held that under a plain language reading of RCW 70A.15.2300 and RCW 70A.15.2210, air pollution control officers, in addition to an air agency board, have the authority to issue orders of approval. PCHB's order further stated that "the parties do not dispute that PSCAA staff engineers constitute control officers. They are therefore authorized to issue the order of approval here under [RCW 70A.15.2300] and PSCAA Regulation I, § 3.01." AR at 12671-72 (footnote omitted).

The Tribe appeals the PCHB's dismissal of the ultra vires claim on partial summary judgment.

ANALYSIS

The Tribe argues that PSCAA's NOC Order of Approval was ultra vires and invalid because it was issued by PSCAA's staff rather than the PSCAA board. Specifically, the Tribe asserts that the PSCAA board impermissibly delegated its authority and violated the WCAA. We disagree.

A. LEGAL PRINCIPLES

Appeals from PCHB orders are governed by the Washington Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 43.21B.180; RCW 34.05.570(3); *Snohomish County v. Pollution Control Hr'gs Bd.*, 187 Wn.2d 346, 357, 386 P.3d 1064 (2016). We "directly apply APA standards to the PCHB's record." *Wash. State Dairy Fed'n v. Dep't of Ecology*, 18 Wn. App. 2d 259, 273, 490 P.3d 290 (2021).

We review summary judgment orders de novo and make the same inquiry as the PCHB. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). Furthermore, "[a]n order granting summary

judgment may be affirmed on any legal basis supported by the record." *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wn.2d 506, 514, 475 P.3d 164 (2020).

Questions of statutory interpretation are also reviewed de novo. *Lakehaven Water & Sewer Dist. v. City of Fed. Way*, 195 Wn.2d 742, 752, 466 P.3d 213 (2020). In cases of statutory interpretation, the court's primary objective is to ascertain and carry out legislative intent. *Id*. "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

A statute's plain meaning is discerned by the context of the statute, the text of the provision in question and related provisions, and the statutory scheme as a whole. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015). All provisions of a statute must be read in harmony and must be construed such that no portion is rendered meaningless or superfluous. *Segura v. Cabrera*, 184 Wn.2d 587, 593, 362 P.3d 1278 (2015); *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 440, 359 P.3d 753 (2015). If the plain language is unambiguous, our inquiry ends "and we will not resort to interpretive tools such as legislative history." *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue*, 196 Wn.2d 1, 8, 468 P.3d 1056 (2020). The rules of statutory interpretation also apply to administrative regulations; if the plain language of a regulation is clear on its face, its meaning is to be derived from the plain language alone. *D.W. Close Co. v. Dep't of Lab. & Indus.*, 143 Wn. App. 118, 126, 177 P.3d 143 (2008). Finally, we construe statutes to avoid absurd results. *Jespersen v. Clark County*, 199 Wn. App. 568, 578, 399 P.3d 1209 (2017).

We review rules and regulations to determine "whether the rules are reasonably consistent with the statutes they purport to implement." *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 51 Wn. App. 49, 52, 751 P.2d 1229 (1988), *aff'd*, 112 Wn.2d 314 (1989).

> Certain well settled principles govern the scope of an administrative agency's rule-making authority. First, an agency has only those powers either expressly granted or necessarily implied from statutory grants of authority. Second, an agency does not have the power to promulgate rules that amend or change legislative enactments. Third, rules may "fill in the gaps" in legislation if such rules are "necessary to the effectuation of a general statutory scheme." Fourth, administrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented. Fifth, a party attacking the validity of an administrative rule has the burden of showing compelling reasons that the rule is in conflict with the intent and purpose of the legislation.

Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd., 95 Wn.2d 108, 112, 622 P.2d 826 (1980) (citations omitted) (internal quotation marks omitted) (quoting *Hama Hama Co. v. Shorelines Hr'gs Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975)).

Ultra vires means "beyond the scope or in excess of legal power or authority." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2480 (2002). An ultra vires act is one performed without legal authority and is "void on the basis that no power to act existed, even where proper procedural requirements are followed." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). "Ultra vires acts cannot be validated by later ratification or events." *Id.*

B. APPLICABLE STATUTES AND REGULATIONS

1. Washington Clean Air Act (WCAA)

The WCAA was enacted in 1967 and created air pollution control authorities in each county to implement and enforce the Act.[6] LAWS OF 1967, ch. 238; *see* chapter 70A.15 RCW; RCW 70A.15.1500(1), (2). The WCAA authorizes two or more contiguous counties to combine and form a "multicounty air pollution control authority." RCW 70A.15.1520; RCW 70A.15.1030(16). PSCAA[7] is a multicounty air pollution control authority comprised of King, Kitsap, Pierce, and Snohomish counties.

Each air pollution control authority is governed by a board of directors. RCW 70A.15.2000(1). In the case of a multicounty air pollution control authority, the board is comprised of one appointee from each county and one representative from each county. RCW 70A.15.2000(2)(c). Board members are not required to have technical expertise. *See* RCW 70A.15.2000; RCW 70A.15.2030.

Under the WCAA, each air pollution control authority's board "shall exercise all powers of the authority except as otherwise provided." RCW 70A.15.2030. A board must hold public meetings at least 10 times per year and may receive no more than $1,000 per year for time spent on board duties. RCW 70A.15.2030. The WCAA authorizes a board to "[a]dopt, amend and

[6] The WCAA was originally codified under chapter 70.94 RCW. Effective June 11, 2020, the Act was re-codified under chapter 70A.15 RCW. LAWS OF 2020, ch. 20. Because the recodification occurred during this litigation, much of the record refers to the former version of the WCAA. However, in their briefing before this court, the parties refer to the current version of the WCAA. The recodification did not alter the language of the WCAA. Because the parties utilize the current version of the WCAA in their statutory references, this opinion will also refer to the current version of the WCAA.

[7] PSCAA was originally called the Puget Sound Air Pollution Control Agency when it first formed in 1969.

repeal its own rules and regulations," and "[i]ssue such orders as may be necessary to effectuate the purposes of this chapter." RCW 70A.15.2040(1), (3). Additionally,

> [a]ny activated authority which has adopted an ordinance, resolution, or valid rules and regulations as provided herein for the control and prevention of air pollution shall appoint a full time control officer, whose sole responsibility shall be to observe and enforce the provisions of this chapter and all orders, ordinances, resolutions, or rules and regulations of such activated authority pertaining to the control and prevention of air pollution.

RCW 70A.15.2300. Consistent with RCW 70A.15.2300, PSCAA has appointed its executive director as the control officer.

One way an air pollution control authority may implement and enforce the WCAA is to require a NOC application for construction of new air contaminant sources. RCW 70A.15.2210(1). RCW 70A.15.2210 provides guidelines for the NOC approval process. The statute states in relevant part:

> Within thirty days of receipt of a notice of construction application, the . . . board may require, as a condition precedent to the establishment of the new source or sources covered thereby, the submission of plans, specifications, and such other information as it deems necessary to determine whether the proposed new source will be in accord with applicable rules and regulations in force under this chapter. If on the basis of plans, specifications, or other information required under this section the . . . board determines that the proposed new source will not be in accord with this chapter or the applicable ordinances, resolutions, rules, and regulations adopted under this chapter, it shall issue an order denying permission to establish the new source. If on the basis of plans, specifications, or other information required under this section, the . . . board determines that the proposed new source will be in accord with this chapter, and the applicable rules and regulations adopted under this chapter, it shall issue an order of approval for the establishment of the new source or sources, which order may provide such conditions as are reasonably necessary to assure the maintenance of compliance with this chapter and the applicable rules and regulations adopted under this chapter. Every order of approval under this chapter must be reviewed prior to issuance by a professional engineer or staff under the supervision of a professional engineer in the employ of the . . . board.

RCW 70A.15.2210(3).

If the owner of an existing source of air contaminants wishes to substantially modify the source, the owner must also file a NOC application with the relevant air pollution control authority. RCW 70A.15.2220. Under RCW 70A.15.2220, "the permitting authority may (1) require that the owner or operator employ reasonably available control technology for the affected emission unit and (2) may prescribe reasonable operation and maintenance conditions for the control equipment."

2. PSCAA Regulations

In order to implement and enforce the WCAA, the PSCAA board has passed various resolutions over several decades promulgating its regulations. PSCAA Regulation I, § 3.01 provides:

> Pursuant to the provisions of the "Washington Clean Air Act" (Chapter 70.94 RCW), the [PSCAA] Board has appointed a Control Officer whose sole responsibility is to observe and enforce the provisions of the Act and all orders, rules, and regulations pursuant thereto, including but not limited to Regulations I, II, and III of the Puget Sound Clean Air Agency. The Control Officer is empowered by the [PSCAA] Board to sign official complaints, issue citations, initiate court suits, or use other legal means to enforce the provisions of the Act.

Puget Sound Clean Air Agency (PSCAA) Regul. I, § 3.01, at 3-1 (June 2022).[8]

Additionally, PSCAA Regulation I, art. 6 provides a comprehensive framework for PSCAA's review of new sources. Art. 6 adopts the new source review program established by the Department of Ecology (Ecology). *See* ch. 173-400 WAC; ch. 173-460 WAC. PSCAA Regulation I, § 6.03 requires a NOC application and order of approval before any new source is established.

[8] [http://perma.cc/HK57-KBNT].

In 1994, the PSCAA board adopted Resolution No. 805, which delegated authority to the control officer to "[i]ssue orders of approval for establishing or constructing new sources pursuant to RCW [70A.15.2210]," and to "[d]elegate any of the [listed] functions as appropriate to [PSCAA] staff," among other duties. AR at 27411, 27413 (PSCAA Resol. No. 805).

In 2009, the PSCAA board passed and adopted Resolution No. 1175, which superseded Resolution No. 805. The language in Resolution No. 805 and Resolution No. 1175 is largely the same, including the control officer's ability to delegate the issuance of "orders of approval for establishing or constructing new sources" to PSCAA staff. AR at 27411 (PSCAA Resol. No. 805); AR at 27416 (PSCAA Resol. No. 1175). However, the PSCAA board clarified that if the control officer delegated any functions to PSCAA staff, including issuing orders of approval on NOC applications, that delegation "shall be done by written authorization from the Executive Director." AR at 27417 (PSCAA Resol. No. 1175).

In appeals before the PCHB, an air pollution control authority may file certified copies of their regulations and amendments with the PCHB, which "shall take judicial note of the copies so filed and the said regulations and amendments shall be received and admitted, by reference, in all hearings before the board, as prima facie evidence that such regulations and amendments on file are in full force and effect." RCW 43.21B.260.

In November 2017, Craig Kenworthy, PSCAA's executive director and control officer,[9] issued a memo delegating "certain authority as provided under the State Clean Air Act, RCW [70A.15], to the appropriate staff" and outlining "the decision making authority . . . delegated, the

[9] Kenworthy is no longer the PSCAA Executive Director. *See Executive Director*, PUGET SOUND CLEAN AIR AGENCY, https://www.pscleanair.gov/248/Executive-Director [http://perma.cc/BN5B-GNLH].

source of the authority, the staff to whom the authority [was] delegated, and any limitations on the delegation." AR at 1218. Included on the list of actions delegated was the delegation of authority to the "Compliance Director, Manager of Compliance" to issue orders of approval. AR at 1222. The memo cited "Regulation I, Section 6.01," "WAC 173-400-110(7)," and "WAC 173-400-460(6)" as the relevant sources of authority for the delegation. AR at 1222.

C. DELEGATION OF AUTHORITY TO ISSUE ORDER OF APPROVAL

The Tribe argues that the NOC Order of Approval is invalid because it was issued by PSCAA staff rather than by its board. The Tribe contends that the WCAA "unambiguously requires PSCAA's Board, and only its Board, to issue approval orders for new sources of pollution." Br. of Appellant (Tribe) at 33. The Tribe points to legislative history in its assertion that the legislature specifically assigned particular duties to the PSCAA board versus other agency staff.

PSCAA argues that RCW 70A.15.2300, PSCAA Regulation I, § 3.01, and PSCAA board resolutions all authorize the control officer to issue NOC orders of approval. In support of PSCAA, amicus curiae Local Air Agencies[10] asserts, "The Tribe would require the part-time boards of local air agencies to evaluate and act on each and every NOC application . . . . The Tribe's scenario is simply not feasible, as the [WCAA] expressly limits the amount of time that board members spend on local air agency business." Br. of Amicus Curiae Local Air Agencies at 1-2. We agree with PSCAA.

[10] Amicus curiae Local Air Agencies include Northwest Clean Air Agency, Olympic Region Clean Air Agency, Southwest Clean Air Agency, Benton Clean Air Agency, Spokane Regional Clean Air Agency, and Yakima Regional Clean Air Agency.

1. Delegation by PSCAA Board to Control Officer

The first question before this court is whether the WCAA authorizes the PSCAA board to delegate its authority to issue orders of approval to the control officer. In matters of statutory interpretation, we first look to the plain language of a statute. *Campbell & Gwinn, LLC*, 146 Wn.2d at 9-10. Additionally, we must read the relevant provisions of the WCAA together and harmonize them. *Segura*, 184 Wn.2d at 593; *Ass'n of Wash. Spirits & Wine Distribs.*, 182 Wn.2d at 350.

RCW 70A.15.2030 provides, "The [PSCAA] board shall exercise all powers of the authority *except as otherwise provided*." (Emphasis added.) RCW 70A.15.2040 enumerates the PSCAA board's specific powers, including the authority to "[a]dopt, amend and repeal its own rules and regulations, implementing [the WCAA] and consistent with it" and to "[i]ssue such orders as may be necessary to effectuate the purposes of [the WCAA]." RCW 70A.15.2040(1), (3). Additionally, RCW 70A.15.2210(3) outlines the procedure for notices of construction of new sources of air contaminants, which includes issuing orders approving and denying construction of new sources of air contaminants. And RCW 70A.15.2300 provides that any activated air pollution control authority "*shall* appoint a full time control officer, whose sole responsibility *shall be to observe and enforce* the provisions of this chapter and *all orders, ordinances, resolutions, or rules and regulations of such activated authority* pertaining to the control and prevention of air pollution." (Emphasis added.)

Reading RCW 70A.15.2030, RCW 70A.15.2040, RCW 70A.15.2210(3), and RCW 70A.15.2300 together, the statutes can be reasonably interpreted as RCW 70A.15.2300 is the "except as otherwise provided" in RCW 70A.15.2030, and the control officer may be delegated the responsibility to "observe and enforce the provisions of this chapter," including the

responsibility of "issu[ing] an order of approval for the establishment of the new source," as well as promulgating rules and regulations to implement the WCAA.

The Tribe argues that RCW 70A.15.2300 is a general law that "cannot be read as an implicit delegation of new source permitting authority." Br. of Appellant (Tribe) at 42. The Tribe points to other provisions of the WCAA that expressly distinguish between the PSCAA board and the control officer. *See* RCW 70A.15.2520.

But RCW 70A.15.2300 expressly authorizes the control officer to observe and enforce "all orders, ordinances, resolutions, or rules and regulations of such activated authority." RCW 70A.15.2300. PSCAA Regulation I, § 3.01 mirrors RCW 70A.15.2300 and also provides, "The Control Officer is empowered by the [PSCAA] Board to sign official complaints, issue citations, initiate court suits, or use other legal means to enforce the provisions of the [WCAA]." Additionally, PSCAA Resolution No. 1175 explicitly delegates authority to the control officer to "[i]ssue orders of approval for establishing or constructing new sources pursuant to [RCW 70A.15.2210]." AR at 27416 (PSCAA Resol. No. 1175). If the Tribe's position were adopted, the second clause of RCW 70A.15.2300 would be rendered meaningless if the control officer could not "enforce" the board's regulations and resolutions, which includes the authority to issue orders of approval. No portion of a statute should be rendered meaningless or superfluous. *Citizens All. for Prop. Rights Legal Fund*, 184 Wn.2d at 440.

Regardless, because the plain language is clear, we need not look outside the language of the statutory provisions to aid in their interpretation. *PeaceHealth St. Joseph Med. Ctr.*, 196 Wn.2d at 8. Accordingly, we hold the WCAA allows the PSCAA board to delegate authority to issue orders of approval to the control officer.

2. Delegation by Control Officer to Staff

The Tribe also argues that the WCAA does not permit delegation of the issuance of orders of approval to PSCAA staff members. Specifically, the Tribe argues that the decision to issue an order of approval is "'discretionary'" or "'quasi-judicial,'" so the authority is nondelegable. Br. of Appellant (Tribe) at 40 (quoting *Jeffers v. City of Seattle*, 23 Wn. App. 301, 309, 597 P.2d 899 (1979)). We disagree.

Here, Cenci, a PSCAA compliance manager, and Munoz, a PSCAA reviewing engineer, issued the NOC Order of Approval. At the summary judgment level, the PCHB concluded that PSCAA staff members have authority to issue orders of approval because staff members "constitute control officers." AR at 12671.

As a threshold matter, the PCHB's conclusion that PSCAA staff members "constitute control officers" is not supported by the plain language of the WCAA. RCW 70A.15.2300 states that an activated air pollution control authority "shall appoint *a* full time control officer," not multiple control *officers*. (Emphasis added.) That the legislature intended a singular control officer per air pollution control authority is further bolstered the definition of "control officer" found in RCW 70A.15.1030, which provides: "'Control officer' means *the* air pollution control *officer* of any authority." RCW 70A.15.1030(9) (emphasis added). Other provisions similarly refer to "control officer" in the singular. *See, e.g.*, RCW 70A.15.2520. PSCAA also references "control officer" in the singular in its own regulations. *See* PSCAA Regul. I, § 3.01. Therefore, it does not follow that *both* Cenci and Munoz are "control officers" as stated in the PCHB's order. Indeed, PSCAA's stated control officer was Executive Director Kenworthy. Therefore, the PCHB erred in its reasoning that Cenci and Munoz have authority to issue orders of approval because they are control officers.

Nevertheless, we may affirm an order granting summary judgment on any legal basis supported by the record. *Martinez-Cuevas*, 196 Wn.2d at 514. Here, Kenworthy, PSCAA's executive director and control officer, issued a memo in 2017 delegating certain authority to "appropriate [PSCAA] staff," including the authority to issue an order of approval to the "Manager of Compliance." AR at 1218, 1222. Kenworthy's memo strongly suggests that Cenci and Munoz, who issued the challenged NOC Order of Approval, are staff. Thus, the relevant question here is whether the control officer's sub-delegation of authority to PSCAA staff to issue orders of approval was permissible.

Under RCW 70A.15.2300, a control officer must observe and enforce all regulations and resolutions of an activated air pollution control authority. PSCAA adopted Resolution No. 1175, which states that the control officer has authority to delegate issuance of orders of approval "as appropriate to Agency staff and such delegation shall be done by written authorization." AR at 27417 (PSCAA Resol. No. 1175).

Here, Kenworthy, PSCAA's control officer, delegated the authority to issue an order of approval to the "Manager of Compliance." AR at 1222. The record shows that Kenworthy's delegation is appropriate.

PSCAA regulates approximately 3,000 sources of air contaminants. In its history, it has received over 12,000 NOC applications. PSCAA engineers must be "highly trained" and "must be familiar with hundreds of air contaminants and types of equipment and processes." AR at 3145. The WCAA recognizes the level of expertise needed and provides that "[e]very order of approval . . . must be reviewed prior to issuance by a professional engineer or staff under the supervision of a professional engineer in the employ of the . . . board." RCW 70A.15.2210(3).

Board members, on the other hand, are not required to have technical expertise. *See* RCW 70A.15.2000; RCW 70A.15.2030. Moreover, PSCAA board members cannot be compensated more than $1,000 annually for their time spent on PSCAA board duties. RCW 70A.15.2030. To say that the legislature expected *only* PSCAA board members, individuals without technical expertise and paid no more than $1,000 per year for their services, to review and research highly technical documents and issue orders of approval for new sources of air contaminants borders on absurd. Courts construe statutes to avoid absurd results. *Jespersen*, 199 Wn. App. at 578. Indeed, it is widely recognized among air pollution control authorities that air agency staff members issue orders of approval.[11] And the legislature has not acted to prohibit such a delegation of authority to an agency staff member. To the extent the Tribe protests the lack of a PSCAA board member's *signature* on an order of approval, regardless of whether the PSCAA board member actually understood what he or she signed, its argument becomes one of form over substance and is unpersuasive.

Because Kenworthy complied with a PSCAA resolution as required by RCW 70A.15.2300, which granted him authorization to delegate issuing orders of approval, and because such delegation was appropriate based on the volume of applications PSCAA receives, the expertise required, and the limited duties that are expected of PSCAA board members, the control officer's delegation of authority to issue an order of approval to staff was not ultra vires.

