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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Thurston County Superior Court Cause No. 07-2-01198-3)

ARTHUR WEST and JERRY LEE DIERKER,

Appellants et al.,

v.

PORT OF OLYMPIA, et al.,

Respondents

APPELLANT DIERKER'S JUNE 20, 2013 OPENING BRIEF

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6/20/13 w/r

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I. INTRODUCTION

1. This case is about how a small local government, the Port of Olympia, has acted improperly to hide all actions and information about the manner of the Port's use of over $40,000,000.00 of public funds and resources used for the Port's planning, leasing, construction, and approval of a dredged deep water port, a large marine terminal and log export yard for Weyerhaeuser Co. the largest timber company owner landowner and developer in this state, to be constructed at the Port of Olympia Washington, to allow the Port of Tacoma to have Weyerhaeuser move it's entire log yard and export facility from the Port of Tacoma to the Port of Olympia as part of series of piecemealed parts of larger regional Ports' project of these two Ports, part of which included these two Ports joint 2 square miles development of the Maytown, Washington into a "South Sound Logistics Center" for the storing bulk freight, cargo containers, and, other cargo nationwide distribution by railroad and truck that was only one of the many things appearing in the Port's "withheld" public records that Appellants requested but never received, which have thereby been withheld unlawfully from the record in this case and Appellants cannot cite to some evidence that the Port has withheld from Appellants and the Courts in this case.

This case is about how Appellants' repeatedly filed petitions for review of agency actions with all proper administrative and Court venues, meeting all standing requirements for such petitions, in their attempts to gain any proper due process review of this matter in any governmental venue they could find, all without success of ever gaining even the Port' disclosure of the all of the known discoverable relevant evidence necessary for these Appellants to properly proceed to petition to government for redress of grievances for gaining procedural and substantive due process of the merits of their claims in this matter.

This case lasted 18 months in the Port's administrative venue with an incomplete Administrative Record of 2800 pages, and then another 6 years in the Superior Court venue alone, with another 2700 pages of records in this case, and with multiple orders of dismissal improperly containing and based upon numerous erroneous or superfluous and prejudicial findings and conclusions in many different orders of dismissal of the Superior Court in this case, while allowing the Port to illegally conceal key discoverable Port public records about the project and the Port's plans and legal and financial responsibilities under even the 2005 Lease where the Port's attorney "edited" out the key pages and parts of the Lease, to conceal them from the Courts and Appellants.

The Port and its pro-development attorney, also the Port of Tacoma's attorney, had done so well in concealing this planned project from the public in the area, that public only found out about this project from the local newspaper story about it done **after** The Olympian's Business Editor and reporter just happened to be at the August 2005 Port Commission Meeting where he first heard about the project when the Port and Weyerhaeuser Co. signed the Lease (AR 1895-1942, et seq.)with terms and conditions committing the Port to use over $40,000,000.00 public funds, Port property and other public resources to construct new Marine Terminal facilities and dredge the Budd Inlet Shipping Channel deeper and wider to make this a deep-water-port waterway with a new much larger Port marine terminal and facilities for handling much larger ships, and construction of a log yard and buildings so that Weyerhaeuser could use them under the terms of the Lease, all of which was done without any proper timely notice to the public or agencies with jurisdiction and without any prior SEPA environmental review of this project at all had been done. (See the Port's and Weyerhaeuser Co.'s signed Lease AR 1895-1942, et seq., missing page 49 ("AR 1941 1/2").

In Jan. and Feb. 2006, Mr. Dierker made two Public Records requests to the Port for records concerning this Port/Weyerhaeuser project proposed for construction in the Marine Terminal area of the Port of Olympia on the site of and in the area contaminated by the Cascade Pole hazardous waste site on the Port Peninsula in Budd Inlet of Puget Sound near Mr. Dierker's home in Olympia, Washington. (Id.; see attached copies of Mr. Dierker's two Jan. and Feb. 2006 Public Records requests).

Mr. Dierker's two Jan. and Feb. 2006 Public Records requests and Mr. West's Jan. 2006 and his 2007 Public Records requests about these records are not in the Port's Administrative Record (AR) on this project and Appellants' Port SEPA Appeal filed in this case, which has records about this project going back several years before the case was filed in June 2007, and the Port's AR filed in this case is incomplete for this reason. (Id.).

Weyerhaeuser's August 16, 2007 Motion to Bifurcate and Stay (CP 1389-1392) the Public Records Act (PRA) claims in this case, shows that the public records both requested in this case involved the same Port of Olympia's public records about this project that at the time were already being reviewed in this Court of Appeals' appellate review of the Superior Court in West v. Port of Olympia, Cause # No. 06-2-00141-6, based upon Appellant and Plaintiff Arthur West's January 2006 public records requests for Port public records about the Port's August 2005 Lease to

Defendant and Respondent Weyerhaeuser Company, and other Port records related to Port development plans including those related to the Port/Weyerhaeuser's large development project on Port Marine Terminal area on the Olympia Port Peninsula and the Port's other interrelated development projects and actions needed for such a Port development project to be constructed and operated on the Port.

While Weyerhaeuser's August 2007 Motion for Bifurcation and Stay of the PRA issues in this case shows that many of the same public records withheld from both Appellants and the Port's Administrative Record in this case had been part of Mr. West's PRA claims in Thurston County Superior Court Cause No. 06-2-00141-6 about these same records, and there is no evidence in the Port's Administrative Record or the Superior Court record in this case to show the Port disclosed these requested public records to Mr. Dierker during the time for making pleadings in the administrative and the Superior Court venues the attempted to appeal the Port complained of actions in this case, and the no evidence to show that the Port submitted them as part of an Amended Port Administrative Record even when it "refiled" the AR Jan 21, 2013, after the Superior Court had erroneously sent the AR back to the Port in mid-2009 because they thought the case had been dismissed.

However, as noted, at the same time Mr. West made his Jan. 2006 request for these Port records about this project he got reviewed by the Court in Cause No. 06-2-00141-6, Appellant and Plaintiff Jerry Dierker, pursuant to numerous laws not just the PRA, filed a set of public records requests for these same records with Defendant and Respondent the Port of Olympia on Jan. 27, 2006 and Feb. 27, 2006, that sought, among other records, records concerning the Port's lease to Defendant and Respondent Weyerhaeuser Company, and records related to Port development plans which included the Port/Weyerhaeuser's large development project on Port Marine Terminal area on the Olympia Port Peninsula and the Port's other interrelated development projects and actions needed for such a Port development project to be constructed and operated, where Mr. Dierker's Feb. 27, 2006 Public Records request to the Port was also a "reply to the Port's public record response of Feb. 21, 2006" refers to about 2300 pages of Port Public Records disclosed to others that which the Port had already withheld from Mr. Dierker for 30 days since his Jan. 27, 2006 Public Record request to the Port for these records which the Port had "silently withheld" from Mr. Dierker and Mr. West . (Id.; see attached copies of Mr. Dierker's Jan. 27, 2006 and Feb. 27,

2006 Public Records requests to the Port; and, if the Port submits it to this Court, see Port's Public Records Response of Feb. 21, 2006 to Mr. Dierker's Jan. 27, 2006 Public Records Request to the Port for these records).

Despite the claims of the Respondents in this case, unlike Mr. West's fairly standard PRA request under the PRA's statute, Mr. Dierker's Feb. 27, 2006 request for records about this project was not made only under the PRA, but makes claims that these public records must be disclosed to Mr. Dierker under the PRA and many other court rule, Federal, State, and constitutional law concerning fundamental due process, as it states:

"RE: Clarification of my first Request to review any and all public information on the Port's various related projects and other actions done in support of and/or required by the Port's lease or other agreements, etc., with the Weyerhaeuser Company to allow a log and railroad tie processing and shipping operation on Port property, including but not limited to all discoverable and disclosable documents, communications, maps, engineering designs, and other information requested by Arthur West, Jan Witt, Barnett Kalikow or others comprising about 2300+ documents of about 2407+ pages, et al, pursuant to the Freedom of Information Act Title 5 USC § 551a, Washington State Public Disclosure Act RCW 42.17 et seq., the Washington State Environmental Policy Act (SEPA) RCW 43.21C et seq., the National Environmental Policy Act (NEPA) Title 42, USC § 4321C et seq., the Washington State and U.S. Constitutions, and/or other applicable state, federal, international, or common law, regulation, statute, and/or case law, et seq., requiring the release of such information held by such government agencies like yours to the public making such requests for information, especially when such information is required for petitioning the government for redress of grievances as it is here."(Id; not in Port's AR or Superior Court Docket).

Since the statute of limitations in effect at the time allowed two years for just a PRA lawsuit actions to be filed in Superior Court after the date of the PRA request, Mr., Dierker's PRA and related lack of disclosure and lack of discovery claims in this case, were timely, even if Mr. Dierker did not immediately file a PRA lawsuit on the Port's failure to disclose these records to Mr. Dierker, like Mr. West did in West v. Port of Olympia, Cause # No. 06-2-00141-6, especially since Mr. Dierker was in continuing contact with the Port about this project throughout the 1 year and 4 month of time before Mr. Dierker filed claims in this case as part of the first Amended Complaint and Second Amended Complaint in this case concerning his public records requests and lack of disclosure relevant evidence.

While the statute of limitations in effect at the time allowed two years for a PRA lawsuit actions to be filed in Superior Court, almost immediately after Mr. West received the Port's 2006 PRA response Mr. West filed West v. Port of Olympia, Cause # No. 06-2-00141-6, a 2006 PRA case on these records withheld from Mr. West, Mr. Dierker and others, where Mr. West partially

won the case in the Court of Appeals where some of these withheld records including "silently withheld" records were released to Mr. West, over a year after this 2007 case was filed, but which were not released to Mr. Dierker nor included by the Port in the Port's Administrative Record (AR) filed in 2007 this case, even after the Port "refiled" the AR on Jan. 21, 2013 for this case's appeal, almost exactly 7 years after Mr. Dierker had made his PRA request to the Port for these clearly disclosable public records still being withheld from this case by the Port. (Compare Port's AR to see if it has any of these same withheld documents in this case, that were released by the decisions of West v. Port of Olympia, Cause # No. 06-2-00141-6, a 2006 PRA case on these same records).