[11] S*ee also 350 Seattle v. Puget Sound Clean Air Agency*, No. 84139-4-I, slip op. at 17 (Wash. Ct. App. Jan. 30, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/841394.pdf (stating "the Agencies have been delegating authority to professional staff since the 1970s . . . . Delegation of NOC approvals is routine").

CONCLUSION

We hold that PSCAA's NOC Order of Approval was not ultra vires. Accordingly, we affirm the PCHB's dismissal of the Appellants' ultra vires claim on partial summary judgment.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we address whether the SEIS was inadequate because (1) the PCHB found the TLNG facility would not have a "significant" adverse impact on greenhouse gas emissions; (2) the use of a static baseline in the No Action Alternative was unreasonable; and (3) the use of a 0.32 percent methane emissions rate was unreasonable. We also address whether the PCHB erred in affirming the NOC Order of Approval because PSCAA did not conduct a sufficient BACT analysis and the NOC Order of Approval was based on an inaccurate air dispersion model, the updated version of which was never provided to the public for comment.

We hold that because the SEIS's conclusions meet the rule of reason, the PCHB did not err in concluding that the SEIS was adequate. We also hold that because PSCAA did not err in its BACT analysis, did not violate public comment requirements, and the PCHB did not prejudice the Appellants in considering the results of the revised air dispersion model, the PCHB did not err in affirming the NOC Order of Approval. We affirm.

ADDITIONAL FACTS

A. BACKGROUND FACTS

LNG is natural gas in its liquefied state. Natural gas is primarily composed of methane, but also includes "ethane, propane, butane, and other C2 through C4 hydrocarbons, and other

diluent gasses such as oxygen, nitrogen, carbon dioxide and trace amounts of sulfur." AR at 27107. Methane is a potent greenhouse gas (GHG).[12] To maintain a liquid state, natural gas must be cooled to -260 degrees Fahrenheit.

The purpose of the TLNG facility is to provide the re-gasified natural gas to PSE customers during times of high demand, known as "peak shaving," and to provide LNG to marine vessels, specifically Totem Ocean Trailer Express (TOTE) vessels, as a cleaner fuel alternative to marine gas oil (MGO). AR at 19427. Additionally, PSE hopes to provide LNG for transport via trucks or barges to other regional markets. The primary components of the TLNG facility that would accomplish these goals are the facility itself, the TOTE Marine Vessel LNG Fueling System, and the PSE Natural Gas Distribution System. PSE has a contract in place with TOTE to provide LNG, as well as contracts with Potelco and InfraSources Services, LLC, to provide LNG to fuel their construction and maintenance trucks.

PSE proposed that the TLNG facility would produce between 250,000 and 500,000 gallons of LNG daily and store up to 8 million gallons of LNG onsite. The TLNG facility would obtain natural gas from British Columbia via the Williams Northwest pipeline, by way of the "Sumas hub" on the border of Washington and British Columbia. Verbatim Rep. of Proc. (VRP) (Apr. 14, 2021) at 729. Based on its function, the TLNG facility is a stationary source of emissions and air pollutants, including GHG emissions.

[12] GHGs also include carbon dioxide, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. WAC 173-400-030(44).

B. FACTS PERTINENT TO SEPA/SEIS

In September 2014, the City of Tacoma (City) initiated an environmental review of the TLNG facility. The environmental review was in response to PSE's application for a Shoreline Substantial Development Permit with the City.

In November 2015, the City issued a Final Environmental Impact Statement (FEIS). The FEIS evaluated two possible alternatives: the construction of the TLNG facility at the Port of Tacoma and a "No Action Alternative." AR at 21578. The FEIS stated: "Several potential alternatives were considered during the development of the [draft environmental impact statement], but were not analyzed in detail because they were not deemed reasonable or they did not meet the Project objectives." AR at 21578. Under the No Action Alternative, "[c]onstruction of the [TLNG] Facility, including upgrading of the natural gas distribution system, would not occur. Existing levels of maritime petroleum fuels use would continue." AR at 22210.

In May 2017, PSE submitted a NOC permit application to PSCAA for the TLNG facility. PSE contracted with Landau Associates, a permitting and engineering design company, to prepare the application. In January 2018, PSCAA notified PSE that an SEIS was needed. Specifically, the SEIS was "required to identify and analyze [GHG] emissions and impacts for this [NOC] application to supplement what was included in the FEIS," in part because the FEIS had been based on Ecology guidance that had since been withdrawn. AR at 21836. PSCAA's goal in preparing the SEIS was to "identify and quantitatively evaluate all GHG emissions to include those upstream and downstream of the proposed project," to be accomplished "through a life-cycle analysis [(LCA)]." AR at 21836; AR at 22407. Specifically, the SEIS was intended to supplement sections 3.2 (Air Quality) and 3.13 (Cumulative Impacts) of the FEIS.

An LCA "identifies and quantifies all GHG emissions associated with natural gas extraction and transmission, on-site LNG production and storage, and 'downstream' end-uses of the LNG." AR at 22221. These emissions are called the "upstream," "direct," and downstream or "[e]nd use" emissions.[13] AR at 22228. "PSCAA concluded that the analysis in the SEIS should be consistent with the stated proposal in the FEIS, since that [was] the document being supplemented." AR at 22407. PSCAA's processing of the NOC application was on hold during the preparation of the SEIS. PSCAA engaged Ecology and Environment, Inc. (E&E) to conduct research, analysis, and document preparation, and Life Cycle Associates, LLC to conduct GHG LCAs.

The SEIS LCA is attached to the SEIS in Appendix B. The SEIS LCA references "'Scenario A'" and "'Scenario B.'" AR at 22228. "The Scenario A analysis is based on a facility LNG production rate of 250,000 [gallons per day]. The Scenario B analysis is based on a production rate of 500,000 [gallons per day]." AR at 22228. In its NOC permit application, PSE proposed that the TLNG facility would only produce 250,000 gallons per day.

In October 2018, PSCAA issued a draft SEIS (DSEIS). The DSEIS concluded that the proposed facility and use of LNG would result "in an overall decrease in GHG emissions in the Puget Sound region," as compared to the No Action Alternative. AR at 21931. However, this conclusion was "dependent upon the assumption that the sole source of natural gas supply to the [TLNG] facility is from British Columbia." AR at 21932. The DSEIS recommended that any

[13] Upstream emissions "are the emissions associated with production and transport of fuel used at the LNG production plant: natural gas feedstock, natural gas fuel, diesel fuel, and electricity." AR at 22228. Upstream emissions also include "natural gas extraction and transport to the facility." AR at 22228. Direct emissions "include all fuel combustion emissions, as well as fugitive emissions at the plant." AR at 22228. Downstream or "[e]nd use emissions refer to the final combustion of LNG for vessel/truck transportation and peak shaving application." AR at 22228.

permit issuance be conditioned on British Columbia being the only source of gas. The public comment period ran from October 8, 2018 to November 21, 2018. A public hearing was held on October 30, 2018 "to provide an opportunity for agencies, organizations, and individuals to present comments regarding the DSEIS." AR at 21922. At the conclusion of the comment period, PSCAA received nearly 15,000 comments from the public.

PSCAA grouped the comments based on issue topic and whether "the subject matter was substantive in relation to the SEIS."[14] AR at 22405. In response to the comments, PSCAA updated the SEIS with new information, revised analyses, and clarified information. PSCAA also identified "sections of the SEIS where revisions were made or details on where additional information is provided within the SEIS, or an explanation for why a comment did not require a change to the SEIS." AR at 22405. For instance, Appendix C.2 of the SEIS included commentary and responses to topics such as "SEPA Alternatives," "No Action Alternative," and "LCA Methodology." AR at 22412-14.

In March 2019, PSCAA issued a final SEIS. The major conclusions of the final SEIS were summarized as follows:

> - The use of LNG produced by the Proposed Action, instead of petroleum-based fuels for marine vessels, trucks, and peak shaving is predicted to result in an overall decrease in GHG emissions, a net beneficial impact compared to the No Action Alternative. As demonstrated by the range of potential impacts from the Proposed Action and No Action alternatives based on an LNG capacity of 250,000 to 500,000 gallons per day, the greater the replacement of other petroleum-based fuels with LNG, the greater the overall reductions in GHG emissions.
>
> - The conclusion regarding the overall reductions in GHG emissions stated above is dependent upon the assumption that the sole source of natural gas supply to the facility is from British Columbia or Alberta, but entering

[14] PSCAA viewed substantive comments as "those that relate to the accuracy, contents, methodology, or assumptions used in the environmental analysis." AR at 22405.

> Washington through British Columbia. The SEIS analysis supports the recommendation that the facility's air permit, if approved, include the condition regarding the sole source of the natural gas through British Columbia as a requirement so the analysis and this conclusion is consistent with the proponent's project description.
>
> - The SEIS analysis demonstrates that GHG emissions are predicted to result in an overall decrease with the completion of the Proposed Action as conditioned above. This means that the Proposed Action will not cause a significant adverse impact from GHG emissions. In addition, if the different assumptions in the life-cycle analysis were to change the final comparative amounts of emissions (e.g., to go from a small decrease to a small increase in GHG emissions as described in Sections 4.5 and 4.8 of the SEIS), the small increase in GHG emissions, between the Proposed Action in comparison to the No Action Alternative, would still not be considered a significant adverse impact because the increase would be small compared to the total GHG emission identified in the life-cycle analysis. Under this latter scenario, the Proposed Action would still need the condition that the sole source of the natural gas supplied to the facility be through British Columbia.

AR at 22223.

To arrive at these conclusions, the final SEIS made several assumptions, including that the gas supply for the TLNG facility would come exclusively from British Columbia or Alberta; LNG produced at the TLNG facility would displace MGO on a 1:1 basis;[15] LNG would displace diesel fuel for on-road trucking; price induced displacement effects of MGO would be so small that they

[15] For its 1:1 fuel displacement assumption, the SEIS stated:

> [T]he emissions from the Tacoma LNG project emissions are compared with life cycle emissions from the no action alternative which consists of fuel that is displaced by the project (diesel for marine engines, diesel for on-road applications, and natural gas that is made available absent LNG use for peak shaving). The analysis is based on a 1:1 displacement of the end use for the no action alternative.

AR at 22278.

did not need to be calculated;[16] and fuel use will remain static over the next 40 years, or the lifetime of the TLNG facility.

C. FACTS PERTINENT TO NOC PERMIT/ORDER OF APPROVAL

1. Facility Design

PSE engaged Chicago Bridge & Iron (CBI) to design the TLNG facility. As part of the TLNG facility's design, CBI considered the composition of gas, known as the feed gas composition, entering the facility. CBI obtained its gas composition data from publicly available gas quality data measured by the Williams Northwest Pipeline at the Sumas Compressor Station on the Washington-British Columbia border.

The feed gas composition is important because during the liquefaction process, carbon dioxide (CO_2), water, and certain "heavier hydrocarbons[17] are removed from the feed gas so that the LNG can be more concentrated in methane, and so that they do not freeze and interfere with the liquefaction process." AR at 26239. CBI simulated the incoming proportion of feed gas that would be converted to LNG and the proportion of feed gas that would then become waste gas.

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[16] The SEIS did not calculate market induced displacement effects because

> [d]isplacing MGO will have a small effect on MGO consumption. The classical consequential LCA approach is to assume that more MGO is available on the market and that the price of MGO drops in response to increased supply. The drop in price results in an increase in consumption elsewhere due to price induced demand. The effect the Tacoma LNG project on Washington MGO prices will be extremely small since it represents a very small fraction of the total fuel market. Ultimately, this assumption implies that crude oil to make MGO is not produced and that no additional demand for marine diesel fuel or other oil refinery products is induced elsewhere in the world.

AR at 22278, n.3.

[17] The "'heavier'" hydrocarbons include ethane, butane, and propane. AR at 26239.

Because it is not possible to remove the heavier hydrocarbons from the feed gas without also removing methane, the waste gas streams include methane.

The key components of the TLNG facility are an LNG vaporizer, an enclosed ground flare, and an LNG storage tank. CBI contracted with equipment vendors to design and supply specific pieces of equipment. Specifically, CBI engaged a company called LFG Specialties (LFG), a flare manufacturer, to design and manufacture the TLNG facility's enclosed ground flare. CBI provided specifications, data sheets, and destruction efficiency to LFG to incorporate into the flare design.

The purpose of the enclosed ground flare is to combust waste gases generated by the pretreatment, liquefaction, and fuel transmitting processes. The flare operates as both an emissions control technology and a source of pollutants: in controlling volatile organic compounds (VOCs)[18] emissions through combustion, it will produce other "criteria pollutants." VRP (Apr. 22, 2021) at 1882. The criteria pollutants are carbon monoxide (CO), particulate matter (PM), ozone (O_3), sulfur dioxide (SO_2), lead (Pb), and nitrogen dioxide (NO_2). WAC 173-400-030(22). The flare has four burners to address different operating ranges: two large "low-NOx"[19] burners and two small burners.[20] AR at 22527. The purpose of the four different burners is to "handle two types

[18] VOCs are "any carbon compound that participates in atmospheric photochemical reactions." WAC 173-400-030(102).

[19] NO_x stands for "nitrogen oxides." AR at 21290. NO_x is often written as "NOx" in the record, seemingly due to formatting constraints or for convenience purposes. This opinion will refer to NO_x and NOx interchangeably.

[20] More specifically, the four burners are comprised of "[a] large low-NOx burner [that] will be used during periods when the inlet waste gas stream is warm and has a heat input rate greater than 8 MMBtu/hr (Burner 1)"; "[a] small cryogenic burner [that] will be used to flare loading arm/hose purge gas after ship bunkering or truck loading. (Burner 2)"; "[a] small standard burner [that] will be used during warm, low flow inlet gas cases that occur rarely during holding mode or facility turndown (Burner 3)"; and "[a] large low-NOx burner designed for cold inlet gases [that] will be used during plant upset conditions. (Burner 4)." AR at 22527.

of gas . . . warm gas and cryogenic gas." VRP (Apr. 23, 2021) at 2088. "Each stream of gas has two burners, one low fire burner and one higher burner to hold the full capacity of operating requirement for the facility." VRP (Apr. 23, 2021) at 2088. The flare will have a stack height of 105 feet.

Low NO_x burners improve the destruction efficiency of hydrocarbons while also reducing CO and NO_x emissions through a process called "forced draft." VRP (Apr. 23, 2021) at 2081. Forced draft entails "forced air blowers that . . . push air into . . . [the] pre-combustion mixing chamber" where gas and air are mixed before they reach the burners. VRP (Apr. 23, 2021) at 2089. This allows the TLNG facility to control the mixture of gases before they reach the burners and thereby better "control the emissions and control the temperature of the combustion." VRP (Apr. 23, 2021) at 2082.

The TLNG facility's vaporizer is intended for peak shaving purposes. The vaporizer consists "of a warm water bath that heats the LNG to a gaseous state suitable for use in the pipeline." AR at 22231. The vaporizer "shall only operate no more than 240 hours per any 12 consecutive month period." AR at 24170. Because only one pipeline conveys natural gas to and from the facility, when the vaporizer is operating, LNG liquefaction could not occur. The ground flare and the vaporizer will be the primary emitting units at the facility, with the flare producing more emissions because "the vaporizer is limited to operate to up to 10 days per year." VRP (Apr. 23, 2021) at 2216. Fugitive emissions from valves and flanges will also be a source of air emissions.

As part of its design process, CBI developed bracketing cases that reflected a range of operating scenarios for the TLNG facility depending on the type and amount of gas entering the flare. Brackets "directly relate to the emission rates for each pollutant and finding the worst case."

VRP (Apr. 23, 2021) at 2224. CBI modeled "Case 5" to "represent[] a hypothetical maximum waste heat flow that could be directed to the enclosed ground flare" and is predicated on an LNG production rate of 275,000 gallons per day—or 10 percent more than TLNG's intended production rate of 250,000 gallons of LNG per day. AR 26243. CBI then increased the waste heat flow by an additional 10 percent as a design contingency. According to CBI, Case 5 was designed to include a "higher percentage of heavier hydrocarbons," "a higher flow rate," and a "higher heat input than is ever expected to be seen." AR at 26244.

2. NOC Worksheet and Air Dispersion Model

Cenci and Munoz reviewed PSE's NOC permit application. While Cenci made the final approval decision on the NOC Order of Approval, Munoz was the lead technical engineer and the primary point of contact with PSE. While reviewing the application, Munoz completed a NOC engineering worksheet. The worksheet is intended as a "summary spot of . . . the final decisions . . . made and the approval conditions . . . put into the permit." VRP (Apr. 20, 2021) at 1246.

To assess whether the TLNG facility will comply with regulatory emissions limits,[21] part of PSCAA's review was to calculate the facility's potential to emit (PTE). PTE is the "maximum capacity of a source to emit a pollutant under its physical and operational design" in conjunction with any emissions controls or conditions imposed by the permitting agency. WAC 173-400-

[21] Any new source of air contaminants must comply with "new source performance standards, national emission standards for hazardous air pollutants, national emission standards for hazardous air pollutants for source categories, emission standards adopted under chapter 70.94 RCW and, for sources regulated by an authority, the applicable emission standards of that authority." WAC 173-400-113(1). Additionally, an agency must verify that "[a]llowable emissions from the proposed new source . . . will not cause or contribute to a violation of any ambient air quality standard." WAC 173-400-113(3). WAC 173-400-113 Table 4a provides emissions thresholds for whether a source contributes to or violates ambient air quality standards.

030(76)[22]. A PTE calculation includes identifying emissions units, emissions factors, and bracketing cases on a pollutant by pollutant basis.

PSCAA also reviewed whether the TLNG facility employed "best available control technology," or BACT. *See* RCW 70A.15.2210(10); WAC 173-400-113. BACT is defined, in part, as "an emission limitation based on the maximum degree of reduction for each air pollutant . . . that the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable . . . through application of production processes and available methods, systems, and techniques." RCW 70A.15.1030(6); *see also* WAC 173-400-030(13).

BACT "applies to the emission units that are subject to NOC review." VRP (Apr. 22, 2021) at 1846. Not all emissions units are subject to review. PSE's application included emissions units "that were categorically exempt from NOC review by the regulations." VRP (Apr. 22, 2021) at 1846. As part of its BACT review, PSCAA also considered its past BACT determinations, other agency BACT determinations, and information submitted by PSE and its vendors in the NOC application.

Section E of the NOC engineering worksheet details PSCAA's BACT review for different processes at the TLNG facility, including review of VOCs, NO_x, CO, and PM emissions, as well as the enclosed ground flare, and the vaporizer. PSCAA then made BACT recommendations. Here, PSCAA determined that "good combustion practices" constituted BACT for PSE's flare

[22] WAC 174-400-030(76) further states: "Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is enforceable. Secondary emissions do not count in determining the potential to emit of a source."

such that PSE could meet prescribed emissions limits. VRP (Apr. 22, 2021) at 1944. "Good combustion practices" is "a shorthand expression in using design in equipment to maintain an efficient combustion operation in a device that's burning fuel or waste. . . . [I]t's usually an indication that there isn't any additional add-on control equipment available or identified to actually reduce [emissions] even further." VRP (Apr. 22, 2021) at 1943.

One such emission limit that PSCAA recommended in the NOC engineering worksheet was that the enclosed ground flare achieve a minimum 99% destruction efficiency for VOCs and implementation of an "LDAR"[23] program for fugitive leaks. AR at 22541.

PSCAA also reviewed air dispersion modeling, conducted by Landau, within the NOC application as part of its "Ambient Toxics Impact Analysis." AR at 22563. An air dispersion model is a mathematical analysis that takes the emissions from a source and predicts potential concentrations of a pollutant offsite. Air dispersion models are used as a screening tool to determine compliance with acceptable source impact levels (ASILs)[24] and National Ambient Air Quality Standards (NAAQS),[25] among other requirements. *See* WAC 173-460-150.

The air dispersion model evaluated the facility's projected emissions of toxic air pollutants (TAPs) relative to ASILs and the NAAQS criteria pollutants[26] relative to the thresholds listed in

[23] LDAR stands for "leak detection and repair." AR at 21290.

[24] ASIL means "a screening concentration of a toxic air pollutant in the ambient air. The ASIL for each toxic air pollutant is listed in WAC 173-460-150." WAC 173-460-020(2). A toxic air pollutant (TAP) is "any toxic air pollutant listed in WAC 173-460-150." WAC 173-460-020(8).

[25] NAAQS means "an ambient air quality standard set by EPA at 40 C.F.R. Part 50 and includes standards for carbon monoxide (CO), particulate matter, ozone (O_3), sulfur dioxide (SO_2), lead (Pb), and nitrogen dioxide (NO_2)." WAC 173-400-030(52); *see* 40 C.F.R. § 50.