The evidence in these cases clearly shows that Mr. Dierker has a valid claim in this case of the Port's improperly withholding of those Port Public Records that were also improperly withheld from Mr. West for this case under this Court's and the Superior Court's later decisions in Cause No. 06-2-00141-6. Therefore, even if the Port and Superior Court proceedings acted to deny any hearing of the evidence and merits of Appellants' claims in this case, so as to prevent inclusion of such key evidence of the Port's wrongdoing in the AR and Superior Court records reviewed by the Court of Appeals in this appeal case, and this alone shows that at least part of the Port records he originally requested from the Port on Jan. 27, 2006 that the Port has later released to Mr. West and/or others as of now, should have been released to Mr. Dierker and should have been included in the AR the Port filed in this case, and Mr. Dierker should have won public records costs and penalties against the Port for this several years ago from the Superior Court, by it kept denying any hearing of the Show Cause Order for these withheld records. (Id.).

The Port's AR in this case is incomplete for this reason alone and the Port failed to properly disclose these withheld records from Mr. Dierker, and he should have been granted PRA penalties and costs for the Port withholding of these records from Mr. Dierker, not denial of any hearing of his PRA type claims.

Further, as noted by the Plaintiffs' Dec. 19, 2007 Declaration re Undisclosed Records (CP 2070-2083), Mr. West's Oct. 16, 2009 Plaintiff's Declaration in Support of the Motion for Show Cause Order (CP 96-298), Mr. West's August 26, 2010 Declaration Re Withholding of Public Records, Filing of False Administrative Record, and Violation of RCW 40.16.010-030 (CP 307-310), and Mr. West's 2011 Declaration in Support of these PRA claims (CP 387) which had attached copies of some of these withheld Port public records that were responsive to Appellants'

records requests and should have been included in the Port's Administrative Record, which included the missing page 49 ("AR 1941 1/2") of the Lease (AR 1895-1942) that "incorporated" the findings and recommendations of the 2005 Environmental Site Assessment (ESA) as further terms and conditions of the Lease the Port is required to follow, where the Lease's incorporated documents were the Port/Weyerhaeuser's consultants reports, environmental site assessments, wetlands reports, and other environmental and project reports about this location and this project, and about the laws that the Port would have to follow to gain all of the many approvals it would need for this one project, most of which never happened at all because of the Port's unlawful actions and/or omissions to properly act under the law and these important as shown by a proper de novo review of the entire Port's Administrative Record under the clearly erroneous standard of review in this case. (See attached).

The Port is still "silently withholding" from Mr. Dierker and the Port's Administrative Record (AR) in this case this missing page 49 ("AR 1941 1/2") of the Lease (AR 1895-1942) and those "incorporated" Environmental Site Assessment, wetlands reports, and other project reports about this location and this project and the laws that the Port would have to follow to gain all of the many approvals it would need for this one project, by the Port's misuse of the PRA to deny disclosure of this relevant evidence of the nature of the large project and large financial debt the Port has committed tens of millions of dollars in public funds and resources to construct and operate without any proper and public environmental and project review of the Port's lease action being done **before** the Port took this action committing these public funds, as required by the SEPA and other law of this State ignored by the Port and Superior Court here. (CP 2070-2083; see attached Port's 2012 Responses to Dierker's 2006 & 2012 Port records requests with Lease and ESA).

Appellants filed SEPA Comments and twice paid for Port SEPA Appeals on the Port's "MDNS (SEPA) #07-2" on this project generally, which was later amended to include the Port's DNS SEPA 07-3 on the Port's "onsite rail road" part of this project, and they requested that the Port prepare an EIS [environmental impact statement] where Co-Appellants argued that the Port had again improperly "piecemealed" the SEPA review of the integral parts of this project in these 2 Port SEPA actions, since the Port's 2 SEPA actions on this project were barred by the Dec. 19, 2006 Decision denying approval of this project of the City of Olympia's Hearing Examiner Thomas Bjorgen for the Port's improper "piecemealing" the integral parts of this project in

smaller pieces during a City of Olympia SEPA and project review of this same project. (See e.g. -- CP 2358, et seq.).

At the time, the Port and Weyerhaeuser claimed Weyerhaeuser wanted to move it's entire log export yard facility from the Port of Tacoma, Washington to the Port of Olympia, Washington, though Weyerhaeuser later decided to not do so with Weyerhaeuser not moving and leasing form the Port of Tacoma of its Port of Tacoma yard for another 10 years and not moving.

However, in the Port's efforts to please its "partner" in this project Weyerhaeuser and gain approval the Sunshine Laws of this State and the Superior Court here have been improperly used by Respondents to withhold discoverable relevant evidence about this project from Appellants, the public, agencies with jurisdiction and approval authority, and from the Courts, in order to bar properly and meaningful procedural due process access to the Courts for redress of grievances Appellants have made against Respondents' improper actions taken in this case.

The Port started this problem by concealing their planning and other actions taken for this project prior to August 2005, and then by the Port failing to properly list a specific item in the Notice of the Port Commissioners Meeting of August 2005 which would have given a reasonable person sufficient information in the public notice to know that the Port and Weyerhaeuser were signing a Lease requiring the Port to make this Port/Weyerhaeuser marine terminal, log export yard, and dredging of Budd Inlet into a deep-water-port waterway project and allowing Weyerhaeuser to use about 1/2 of the area for log export yard for 5 years, all without any proper timely notice to the public and without any proper prior environmental, project or action review at all.

The Court Record and the Port's Administrative Record (AR) in this case clearly show that Port has an unlawful, unconstitutional, unreasonable, clearly erroneous, illegal and/or arbitrary and capricious custom, policy, procedure or business practice which the Port and its attorneys have used to unlawfully conceal the Port's planning and approvals of each and every separate part of this entire project. The record in this case shows or indicates the Port or its pro-development attorney at least thought that the Lease to Weyerhaeuser required the Port and its pro-development attorney to:

1) hide all important relevant evidence in the Port's files from everyone which might caused problems for gaining approval of the Port/Weyerhaeuser partners' joint project plans and actions from agencies with jurisdiction, from the general public, and from persons with known interests in

the location or such project like the Appellants, who even requested this evidence from the Port and who filed numerous comments, appeals or requests for proper action with the Port and others about this project, as well as where Appellants have requested this same relevant evidence in the Courts where the Port withheld this same relevant evidence about this project from every person, agency and Court;

2) hide the Port's misuse and theft of public funds or resources used for this project, partly by unlawfully putting the taxpayers in this area in tens of millions of dollars in debt to pay for bonds sold by the Port to promote, approve, construct, and operate this project for at least the 6 years until now, without the Port doing any proper administrative review of this clearly unsustainable and unreasonable development;

3) to especially hide all relevant evidence concerning the Port/Weyerhaeuser partners' joint project, since the project added new threats to the already threatened or damaged people, plants, animals, and environment of the area, especially when the project added new threats to stop an actual environmental cleanup of one of the most toxic industrial hazardous waste and disposal sites that had ever been built on the shore lands and aquatic lands of the Port of Olympia peninsula in the middle of Budd Inlet of the deadest "Dead Zone" in the Puget Sound, in Olympia Washington, within sight of the State Supreme Court and Governor's Mansion of the State Capital in Olympia, Washington; and

4) the Port and its pro-development attorney Ms. Lake continued to conceal this relevant evidence and continued to do many other unlawful and unreasonable actions to prevent the Appellants from ever having any meaningful opportunity to be heard by any impartial adjudicative agency with jurisdiction or Court, based on the Port's documented relevant evidence, where the Port's withheld such relevant documented evidence from the Port's files that was necessary for the Appellants to properly base their "appeal" pleadings on for appealing the Port's and other agencies numerous separate "piecemealed" actions taken to approve various integral interconnected parts of this large project, to stop this project until the Port follows the laws necessary to allow this project.

The record in the Superior Court in this case shows that most of time the Courts judges and staff blindly followed any and all misrepresentations of fact or law made by the attorneys of Respondents Port and its partner Weyerhaeuser, just like someone's' "lap dog" would.

The record in this case also shows that in just one instance, Judge Wickham, who like the

Port and Weyerhaeuser are members of the pro-development Chamber of Commerce (CoC) promoting this Port/Weyerhaeuser project, made several "mistakes" aiding and abetting the delays of this case caused by the improper actions or failures to properly act of his fellow members of the Chamber of Commerce, which ended up delaying this case for almost 5 years until it was improperly dismissed for Appellants' lack of prosecution by Judge Sam Meyer, Judge Wickham's subordinate judge in the Thurston County Court's and who was also Judge Wickham's subordinate at the Board for Administration of the Courts, who used Judge Wickham's judicial assistant for the last part of this Superior Court case that District Court Judge Sam Meyer was assigned as a "Pro Tem/Visiting Superior Court Judge on this case only having PRA claims left, who later admitted that he knew nothing about the PRA and that this was his first case as a Superior Court Judge at the hearing on the Port's Motion to Dismiss, after he again refused to consider Judge Pomeroy's case scheduling order for the bifurcated claims in this case which set the previously ordered PRA show cause hearing two week before any motion to dismiss, especially such one that was barred under the law of this case's prior rulings in both the Superior and Supreme Courts, as noted herein. (See CP 2117, et seq.; see AR 2341 the Thurston County Chamber of Commerce Comment letter to the Port in support of the Port SEPA 07-2 action to further the construction of this large project at the Port of Olympia).

Clearly, the 6 year delay and final dismissal of this case that denied Appellants any proper hearing of Appellants' claims in this case by an impartial review of all of the relevant evidence necessary for pleading this case in a hearing where Appellants have an unprejudiced and meaningful opportunity to be heard, could not have benefitted Appellants in any way, as Judge Sam Meyer's erroneous and improper Order of Dismissal unlawfully attempted to claim or insinuate.

Clearly, the record in this case shows that the Respondents Port and its partner Weyerhaeuser have unlawfully denied Appellants proper meaningful access to Courts and other government adjudicative agencies, so that Appellants could not gain redress of grievances of the Port's improper actions and/or failures to properly act in this case, shows that the Port violated the PRA and SEPA among other laws, and, therefore, this appeal should be granted.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