[26] The pollutants identified under NAAQS are also referred to as "criteria pollutants." *See* WAC 173-400-030(22) ("'Criteria pollutant' means a pollutant for which there is established a National

WAC 173-400-113 Table 4a. The modeling results showed that the projected TAPs emitted by the facility would be well below the ASILs. Additionally, all criteria pollutants, with the exception on $PM_{2.5}$, fell below the WAC 173-400-113 thresholds. As for $PM_{2.5}$, the 24-hour modeled concentration was 1.2 $\mu g/m^3$ and was therefore exactly at the WAC 173-400-113 threshold of 1.2 $\mu g/m^3$ for $PM_{2.5}$.[27] *See* WAC 173-400-113(4)(a).

Because the projected level of $PM_{2.5}$ was at the WAC 173-400-113 threshold, PSCAA reviewed background concentrations of $PM_{2.5}$. Background air quality concentrations "are those concentrations that are caused by sources of pollution other than the one that is being considered for permitting." AR at 26135. PSCAA added the background concentrations to the modeled $PM_{2.5}$ level and determined there was no NAAQS violation.

PSCAA obtained its background concentration value for 24-hour $PM_{2.5}$ from its Tacoma Tideflats monitor, which measures 24-hour $PM_{2.5}$ concentrations. For $PM_{2.5}$ levels, the NAAQS is measured as the 98th percentile value, averaged over three years. *NAAQS Table*, U.S. ENV'T PROT. AGENCY (last updated Mar. 15, 2023).[28] The Tideflats monitor showed a three-year average value of 25.4 $\mu g/m^3$ for 24-hour $PM_{2.5}$. 1.2 $\mu g/m^3$ added to 25.4 $\mu g/m^3$ totals 26.6 $\mu g/m^3$, which is under the NAAQS threshold of 35 $\mu g/m^3$. *See NAAQS Table*, *supra.*

3. Public Comment

In July 2019, PSCAA preliminarily determined that the TLNG project met regulatory requirements and should be approved. PSCAA issued a proposed order of approval (Proposed

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Ambient Air Quality Standard at 40 C.F.R. Part 50. The criteria pollutants are carbon monoxide (CO), particulate matter, ozone (O_3) sulfur dioxide (SO_2), lead (Pb), and nitrogen dioxide (NO_2)").

[27] μ/m^3 stands for "micrograms per cubic meter." VRP (Apr. 27, 2021) at 2460.

[28] https://www.epa.gov/criteria-air-pollutants/naaqs-table [https://perma.cc/7M4Y-JYK3].

Order) and began a 45-day comment period. The Proposed Order generated nearly 10,000 comments. The documents made available to the public included PSE's NOC application, the SEIS, the NOC engineering worksheet, and supplemental application information submitted by PSE. One piece of the supplemental application information, submitted in March 2019, included "Best Available Control Technology Review Update" and "Dispersion Modeling." AR at 22491-92.

In the "Dispersion Modeling" section, PSE wrote:

> Predicted ambient concentration from emissions from the proposed project are still below the significant impact level (SIL) and acceptable source impact level (ASIL) for all pollutants. . . .
>
> . . . The modeled ambient concentrations are still less than the cause or contribute threshold levels for all pollutants and averaging periods. Therefore, this project is not expected to cause or contribute to a violation of the NAAQS or WAAQS.[29] As a result, no further modeling analysis is required.

AR at 22493.

PSE included a table with the results of its air dispersion modeling for pollutants identified in WAC 173-400-113.[30] The engineering worksheet incorporated the same results table.

PSCAA received comments expressing concern that the TLNG facility would only meet the WAC 173-400-113 thresholds based on "misleading emissions factors" and "unsubstantiated

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[29] WAAQS stands for "Washington Ambient Air Quality Standards." AR at 22569. Washington maintains WAAQS for five pollutants: carbon dioxide, nitrogen dioxide, particulate matter (PM_{10}), ozone, and sulfur dioxide. WASH. DEP'T OF ECOLOGY, AMBIENT AIR IMPACTS ANALYSES (undated), https://apps.ecology.wa.gov/publications/UIPages/documents/ecy070410e.pdf [https://perma.cc/RPK4-35MS]

[30] WAC 173-400-113(4)(a) identifies CO, SO_2, PM_{10} (particulate matter "with an aerodynamic diameter less than or equal to 10 microns"), $PM_{2.5}$ (particulate matter "with an aerodynamic diameter less than or equal to 2.5 microns"), and NO_2. AR at 21290; *see also* WAC 173-400-030(71), (73).

assumptions regarding the flare's destruction efficiency." AR at 22759 (bold face omitted). PSCAA responded that

> the short term emission impacts were modeled with four different scenarios and using the highest emission rates from each operating scenario to yield the highest estimated concentration. The proposed facility has shown that it will meet all requirements of WAC 173-400-113. Performance testing has also been placed into the permit to verify compliance with BACT limits and the emission factors used to conduct modeling for PM, VOCs and other pollutants. [See draft Permit Conditions 5, 7, 8, 9, 15, 16, 17, 18, 19, and 20.]

AR at 22759 (brackets in original).

Overall, as a result of the comments, PSCAA made "technical edits that clarif[ied] some proposed permit conditions and/or provide[d] new conditions." AR at 22738.

4. NOC Order of Approval

In 2019, PSCAA issued NOC Order of Approval No. 11386. Munoz and Cenci signed the NOC Order of Approval. The NOC Order of Approval included 48 conditions. The TLNG facility is required to continuously comply with all conditions. Conditions relevant to the issues on appeal include:

Condition 1, which provides:

> Approval is hereby granted as provided in Article 6 of Regulation I of the [PSCAA] to the applicant to install or establish the equipment, device or process described hereon . . . in accordance with the plans and specifications on file in the Engineering Division of the [PSCAA].

AR at 24170.

Most conditions in the NOC Order of Approval relate to the TLNG facility's emissions. For instance, as it pertains to TLNG's ground flare, Condition 15 states: "The owner and/or operator shall ensure the enclosed ground flare achieves a minimum of 99% destruction of all

volatile organic compounds." AR at 24172. Additionally, Condition 17 and Condition 18 provide as follows:

> 17. The enclosed ground flare may not discharge nitrogen oxides (NO_x) into the atmosphere in excess of the following limits: 0.066 lbs/MMBtu whenever the small warm burner (Burner 3) is operating, 0.060 lbs/MMBtu whenever the small cold burner (Burner 2) is operating, and 0.023 lbs/MMBtu whenever exclusively one or both of the large burners (Large Warm Burner 1 and Large Cold Burner 4) are operating.
>
> 18. The enclosed ground flare may not discharge carbon monoxide (CO) into the atmosphere in excess of the following limits: 0.196 lbs/MMBtu whenever the small warm burner (Burner 3) is operating, 0.180 lbs/MMBtu whenever the small cold burner (Burner 2) is operating, and 0.075 lbs/MMBtu whenever exclusively one or both of the large burners (Large Warm Burner 1 and Large Cold Burner 4) are operating.

AR at 24173. For fugitive emissions, Condition 32 states: "The owner and/or operator shall develop and maintain a Leak Detection and Repair Plan (LDAR) plan for fugitive emissions" and provides the criteria PSE must follow for its LDAR plan. AR at 24174.

Also, Condition 41 states: "The owner and/or operator shall ensure that the sole source of natural gas supply used in all operations at the [TLNG] facility comes from British Columbia or Alberta, Canada." AR at 24176.

D. PROCEDURAL HISTORY

ACT and the Tribe appealed to the PCHB, challenging the NOC Order of Approval and the SEIS that supported the order. A hearing was set for April 2021. The PCHB planned to conduct a 10-day hearing, set to begin on April 12. The parties agreed to devote the first five days to SEPA issues and the SEIS. The latter five days were devoted to the NOC permit issues related to the NOC Order of Approval.

In February 2021, the PCHB set deadlines for discovery and the submission of expert witness testimony. Specifically, the PCHB prehearing order stated that written discovery needed to be completed by March 5, and the final exhibit list be exchanged between parties on March 22 and submitted to the PCHB by March 29. On March 29, the Tribe filed a motion in limine, in part to "exclude undisclosed and untimely expert opinions" that the Tribe believed was new evidence "masquerading as 'rebuttals.'" AR at 12721-22.

Then, on April 8, PSE informed the parties and the PCHB "that air dispersion modeling results that had been submitted in support of PSE's application for [NOC] No. 11386 had contained meteorological data that contained wind direction that had been reversed 180 degrees." AR at 14732. Separately, on April 9, the PCHB granted in part and denied in part the Tribe's March 29 motion in limine. Specifically, the PCHB granted the Tribe's motion on the issue of "undisclosed and untimely expert opinions." AR at 14563.

On April 12, PSE submitted revised results of the air dispersion modeling based on the corrected wind direction. PSE and PSCAA requested that PCHB allow them to present evidence of the revised air dispersion modeling results and expert witness testimony about those results. The Tribe objected to the admission of the revised air dispersion modeling results as "untimely evidence" and because the public did not have the opportunity to review and comment on the updated information. AR at 15117. The PCHB reversed its prior limitation on new evidence "solely as to the reversed wind direction evidence and related analysis including testimony from fact and expert witnesses" because the "new evidence and analysis as to the reversed wind direction of the data used by PSCAA to issue the Permit is relevant and would be helpful to the [PCHB]." AR at 15144.

According to PSE, it offered a continuance so the Tribe could spend more time reviewing the new information, which the Tribe rejected. However, the parties agreed to proceed with SEPA issues the first week of the PCHB hearing, and then resume the following Tuesday with NOC permit issues, so the parties would have time to fully analyze the revised modeling results.

After the hearing, the PCHB affirmed both the SEIS and NOC Order of Approval, but remanded "to add a condition in the Permit to install a continuous emission monitoring system to monitor SO_2 and VOC emissions from TLNG's enclosed ground flare." AR at 15633. The PCHB's Findings of Fact, Conclusions of Law and Order (Final Order) was split into two orders: one pertaining to SEPA/SEIS issues and one pertaining to NOC permit issues. Together, the two orders "comprise[d] [PCHB]'s sole decision in this case." AR at 15633.

Appellants appeal the PCHB's Final Order.

ANALYSIS

The Appellants argue that PCHB erred in affirming the SEIS under SEPA because (1) the SEIS concluded that TLNG would not cause a "'significant'" adverse impact; (2) the SEIS's No Action Alternative comparison was unreasonable; and (3) the SEIS's assignment of a low methane emissions rate from British Columbia is not supported by evidence. Amend. Br. of Appellant (ACT) at 4. Appellants also argue that the PCHB erred in affirming the NOC Order of Approval because PSCAA did not conduct a sufficient BACT analysis and the NOC Order of Approval was based on an inaccurate air dispersion model, the updated version of which was never provided to the public for comment. We disagree.

A. ADMINISTRATIVE PROCEDURE ACT

The APA, chapter 34.05 RCW, governs judicial review of a PCHB order. RCW 43.21B.180; RCW 34.05.570(3); *Snohomish County* 187 Wn.2d at 357. Our review is confined to

the agency record. RCW 34.05.558. The party asserting invalidity of an agency action has the burden of demonstrating the invalidity. RCW 34.05.570(1)(a).

Courts may grant relief "'where the agency has erroneously interpreted or applied the law, the agency's order is not supported by substantial evidence, or the agency's decision is arbitrary and capricious.'" *Snohomish County*, 187 Wn.2d at 357 (quoting *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000)); *see* RCW 34.05.570(3)(d), (e), (i). "We review questions of law and an agency's application of the law to the facts de novo, but we give the agency's interpretation of the law great weight where the statute is within the agency's special expertise." *Cornelius* 182 Wn.2d at 585. Additionally, substantial evidence exists when there is a "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004) (internal quotation marks omitted) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000)). Finally, an agency order is arbitrary and capricious if it is unreasonable and ignores facts and circumstances in the record. *Id.* at 589. However, "[w]here there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though this court may have reached the opposite conclusion." *Id.*

We will only overturn an agency's factual findings if they are clearly erroneous. *Cornelius*, 182 Wn.2d at 585. "We do not weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to findings of fact." *Port of Seattle*, 151 Wn.2d at 588.

B. STATE ENVIRONMENTAL POLICY ACT

1. Legal Principles

SEPA is codified under chapter 43.21C RCW. The legislature recognized "the profound impact" of human activity on "all components of the natural environment" and "the critical importance of . . . maintaining environmental quality to the overall welfare and development of human beings." RCW 43.21C.020(1). The legislature declared as a policy, in part, to "promote efforts which will prevent or eliminate damage to the environment and biosphere." RCW 43.21C.010. Ecology has promulgated rules to interpret and implement SEPA. *See* RCW 43.21C.110; RCW 43.21C.120; WAC 197-11-010 et seq.

SEPA directs that all branches of government, including state agencies and municipal corporations, to "[u]tilize a systematic, interdisciplinary approach . . . in planning and in decision making which may have an impact on the environment" and to "utilize ecological information in the planning and development of natural resource-oriented projects." RCW 43.21C.030(2)(a), (h). To that end, an agency "maintains a responsibility to consider the impacts of climate change under SEPA to the extent that it must interpret its rules and statutes consistently with SEPA's mandates." *Wash. State Dairy Fed'n,* 18 Wn. App. 2d at 309.

a. EIS threshold determination

Generally, SEPA requires environmental impact statements (EIS) for "major actions having a probable significant, adverse environmental impact." RCW 43.21C.031(1). When an action or project with a potential environmental impact has been proposed, the SEPA lead agency or responsible official [31] conducts a "threshold determination," as provided in WAC 197-11-330,

[31] The "lead agency" is the agency responsible for complying with SEPA's procedural requirements. WAC 197-11-758. The "responsible official" is "that officer or officers, committee,

to assess whether an EIS is needed. WAC 197-11-330; *see also* WAC 197-11-080 (Incomplete or unavailable information); WAC 197-11-315 (Environmental checklist); WAC 197-11-960 (Environmental checklist). Actions may fall into one of two categories: "project action" or "[n]onproject action[]." WAC 197-11-704(2). A project action is a "decision on a specific project" within "a defined geographic area." WAC 197-11-704(2)(a). A nonproject action involves decisions on policies, plans, programs, and legislation, including the adoption of land use plans and zoning ordinances. WAC 197-11-704(2)(b). Here, the record shows that the TLNG facility is a project action because it involves a single facility within a defined geographic area.

If the lead agency determines there will be no probable significant adverse impact, it must prepare and issue a "determination of nonsignificance." WAC 197-11-340(1). In the case of a determination of nonsignificance, no EIS is required.[32] WAC 197-11-330; WAC 197-11-340; WAC 197-11-734. If the lead agency determines there is a probable significant adverse impact, it issues a "determination of significance," an EIS is required, and the lead agency must identify the scope of the needed EIS. WAC 197-11-330; WAC 197-11-360; WAC 197-11-736. Challenges to a threshold determination are reviewed under a "clearly erroneous" standard. *Wild Fish Conservancy v. Dep't of Fish & Wildlife*, 198 Wn.2d 846, 866, 502 P.3d 359 (2022).

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department, or section of the lead agency designated by agency SEPA procedures to undertake its procedural responsibilities as lead agency." WAC 197-11-788. The SEPA "lead agency" and SEPA "responsible official" may be read synonymously unless the context clearly requires otherwise. *See* WAC 197-11-758 (Lead agency); WAC 197-11-788 (Responsible official); WAC 197-11-910 (Designation of responsible official).

[32] An agency may also issue a mitigated determination of nonsignificance "if the proposal will not have probable significant environmental impacts or if those impacts will be mitigated." *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 286, 232 P.3d 1154 (2010); WAC 197-11-350.

Here, there is no dispute over the threshold determination. The City acted as the initial SEPA lead agency, issued a determination of significance, and determined that the TLNG project needed an EIS.

b. EIS Requirements

The purpose behind an EIS is to "provide impartial discussion of significant environmental impacts" and to "inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality. . . . It shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions." WAC 197-11-400(2), (4). An impact is "significant" under SEPA if there is "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794.

SEPA does not require that an EIS be an agency's only decision-making document; rather, "[t]he EIS provides a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts." WAC 197-11-448(1) (Relationship of EIS to other considerations). The scope of an EIS is limited only to the probable significant adverse impacts, reasonable alternatives, including a no-action alternative, and mitigation measures. WAC 197-11-408 (Scoping); WAC 197-11-440 (EIS contents); RCW 43.21C.031(2). Additionally, an EIS must discuss in detail a project's objectives, purpose, and areas of uncertainty. *See* WAC 197-11-402 (General requirements); WAC 197-11-430 (Format); WAC 197-11-440 (EIS contents); WAC 197-11-080 (Incomplete or unavailable information). If there is uncertainty and "[i]f information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known," then "the

agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed." WAC 197-11-080(3)(b).

Reasonable alternatives include only those "that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-440(5)(b). "'Impacts or alternatives which have insufficient causal relationship, likelihood, or reliability to influence decisionmakers are 'remote' or 'speculative' and may be excluded from an EIS.'" *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 641, 860 P.2d 390, 866 P.2d 1256 (1993) (quoting R. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS § 14(a)(i) (4th ed. 1993)); *see also* WAC 197-11-060(4)(a) ("SEPA's procedural provisions require the consideration of 'environmental' impacts . . . with attention to impacts that are likely, not merely speculative."). "The word 'reasonable' is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative." WAC 197-11-440(5)(b)(i). Nevertheless, the analysis of each reasonable alternative must be sufficiently detailed to permit a comparable evaluation with the proposed action. WAC 197-11-440(5)(c)(v)-(vii).

Additionally, the extent to which an EIS discusses alternatives depends on whether the proposed project is public or private. *Org. to Pres. Agric. Lands v. Adams County*, 128 Wn.2d 869, 876, 913 P.2d 793 (1996); *accord Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 39, 873 P.2d 498 (1994). A private project is "any proposal primarily initiated or sponsored by an individual or entity other than an agency." WAC 197-11-780. If the project is private, then "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). A public project, however, must include discussion of offsite alternatives. *Org. to Pres. Agric.*

Lands, 128 Wn.2d at 876; *see* WAC 197-11-440(5)(b). Here, PSE is not an agency and is the entity that submitted a proposal; therefore, the TLNG facility is a private project.

Agencies must invite public comment on draft EISs. WAC 197-11-502; WAC 197-11-455. Comments allow agencies to modify the proposed action or alternatives; develop additional alternatives; supplement, improve, or modify analyses; and make any needed factual corrections. WAC 197-11-560(1). Furthermore, an agency may "[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support the agency's response." WAC 197-11-560(1)(e).

In the event an agency prepares an SEIS, it must be prepared according to the same procedures as an EIS.[33] WAC 197-11-620(1). But the SEIS "should not include analysis of actions, alternatives, or impacts that is in the previously prepared EIS." WAC 197-11-620(1).

If an agency denies a project proposal under SEPA, the agency must find that (1) "[t]he proposal would be likely to result in significant adverse environmental impacts identified in a[n] [EIS] or [SEIS] prepared under this chapter," and (2) "[r]easonable mitigation measures are insufficient to mitigate the identified impact." WAC 197-11-660(1)(f).

c. EIS / SEIS adequacy

The adequacy of an EIS is a question of law we review de novo. *Org. to Pres. Agric. Lands*, 128 Wn.2d at 875. EIS adequacy "involves the legal sufficiency of the data in the EIS." *Id*. Courts must give "substantial weight" to governmental agency determinations of an EIS's adequacy. RCW 43.21C.090; *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 633; *Wild Fish Conservancy*, 198 Wn.2d at 866 ("In any action challenging a governmental

[33] *See also* WAC 197-11-738 ("The term 'EIS' as used in these rules refers to draft, final, or supplemental EISs.").

agency's determination, SEPA requires the court give substantial weight to the agency's decision."). Additionally, rules adopted by Ecology "shall be accorded substantial deference in interpretation" of SEPA. RCW 43.21C.095.

The sufficiency of an EIS's data is assessed under the "rule of reason." *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 633; *accord Citizens All. to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 361, 894 P.2d 1300 (1995) (*CAPOW*). "The EIS must present decision makers with a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision.'" *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 509, 306 P.3d 1031 (2013) (internal quotation marks omitted) (quoting *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 633). In other words, courts "'must determine whether the environmental effects of the proposed action are sufficiently disclosed, discussed, and substantiated by supportive opinion and data.'" *CAPOW*, 126 Wn.2d at 362 (quoting *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 644).

An EIS is meant to aid decisionmakers and "need not address every conceivable effect or alternative to a proposed project." *Cascade Bicycle Club*, 175 Wn. App. at 509. "We do not rule on the wisdom of the proposed development but rather on whether the [EIS] gave the [decisionmakers] sufficient information to make a reasoned decision." *CAPOW*, 126 Wn.2d at 362.

2. Limiting Greenhouse Gas Emissions

Washington has committed to reduce its GHG emissions. RCW 70A.45.005(1).[34] Gases considered to be a GHG include "carbon dioxide, methane, nitrous oxide, hydrofluorocarbons,

[34] Washington's GHG emissions reporting statute, chapter 70A.45 RCW, was formerly codified under chapter 70.235 RCW. LAWS OF 2020, ch. 20, § 2052.

perfluorocarbons, sulfur hexafluoride, and any other gas or gases designated by [Ecology] by rule." RCW 70A.45.010(7). The legislature declared its intent that Washington "[l]imit and reduce emissions of [GHG] consistent with the emission reductions established in RCW 70A.45.020" and "reduce emissions at the lowest cost to Washington's economy, consumers, and businesses." RCW 70A.45.005(3).

Under RCW 70A.45.020, Washington must meet the following GHG emissions reductions:

> By 2030, reduce overall emissions of [GHGs] in the state to fifty million metric tons, or forty-five percent below 1990 levels;
>
> . . . .
>
> . . . By 2040, reduce overall emissions of [GHGs] in the state to twenty-seven million metric tons, or seventy percent below 1990 levels;
>
> . . . .
>
> . . . [and] [b]y 2050, reduce overall emissions of [GHGs] in the state to five million metric tons, or ninety-five percent below 1990 levels.

RCW 70A.45.020(1)(a)(ii), (iii), (iv). However, these goals do not require proportional emissions reductions from various agencies or projects. *Cascade Bicycle Club*, 175 Wn. App. at 503-04. The statute pertains only to statewide emissions reductions. *Id*. at 504.

3. SEIS's Adverse Impact Determination

ACT argues that the PCHB erred when it "affirmed" PSCAA's "insignificance determination in the SEIS." Amend. Br. of Appellant (ACT) at 19. First, ACT alleges that the SEIS "misleads decisionmakers about the climate impacts caused by the project because it erroneously concludes that maintaining fossil gas use and GHG emissions for decades would have an 'insignificant' impact," which conflicts with SEPA's purpose of ensuring accurate disclosure

of environmental consequences of a project. Amend. Br. of Appellant (ACT) at 20. Specifically, ACT challenges the SEIS's determination that the TLNG facility's GHG emissions would not cause a significant adverse impact and asserts that the failure to consider the TLNG facility's contribution to overall emissions are "unhinged from the undisputed scientific evidence." Amend. Br. of Appellant (ACT) at 25. Second, ACT alleges that the "PCHB's decision to ignore the 'significance' caselaw" was legal error. Amend. Br. of Appellant (ACT) at 29. Finally, ACT alleges that the SEIS failed to integrate GHG policies into its ultimate conclusion.[35]

Respondents PSE and PSCAA both argue that ACT identifies the incorrect standard in its challenge to the SEIS. Respondents argue that the SEIS must be reviewed under the rule of reason, and that a determination of significance or insignificance arises only at the "threshold determination" stage. Br. of Resp't (PSE) at 17. Furthermore, Respondents maintain that the SEIS meets the rule of reason.

We hold that the SEIS is adequate under the rule of reason.

a. SEIS significance determination

ACT first argues that the PCHB erred "when it held that the question of significance becomes irrelevant once an agency prepares an EIS." Amend. Br. of Appellant (ACT) at 21. As an initial matter, a determination of significance or nonsignificance arises during the threshold

[35] ACT assigns error to the PCHB's conclusions of law (COL), paragraphs 48, 54-56, and 124-137. COL 48 addresses the PCHB's scope of review and the level of deference given to PSCAA. COL 54-56 address levels of agency deference on issues inside and outside an agency's expertise. COL 124-137 address the SEIS's conclusion of no significant impact and the adequacy of the SEIS. ACT does not elaborate on every single COL to which it assigns error; rather, ACT cites to various, but not all, COLs as it makes arguments more generally. While we need not address claims of error unsupported by argument, this opinion will mirror ACT's brief and address its arguments generally instead of by specific COL. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

determination stage when an agency assesses whether an EIS is required. *See* WAC 197-11-300; WAC 197-11-330; WAC 197-11-340; WAC 197-11-360. This is reinforced by the case law and regulations that ACT cites in support of its argument that the SEIS erroneously concluded that the TLNG facility's GHG emissions will have an "'insignificant'" impact. Amend. Br. of Appellant (ACT) at 20.

ACT appears to conflate legal determinations of significance or nonsignificance, which occur at the threshold determination stage, with the notion of "significance" from a policy perspective. At issue in the cases ACT cites to is a project's *threshold* determination stage and/or whether an EIS is required for a proposed action. *See*, *e.g.*, *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 278, 552 P.2d 674 (1976) (holding that transforming a heavily wooded area into a suburban residential area with "a large number of homes" was a significant impact that required an EIS); *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 54-55, 252 P.3d 382 (2011) (discussing the hearing examiner's conclusion regarding significance at the threshold determination stage); WAC 197-11-330 (Threshold determination process). Furthermore, courts review the threshold determination stage under an entirely different standard than when reviewing the adequacy of an EIS/SEIS. *See Wild Fish Conservancy*, 198 Wn.2d at 866.

Here, the TLNG project is far past the threshold determination stage. The City, as the initial SEPA lead agency, already issued a determination of significance, which is not challenged here. In its SEPA Final Order, the PCHB came to the same conclusion that the TLNG facility is past the threshold determination stage and noted: "[A]ll of the cases by Appellants involve an agency's threshold determination of whether to prepare an EIS, which is not at issue here." AR at 15691. Thus, to the extent that ACT suggests this court should review the SEIS's finding that the

TLNG facility "will not cause a significant adverse impact" as a threshold determination, we decline to do so. AR at 22223.

The crux of ACT's challenge to the SEIS finding appears to be a challenge to the adequacy of the SEIS and its conclusion. Washington case law overwhelmingly establishes that challenges to the adequacy of an *existing* EIS or SEIS are reviewed de novo under the rule of reason, instead of the clearly erroneous standard of a threshold determination.[36] *See, e.g.*, *Org. to Pres. Agric. Lands*, 128 Wn.2d at 875; *CAPOW*, 126 Wn.2d at 361; *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 633; *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976); *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 2 Wn. App. 2d 737, 753, 413 P.3d 590 (2018); *Cascade Bicycle Club*, 175 Wn. App. at 508-09; *Gebbers v. Okanogan County Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 379, 183 P.3d 324, *review denied*, 165 Wn.2d 1004 (2008); *Glasser v. City of Seattle*, 139 Wn. App. 728, 739-40, 162 P.3d 1134 (2007), *review denied*, 163 Wn.2d 1033 (2008); *compare with Wild Fish Conservancy*, 198 Wn.2d at 866; *Norway Hill Pres. & Prot. Ass'n*, 87 Wn.2d at 275; *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 286, 232 P.3d 1154 (2010); *King County v. Friends of Sammamish Valley*, 26 Wn. App. 2d 906, 942-43, 530 P.3d 1023 (2023).

ACT's point that climate change is an urgent crisis is well taken, and we agree that any contribution of GHG to the atmosphere may be highly problematic. Nevertheless, the urgency of the crisis does not change our standard of review.

The PCHB properly identified that ACT's issue was with the SEIS's adequacy and stated that it "reviews the adequacy of the SEIS under the rule of reason." AR at 15691. Accordingly,

[36] We note that in its opening brief, ACT does not once mention the rule of reason.

we hold that the PCHB did not improperly "ignore" relevant case law and did not err in its conclusion that a determination of significance or nonsignificance, as discussed in the cases cited by ACT, apply only to the threshold determination stage—a stage that is not on appeal before this court.

b. SEIS adequacy

The adequacy of an EIS is a question of law. *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 632. As ACT's challenge to the SEIS's finding of "no significant impact" is really a challenge to the adequacy of the SEIS, this court applies de novo review and the rule of reason. *Org. to Pres. Agric. Lands*, 128 Wn.2d at 875. Therefore, our review is to determine whether the SEIS provides a "'reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision.'" *Id.* (internal quotation marks omitted) (quoting *Weyerhaeuser*, 124 Wn.2d at 38).

i. Discussion of cumulative effect

ACT argues that the SEIS is inadequate because it fails to consider the impact of the TLNG facility's GHG emissions on global climate change when it arrives at its "no significant adverse impact" conclusion. PSE responds that "SEPA requires analysis and attribution of direct, indirect and cumulative impacts" from the TLNG facility only, not its impact on a global scale in light of environmental policies. Br. of Resp't (PSE) at 20. Likewise, PSCAA argues that the SEIS's conclusion that a small decrease in GHG emissions is not "significant" is supported by SEPA and that the SEIS meets the rule of reason. Br. of Resp't (PSCAA) at 25.

Here, the purpose and scope of the SEIS is to "evaluate the life-cycle GHG emissions" from the TLNG facility. AR at 22214. Specifically, LCAs were performed for three circumstances to allow comparison: (1) Scenario A if the TLNG facility produces 250,000 gallons of LNG per

day; (2) Scenario B if the TLNG facility produces 500,000 gallons of LNG per day; and (3) the No Action Alternative, "i.e., the current situation," if no TLNG facility was built. AR at 22221.

The SEIS includes discussion of "Affected Environment, Environmental Consequences, and Mitigation" (Chapter 4) of the TLNG project. AR at 22216. Chapter 4 contains subsections on impacts of the proposed action, an impact summary, and cumulative impacts, all of which include discussion, analysis summaries and comparisons, or reference to supporting technical analyses in the appendices or outside documents. Specifically, Appendix B of the SEIS is comprised of the detailed LCA report performed by Life Cycle Associates for PSCAA and which forms the basis of the SEIS's conclusions. Based on the analysis performed in the LCA, the SEIS stated that "direct onsite GHG emissions for the [TLNG facility] are now estimated to be between 54,522 and 107,922 metric tons of CO_2e[37] per year.[38] However, the analysis predicts a net GHG reduction would occur with the Proposed Action, *contingent upon the source of the natural gas*." AR at 22252 (emphasis added). The SEIS recommends that the agency condition its approval of the NOC permit on the source of the natural gas and it states in no uncertain terms, "If this recommendation for a conditional requirement is not adopted, the conclusion that the [TLNG facility] would produce a net reduction of GHG emissions on a life-cycle basis would no longer be valid." AR at 22252. This complies with WAC 197-11-440(6)(a), which states that an "EIS shall describe the existing environment that will be affected by the proposal," and "analyze significant impacts of alternatives including the proposed action."

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[37] CO_2e is "carbon dioxide equivalent." AR at 22219.

[38] The original FEIS estimated that GHG emissions for the TLNG facility at 20,751 metric tons CO_2e per year.

Additionally, the SEIS acknowledges that "[w]hile individual sources of GHG emissions are not large enough to have an appreciable effect on climate change, the global accumulation of GHG emissions is resulting in global and local impacts on the climate." AR at 22244. The SEIS further notes that state and federal programs, along with state reporting requirements, "help the state design policies to reduce GHG emissions and track its progress towards meeting the state's statutory GHG reduction limits." AR at 22244.

The purpose of an SEIS is to "aid[] the decision-making process and [it] need not address every conceivable effect or alternative to a proposed project." *Cascade Bicycle Club*, 175 Wn. App. at 509. So long as there is a reasonably thorough discussion of probable environmental consequences that allows decisionmakers to "make [a] balancing judgment mandated by SEPA," an SEIS is adequate. WAC 197-11-448(1); *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 633. The SEIS does that here.

ACT cites to *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), as an analogous case where the Ninth Circuit "vacated an agency's finding of no significant impact because the agency failed to provide a 'convincing statement of reasons for why a small decrease . . . in the growth of CO_2 emissions would not have a significant impact on the environment.'" Amend. Br. of Appellant (ACT) at 26 (quoting *Ctr. for Biological Diversity*, 538 F.3d at 1220-21). In *Center for Biological Diversity*, petitioners challenged the adequacy of an environmental assessment (EA) under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., for a new rule promulgated by the National Highway Traffic Safety Administration (NHTSA). *Ctr. for Biological Diversity*, 538 F.3d at 1180-81. The rule set corporate average fuel economy (CAFE) standards for on-road vehicles. *Id.* at 1181. Petitioners also claimed that NEPA required NHTSA to prepare an EIS. *Id.*

The Ninth Circuit held that the EA's cumulative impact analysis of GHG emissions was inadequate in part because it did "not discuss the actual environmental effects resulting from those emissions or place those emissions in context of other CAFE rulemakings." *Id.* at 1216.

Center for Biological Diversity is distinguishable in several ways. First, *Center for Biological Diversity* deals with an agency rule, which may be likened to a nonproject action under WAC 197-11-704(2)(b)(i) (nonproject actions involve "[t]he adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment."). The TLNG facility is a project action. WAC 197-11-704(2)(a). An EIS for nonproject actions is subject to different criteria than for project actions. WAC 197-11-442. Second, *Center for Biological Diversity* discusses the adequacy of an *EA*, which is part of the threshold determination process, not an *EIS*. *See generally* 40 C.F.R. § 1501 et seq. An EA is meant to "aid an agency's compliance with [NEPA] and support its determination of whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R § 1508.1(h). Finally, the challenged rule in *Center for Biological Diversity* would "not actually result in a decrease in carbon emissions, but potentially only a decrease in the *rate of growth* of carbon emissions" and the EA did not discuss "*actual* environmental effects." *Ctr. for Biological Diversity*, 538 F.3d at 1216 (first emphasis added). This is not the case with PSCAA's SEIS, which does discuss quantifiable impacts with supporting analyses.

The SEIS's conclusion is one of many considerations that an agency takes into account when making a final decision. WAC 197-11-448(1). Furthermore, the record shows that the SEIS provided a thorough discussion of probable environmental consequences, supported by quantitative analysis, all of which is information that PSCAA could use when considering cumulative impact and global environmental policies. Therefore, we hold that the SEIS is not

inadequate by not discussing the TLNG facility's potential cumulative impact on global climate change.

ii. Integration of climate policies

ACT also argues that the SEIS is inadequate because it "failed to ground its significance finding in Washington's climate laws." Amend. Br. of Appellant (ACT) at 30. Specifically, ACT cites to WAC 197-11-330, WAC 197-11-030, and Washington's GHG policies and asserts that "[t]hese policies provide a meaningful benchmark for evaluating the significance of GHG impacts from a project." Amend. Br. of Appellant (ACT) at 30.

PSCAA argues that the SEIS did identify applicable GHG policies, and even so, "there is no SEPA authority saying . . . that to be adequate the SEIS must list or address every policy" that ACT identified. Br. of Resp't (PSCAA) at 28. PSE similarly argues that the generalized requirement in WAC 197-11-030 to interpret and administer policies in accordance with SEPA does not require an agency to base its significance finding on Washington statewide GHG emissions goals. Furthermore, PSE contends that the "SEIS devoted an entire section to the applicable legal framework, including PSCAA and State GHG policies and regulations." Br. of Resp't (PSE) at 22. We agree with the Respondents.

As a threshold matter, ACT continues to shoehorn the threshold significance determination standard into its argument that the SEIS is inadequate, which is improper. Furthermore, "[w]e do not rule on the wisdom of the proposed development but rather on whether the [SEIS] gave the [decisionmakers] sufficient information to make a reasoned decision." *CAPOW*, 126 Wn.2d at 362. Therefore, the pertinent question before this court is whether the SEIS provided a reasonably thorough discussion of climate policies in light of the proposed project.

Here, the SEIS devotes a section to the regulatory framework that applies to the construction and operation of the TLNG facility. Subsections include: "Agency Jurisdiction," "Federal GHG Policy and Regulations," "State GHG Policies and Regulations," "PSCAA GHG Policies and Regulations," "Air Quality Permitting Requirements" and "Regional and State [GHG] Emissions." AR at 22240-42. Each subsection provides discussion of the relevant statutes and regulations, including Washington's GHG emissions standards found at chapter 70A.45 RCW.[39]

ACT argues that a mere list of the state's climate policies does not mean that the SEIS integrated those policies into its conclusion and that the SEIS's "[f]ailure to consider and apply [the] GHG standards by itself violated SEPA." Amend. Br. of Appellant (ACT) at 31. It is true that agencies must consider whether a proposal conflicts with local, state, or federal environmental laws. WAC 197-11-330(3)(e)(iii).[40] However, neither WAC 197-11-220 nor WAC 197-11-030,

[39] The SEIS cites to the State Agency Climate Leadership Act, formerly codified at chapter 70.235 RCW. The Act was re-codified under chapter 70A.45 RCW. LAWS OF 2020 ch. 20 § 2052. This opinion will refer to the current statute.

[40] WAC 197-11-330(3) provides the specific criteria that an agency must use to make a significance finding in the threshold determination stage:

> In determining an impact's significance (WAC 197-11-794), the responsible official shall take into account the following, that:
>
> (a) The same proposal may have a significant adverse impact in one location but not in another location;
>
> (b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;
>
> (c) Several marginal impacts when considered together may result in a significant adverse impact;

let alone SEPA itself, mandate that the SEIS base its significance determination solely on a single statute. Furthermore, the emissions standards outlined in RCW 70A.45.020 and RCW 70A.45.050 provide GHG emission goals for the entire *state* or *state agencies generally*, not GHG emission goals on a project by project basis. RCW 70A.45.020(1); *see also* RCW 70A.45.050; *Cascade Bicycle Club*, 175 Wn. App. at 504 (holding that the legislature did not intend its GHG emissions reporting statute to apply to constituents on a pro rata basis). Just because the TLNG facility will have some emissions does not mean state policy is automatically violated.

The purpose of the SEIS was to conduct an LCA of GHG emissions from the TLNG facility in different scenarios—arguably this is an integration and application of RCW 70A.45.020 and RCW 70A.45.050 in that the SEIS provided quantified data to PSCAA to consider in conjunction with the emissions standards discussed in Section 4.1.3 of the SEIS (State GHG Policies and Regulations). Moreover, as mentioned above, the SEIS directly discusses climate change, calling climate change to the attention of the decisionmakers.

> (d) For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified.
>
> (e) A proposal may to a significant degree:
>
> (i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness;
>
> (ii) Adversely affect endangered or threatened species or their habitat;
>
> (iii) Conflict with local, state, or federal laws or requirements for the protection of the environment; and
>
> (iv) Establish a precedent for future actions with significant effects, involves unique and unknown risks to the environment, or may affect public health or safety.

The PCHB reached a similar conclusion. In conclusions of law (COL) 135, the PCHB stated,

> The Board is mindful of climate change as well as the policy basis for SEPA. In reviewing the adequacy of an EIS, the Board is limited to reviewing whether the EIS presented decision-makers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision. SEPA only requires the agency consider whether the project is in conflict with applicable laws, regulations, and policies, and PSCAA found it was not. The decision before PSCAA was not to adopt a policy or a regulation addressing GHGs in relation to an entire industry.

AR at 15693-94.

An SEIS is meant to "provide[] a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts." WAC 197-11-448(1). The record shows that the SEIS did so here: it integrated GHG policies and climate laws into its analysis and provided information that allowed PSCAA to make a reasoned decision. Therefore, we hold that the SEIS is not inadequate by not discussing climate policies.

4. Baseline Assumptions and Uncertainties

ACT argues that the SEIS failed to adequately disclose environmental consequences because it "creat[ed] a false comparison between the [TLNG] project and a 'no action' alternative where Washington, other entities, and the marine industry take no action to respond to the impending climate crisis over the course of 40 years." Amend. Br. of Appellant (ACT) at 35. Specifically, ACT contends the SEIS is misleading because (1) "LNG as a transportation fuel has only trivial, if any, GHG benefits compared to conventional fossil fuels"; (2) the static baseline, which assumes that marine vessels and trucks will continue to operate with identical technologies and regulations to those that exist today, is unreasonable in light of climate change policies and

goals; (3) the SEIS did not disclose the uncertainties of the No Action Alternative; and (4) PSCAA failed to adequately respond to comments regarding the assumption that LNG would replace MGO on a 1:1 basis. Amend. Br. of Appellant (ACT) at 37.

a. Dispute with benefits of LNG

ACT argues that evidence does not support that LNG has meaningful benefits, as compared to MGO, from a GHG emissions perspective. ACT appears to dispute the entire premise of the SEIS's analysis of LNG as compared to other alternative fuels. PSE argues that ACT fails to tie its argument that LNG lacks meaningful climate benefits to any actual error related to the Final Order. We decline to address this argument.