1. The Superior Court erred in hearing, granting, and/or construing the granting of Respondents' Motion to Bifurcate and accompanying case scheduling order, and erred in

hearing and granting both of the Port's two Motions to Dismiss Appellants' bifurcated claims in this case. a) Did the Superior Court fail to consider that the motion to bifurcate and both motion to dismiss were barred by law, by collateral estoppel or res judicata, and/or by contractual obligation the Port owed to Appellants? Yes. b) Did the Superior Court err when granting bifurcation and these two dismissal by failing to consider the pleadings, facts and inferences therefrom in the light most favorable to the non-moving parties, the Appellants in this case? Yes? c) When a motion to dismiss is decided on affidavits and declarations, like these dismissals, is it decided as a motion for summary judgment? Yes. d) Is it error on a motion for summary judgment to determine disputed issues of fact or weigh evidence and credibility of the parties? Yes. e) Did the Superior Court determine disputed issues of fact or or weigh evidence and credibility of the parties? Yes. f) Did the Superior Court repeatedly weigh evidence and credibility, with respect to Appellants' documented evidence and oral argument at hearing? Yes. g) Are "Findings of Fact" in a dismissal always superfluous and not prejudicial to Appellants in a case, and are they always improper for disputed factual claims? Yes and Yes. h) In making this Opening Brief, should Appellants be required to make and argue specific "Errors" on the final Dismissal's Findings of Fact or Conclusions of Law which are are always superfluous and not prejudicial to Appellants in a case? No. i) In making this Opening Brief, should Appellants be required to make and argue specific "Errors" on the final Dismissal's Findings of Fact which is actually a mixed finding of fact on disputed facts and an erroneous conclusion of law, and especially when Findings of Fact and Conclusions of Law are always superfluous and not prejudicial to Appellants in a case. j) Were Appellants prejudiced by the Port or Weyerhaeuser Respondents improper litigation actions in this case and/or by the Port's actions as "the prevailing party" to make and refuse to not have "findings of fact" in the Order of Dismissal of the Superior Court, some on disputed facts or mixed issues of fact and law? Yes and Yes. k) Were the Superior Court's three sets of rulings and Orders bifurcating and dismissing this case manifestly unreasonable, based on untenable grounds, an erroneous view of the law controlling the case, irregular proceedings, lack of jurisdiction, an improper aiding of Respondents improper litigation practices of in this case, and/or an abuse of its discretion under the law? Yes.

2. The Superior Court erred in hearing, granting, and construing the August 24, 2007 order of bifurcation. a) Did the Superior Court err in this bifurcation as noted by the Issues a, b,

f, j and k in Error 1? Yes. b) Was the Superior Court in err when granting the order of bifurcation since SEPA statutory scheme incorporates the PRA public records provisions in the SEPA regulations at WAC 197-11-504(1) barring such a bifurcation? Yes. c) Did the Superior Court err in following the provisions of the accompanying scheduling order in the August 24, 2007 Clerk's Note's on this hearing setting date of the PRA hearing before the date for the hearings of Respondents' numerous dispositive motions? Yes. d) Did the Superior Court err in construing the order of bifurcation in such a fashion that the Thurston County Superior Court administration thought Appellants' PRA claims had been stayed, or, alternatively, dismissed, effectively barring Appellants from proceeding? Yes. e) Was it an error to conclude that the entire case had been dismissed and to refuse to allow Appellants to file pleadings in the case, when in fact the order of bifurcation bifurcated the case and the orders of dismissal in question only dismissed Appellants' non-PRA claims or any PRA claims as to Weyerhaeuser, not as to the Port? Yes. f) Do not the declaration at CP 369, "When plaintiff attempted to set a hearing he was informed by the Superior Court's private ex officio legal counsel that the case had been dismissed. Intervention by the Office of the prosecuting Attorney was required to have the case reactivated " and the fact that Mr. West, upon hearing Judge Thomas McPhee 's statement that the "stay" in the case would have to be lifted before the case could proceed, filed a motion to lift the "stay " (CP 533-538), demonstrate that the practical effect of the bifurcation order was in fact to prevent the PRA case from going forward? Yes.

3. The Superior Court erred in hearing and granting the Port's Motion to Dismiss Appellants' "Non-PRA" claims in this case. a) Did the Superior Court err in this dismissal as noted by the Issues a-k in Error 1? Yes. b) Did the Superior Court fail to consider that the Port's Motion to Dismiss was improper since it was barred by the Port's SEPA Policy Resolution 2006-3, Section 8(6), that "the parties to the appeal have standing to appeal to Court" (CP 2351), and that "(6) Appeal of Port Final Decisions. Port environmental Final Decisions shall be appealable to the Superior Court for the State of Washington" (CP 2382), and barred by provisions of the Port's own Letter Decision denying the Port SEPA Appeal Appellants prosecuted and paid for? Yes. c) Did the Judge Wickham err in construing the order of bifurcation where Respondents' requested "stay" had been denied, in such a fashion that he and the whole Thurston County Superior Court administration thought Appellants' PRA claims had been stayed, when they were not? Yes. d) Did

Judge Wickham err in considering this dismissal in this manner by refusing to set the PRA Show Cause Hearing in this case **before** hearing and granting the Port's Motion to Dismiss of the "Non-PRA" claims in Appellants' Port SEPA Appeal for lack of standing, preventing Judge Wickham from considering evidence within the "withheld" PRA records since SEPA statutory scheme incorporates the PRA public records provisions at WAC 197-11-504(1)? Yes. e) Did the Superior Court fail to consider that the Port's filing of the Administrative Record in this case of the Port SEPA Appeal decision in this case about this development project prosecuted and paid for by Appellants, provides Appellants with sufficient interest for standing to request a judicial review of the Port SEPA Appeal decision in this case? Yes. f) Did Mr. Dierker make sufficient factual allegations of sufficient interest and injury to himself, according to the procedural posture of the case? Yes. g) Did the Superior Court fail to consider that evidence in the record and/or of judicial notice cited by Appellants showed Appellants had sufficient interest for finding injury in this case? Yes. h) Did Judge Wickham of the Superior Court err by refusing to recuse himself from this case reviewing Port development project decisions when Judge Wickham could not be impartial since he had a direct conflict of interest through his admitted membership in the "pro-development" Chamber of Commerce barring him from hearing any cases concerning development? Yes. i) Did the Superior Court err in dismissing the SEPA issues in this case, when the Port's actions taken on this project that Appellants complained of in this case were barred under res judicata and collateral estoppel due to a prior Dec. 19, 2006 Final Decision of then Olympia City Hearing Examiner Thomas Bjorgen denying approval of this same Port/Weyerhaeuser project, which the Appellants were in privity with since they testified at the hearings on for this decision and even tried to intervene as Appellants into? Yes.