SEISs are limited in scope. *See* WAC 197-11-620(1). They are meant to supplement existing EISs, which themselves are limited in the range of alternatives discussed. *See* WAC 197-11-060; WAC 197-11-402; WAC 197-11-440(5)(b); WAC 197-11-620(1); *Gebbers*, 144 Wn. App. at 379. The TLNG project is "to construct and operate an *LNG* liquefaction, storage, and marine bunkering facility." AR at 22209 (emphasis added). The scope of the challenged SEIS was to "address Section 3.2 [Air Quality] and 3.13 [Cumulative Impact] of the FEIS" and quantify "all GHG emissions associated with natural gas extraction and transmission, on-site LNG production and storage, and 'downstream' end-uses of the LNG." AR at 22221. It follows that the SEIS would and should analyze projected LNG emissions as use of LNG is the key component and entire purpose of the TLNG project. To suggest that the SEIS should have examined a different type of fuel would mean changing the project proposal altogether and that the proposed facility could potentially not be an LNG facility, which is not the case. To the extent that ACT suggests we reverse the Final Order and remand for a new SEIS because LNG, as a proposed fuel

source, may or may not have climate change benefits, we decline to do so. We do not opine on the wisdom of a proposed action. *CAPOW*, 126 Wn.2d at 362.

b. Use of "static" baseline assumptions

ACT argues that the SEIS should have employed a dynamic baseline of future fuel use that accounts for GHG emissions reductions policies and future changes in technology and fuel usage. Additionally, ACT argues that the PCHB's conclusion that the SEIS static baseline was reasonable was "clearly erroneous and arbitrary and capricious." Amend. Br. of Appellant (ACT) at 50. PSE argues that PSCAA's use of a static baseline was reasonable and that any dynamic baseline would have been too speculative. Similarly, PSCAA argues that "the SEIS was prepared to analyze the GHG emissions from PSE's specific project in Tacoma; it was not prepared to evaluate or identify impacts from changes (technologically or regulatorily) for the future of all global marine shipping." Resp't (PSCAA) Reply to Amicus Br. at 10.[41] We agree with the Respondents.

ACT points to "low carbon and marine truck technologies [that] are poised for takeoff . . . for much broader adoption" as evidence that LNG will need to increasingly compete with other low-carbon fuel options and therefore PSCAA's use of a static baseline, which assumes current-day fossil fuel usage, was unreasonable. VRP (Apr. 12, 2021) at 77. For marine vessels, those low carbon approaches include "ammonia technologies that will be commercially available within three years," "[b]attery technologies," and "[h]ydrogen technologies . . . poised for uptake by increasingly large vessels." Amend. Br. of Appellant (ACT) at 41-42. However, key here is ACT's and ACT's witnesses' use of the future tense. The record shows that while alternative, low

[41] On the issue of the SEIS's assumptions, PSCAA's arguments are contained in its Amicus Response.

carbon, or zero-carbon technologies will likely exist or do exist and might soon be commercially available, when those events will occur is less clear.

For instance, ACT cites to DNV GL's 2019 Maritime Forecast in support of its contention that there are other fuel options besides LNG available for reducing GHG emissions in shipping. Amend. Br. of Appellant (ACT) at 42 ("'Many alternative fuel technologies are available for reducing the GHG emissions of shipping.'" (quoting AR at 15833 (DNV GL Forecast))). However, that report further states, "For alternative fuels and power sources, the technical applicability and commercial viability will vary greatly for different ship types and trades, where deep-sea vessels have fewer options compared with the short-sea segment," and for deep-sea vessels, "[c]urrently, the *only technically applicable alternatives* . . . are [LNG] and sustainable advanced biofuels." AR at 15833 (emphasis added). Furthermore, "[f]or the majority of global shipping, battery applications do not provide enough energy to cover the entire length of voyages." AR at 15833. According to DNV GL, "[t]echnologies and fuels exist to close the emissions gap," but "are not ready for large scale implementation." AR at 15834. Additionally, the record shows that it is likely that ships will continue using MGO decades into the future.

ACT argues that a dynamic baseline was feasible for the SEIS and would have more accurately identified "plausible future trends." Amend. Br. of Appellant (ACT) at 44. ACT witness Dr. Joseph Pratt, a mechanical engineer and expert in alternative energy technologies, stated "there are lots of ways to come up with reasonable predictions and trends" in support of a dynamic baseline. VRP (Apr. 12, 2021) at 140. Specifically, Dr. Pratt discussed a DNV GL forecasting report with 30 potential future scenarios. Dr. Pratt stated that of those potential future scenarios, "[he]. . . would be really hard-pressed to say you're going to pick the one where nothing has changed." VRP (Apr. 12, 2021) at 143. ACT also points to an email exchange between E&E

and Life Cycle Associates discussing preparation of the LCA methodology, where E&E stated a "'Business as usual' scenario" would "never happen." AR at 18117.

Conversely, PSE witness Patrick Couch, a consultant in clean energy and transportation, testified, "A dynamic baseline entails a number of assumptions that are required to forecast a future technology mix and then forecast the relative competition amongst technologies, as well as the associated pathways that would supply fuel to these technologies. So it becomes a very speculative analysis." VRP (Apr. 14, 2021) at 752. Couch stated that future assumptions typically need to be grounded in "specific enforceable regulations." VRP (Apr. 14, 2021) at 752. Furthermore, he stated, "[T]he use of [a] static baseline is not an affirmative assertion that nothing will change in the future. It's a recognition that how things will change in the future is sufficiently unclear that we can't estimate the magnitude and direction." VRP (Apr. 14, 2021) at 754. Couch also testified that a dynamic baseline runs the risk of misinforming decisionmakers about relative impacts of a project if the "vision of the future is incorrect and that is used as the baseline of the project." VRP (Apr. 14, 2021) at 753. According to Couch, if given 30 potential future scenarios, it is impossible to have confidence in selecting the most reasonable or likely forecast.

Here, Dr. Pratt does not consider himself an expert in marine fuel forecasting. Furthermore, both Dr. Pratt and E&E make the unstated assumption that all future GHG emissions will *improve* from today's status quo. While that may be the case, it is by no means certain. As Couch testified and as Respondents argue, a dynamic baseline would require several assumptions that become pure speculation regarding technology, commercial availability, uptake, and enforceable regulations. Indeed, given the speculative nature of a dynamic baseline, the SEIS's assumptions would only be more open to more attack as unreasonable because there is necessarily

less hard data available to support those assumptions.[42] "The [SEIS] purpose is to facilitate the decision-making process; it need not list every remote, speculative, or possible effect or alternative." *Gebbers*, 144 Wn. App. at 379; WAC 197-11-060(4)(a).

We agree that a static baseline provides a measurable standard against which PSCAA could assess the TLNG facility's relative impact, and, contrary to ACT's contention, "is not an affirmative assertion that nothing will change in the future." VRP (Apr. 14, 2021) at 754. Furthermore, the PCHB found Respondents' witnesses more credible on this issue and was not persuaded that use of a static baseline was unreasonable. "We do not weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to findings of fact." *Port of Seattle*, 151 Wn.2d at 588. Because the static baseline provides information supported by

[42] ACT states, "Courts routinely reject unsupported claims in EISs that fossil fuel projects would have no impact because the fuel would displace other fuels that would otherwise be used." Amend. Br. of Appellant (ACT) at 49. However, this statement misconstrues the SEIS's conclusion.

ACT mischaracterizes the SEIS by implying that the SEIS claims that use of LNG, as replacement for MGO or other fossil fuels, would not generate a GHG emissions impact. This is not true. The SEIS states that "[i]ncreased GHG emissions are the primary cause of climate change" and "climate change impacts would occur under both the No Action Alternative and the Proposed Action." AR at 22244. Also, the cases ACT cites to support its argument are not analogous. In those cases, parties made assumptions clearly unsupported by the record. *See, e.g.*, *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1234-35 (10th Cir. 2017) (stating there needs to be a "level of data necessary to reasonably bolster the . . . choice of alternatives"); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) ("But the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price, which is the stated goal of the project, is illogical at best."). The parameters of a dynamic baseline are inherently speculative. ACT assumes that future GHG emissions will be at the levels articulated in the climate change policies, or at least there will be fewer GHG emissions, because of the climate change policies in place. However, the record suggests that simply having climate change policies—even aggressive policies—do not mean those policies will be achieved. *See* AR at 15833 ("With current policy measures only, the . . . ambitions in the IMO GHG strategy are not going to be met."). Therefore, the record does not suggest PSCAA has made an unreasonable assumption by choosing a static baseline.

quantifiable data, as opposed to the speculative nature of a dynamic baseline, we hold that the SEIS's use of a static baseline meets the rule of reason.

ACT advances a similar argument regarding the SEIS's trucking assumptions. Specifically, ACT asserts (1) it was error for the SEIS to assume the amount of LNG used for on-road trucking under Scenario A was zero; and (2) it was error to assume that "every gallon of LNG will displace fossil diesel in trucks for the lifetime of the project." Amend. Br. of Appellant (ACT) at 52.

Here, the SEIS Table 2-1 reflects "LNG End Use Volume" for the TLNG project. AR at 22233. In Scenario A, or where TLNG produces 250,000 gallons of LNG per day, PSCAA assumed zero gallons per day would be attributed to on-road trucking. The record also shows that the primary use for the LNG produced at the facility is for marine vessels, not for on-road trucking. During the PCHB hearing, PSE witness Blake Littauer, the director of business development for Puget LNG,[43] testified that PSE estimates to sell approximately one million gallons of LNG per year to Potelco from the TLNG facility. In contrast, Littauer estimated that the TLNG facility will provide "about a million gallons of fuel *per week*" to TOTE. VRP (Apr. 13, 2021) at 423 (emphasis added). And Littauer stated that LNG sales for on-road trucking "is a very small percentage of our overall sales mix" and that PSE was "not actively soliciting outbound sales for over-the-road trucking." VRP (Apr. 13, 2021) at 423.

Accepting Littauer's testimony as true, and viewing the estimates on an annual basis, the record shows one million gallons of LNG for on-road trucking per year versus 52 million gallons of LNG for TOTE per year. One million gallons of LNG of the hypothetical total of 53 million

[43] Puget LNG is a commercial sales corporation that is a sister company to PSE. Puget LNG sells fuel to commercial businesses.

gallons of LNG produced accounts for less than 2% of the LNG produced by the TLNG facility per year. Table 2-1 in the SEIS reflects gallons per *day*. Thus, the projected LNG produced for on-road trucking is such a nominal amount relative to the other intended end uses of LNG that it was not unreasonable for the SEIS to assume zero gallons per day for on-road trucking under Scenario A. Because the relative amount of LNG projected for on-road trucking is so small compared to the LNG projected for marine vessels *per year*, this court should hold it was not error for the SEIS to assume the amount of LNG used for on-road trucking *per day* under Scenario A was zero.

ACT argues that the SEIS assumption that LNG will displace fossil fuels in trucks on a 1:1 basis[44] is "absurd" in light of "alternatives to fossil fuels currently in use, and state and federal initiatives." Amend. Br. of Appellant (ACT) at 51. In discussing the 1:1 displacement assumption for trucking, ACT advances much of the same arguments as it did above regarding the use of a static baseline versus a dynamic baseline. As stated above, a static baseline is not an assumption that nothing will change over the next 40 years. Rather, it provides a measurable threshold against which PSCAA can assess the TLNG facility's impact. For PSCAA to assess the facility's impact using a dynamic baseline becomes a matter of guesswork—it would not have sufficient information "substantiated by supportive opinion and data" to make a reasoned decision. *See Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 644.

[44] ACT's brief states, "[A]s it did with marine fuel, the SEIS assumes that every gallon of LNG will displace fossil diesel in trucks for the lifetime of the project." Amend. Br. of Appellant (ACT) at 51. However, ACT does not appear to have actually challenged the 1:1 displacement assumption for marine vessels in its brief, contrary to the implication that it did so in the sentence above. ACT seems to assume that it made an argument regarding the 1:1 displacement issue with regard to marine vessels and proceeds through its brief with regard to trucks as if it had made the argument.

c. Disclosure of uncertainties of No Action Alternative

ACT argues that the "speculative emissions of the 'no action' alternative was legally flawed because the SEIS did not disclose deep uncertainties attendant to that latter estimate." Amend. Br. of Appellant (ACT) at 53. PSE argues that the SEIS "thoroughly disclos[es] relevant uncertainty in the underlying assumptions that formed the basis of its analysis of TLNG's GHG emissions." Resp't (PSE) Reply to Amicus Br. at 12.[45]

Here, ACT fails to identify any specific uncertainty of the No Action Alternative that was not disclosed, other than the generalized statement, "the SEIS does not disclose any of the uncertainties about its predictions forty years into the future." Amend. Br. of Appellant (ACT) at 54. ACT points to "a comparable" SEIS prepared by Ecology for a proposed manufacturing and marine export facility in Kalama (Kalama SEIS) and its "[c]andor" about uncertainties as evidence that the PSCAA's SEIS was inadequate in its disclosures. Amend. Br. of Appellant (ACT) at 54. However, ACT's examples of Ecology's "candor" are taken out of context. For instance, the Kalama SEIS's statement that "significant uncertainty exists regarding whether these estimates are truly accurate," cited by ACT in support of its assertion that Ecology disclosed uncertainties of a *no action alternative*, actually reads in full: "While the low and medium emission scenarios described above represent a plausible, literature-supported range in upstream methane emission rate estimates, significant uncertainty exists regarding whether these estimates are truly accurate." AR at 17635. The sentence was in reference to emissions scenarios of the proposed Kalama project, *not* in reference to a no action alternative.

[45] On the issue of disclosure of uncertainty, PSE incorporates into its answer amicus curiae Attorney General's (AGO) brief.

ACT's argument that the SEIS fails to disclose the uncertainties of the No Action Alternative appears to be a continuation of its argument against the use of a static baseline. To that end, the argument has already been addressed above.

Even if we address ACT's No Action Alternative disclosure argument separately, its argument is unavailing. Here, the SEIS "Summary of Impacts" section includes several caveats, such as: "In the life-cycle analysis, various assumption needed to be made. . . . Those assumptions are documented in Appendix B"; if certain higher emissions rates based on the source of natural gas were realized, there "would be an increase in GHG emissions through the life-cycle analysis rather than the decreases shown"; and that an expanded sensitivity analysis "included variable assumptions that would both increase and/or decrease the GHG emissions included in the life-cycle analysis." AR at 22249-50.

Furthermore, the LCA in Appendix B details its methods and data sources, including key parameters affecting GHG emissions and assumptions pertaining to natural gas upstream, the facility operation, and LNG consumption, among others. Additionally, the LCA sensitivity analysis states, "Many factors affect the net life cycle GHG emissions as shown in Figure 5.5 [Sensitivity Analysis]." AR at 22340. It further lists the facts that affect the range in emissions. Because ACT does not identify uncertainties about a no action scenario that the SEIS failed to disclose, other than a sweeping generalization that uncertainties exist with 40-year predictions, and because use of a static baseline is not unreasonable, we hold the SEIS is not inadequate for failure to disclose uncertainties of a No Action Alternative.

d. Responses to comments regarding 1:1 fuel displacement assumption

ACT argues that the PSCAA failed to adequately respond to public comments, specifically on the SEIS's fuel displacement assumption, in violation of WAC 197-11-560 and WAC 173-400-

171(7)(c). PSE argues that PSCAA's responses to public comments comply with SEPA. Additionally, PSCAA argues that its 1:1 fuel displacement was appropriate and that it did respond to public comments on the issue. We agree with the Respondents.

WAC 197-11-560 provides that a lead agency shall respond to comments on an SEIS. WAC 197-11-560(1). An agency may reply to public comments in several ways, including to modify alternatives, modify analyses or make corrections, or explain why comments do not merit further response. WAC 197-11-560(1)(a), (c)-(e). The "lead agency may respond to each comment individually, respond to a group of comments, cross-reference comments and corresponding changes in the [SEIS], or use other reasonable means to indicate an appropriate response to comments." WAC 197-11-560(3). Comments must be considered before a final decision on a project proposal is made. WAC 173-400-171(7)(c).

ACT claims that "PSCAA neither engaged . . . comments [about the fuel displacement assumption] nor offered any justification for its static future approach." Amend. Br. of Appellant (ACT) at 56. Here, PSCAA received nearly 15,000 comments on the SEIS. In the SEIS, PSCAA explained its comment review process:

> The PSCAA project team carefully reviewed the comments received and sorted the comments by submittal method, whether the comment was substantive, and the comment's relevancy to the scope of the SEIS. Substantive comments were then grouped by shared common topic areas and responses were prepared. Some topic areas, grouped by issue, overlapped with others; for this reason, commenters are encouraged to look for responses beyond their topic area for information relevant to their concerns.

AR at 22405. PSCAA delineated 24 discrete categories of comments to which it devoted considerable discussion. The categories included comments about the "No Action Alternative" and several different "LCA Inputs and Assumptions," such as "LCA Inputs and Assumptions –

Marine Diesel Oil" and "LCA Inputs and Assumptions – End Use." AR at 22413, 22417, 22426-27.

The record shows that PSCAA responded to comments regarding the fuel displacement assumption and the static baseline within several of its comment categories.[46] For instance, under the "No Action Alternative" comment discussion, PSCAA stated:

> Comments indicated that the No Action Alternative assumes that the mix of marine fuels used in vessels would remain the same for the next 40 years, and that GHG emissions factors should be extrapolated to accommodate for future trends. PSCAA does not agree with this characterization of the No Action Alternative included in the analysis. *PSCAA's choice in the methodology to complete the GHG life-cycle analysis used the identified baseline No Action Alternative to allow comparison with the project as proposed*. PSCAA used reasonable judgement [sic] in deciding which variables to include in the analysis.

AR at 22413-14 (emphasis added). Under "LCA Inputs and Assumptions—Marine Diesel Oil," PSCAA stated:

> Comments stated that the DSEIS assumed all vessel and truck traffic calling at the project site would be LNG powered, which is incorrect and this was not the assumption made in the analysis. Rather, the report assumed that the LNG produced would be largely used in marine vessels and would displace MGO on a 1:1 Btu[47] replacement basis. To the extent that some vessels will continue to operate on MGO, even if the Tacoma LNG facility is built, does not alter the effect of LNG used in marine vessels.

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[46] We note that ACT's characterization of events appears to undercut its own argument. For instance, ACT argues that "PSCAA put no effort into responding to comments" on the displacement assumption and static baseline despite hiring "contractors to address other disputed issues." Amend. Br. of Appellant (ACT) at 56. ACT's specific citation to the record, along with the record itself, reveals the opposite. ACT cites to the Administrative Record at pages 18104-05, which was a *draft* document of comment categories that PSCAA and its contractors initially identified as needing a response without having fully reviewed the public comments. While those initial categories did not include the displacement assumption, Life Cycle Associates Managing Director Stefan Unnasch testified: "[W]hen we actually prepared the final LCA report, we looked at specific comments that we were actually asked to address, and then we made those changes in the LCA report that we were asked to address." VRP (Apr. 14, 2021) at 704.

[47] Btu stands for "British thermal unit." AR at 22268.

AR at 22427. Additionally, under "LCA Inputs and Assumptions—End Use," PSCAA stated:

> To complete the analysis for the SEIS, it was not necessary to know all of the customers that may buy the product. The assumptions about future marine fuel use have been the stated purpose for most of the produced LNG since the publication of the DEIS (November 9, 2015). Considering business options that speculate beyond the previously reviewed business use is not necessary for this analysis to be complete. The FEIS stated the number of truck trips to/from the site at two per day to transport LNG product and that the scenarios used for the DSEIS reflect that volume. (See FEIS Sections 3.10.4.2 Operations Impacts, and Response 21-5, Transportation / Traffic Volumes.)
>
> . . . .
>
> Commenter(s) suggested that TOTE and other maritime users of the project's LNG might need to use diesel back-up power on occasion, and these back-up diesel emissions should be included in the analysis. PSCAA based the GHG life-cycle analysis on facility production and LNG end-use operational parameters provided by PSE and TOTE as compared to the use of marine fuel. In order to complete the life-cycle analysis for GHG emissions, it was necessary to assume that any LNG produced would be sold and that would include TOTE as an early customer for this fuel stream. It was also necessary to assume that any LNG sold would be used to displace a liquid fuel. No changes to the end-use scenarios for LNG were made for the final SEIS.

AR at 22427-28.

Here, PSCAA explained the assumptions it made and clarified any misunderstandings on the part of public comments. And the record is clear that in certain circumstances, PSCAA used public comments to modify or supplement its analysis. Furthermore, PSCAA was clear that in order to conduct an LCA that provided sufficient GHG emissions information for both the project and No Action Alternative, it had to assume that any LNG produced was sold and used—without such assumptions, there is no true comparison. Therefore, we hold that PSCAA complied with SEPA in its responses to public comments.

5. British Columbia Gas Assumptions

ACT disputes the SEIS's use of a 0.32 percent upstream methane loss rate "despite abundant evidence that the real loss rate was an order of magnitude higher." Amend. Br. of Appellant (ACT) at 59. ACT argues this loss rate is "an unusually low estimate of upstream methane loss rate" based on an industry study that "didn't account for more recent and widely accepted science." Amend. Br. of Appellant (ACT) at 59. Accordingly, ACT contends that the PCHB's conclusion that the SEIS provided decisionmakers "with a reasonable range of methane emission data" was against the evidence and therefore arbitrary. AR at 15678.

PSE argues that "[t]he SEIS considered a range of methane leakage rates in its analysis from 12 studies cited in the SEIS, ranging from 0.32% to 2.3%" and its ultimate reliance on the 0.32% rate meets the rule of reason. Br. of Resp't (PSE) at 37. PSCAA also argues that the SEIS properly considered a range of methane loss rates and that the LCA "utilized established, well-known models and considered both bottom-up[48] and top-down[49] methane leak studies within the considered range of rates." Resp't (PSCAA) Reply to Amicus Br. at 19. We agree with the Respondents.

The question before this court is whether the SEIS provided decisionmakers with a reasonable range of methane emissions data, along with disclosures of any uncertainties, that allowed them to make a reasoned decision. *CAPOW*, 126 Wn.2d at 362. Here, the SEIS analysis

[48] The "bottom-up" method of measuring fugitive methane emissions involves "measuring or estimating fugitive methane emissions rates for various components of equipment and processes (compressors, valves, tanks, etc.)." AR at 27108.

[49] The "top-down" method of measuring fugitive methane emissions "attempts to measure methane concentrations in the atmosphere in a region of interest and then attribute a portion of those emissions to a facility or activity (gas processing facility or well pad, for example)." AR at 27108.

was based on the assumption that "[t]he gas supply for the [TLNG] facility would come exclusively from British Columbia or Alberta, but entering Washington through British Columbia." AR at 22228. The NOC Order of Approval Condition 41 states: "The owner and/or operator [of the TLNG facility] shall ensure that the sole source of natural gas supply used in all operations at the Tacoma LNG facility comes from British Columbia or Alberta, Canada." AR at 24176.

The SEIS's LCA includes a "Summary of Recent Upstream Natural Gas Leakage Estimates," which lists leakage rates as reported in 12 different recent studies, with the oldest from 2013. AR at 22373. The listed methane emissions rates range from 0.32% to 2.3%. The LCA acknowledges, "Fugitive methane emissions from the natural gas delivery chain are material to the project's Life Cycle GHG emissions." AR at 22373. However, the LCA also explains: "Estimate of upstream GHG emissions from natural gas in British Columbia and Canada are lower than United States averages. The GHGenius[50] model estimates [British Columbia] GHG emissions of 0.32% of production vs estimates of [United States] emissions from 1.0% to 1.5%, or higher." AR at 22374.

Because the TLNG facility's gas will enter the United States via the Sumas hub at the border of British Columbia and Washington, Couch testified, "gas production data provided by the [British Columbia] government report that 95 percent of marketable natural gas in [British Columbia] is produced in [British Columbia], with only small amounts attributable to imports from Alberta or other regions. Consequently, gas exported to the [United States] through the [British Columbia] Sumas hub, and ultimately to the [TLNG] facility[,] would consist predominantly of

[50] GHGenius is an "LCA model based on UC Davis Life Cycle Emissions Model (LEM) that was developed for Natural Resources Canada." AR at 22268.

gas produced" in British Columbia. AR at 27120. Any gas from Alberta would still enter Washington through British Columbia and the Sumas hub, and therefore be subject to British Columbia regulations.

Of the 12 studies in the summary, three were regionally specific to British Columbia while others aggregated emissions rates across the United States or North America. The 0.32 percent emissions rate was taken from the GHGenius 4.03 spreadsheet. The study within the inventory that identified a 0.32 percent emissions rate utilized a bottom-up method of measuring fugitive emissions. The 0.32 percent rate does not include "estimates of unintended or accidental releases."[51] VRP (Apr. 15, 2021) at 775.

ACT argues that studies that utilize the bottom-up method tend to understate emissions and points to studies that show much higher rates of methane loss. However, the record also shows that a majority of regulatory entities that maintain national GHG inventories, such as the Environmental Protection Agency (EPA) and Environment and Climate Change Canada (ECCC),[52] utilize bottom-up analyses in their inventories. The "inventories are calculated on *measured* emissions rates of components and processes." AR at 27109 (emphasis added). While top-down analyses reflect "actual methane concentrations in the atmosphere" and can "captur[e] the aggregate effects of emissions[,] . . . it can be difficult to accurately apportion measured atmospheric emissions with specific processes and facilities on the ground." AR at 27109.

[51] Unintended or accidental releases are "emissions that do not occur by design—faulty equipment, operator error, or component wear and tear." AR at 26918. Conversely, "[i]ntentional emissions, or vents, are emissions by design." AR at 26918.

[52] "Official inventory estimates of greenhouse gas (GHG) emissions in Canada are provided in Environment and Climate Change Canada's (ECCC) National Inventory Report (NIR)." AR at 17520.

Witnesses from both sides testified that the two methods are complementary. Nevertheless, the record shows that it is possible to generate estimates for unreported methane sources "for each region by combining ECCC baseline inventory data with up to date, region-specific volume and activity data." AR at 17524. Furthermore, the record shows that PSCAA was required to use the GHGenius 4.03 model, which provided the 0.32 percent rate, based on the "British Columbia Renewable & Low Carbon Fuel Requirements (BC-LCFS) Regulation." AR at 27112. Because the record shows that national entities utilize bottom-up analyses in their GHG inventories, a top-down analysis is not necessarily more accurate than a bottom-up analysis, and that PSCAA complied with BC-LCFS, we hold that it was not unreasonable for the SEIS to rely on a GHG emissions inventory that utilized a bottom-up method.

ACT points to several studies as evidence that the SEIS used an improbably low fugitive methane emissions rate. However, those studies were either not specific to British Columbia or post-dated the final SEIS by two years, meaning it was impossible for PSCAA to incorporate those studies into its analysis.

ACT also relies on the Kalama SEIS where Ecology had rejected an EIS as inadequate based on the upstream emissions scenarios it provided. However, the Kalama SEIS is distinguishable because the Kalama project was considerably larger than the TLNG facility and the project had identified U.S. gas sources as potential natural gas suppliers for the facility.

Here, there is evidence in the record that often "fugitive emissions rates are reported for the oil and gas sector as an *aggregate*. There's no attribution to oil-related vs gas-related emissions." AR at 18158 (emphasis added). Another report stated, "methane emissions vary significantly over space and time. . . . Measurements from one region, in general, cannot be extrapolated to other regions." AR at 26917-18 (boldface omitted). Furthermore, Couch explained

extensively why using region-specific studies was reasonable—indeed, the studies reflected in the SEIS demonstrated that independent studies and the ECCC's National Inventory Report came up with consistent measurements of methane emissions in British Columbia, implying a higher degree of accuracy. Even so, the SEIS LCA's sensitivity analysis included various methane emissions ranges, which demonstrated that if the true methane emissions rates are higher, the TLNG facility would result in higher total GHG emissions. Because the record shows that the SEIS utilized a region-specific methane emissions rate, while also reflecting the possibilities of a higher methane emissions rate in its sensitivity analysis, we hold that the SEIS's methane leakage assumption meets the rule of reason.

ACT contends that the SEIS violated SEPA because the information regarding higher leakage rates was accounted for only in the sensitivity analysis, as opposed to the main SEIS text. ACT cites to several federal cases under NEPA that held that it was error for an EIS to relegate opposing opinions to appendices. *See, e.g.*, *Ctr. for Biological Diversity*, 349 F.3d at 1169 (stating "the regulations clearly state that the agency must disclose responsible opposing scientific opinion and indicate its response in the text of the final statement itself"); *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 997 (D.D.C. 1983) (stating "[a]ny substantial information pertinent to the cost-benefit analysis or the analysis of alternatives found in the administrative record, but not in the environmental impact statement, would render the impact statement inadequate under NEPA" when key documents were placed in the administrative record *after* the public comment period closed); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Servs.*, 482 F. Supp. 2d 1248, 1253 (W.D. Wash. 2007) ("An EIS violates NEPA where it fails to 'disclose and discuss the responsible opposing views.'" (quoting *Ctr. for Biological Diversity*, 349 F.3d at 1169)).

However, SEPA has slightly different requirements than NEPA—SEPA allows detailed descriptions and technical analyses to be included in appendices or other supporting documents. WAC 197-11-425(3); WAC 197-11-440(8); WAC 197-11-560. Regardless, the SEIS summarized its sensitivity analysis and made disclosures about the methane emissions rate it assumed in the body of the SEIS and by no account appears to have tried to hide opposing views. Based on these facts, the record shows that PSCAA complied with SEPA requirements in its discussion of the sensitivity analysis in the body of the SEIS and in its placement of the entire sensitivity analysis in the appendix.

ACT also claims that "even if the SEIS could lawfully place" the sensitivity analysis in the appendix, the SEIS "got the math completely wrong" and "the incorrect number was never explained." Amend. Br. of Appellant (ACT) at 68-69. ACT points to a calculation conducted by one of its expert witnesses that did not align with numbers provided in the sensitivity analysis. However, PSCAA witnesses explained the sensitivity analysis's calculations and how they arrived at the final estimates. Therefore, ACT's argument that the Respondents "never explained" their calculations is unavailing.

ACT also asserts that the PCHB's determination that the SEIS's methane leakage rate was reasonable was a "conclusory determination." Amend. Br. of Appellant (ACT) at 64. But the PCHB explained why it concluded PSCAA's methane emissions rate was reasonable. For instance, the PCHB explained that the sensitivity analysis incorporated a study that showed higher emissions rates and "the SEIS included an explanation about why PSCAA relied on the regional data and bottom-up methodology for methane leakage emissions." AR at 15678. Furthermore, the PCHB noted, "the ranges [ACT is] suggesting should have been used are indeed contained in the sensitivity analysis." AR at 15679.

Additionally, the PCHB concluded "that [PSE witness] testimony regarding conservative estimates in the LCA for methane leakage and slip is credible and persuasive. They provided a reasonable basis for their conclusions." AR at 15679. Thus, on the issue of methane leakage rate, the PCHB found PSE's witnesses more credible. This court does not weigh the credibility of witnesses "or substitute our judgment for the PCHB's with regard to findings of fact." *Port of Seattle*, 151 Wn.2d at 588. Therefore, we hold that the PCHB did not err.

C. NOC PERMIT ISSUES RELATED TO ORDER OF APPROVAL

1. Best Available Control Technologies (BACT)

The Tribe argues that the PCHB erred in affirming PSCAA's analysis and determination that the TLNG facility will achieve BACT. Specifically, the Tribe asserts that PSCAA should have considered (1) waste gas recovery, (2) thermal oxidizers, and (3) leakless and sealless components for the TLNG facility. The Tribe also argues that the PCHB erroneously interpreted and applied the law when it allegedly "excuse[d]" PSCAA from BACT requirements, specifically in regard to the flare's 99% destruction efficiency for VOCs and when the PCHB determined that PSCAA is not required "'to redesign the [TLNG facility].'" Br. of Appellant (Tribe) at 57, 60. The Tribe asks us to reverse the PCHB's Final Order, "vacate the permit, and remand it to PSCAA with instructions to undertake a BACT analysis that complies with the Clean Air Act." Br. of Appellant (Tribe) at 68.

PSE argues that PSCAA made appropriate BACT determinations and that the PCHB properly deferred to PSCAA's expertise. PSCAA also argues that it appropriately determined BACT for the TLNG facility's equipment and that the PCHB did not err in affirming the NOC Order of Approval. We agree with the Respondents.

a. Legal principles

The WCAA and its accompanying regulations provide the criteria for reviewing proposed new sources of air contaminants. *See* RCW 70A.15.2210. The purpose of review is to ensure that the source of air contaminants complies with air quality and emissions standards, along with confirming that appropriate technologies are utilized. *See* WAC 173-400-040; WAC 173-400-113; WAC 173-460-060. One criteria is that a "determination that the new source will achieve best available control technology" be made. RCW 70A.15.2210(10).

Best available control technology, or BACT, is defined as

> an emission limitation based on the maximum degree of reduction for each air pollutant . . . emitted from or that results from any new . . . stationary source, that the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such a source . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such a pollutant.

RCW 70A.15.1030(6).[53] An "emission limitation" is defined as

> a requirement established under the federal clean air act or this chapter that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work

[53] RCW 70A.15.1030(6) further states:

> In no event shall application of "best available control technology" result in emissions of any pollutants that will exceed the emissions allowed by any applicable standard under 40 C.F.R. Part 60 and Part 61, as they exist on July 25, 1993, or their later enactments as adopted by reference by the director by rule. Emissions from any source utilizing clean fuels, or any other means, to comply with this subsection shall not be allowed to increase above levels that would have been required under the definition of BACT as it existed prior to enactment of the federal clean air act amendments of 1990.

The definition of BACT found in WAC 173-400-030 is nearly identical to the language of RCW 70A.15.1030(6). *See* WAC 173-400-030(13).

> practice, or operational standard adopted under the federal clean air act or this chapter.

RCW 70A.15.1030(12); *see* WAC 173-400-030(29). Generally, available and applicable technologies are considered technically feasible. *Nat'l Parks Conserv. Ass'n v. Dep't of Ecology*, No. 17-055c, 2018 WL 3609853, at *5 (Wash. Pollution Control Hr'gs Bd. July 17, 2018). "A technology is considered available if it can be obtained through commercial channels and it is applicable if it can be reasonably installed and operated on the source under consideration." *Id.*

The same BACT requirements also apply to sources that will emit TAPs. WAC 173-460-010; WAC 173-460-020(3); *see* WAC 173-460-040. As applied to TAPs, BACT practices are referred to as tBACT. WAC 173-460-020(3). Both BACT and tBACT rely on the same regulatory definition. WAC 173-400-030(13). An agency may not "require the use of emission control equipment or other equipment, machinery, or devices of any particular type, from any particular supplier, or produced by any particular manufacturer." RCW 70A.15.2210(6).

"A BACT determination is a totality-of-the-circumstances, project specific analysis." *Microsoft-Yes Toxic Air Pollution-No v. Dep't of Ecology*, No. 10-162, 2012 WL 3577478, at *14 (Wash. Pollution Control Hr'gs Bd. July 25, 2012) (*MYTAPN*). An agency must balance several factors, such as "the removal efficiency of different control options, the cost efficiency of each option, collateral environmental impacts associated with a control option, and energy considerations." *Id.*

While there is no specific statutory or regulatory methodology for BACT determinations, Ecology suggests a five-step approach to BACT determinations for prevention of significant deterioration (PSD)[54] program applicants:

> - . . . Step 1 – Identify each emission unit and all available control options.
> - Step 2 – Evaluate the technical feasibility of each control option. Eliminate control options that are not technically feasible based on physical, chemical, and engineering principals.
> - Step 3 – Rank remaining control options on the basis of control efficiency, the top ranked control alternative is the first selection of BACT.
> - Step 4 – Eliminate control options based on evaluation of economic, environmental and energy impacts.
> - Step 5 – Select the most effective option as BACT.

WASH. DEP'T OF ECOLOGY, BEST AVAILABLE CONTROL TECHNOLOGY 1 (updated), (ECY 070-410d);[55] *see also Nat'l Parks Conserv*, 2018 WL 3609853, at *11.[56]

b. Redefining the facility

The Tribe argues that the PCHB erroneously interpreted and applied the law when "it tried to excuse PSCAA from performing a proper BACT analysis by claiming that PSCAA is not authorized or required 'to redesign the project.'" Br. of Appellant (Tribe) at 60 (quoting AR at

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[54] The PSD program applies to "major stationary sources." WAC 173-400-700; *see* WAC 173-400-710(1). Major stationary sources are sources with the potential to emit 250 tons per year or more of a regulated pollutant. 40 C.F.R. § 52.21(b)(1)(i)(b). Fugitive emissions are not included when assessing whether a source is a major source. 40 C.F.R. § 52.21(b)(1)(iii); WAC 173-400-810(14)(e). Major sources require PSD-specific permits. WAC 173-400-700; WAC 173-400-720. We note, however, that the PSD program is not applicable here.

[55] https://apps.ecology.wa.gov/publications/documents/ecy070410d.pdf [https://perma.cc/UU9Q-VBA8]

[56] This approach is promulgated as the "top-down" procedure by the EPA. *See* U.S. ENV'T PROT. AGENCY, NEW SOURCE REVIEW WORKSHOP MANUAL: PREVENTION OF SIGNIFICANT DETERIORATION AND NONATTAINMENT AREA PERMITTING B.5-B.6 (Draft, Oct. 1990), https://www.epa.gov/sites/default/files/2015-07/documents/1990wman.pdf [https://perma.cc/ZHC9-3QND]; *Nat'l Parks Conserv*, 2018 WL 3609853, at *11.

15796). The Tribe devotes several pages of its brief to discussing the federal "redefining the source" doctrine[57] and why it does not apply here.

However, neither the PCHB in its Final Order nor the Respondents argue that the federal doctrine applies. Indeed, all parties appear to agree that the doctrine is inapplicable. Because the inapplicability of the doctrine is not in dispute, we need not address whether it applies.

Nevertheless, the Tribe challenges the PCHB's COL 165, which states: "BACT and an agency's Permit application review does not authorize or require PSCAA to redesign the project." AR at 15796. This conclusion was based on Director Van Slyke's testimony that PSCAA is not authorized or required to redesign a facility through a NOC application. Director Van Slyke stated: "[W]e . . . review the application received for the project proposed and whether it meets the requirements under the rule, that's the choice. If we wish they would propose a different project, that's not within [PSCAA]'s scope of what [it] can do in the NOC review. . . . [W]e can't try to approve a project that wasn't proposed." VRP (Apr. 22, 2021) at 1945.

The WCAA provides that if a NOC application for a proposed new source of emissions is "in accord" with the applicable rules and regulations, an order of approval must be issued. RCW

[57] Under the federal "redefining the source" doctrine, an agency does not need to consider control alternatives in a BACT analysis if those alternatives "'redefine the source.'" *Helping Hand Tools v. EPA*, 848 F.3d 1185, 1194 (9th Cir. 2016). "[A] control alternative redefines the source if it requires a complete redesign of the facility. In a classic and simple example, a coal-burning power plant need not consider a nuclear fuel option as a 'cleaner' fuel because it would require a complete redesign of the coal-burning power-plant." *Id.*

Courts conduct a two-step analysis to determine if a control technology will redefine the source. *Id.* First, the applicant must propose an "'objectively discernable'" purpose for the proposed facility. *Id.* (quoting *In re Prairie State Generating Co.*, 13 E.A.D. 1, 22 (E.A.B. 2006)). Second, the agency then takes a "'hard look' at the proposed definition to determine which design elements are inherent to the applicant's purpose and which elements can be changed to reduce pollutant emissions without disrupting the applicant's basic business purpose." *Id.* (quoting *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 530 (E.A.B. 2009)).

70A.15.2210(3). Under the regulations, an agency must issue an order of approval if the new source meets the criteria under WAC 173-400-113: (1) the new source must comply with various emissions standards; (2) it must employ BACT for "all pollutants not previously emitted or whose emissions would increase as a result of the new source"; and (3) "[a]llowable emissions from the proposed new source . . . will not cause or contribute to a violation of any ambient air quality standard." WAC 173-400-113(1)-(3).

Again, BACT is defined as

> an emission limitation based on the maximum degree of reduction for each air pollutant . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

WAC 173-400-030(13). Generally, emission limitations are based on control technologies for individual emission units. *See* WASH. DEP'T OF ECOLOGY, BEST AVAILABLE CONTROL TECHNOLOGY 1 (ECY 070-410d). An agency may not "require the use of emission control equipment or other equipment, machinery, or devices of any particular type, from any particular supplier, or produced by any particular manufacturer." RCW 70A.15.2210(6).

Based on the plain language of the statute and regulations, it is clear that if a proposed project meets the requirements, regardless of how the agency or another party might have designed its own facility, the agency has no choice but to issue an order of approval. Conversely, if the proposed project does not meet the requirements, the NOC application must be denied. There is nothing in the applicable statutory or regulatory scheme that authorizes or requires PSCAA to condition a project approval on major design changes when all criteria are met; indeed, it would necessitate an entirely new NOC application on the part of the applicant. Therefore, we hold that

the PCHB did not erroneously interpret the law when it stated that BACT and PSCAA's NOC permit review does not authorize or require re-design of a project.

c. Waste gas recovery

The Tribe argues that it presented evidence that recovery of waste gas is a BACT because there would be no emissions from flaring waste gas, and therefore, it was error for PSCAA to not consider waste gas recovery in lieu of the flare. We disagree.