4. The Superior Court erred in hearing and granting the Port's Motion for Dismissal of Appellants' "PRA" claims and for final dismissal of all claims in this case under CR 41(b) for lack of prosecution. a) Did the Superior Court err in this dismissal as noted by the Issues a-k in Error 1? Yes. b) Did the Superior Court fail to consider that the Port's motion to dismiss was barred by the law of this case under res judicata and collateral estoppel, for the Port's winning of the Supreme Court action (No. 80733-7) where the Appellants claimed the Superior Court and respondents concerted actions had improperly delayed the hearing of Appellants' PRA claims in this case? Yes. c) Did the Superior Court err in dismissing Appellants' PRA claims when

the record in the case demonstrates that the Port had violated the Public Records Act? Yes. d) Did the Superior Court err in dismissing Appellants' PRA claims when the case had been delayed so long that the in camera records submitted to the Superior Court by the Port for this case's review had been sent back the Port in mid-2009 by the Superior Court who "mistakenly" thought the case had been completely dismissed in in mid-2008? Yes. e) Did the Superior Court err in dismissing Appellants' PRA claims when the record in the case demonstrated that the Port had violated the Public Records Act? Yes. f) Did Appellants fail to note the matter for hearing or trial? No. g) Did Mr. Dierker violate an order of the Superior Court? No. h) Did the Superior Court have any finding that Mr. Dierker had deliberately and willfully delayed the case like that made for Mr. West in Finding of Fact 13? No. i) Without any such Finding of Fact for Mr. Dierker, did the Superior Court err in concluding Mr. Dierker had failed to note the matter for hearing, such that CR 41(b)(1) could be applied in dismissing Mr. Dierker's PRA claims? Yes. j) Did the Port of Olympia show prejudice? Yes. k) Did the Superior Court expressly consider whether lesser sanctions than dismissal would suffice? No. l) Did the Superior Court err in weighing evidence and credibility, with respect to Appellants' documented evidence and oral argument at hearing that the Superior Court Clerk's Office had admitted that they had refused to accept Appellants' filings or set the matter for any hearing in this case? Yes. n) Did the Superior Court err in construing the order of bifurcation in such a fashion that the Thurston County Superior Court administration thought Appellants' PRA claims had been stayed, or, alternatively, in construing the April 25, 2008 order of dismissal of the "non-PRA" claims in this case in such a fashion that the Thurston County Superior Court administration thought all of Appellants' claims, including the PRA claims, had been dismissed, effectively barring Appellants from proceeding at all? Yes. o) Did the Superior Court err in the "introduction" to the improper "Findings of Fact" section of the Order of Dismissal, where Judge Meyer made clearly erroneously claims at page 2-3, that he had considered the relevant pleadings and "the other pleadings and the docket on file in this case", when much of the evidence supporting the Appellants' "other pleadings", like the Administrative Records and even the PRA records withheld by the Port, were **not** in the Superior Court's possession when this Judge had the case since the Court had sent them back to the Port and the Port had failed to refile them with the Superior Court until Jan. 2013 after the case had been dismissed and had been on appeal for 5 months, delaying this appeal, and when his rulings and decisions appear to show that

he failed to consider any documented evidence in the case or pleadings from Appellants, the Port, and even the Superior Court staff and Court Docket itself which contradict Judge Meyer's findings and rulings supporting his dismissal of this case? Yes.

5. The Superior Court did not dismiss the case pursuant to its own inherent powers, but that would have been error.

6. The Superior Court erred in making Finding of Fact 3 (CP 934), "On August 24, 2007, this Court, the Honorable Christine Pomeroy, granted Defendant Weyerhaeuser Company's motion to bifurcate, and segregated Plaintiffs' Public Records Act claims from the other causes of action in the case. Nothing in the bifurcation order prevented the PRA case from going forward." a) Do not the declaration at CP 369, "When plaintiff attempted to set a hearing he was informed by the Superior Court's private ex officio legal counsel that the case had been dismissed. Intervention by the Office of the prosecuting Attorney was required to have the case reactivated " and the fact that Mr. West, upon hearing Judge Thomas McPhee 's statement that the "stay" in the case would have to be lifted before the case could proceed, filed a motion to lift the "stay " (CP 533-538), demonstrate that the practical effect of the bifurcation order was in fact to prevent the PRA case from going forward? Yes.

7. The Superior Court erred in making Finding of Fact 10 (CP 935), "No action was taken by anyone in this case until October 16, 2009 when Mr. West filed a Declaration of Support of Motion for Show Cause Order, on the Public Records Act issue." a) Does the e-mail at CP 517, "Upon further review by court administration and consultation with our staff attorney, it has been determined that this case was closed by Order of Dismissal signed by Judge Wickham on 4-25-08. Based on that, the (Superior) court is not going to reassign this case to another judge. No further motions will be heard in this case", demonstrate that the Thurston County Superior Court administration "mistakenly" thought the entire case had been dismissed? Yes. b) Does Mr. Dierker's Declaration at CP 833 that "many of the Superior Court Staff were aware of my and Mr. West's efforts to set a hearing for the PRA issues during the about 1 1/2 years of time when the Clerk's 'mistake' about the dismissal of this case prevented us from filing any pleadings or setting any hearings in this case", and Mr. West 's declaration at CP 943-946 where he was "arrested" twice for trying to file a Notice of Issue to set a hearing for the PRA claims show that in fact Appellants had done everything short of being jailed for contempt for

attempting to file pleadings and set hearings proceed in this case, while the Superior Court even sent the Port's Administrative Record and the sealed Port withheld PRA records for the In Camera Review on the PRA claims, back to the Port in mid-2009, by the Superior Court's "mistaken" thinking the case was all "dismissed", and so no judge was assigned to the case? Yes.

8. The Superior Court erred in making Finding of Fact 13 (CP 936), "Those reasons [that Appellants' PRA show cause hearing that had been delayed for several years by erroneous or improper actions of the Respondents and the Superior Court, which Mr. West had even filed eight notices of issue to set during that time but was never heard] included Mr. West noting the hearing for a day he had previously been informed that counsel for the Port was not available, Mr. West noting the hearing for dates when the assigned judicial officer was not present and/or available and Mr. West failing to confirm the hearing in advance. None of the delays were caused by the Port of Olympia and none of the reasons the show cause hearing was never held were caused by the Port of Olympia." a) Do not Mr. West's Declaration at CP 943-946, Mr. Dierker 's Declaration at CP 833, and Mr. West 's Declaration at CP 369-370 show that in fact the unavailability of the counsel for the Port of Olympia coincided with the only available dates for hearing before the assigned judge, Judge Wickham, then on Juvenile and Family Court rotation, and that this coincidence also led to the non-hearing of Appellants' PRA show cause hearing, a circumstance not attributable to Mr. West or Mr. Dierker? Yes. b) Did the Superior Court err when claiming that "None of the delays were caused by the Port of Olympia and none of the reasons the show cause hearing was never held were caused by the Port of Olympia", when the record shows that all the delays in this case stem from the Port's false claims to the Court that the withheld records in the PRA claims did not need to be heard before the "non-PRA claims were, had been improperly granted a "stay" by Judge Wickham's scheduling order which had no setting of the date for the Show Cause Hearing of the PRA claims to be heard before the hearing of the Port's Motion to Dismiss the Non-PRA claims that occurred without having the related interconnected evidence withheld by the Port using the PRA, the Port's false claims the Appellants caused the delay in this case, when even the Port's own evidence in this record showed the Superior Court's confusion about the orders granting the Port's and Weyerhaeuser's motions to dismiss and motion to bifurcate had caused the delays which only aided the Respondents, not Appellants in this case where their claims were all improperly dismissed,

and since the final "delay" of the PRA show cause hearing in this case was clearly caused by the Port's filing and pleadings made in support of this improper and barred Motion to Dismiss for lack of prosecution? Yes.

9. The Superior Court erred when making the handwritten portion of "Finding of Fact 16" (CP 936) underlined here that "On June 10, 2011, Mr. Dierker filed an Affidavit of Prejudice as to Judge McPhee. <u>Prior to 6/10/11 Mr. Dierker made no filings in Sup. Ct. (Superior Court) in this case since August, 2007.</u>" a) Did the Superior Court err by an abuse of discretion when the legal standards of review for considering a motion to dismiss do not allow the Court to make the handwritten portion of "Finding of Fact 16" concerning the disputed facts in this case about whether or not Appellant Dierker filed any pleadings in this case between August, 2007 and June 10, 2011? Yes. b) Did the Superior Court err by an abuse of discretion and did the Judge obviously make erroneous claims in the handwritten portion of "Finding of Fact 16", when the evidence in the relevant pleadings and the pleadings and the Court Docket on file in this case that this order claimed to have considered, clearly shows that Appellant Dierker filed many pleadings in this case between August, 2007 and June 10, 2011, and/or shows that Mr. Dierker was also was not allowed to file by the Superior Court's "mistakes" in thinking the case was dismissed in April 2008 or "stayed", like Mr. West was? Yes.

10. The Superior Court erred in making Finding of Fact 27 (CP 937-938), "This Court finds that the delays in this case have severely prejudiced the Port of Olympia, since the Public Records Act requires a mandatory daily penalty in the event that a court finds an agency to have violated the act and does not vest a court with discretion to reduce the number of days for which a penalty may be imposed. Mr. West and Mr. Dierker should not be allowed to benefit from the delays that they themselves caused." a) Did the Superior Court err in using a "Finding of Fact" to make this part of this ruling since this is obviously a mixed claim of law and fact that is not allowed under the law to be made into a "Finding of Fact" by a Superior Court's clearly erroneous and unlawful actions or claims in this ruling? Yes. b) Do not the Superior Court's own E-mail chain and other documented evidence in this case show that in fact the delay had been caused by the Superior Court's confusion and mistakes over the orders of bifurcation and dismissal of the non-PRA claims, and that the Superior Court's confusion and mistakes here also led to the denial of any hearing of Appellants PRA Show Cause hearing in this

case, a circumstance not attributable to Appellants? Yes. c) Is it not true that an increased number of days for which a penalty might be imposed is not, in fact, "prejudice"? Yes. d) Does the PRA "vest a court with discretion" to set the from 5 to 100 dollars per day amount PRA financial penalty imposed against the Port here? Yes. e) Did the Superior Court err when not finding that the Port had violated the PRA and SEPA by withholding these public records related to this project, when not hearing the PRA claims in this case, and when not awarding Appellants costs, fees and attorney fees where appropriate? Yes.