Here, the design of the TLNG facility includes an enclosed ground flare. The purpose of the enclosed ground flare is to combust waste gases generated by the pretreatment, liquefaction, and fuel transmitting processes. The record shows that when PSE worked with CBI to design the TLNG facility, alternative options for waste gas disposal were discussed, such as storing the waste gas, trucking it away, or re-injecting it into a pipeline. Matthew Stobart, the CBI engineering manager for the TLNG project, testified that those alternatives were deemed "prohibitively expensive and prohibitively dangerous." VRP (Apr. 21, 2021) at 1523. Stobart also testified that PSE told him that permitting for a new pipeline, for the purposes of removing waste gas, could be problematic and it did not want to pursue that option.

The NOC engineering worksheet shows Munoz's BACT considerations for the flare. The worksheet stated: "Ground flares are typically custom-designed, based on a given facility's waste gas composition and flow rate; therefore, a direct comparison of BACT/LAER[58] determinations

[58] LAER stands for

> "[l]owest achievable emissions rate," . . . [which] reflects: (a) The most stringent emission limitation that is contained in the implementation plan of any state for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable; or (b) The most stringent emission limitation that is achieved in practice by such class or category of source, whichever is more stringent.

for facility types that have different inlet gas composition and flow characteristics is sometimes not appropriate." AR at 22527. Nevertheless, Munoz still assessed and listed several facilities and their respective agencies' BACT determinations for those facilities' flares as part of his review.[59] Munoz testified that when he conducted a BACT review of the NOC application, he did not consider prohibiting PSE from flaring waste gas because "that wouldn't have been consistent with the application [PSCAA] was asked to review." VRP (Apr. 20, 2021) at 1404. Munoz further stated that the BACT and tBACT analysis "considered flare performance in terms of destruction efficiency." VRP (Apr. 20, 2021) at 1405.

PSE also made its own BACT proposal for the flare to PSCAA, which involved good combustion practices and use of low NO_x burners. PSCAA determined that PSE's "proposed BACT for the flares were acceptable, taking into consideration energy, environmental, economic impacts and a comparison to other BACT analysis done . . . for each pollutant." AR at 22530. PSCAA then made BACT recommendations for each pollutant that were then factored into the NOC Order of Approval's conditions as emissions limits.

The Tribe argues that PSCAA had to "consider 'the maximum degree of emission reduction for any pollutant' that 'is achievable . . . through the application of production processes or available methods, systems and techniques.'" Br. of Appellant (Tribe) at 63 (alteration in the original) (quoting WAC 173-400-030(13)). The Tribe points to testimony from its expert witness,

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RCW 70A.15.1030(14).

[59] Agency BACT decisions regarding flares that PSCAA reviewed included decisions of the Bay Area Air Quality Management District (BAAQMD), San Joaquin Valley Air Pollution Control District (SJVAPD), Texas Commission on Environment Quality (TCEQ), Massachusetts Department of Environmental Protection (MassDEP), South Coast Air Quality Management District (SCAQMD), and Maine Department of Environmental Protection (MaineDEP).

Dr. Ranajit Sahu, stating that PSCAA should have "considered flare gas recovery, storage," or "design changes that only require flaring under specified emergency conditions," including the "use of a 'tail gas' line to remove waste gases from the facility without flaring." AR at 21098, 21100.

The Tribe's position is premised on the idea that *any* combustion or flaring of waste gases produces hazardous air pollutants (HAPs)[60] and TAPs, which would not be BACT if there was an option to avoid production of HAPs and TAPs altogether. However, BACT for a particular emission unit is not simply the elimination of the unit, as the Tribe seems to suggest. When the Tribe cites to the regulatory definition of BACT, it emphasizes the "maximum degree of reduction for each air pollutant" while neglecting the subsequent clause, which states: "on a *case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs." WAC 173-400-030(13) (emphasis added).

Agencies consider a variety of factors, such as technological and economic feasibility, in addition to environmental impacts, when conducting a BACT analysis. *See* WAC 173-400-030(13); *MYTAPN*, 2012 WL 3577478, at *14. BACT for one facility may not be BACT for another facility. Even the Tribe acknowledges there "is no specific, legally-required methodology" for BACT determinations. Br. of Appellant (Tribe) at 48. Furthermore, the record shows that PSE considered transporting waste gas away from TLNG, either through trucking it away or constructing a new pipeline, and determined that it was going to be either prohibitively expensive or prohibitively dangerous or both.

[60] HAPs include formaldehyde, benzene, toluene, ethyl benzene, and xylene. The latter four pollutants are often referred to as BTEX.

In her pre-filed testimony, PSE witness Dr. Shari Beth Libicki stated that BACT is an emission limitation "that can be satisfied in any manner selected by the facility." AR at 26196. For instance,

> if a BACT analysis identifies pollution control device A as providing the maximum degree of reduction, the agency would set a BACT emission limit based on the emission reduction achievable through the installation of pollution control device A. The source is not required to install pollution control device A, however. The source can choose to install pollution control device B, as long as that device is able to meet the emission limit set through the BACT process.

AR at 26196. PSCAA Compliance Director Van Slyke testified, "BACT for the flare is an emission control device." VRP (Apr. 22, 2021) at 1899.

Dr. Libicki's and Director Van Slyke's testimony is supported by the statutory and regulatory scheme. PSCAA cannot require the use of a specific piece of equipment for TLNG. *See* RCW 70A.15.2210(6). Rather, a BACT analysis is to set an emissions limitation that a facility is required to meet. WAC 173-400-030(13). PSCAA's BACT review for the flare is also supported by the EPA's and Ecology's suggested approach to BACT reviews—Step 1 states: "Identify *each emission unit* and all available control options." WASH. DEP'T OF ECOLOGY, BEST AVAILABLE CONTROL TECHNOLOGY 1 (ECY 070-410d) (emphasis added). The record shows that is what PSCAA did.

The record shows that PSCAA considered the flare as an emissions unit, reviewed and compared BACT determinations made by other agencies for other facilities with flares, and based on its review, made BACT recommendations for the flare that were incorporated in the conditions in the NOC Order of Approval. Based on these facts, we hold that PSCAA did not err when it did not consider waste gas recovery and that PSCAA's BACT determination complied with statutory

and regulatory requirements. Accordingly, the PCHB did not err when it affirmed PSCAA's BACT analysis as it pertained to the flare.

d. Thermal oxidizers

The Tribe argues that PSCAA should have considered thermal oxidizers and whether thermal oxidizers are "a better control technology" than the flare at the TLNG facility. Br. of Appellant (Tribe) at 54. PSE argues that PSCAA did consider thermal oxidizers as well as other types of enclosed combustors, and furthermore, an enclosed ground flare is a type of thermal oxidizer. PSCAA similarly argues that the TLNG facility's flare is a type of thermal oxidizer.

The parties dispute whether the TLNG facility's enclosed ground flare is a form of thermal oxidizer. Dr. Sahu testified that a thermal oxidizer is designed to have "as close to possible uniform temperature throughout the entire chamber." VRP (Apr. 21, 2021) at 1600-01. The uniform temperature, established through the mixing of gases, increases destruction efficiency. Dr. Sahu asserts that the TLNG facility's enclosed ground flare is "really just an enclosure around four flames" and "there is no combustion chamber with the same characteristics." VRP (Apr. 21, 2021) at 1601. According to Dr. Sahu, any gases directed to the flare would only pass through the burner that happened to be "on," and then "just progressively preceding and exiting the flare at the top." VRP (Apr. 21, 2021) at 1602.

On the other hand, Respondents' witnesses testified that the TLNG facility's enclosed combustor is "a form of oxidizer." VRP (Apr. 22, 2021) at 1883. PSE witness Dr. Joseph Smith testified that the flare is an insulated vessel that will not easily lose heat. Furthermore, according to Dr. Smith, the height of the flare stack coupled with the diameter means a "constricted exit" for gases exiting the flare. VRP (Apr. 23, 2021) at 2139. With such a constricted exit, the gases will "turn back on themselves" and mix, which leads to better combustion efficiency. VRP (Apr. 23,

2021) at 2139. Director Van Slyke testified that regardless of whether TLNG's enclosed ground flare is considered a thermal oxidizer, "the important thing here is to look at what is the emission performance the device . . . can provide and is going to be required to provide." VRP (Apr. 22, 2021) at 1884.

The Tribe points to another facility, the Freeport LNG Facility (Freeport), permitted by Texas Commission on Environment Quality (TCEQ), as employing a "superior control" technology than the TLNG facility because Freeport has a thermal oxidizer. Br. of Appellant (Tribe) at 52. But the record also shows that TCEQ's BACT analysis at Freeport is not applicable to the TLNG facility based on differences in Freeport's design, operation, and purpose. Moreover, Freeport's permit appears to contain the same condition regarding VOC destruction efficiency of 99% as in PSCAA's NOC Order of Approval for the TLNG facility.

As stated above, the BACT for the ground flare is a means of limiting emissions. This means an engineer would review the efficiency of the ground flare and set emissions limits for the specific equipment unit. The record shows that PSCAA researched several different types of enclosed combustors, flares, and/or thermal oxidizers in its NOC application review. The record also supports the idea that the enclosed ground flare at the TLNG facility is a form of thermal oxidizer. The PCHB agreed with the Respondents' witnesses in this regard, finding them more credible than Dr. Sahu. We do not weigh the credibility of witnesses. *Port of Seattle,* 151 Wn.2d at 588.

PSCAA then made BACT recommendations for emissions levels of VOCs and other pollutants, and those limits were incorporated into the NOC Order of Approval. For instance, the NOC Order of Approval Condition 15 establishes that "[t]he owner and/or operator shall ensure the enclosed ground flare achieves a minimum of 99% destruction of all volatile organic

compounds." AR at 24172. "'[S]ubstantial judicial deference to agency views [is] appropriate when an agency determination is based on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise.'" *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 754, 271 P.3d 331 (2012) (alterations in original) (quoting *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997)).

Because the record shows that PSCAA complied with the statutory and regulatory requirements of a BACT analysis as related to the TLNG facility's enclosed ground flare and because the PSCAA's conclusion is based on highly complex, technical facts within its expertise, we hold that PSCAA did not err in its consideration of flares and thermal oxidizers.

e. Leakless or sealless components

The Tribe argues that PSCAA erred in its failure to consider leakless and sealless components at the TLNG facility to reduce fugitive emissions. Specifically, the Tribe points to the testimony of Dr. Sahu, who stated that "[s]ealless valves, leakless pumps, and magnetic drive pumps" have been available for years. VRP (Apr. 21, 2021) at 1648. Additionally, the Tribe asserts that the "EPA has required the use of such technology at fossil fuel facilities with fugitive VOC emissions (like TLNG)." Br. of Appellant (Tribe) at 55. Respondents argue that leakless or sealless components are not a readily available technology for LNG facilities for BACT purposes.

Here, Stobart testified that CBI did not consider leakless or sealless components for its design of the TLNG facility because he had never seen such components available for the cryogenic valves the TLNG facility would have. Munoz testified that PSCAA did not consider requiring the TLNG facility to install leakless or sealless components to prevent fugitive emissions, in part because it would constitute a re-design of the facility. And the record shows that PSCAA conducted a BACT analysis for fugitive emissions.

Munoz testified that the way that agencies typically address the potential for fugitive emissions is to require a LDAR program. Munoz stated: "[T]he LDAR program is intended to actually catch where something needs to be maintained in the system. [TLNG] is intended to be leak-free." VRP (Apr. 20, 2021) at 1406.

Munoz also testified that he consulted several other agency websites and permits issued in Washington for comparison purposes. On the NOC engineering worksheet, Munoz listed BACT determinations from San Joaquin Valley Air Pollution Control District (SJVAPD), TCEQ, and the Santa Barbara County Air Pollution and Control District as examples. The worksheet then discussed several federal standards and why those standards were applicable or not applicable to the TLNG facility.

The NOC Order of Approval Conditions 31 and 32 address requirements the TLNG facility must follow in implementing an LDAR program. For instance, the LDAR program must be implemented according to several monitoring and recordkeeping requirements under 40 C.F.R. 63 Subpart H.[61]

The Tribe cites to *In re of Cash Creek Generation, LLC*[62] in support of its contention that the EPA has required use of leakless and sealless components in "fossil fuel facilities." Br. of Appellant (Tribe) at 55. However, *Cash Creek*'s discussion of leakless components is in reference to an argument made in the petitioners' briefing that the "EPA has required consideration/use of *some* leakless and/or certified low leak components in consent decrees for similar facilities." 2012

[61] 40 C.F.R. 63 Subpart H addresses national emissions standards for organic HAPs for equipment leaks.

[62] *In re Cash Creek Generation, LLC*, No. IV-2010-4, 2012 WL 11850445, at *25 (U.S. Env't. Prot. Agency June 22, 2012).

WL 11850445, at *25 (emphasis in original). There is no indication of what the actual circumstances were at the "similar facilities," let alone what those similar facilities were. *See id*. Furthermore, the EPA noted that the BACT discussion was premature because the BACT analysis in that case had not yet been submitted for public comment. *See id.* Based on *Cash Creek*'s lack of specificity about the past EPA requirements for other facilities, even aside from the fact that the EPA did not address the merits of the argument, the Tribe's argument is unpersuasive. In any case, even if there had been more specificity, as discussed above, BACT for one facility is not necessarily BACT for a different facility.

Here, the record shows the PCHB reviewed PSCAA's BACT analysis and determined that PSCAA considered reasonable alternatives. In concluding that PSCAA's BACT determination was reasonable, the PCHB deferred to PSCAA's engineering judgment and technical expertise. Because substantial evidence in the record supports the PCHB conclusion that PSCAA conducted a BACT analysis in compliance with regulatory requirements, we hold that the PCHB did not err.

f. Flare destruction efficiency

The Tribe argues that the PCHB erred when it relied "on the alleged 99% destruction efficiency [of the flare] to excuse PSCAA from performing a proper BACT analysis." Br. of Appellant (Tribe) at 57. Specifically, the Tribe asserts that the 99% destruction efficiency, and the NOC Order of Approval Condition 15, is only for VOCs when there is evidence that the TLNG facility will emit other non-VOC TAPs, such as mercury.

Here, the NOC engineering worksheet devotes a section to "Ambient Toxics Impact Analysis." AR at 22563. The ambient toxics impact analysis provides tables of worst-case scenario emissions of various HAPs and TAPs, including for mercury, as compared to the

pollutants' small quantity emissions rates (SQERs)[63] and acceptable source impact levels (ASILs).[64] PSCAA determined that most TAPs, *including mercury*, fell below their respective SQER values. After additional modeling, discussed in the NOC worksheet, PSCAA determined the ambient concentrations of the six pollutants[65] that exceeded their SQER levels still fell below their corresponding ASIL values. Therefore, the record shows that the facility's projected emissions of other non-VOC HAPs and TAPs will not violate regulatory concentration limits. Moreover, the NOC Order of Approval addresses the removal of mercury from natural gas entering the TLNG facility. Condition 38 states:

> The owner and/or operator shall install a mercury removal system, capable of removing elemental mercury from the natural gas coming into the facility. The owner and/or operator shall include periodic inspection and maintenance of the mercury removal system in the operation and maintenance plan, accordingly.

AR at 24175.

The Tribe also argues that "[i]f there is an available technology that can eliminate 100% of pollutants, then the technology that eliminates only 99% is not the best available." Br. of Appellant (Tribe) at 59. The operative word in the Tribe's argument, however, is "if." The Tribe does not point to any actual, available technology that would eliminate *100 percent* of pollutants. As discussed in the sections above, the record shows that PSCAA complied with regulatory

[63] SQERS means "a level of emissions below which dispersion modeling is not required to demonstrate compliance with acceptable source impact levels. SQERs are listed in WAC 173-460-150." WAC 173-460-020(7).

[64] If a particular pollutant's projected emission level falls below that pollutant's SQER value, then no further analysis is needed. *See* WAC 173-460-020(7). Otherwise, a source must demonstrate compliance by showing that the pollutant concentration falls below the applicable ASIL.

[65] 7,12-Dimethylbenzene(a)anthracene, ammonia, arsenic, cadmium, hydrogen sulfide, and sulfur dioxide.

requirements in its BACT analysis. Furthermore, an agency's interpretation of the law where the statute is within the agency's expertise is accorded great weight. *Cornelius*, 182 Wn.2d at 585. Therefore, we hold that the PCHB did not err when it upheld PSCAA's BACT determinations.

2. Revised Air Dispersion Model

The Tribe argues that the PCHB erred in affirming the NOC Order of Approval because the revised air dispersion modeling results were never made available for public comment and the last-minute update was prejudicial to the Appellants. Respondents argue there was no error in the admission of the revised air dispersion modeling results, the PCHB's consideration of the updated information, or in the public participation requirements. We agree with the Respondents.

a. Legal principles

i. APA standards

Under the APA, this court may grant relief if an agency has engaged in unlawful procedure or has failed to follow a prescribed procedure. RCW 34.05.570(3)(c). Courts review procedural errors de novo. *K.P. McNamara Nw., Inc. v. Dep't of Ecology*, 173 Wn. App. 104, 121, 292 P.3d 812, *review denied*, 177 Wn.2d 1023 (2013). The party seeking judicial relief must show that it has "been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d); *K.P. McNamara Nw., Inc.*, 173 Wn. App. at 121. A party has been prejudiced if it can show with "reasonable probability" that the result of a proceeding—in this case, the issuance of the NOC Order of Approval after the public comment period—would have been different. *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 908, 385 P.3d 251 (2016).

ii. Regulatory guidelines

When an applicant submits a NOC application, the permitting authority must notify the applicant whether the application is "complete" or whether additional information is needed.

WAC 173-400-111(1)(a). An application is complete when it contains "all the information necessary for processing the application." WAC 173-400-111(1)(b). This includes

> information on the nature and amounts of emissions to be emitted by the proposed new source . . . as well as the location, design, construction, and operation of the new source as needed to enable the permitting authority to determine that the construction . . . will meet the requirements of WAC 173-400-113.

WAC 173-400-111(1)(b). However, the completeness of the NOC application does not preclude the permitting authority from accepting or reviewing additional information after a completeness determination has been made. WAC 173-400-111(1)(b).

The TLNG facility is located in an attainment area. An attainment area is "a geographic area designated by EPA at 40 C.F.R. Part 81 as having attained the [NAAQS] for a given criteria pollutant." WAC 173-400-030(10). If a project proposal for a new stationary source of emissions in an attainment area satisfies the following three criteria under WAC 173-400-113, then a permitting authority must issue an order of approval:

> (1) The proposed new source . . . will comply with all applicable new source performance standards, national emission standards for hazardous air pollutants, national emission standards for hazardous air pollutants for source categories, emission standards adopted under chapter 70.94 RCW and, for sources regulated by an authority, the applicable emission standards of that authority.
>
> (2) The proposed new source . . . will employ BACT for all pollutants not previously emitted or whose emissions would increase as a result of the new source or modification.
>
> (3) Allowable emissions from the proposed new source . . . will not cause or contribute to a violation of any ambient air quality standard. If the modeled concentrations of allowable emissions from the proposed new source . . . are below the levels in Table 4a, the proposed source does not contribute to a violation of an ambient air quality standard.

WAC 173-400-113. WAC 173-400-113's Table 4a lists threshold values for proposed new sources for nonattainment areas:

Table 4a:
Cause or Contribute Threshold Values for Nonattainment[66] Area Impacts

Pollutant	Annual Average	24-Hour Average	8-Hour Average	3-Hour Average	1-Hour Average
CO-	-		0.5 mg/m^3	-	2 mg/m^3
SO_2	1.0 µg/m^3	5 µg/m^3	-	25 µg/m^3	30 µg/m^3
PM_{10}	1.0 µg/m^3	5 µg/m^3	-	-	-
$PM_{2.5}$	0.3 µg/m^3	1.2 µg/m^3			
NO_2	1.0 µg/m^3	-	-	-	-

WAC 173-400-113(4)(a).[67]

[66] A nonattainment area is "a geographic area designated by EPA at 40 C.F.R. Part 81 as exceeding a National Ambient Air Quality Standard (NAAQS) for a given criteria pollutant. An area is nonattainment only for the pollutants for which the area has been designated nonattainment." WAC 173-400-030(58). As stated above, the TLNG facility is not located within a nonattainment area. However, Table 4a is applicable to new stationary sources of emissions in attainment areas in that it provides safe harbor values, i.e., a source will not contribute to a violation of an ambient air quality standard if it falls below the threshold values. WAC 173-400-113(3).

[67] WAC 173-400-113(4) addresses criteria for proposed new major stationary sources as defined in WAC 173-400-810. A "major" source "means any stationary source of air pollutants that emits, or has the potential to emit, one hundred tons per year or more of any regulated NSR pollutant." WAC 173-400-810(14)(a); 40 C.F.R. § 52.21(b)(1)(i)(a); *see* WAC 173-401-200(19). Specifically, the 100 tons per year threshold applies to particular kinds of facilities, listed in 40 C.F.R. § 52.21(b)(1)(i)(a). Additionally, any stationary source that has the potential to emit 250 tons per year or more of a regulated pollutant is considered a major source. 40 C.F.R. § 52.21(b)(1)(i)(b). Fugitive emissions are not included when assessing whether a source is a major source. 40 C.F.R. § 52.21(b)(1)(iii); WAC 173-400-810(14)(e). Major sources are subject to the PSD permitting program and require PSD-specific permits. WAC 173-400-700; WAC 173-400-720.

PSCAA determined that the TLNG facility does not qualify as a major source such that a PSD permit would apply. Additionally, Appellants do not assign error to the *type* of permit PSCAA issued for the TLNG facility. At the proceedings below, the PCHB reviewed Issue 4d, or whether PSCAA erred in concluding that the TLNG facility is not a major source of pollutants,

NOC applications for new air contaminant sources are subject to a mandatory public comment period. WAC 173-400-171(3)(b). The permitting authority must make the "[a]dministrative record" available for public review during the comment period. WAC 173-400-171(5)(a), (b). The administrative record includes "information submitted by the applicant" and "any applicable preliminary determinations, including analyses of the effects on air quality." WAC 173-400-171(5)(a). When a permitting authority provides notice of the comment period to the public, the notice must include a description of the proposed facility and a "description of the air contaminant emissions including the type of pollutants and quantity of emissions that would increase under the proposal." WAC 173-400-171(6)(a)(iii), (iv).

iii. PCHB standards

The PCHB has jurisdiction to hear and decide appeals from orders of local air pollution control authority boards. RCW 43.21B.110. PCHB hearings are quasi-judicial in nature. WAC 371-08-485(1); *see generally* RCW 43.21B.170; RCW 34.05.449. The PCHB's "scope and standard of review shall be de novo unless otherwise provided by law." WAC 371-08-485(1); *Port of Seattle*, 151 Wn.2d at 592. "Where a statute is within the agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous." *Postema,* 142 Wn.2d at 77.

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including of VOCs. The PCHB concluded that Appellants did not meet their burden and PSCAA appropriately determined that the TLNG facility is not a major source of pollutants.

The Tribe assigns error to the PCHB's conclusion, COL 105, in the Tribe's assignments of error laundry list, but does not actually brief the argument that TLNG should have been considered a "major source." We do not consider assignments of error unsupported by argument or authority and the assignment of error is waived. RAP 10.3(a); *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, the "major source" standards do not apply.

The PCHB makes findings of fact based on a preponderance of the evidence. WAC 371-08-485(2). Under its de novo scope of review, the PCHB may review all evidence available at the time of the hearing, even if that information was not available at the time the challenged order was issued. *Port of Seattle*, 151 Wn.2d at 597-98 ("Nothing suggests that [PCHB's] review should be limited to the record below."); *see also* RCW 34.05.452(1); WAC 371-08-500.

WAC 371-08-500 states:

> Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. All relevant evidence is admissible which, in the opinion of the presiding officer, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness. In passing upon the admissibility of evidence, the presiding officer shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings in matters not involving trial by jury in the superior courts of the state of Washington.

WAC 371-08-500(1).

We review evidentiary decisions for abuse of discretion. *King County Pub. Hosp. Dist. No. 2 v. Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013); RCW 34.05.452; *see* RCW 43.21B.180.

b. Public notice and comment requirements

The Tribe argues that the Respondents violated the public notice and comment requirements of WAC 173-400-171. Specifically, the Tribe asserts that public comment is not meaningful when an agency provides incorrect information, as was the case with the original air dispersion model that had wind direction rotated 180 degrees.

Here, when PSCAA issued its Proposed Order on July 22, 2019, it commenced a 45-day public comment period. Additionally, it held a public hearing on August 27, 2019. PSCAA made available the permit documents and information it had to date, including the results of the original

air dispersion model and the NOC engineering worksheet. PSCAA received nearly 10,000 comments, including comments regarding the concentration of $PM_{2.5}$ in the area of the facility and the applicability of WAC 173-400-113. In response to comments, PSCAA stated, "PSE's application for the LNG facility, as conditioned, will . . . [n]ot contribute to any exceedance of an ambient air quality standard" and "[t]he proposed facility has shown that it will meet all requirements of WAC 173-400-113." AR at 22749, 22759.

Later, when PSE became aware of the mistake in the air dispersion model, it immediately notified all parties and provided updated results. PSCAA analyzed the results of the revised air dispersion model, which showed a slight increase in the 24-hour $PM_{2.5}$ level from 1.2 $\mu g/m^3$ to 1.3 $\mu g/m^3$. PSCAA determined that "[n]o impacts change with respect to thresholds identified in the regulations and the NOC review." AR at 14728.

The Tribe cites to both federal and Washington cases in support of its contention that PSCAA failed to allow the public to meaningfully comment on the "agency decision-making." Br. of Appellant (Tribe) at 73; *see Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992); *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002). In *Simpson Tacoma Kraft Co.*, Ecology had promulgated a numeric standard for a toxic substance based on federal guidance and data. 119 Wn.2d at 643-44. However, Ecology failed to follow rule-making procedures before promulgating the standard and when evidence showed that differences of opinion existed within the scientific community regarding the toxic substance's acceptable concentration levels. *Id.* at 644. The Washington Supreme Court held that Ecology's standard constituted a rule under the APA and it was invalid based on Ecology's failure to follow any rule-making procedures. *Id.* at 650.

Gerber involved an appeal of a summary judgment, where the district court had upheld a Fish and Wildlife Service (FWS) decision to issue a permit for a residential development in an area connected with an endangered species. *Gerber*, 294 F.3d at 175. There, FWS issued a permit despite the fact that a key component of the permit was not available for public comment, as required by statute. *Id.* at 177-79. The D.C. Circuit held that the failure to include the component such that the public could not meaningfully comment on it was error and that the error was not harmless because the appellants "'presented enough to show that on remand they [could] mount a credible challenge'" to the permit issuance. *Id* at 184 (quoting *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001)).

Both cases are distinguishable. In *Simpson Tacoma Kraft Co.*, Ecology failed to engaged in *any* rule-making procedures altogether before it decided upon an enforceable standard for which there was room for reasonable debate. In *Gerber*, FWS failed to follow *statutory* requirements when it issued a permit that was missing important impact mitigation information.

Here, when PSCAA issued its Proposed Order, it provided a 45-day public comment period that stretched from July 22, 2019 to September 9, 2019, in compliance with WAC 173-400-171(3)(b) and -171(7)(a). PSCAA held a public hearing on August 27, 2019, in compliance with WAC 173-400-171(10). PSCAA made available the NOC application and the supporting documents, such as the original air dispersion modeling results, in PSCAA's possession, in compliance with WAC 173-400-171(5). Based on the information PSE provided to PSCAA, albeit subsequently found inaccurate due to a spreadsheet formatting error, PSCAA could assess whether the NOC application would meet the requirements of WAC 173-400-113. *See* WAC 173-400-111(1)(b). Furthermore, the public commented extensively on the application of WAC 173-400-113 to the TLNG facility and $PM_{2.5}$ concentration levels. The record does not suggest that PSE or

PSCAA withheld information from the public in an effort to avoid public notice and comment requirements or to mislead the public.

The Tribe asserts that the public must be presented with a "'complete application'" that provides "'information on the nature and amounts of emissions to be emitted by the proposed new source'" and a "'description of the air contaminant emissions including the type of pollutants and quantity of emissions that would increase under the proposal.'" Br. of Appellant (Tribe) at 70-71 (quoting WAC 173-400-111(1)(b) and WAC 173-400-171(6)(a)(iv)). The Tribe attempts to blend the procedures of processing NOC applications under WAC 173-400-111 with public notice requirements under WAC 173-400-171. A "complete application" is part of the "completeness determination" under WAC 173-400-111(1)—it speaks to what is needed for an agency to *begin* reviewing an application. Director Van Slyke testified that "completeness" means "engineers [reviewing a NOC application] . . . are looking to see if they have the necessary information in terms of the project description, the emissions, any emission controls . . . and any impact analyses . . . for them to proceed in their actual technical review." VRP (Apr. 22, 2021) at 1840. Furthermore, a completeness determination "does not preclude the reviewing authority from requesting or accepting any additional information." WAC 173-400-111(b).

Here, the record shows that PSCAA followed the public notice and comment requirements of WAC 173-400-171, and provided the information it had available, including the results of the air dispersion model at the time. Additionally, the public both had the opportunity to comment on and did comment on the application, as it related to WAC 173-400-113 and $PM_{2.5}$ concentration levels. Therefore, we hold that there was no violation of public participation requirements.

c. Prejudice

The Tribe argues that the "error was prejudicial" because it precluded the public an opportunity to potentially "'mount a credible challenge'" to the Proposed Order before the final NOC Order of Approval was issued. Br. of Appellant (Tribe) at 75-76 (quoting *Gerber*, 294 F.3d at 184). Because we hold that there was no violation of public participation requirements for the reasons stated above, it follows that there was no error and therefore no prejudice.

Even if the fact that the revised modeling results were not provided to the public was considered an error, we hold that the Tribe's prejudice argument still fails.

As discussed above, in its responses to public comments, PSCAA stated that the TLNG facility "will . . . [n]ot contribute to any exceedance of an ambient air quality standard" and "[t]he proposed facility has shown that it will meet all requirements of WAC 173-400-113." AR at 22749, 22759. According to the Tribe, this is PSCAA's "'regulatory rationale'" offered during the permitting process, a rationale that the Tribe claims "is now known to be false." Br. of Appellant (Tribe) at 78-79. We disagree that PSCAA's statements in response to public comments is now false in light of the revised 24-hour $PM_{2.5}$ level.

The Tribe is correct that the revised 24-hour $PM_{2.5}$ level of 1.3 $\mu g/m^3$ exceeds the threshold in Table 4a of WAC 173-400-113 when that was previously not the case because the previous 24-hour $PM_{2.5}$ level was 1.2 $\mu g/m^3$, which is at threshold. *See* WAC 173-400-113(4)(a). However, because the TLNG facility is in an attainment area and not considered a "major" stationary source of emissions, exceeding the Table 4a threshold does not automatically mean a *violation* of ambient air quality standards resulting in a denial of the NOC application. *See* WAC 173-400-113(3). Contrary to the Tribe's assertion, WAC 173-400-113 does not state that criteria pollutant emissions for facilities in an attainment area must fall below the Table 4a threshold values in order for a NOC

application to be approved. *See* WAC 173-400-113. Rather, WAC 173-400-113(3) merely provides that if a proposed new source's modeled concentrations fall *below* the levels in Table 4a, "the proposed source *does not* contribute to a violation of *an* ambient air quality standard." WAC 173-400-113(3) (emphasis added).

Significantly, Table 4a is not an ambient air quality standard[68] for attainment areas. *See* WAC 173-400-113(4)(a). Table 4a sets the standard that "Cause or Contribute to Threshold Values *for Nonattainment Area Impacts*." WAC 173-400-113(4)(a) (emphasis added). The applicable ambient air quality standard that must be reviewed under WAC 173-400-113(3) to determine if the ambient air quality standard has been violated is the NAAQS.[69] *See* WAC 173-400-030(10). Therefore, to determine if the revised 24-hour $PM_{2.5}$ level violates an ambient air quality standard, the revised 24-hour $PM_{2.5}$ level must be viewed in the context of the NAAQS.

Here, when the revised 24-hour $PM_{2.5}$ level of 1.3 $\mu g/m^3$ is added to the background concentration data of 25.4 $\mu g/m^3$, the revised total 24-hour $PM_{2.5}$ level is 26.7 $\mu g/m^3$, which remains below the NAAQS threshold of 35 $\mu g/m^3$ for 24-hour $PM_{2.5}$. *See* 40 C.F.R § 50.7; 40 C.F.R. § 50 App. N. Therefore, despite the change in the 24-hour $PM_{2.5}$ level based on the revised air dispersion modeling, PSCAA's representations to the public that TLNG "will . . . [n]ot contribute to any exceedance of an ambient air quality standard" and "[t]he proposed facility has

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[68] Generally, an ambient air quality standard is an "established concentration, exposure time, and frequency of occurrence of air contaminant(s) in the ambient air which shall not be exceeded." WAC 173-400-030(8). For instance, regulations define NAAQS as "an ambient air quality standard set by EPA at 40 C.F.R. Part 50." WAC 173-400-030(52).

[69] There has been no standard established for 24-hour $PM_{2.5}$ under WAAQS. WASH. DEP'T OF ECOLOGY, AMBIENT AIR IMPACTS ANALYSES (undated) (ECY 070-410e), https://apps.ecology.wa.gov/publications/UIPages/documents/ecy070410e.pdf [https://perma.cc/RPK4-35MS].

shown that it will meet all requirements of WAC 173-400-113" remain true in that the TLNG facility is not projected to contribute to a violation of an ambient air quality standard and the TLNG facility will meet the requirements of WAC 173-400-113. AR at 22749, 22759.

Furthermore, the Tribe does not specify what "credible challenge" the public might have mounted had the revised air dispersion modeling results been available. The Tribe argues that because of the mistake in the air dispersion model, "many" emissions limits conditions in the NOC Order of Approval "are predicated on the erroneous modeling." Br. of Appellants (Tribe) at 79. However, the Tribe only points to conversations about SO_2 emission limits that appear to have formed the basis of Condition 16 in the NOC Order of Approval. Condition 16 states: "The enclosed ground flare may not discharge total sulfur dioxide (SO_2) into the atmosphere in excess of 165 lbs of SO_2 per MMScf." AR at 24172. The Tribe does not actually challenge the modeled SO_2 emissions as erroneous, nor Condition 16 as unreasonable, here. Furthermore, the updated air dispersion model results for SO_2 show that SO_2 concentrations are still well below the threshold values in WAC 173-400-113 Table 4a.

The Tribe's argument appears to be premised the notion that PSCAA and PSE withheld information "that should have been, but was not, made available to the public during the comment phase." Br. of Appellant (Tribe) at 79. Again, the record does not suggest that PSCAA or PSE withheld information in order to evade regulatory requirements.

The Tribe does not specify what "credible challenge" might have been mounted had the public been aware of the updated modeling results, and because the revised $PM_{2.5}$ level does not violate the ambient air quality standard set forth in the NAAQS, the Tribe cannot show with reasonable probability that the permit would not have been issued. Therefore, we hold that even

if there was a procedural error for failure to submit the revised air dispersion modeling results for public comment, it was not prejudicial.

d. Admission of the revised air dispersion modeling

The Tribe argues that the PCHB erred in its admission of the revised air dispersion modeling. Specifically, the Tribe argues that it was highly prejudicial to the Tribe to allow PSE and PSCAA to "spring this new, highly technical information onto the Tribe during the hearing." Br. of Appellant (Tribe) at 81. PSE argues there was no prejudice to the Tribe because the "revised modeling did not change PSCAA's analysis underlying the Permit, and the Tribe rejected offers to delay the hearing to allow it more time to assess the revised modeling." Br. of Resp't (PSE) at 55. PSCAA argues that the PCHB properly considered evidence of the revised air dispersion modeling based on its de novo review. We agree with the Respondents.

The APA governs our review of the PCHB's Final Order. RCW 43.21B.180; RCW 34.05.570(3); *Snohomish County*, 187 Wn.2d at 357. Evidentiary decisions are reviewed for abuse of discretion. *King County Pub. Hosp. Dist. No. 2*, 178 Wn.2d at 372; RCW 34.05.452; *see* RCW 43.21B.180.

Here, PSE informed all parties, including the PCHB, of the mistake in the air dispersion modeling as soon as it became aware of the error. PSE described with specificity how and why the mistake occurred and why it had been belatedly discovered. The PCHB admitted evidence of the revised air dispersion modeling because it determined the evidence was "relevant and would be helpful to the [PCHB]." AR at 15144. In conjunction with the admission of the revised air dispersion modeling, the PCHB also allowed the Tribe to present new analysis and testimony from its expert witness regarding the updated modeling results and the initial error.

Additionally, in acknowledgment of the new information, the parties agreed to proceed with SEPA issues the first week of the PCHB hearing, and then resume the following week with permitting issues so that there would be time for the parties to fully analyze the revised modeling. According to PSE, it offered a continuance so the Tribe could spend more time reviewing the new information, which the Tribe rejected. The PCHB also noted this fact in its Final Order when it stated, "No party asked to continue the hearing beyond what was agreed." AR at 15744.

WAC 371-08-500(1) provides that evidence "is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." Here, the PCHB presiding officer determined that the revised air dispersion modeling results, and rebuttal testimony and analysis about those updated results, would be information relied upon when considering a NOC permit; therefore, the evidence was relevant to the PCHB's review of PSCAA's NOC Order of Approval.

WAC 371-08-500(1) further states that while the PCHB presiding officer must consider the rules of evidence, it is not bound by them. Moreover, "[a]dministrative law judges . . . have considerable discretion to determine the scope of admissible evidence." *King Cnty. Pub. Hosp. Dist. No. 2*, 178 Wn.2d at 373; *accord Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008) ("It was within the sound discretion of the [ALJ] to admit, or not admit, evidence that came into existence after the close of the public comment period."). Because the PCHB determined the revised results would be helpful for its review, and coupled with the PCHB's de novo review under WAC 371-08-485, we hold that the PCHB acted within its discretion to consider evidence of the revised air dispersion modeling.

The Tribe argues that allowing PSE a "'do-over'" of its air dispersion model implicates the "moving target" problem, or where review becomes unmanageable when new information is

continually introduced. Br. of Appellant (Tribe) at 82-83. The Tribe argues that in *Port of Seattle*, the Washington Supreme Court "found that enforcing firm discovery deadlines is the proper method to avoid that scenario." Br. of Appellant (Tribe) at 83 (citing *Port of Seattle*, 151 Wn.2d at 598-99). In *Port of Seattle*, the PCHB had limited the scope of its own de novo review as it pertained to novel issues that arose after Ecology issued a water quality certification, in anticipation of potential "moving target" problems that the Court ultimately found did not exist in practice. *See* 151 Wn.2d at 598-99. There, the Court held that the PCHB should not limit its de novo review in anticipation of "moving target" problems, especially when the PCHB has the ability to set discovery deadlines. *Id.* at 599.

Here, the record does not show that there is a "moving target" problem with the air dispersion modeling. As stated above, PSE submitted the revised air dispersion modeling as soon as it discovered the error. Again, there is nothing in the record to suggest that PSE or PSCAA withheld information from the public. Furthermore, *Port of Seattle* does not stand for the proposition that the PCHB must strictly enforce its discovery deadlines. Rather, the upshot of *Port of Seattle* is that the PCHB should not limit its de novo review and there are procedural mechanisms in place to avoid the "moving target" problem—which, again, is not implicated here. The PCHB addressed this issue in a footnote of its Final Order: "[T]he [PCHB]'s consideration of the wind evidence under its *de novo* review authority as construed in *Port of Seattle* was an appropriate and efficient way to address evidence occasioned by a spreadsheet mistake and discovered right before hearing." AR at 15744, n.14 (emphasis in original). We agree.

Furthermore, the PCHB allowed all parties to submit expert witness testimony and analysis on the revised air dispersion modeling, so all parties had an opportunity to fully address and/or rebut the new evidence. The record also shows that Tribe did not ask to continue the hearing

beyond the agreed upon schedule, agreeing instead to try the SEPA issues the first week before resuming with NOC issues the following week.

Because the PCHB has broad discretion to determine the scope of admissible evidence and it acted within its regulatory authority, and because it determined the revised air dispersion modeling was relevant, the PCHB did not abuse its discretion. And because the Tribe was provided an opportunity to present new analysis and testimony from its own expert witness regarding the updated modeling results and the initial error, there was no prejudice when the PCHB admitted evidence of the revised air dispersion model results. Therefore, we hold that the PCHB did not err when it admitted evidence of the revised air dispersion modeling.

CONCLUSION

Because we find no error in the PCHB's conclusion that the SEIS was adequate or in the PCHB affirming the NOC Order of Approval, we affirm PCHB's Final Order.

Lee, J.

We concur:

Maxa, P.J.

Price, J.