III. STATEMENT OF THE CASE

Appellant and Plaintiff Jerry Dierker while Mr. Dierker incorporates by reference into his Opening Brief and joins with those portions of the "Statement of the Case" in Mr. West's Opening Brief that apply to both Mr. Dierker and Mr. West, except where Mr. Dierker will restate the Statement of the Case and, with his Introduction, will add his own parts as follows.

Further, Mr. Dierker requests that where, appropriate this Court of Appeals waive any strict requirement under RAP 10.3(a)(5) for citing to the record in this case, since certain key records and evidence related to Appellants' claims in this case never made it into the Superior Court records in this case, since 1) they were "withheld" from the Port's Administrative Record (AR) filed in this case by the Port's misuse of the Public Records Act (PRA) and the Port's misuse of the State Environmental Policy Act (SEPA) to deny Appellants' SEPA Appeal and not conduct any proper recorded adjudicative hearing appeal proceeding, in order for the Port to make a proper AR record for review by the Superior Court and this Court of Appeals; and were withheld from the Superior Court Record in this case by dismissing this case without ever allowing any hearing of the Show Cause Hearing for the public records and evidence withheld by the Port misusing the PRA, and without any hearing or trial on the SEPA claims, where Appellants' documented evidence could have been produced in the Superior Court for including in the Superior Court records in this case for appellate review by this Court of Appeals, and therefore, neither the Port's Administrative Record (AR) nor the Superior Court's record in this case can be properly cited to for this Opening Brief in the Court of Appeals. (See attached).

As noted by Weyerhaeuser's August 16, 2007 Motion to Bifurcate and Stay (CP 1389-1392) the Public Records Act (PRA) claims in this case involved Port of Olympia's public records

about this project that at the time were already being reviewed in this Court of Appeals' appellate review of the Superior Court in West v. Port of Olympia, Cause # No. 06-2-00141-6, based upon Appellant and Plaintiff Arthur West's January 2006 public records requests for Port public records about the Port's August 2005 Lease to Defendant and Respondent Weyerhaeuser Company, and other Port records related to Port development plans including those related to the Port/Weyerhaeuser's large development project on Port Marine Terminal area on the Olympia Port Peninsula and the Port's other interrelated development projects and actions needed for such a Port development project to be constructed and operated on the Port.

At this time Appellant and Plaintiff Jerry Dierker, pursuant to numerous laws not just the PRA, filed a set of public records requests for these same records with Defendant and Respondent the Port of Olympia on Jan. 27, 2006 and Feb. 27, 2006, that sought, among other records, records concerning the Port's lease to Defendant and Respondent Weyerhaeuser Company, and records related to Port development plans which included the Port/Weyerhaeuser's large development project on Port Marine Terminal area on the Olympia Port Peninsula and the Port's other interrelated development projects and actions needed for such a Port development project to be constructed and operated, where Mr. Dierker's Feb. 27, 2006 Public Records request to the Port was also a "reply to the Port's public record response of Feb. 21, 2006" refers to about 2300 pages of Port Public Records disclosed to others that which the Port had already withheld from Mr. Dierker for 30 days since his Jan. 27, 2006 Public Record request to the Port for these records which the Port had "silently withheld" from Mr. Dierker and Mr. West . (Id.; see attached copies of Mr. Dierker's Jan. 27, 2006 and Feb. 27, 2006 Public Records requests to the Port, and Port's its 2012 Public Records Response to Mr. Dierker's 2006 and 2012 Public Records Requests to the Port for these records; and see Port's missing Feb. 21, 2006 response when they file it).

Despite the claims of the Respondents in this case, unlike Mr. West's fairly standard PRA request under the PRA's statute, Mr. Dierker's Feb. 27, 2006 request for records about this project was not made <u>only</u> under the PRA, but makes claims that these public records must be disclosed to Mr. Dierker under the PRA and many other court rule, Federal, State, and constitutional law concerning fundamental due process, as it states:

"RE: Clarification of my first Request to review any and all public information on the Port's various related projects and other actions done in support of and/or required by the Port's lease or other agreements, etc., with the Weyerhaeuser Company to allow a log and railroad tie processing

and shipping operation on Port property, including but not limited to all discoverable and disclosable documents, communications, maps, engineering designs, and other information requested by Arthur West, Jan Witt, Barnett Kalikow or others comprising about 2300+ documents of about 2407+ pages, et al, pursuant to the Freedom of Information Act Title 5 USC § 551a, Washington State Public Disclosure Act RCW 42.17 et seq., the Washington State Environmental Policy Act (SEPA) RCW 43.21C et seq., the National Environmental Policy Act (NEPA) Title 42, USC § 4321C et seq., the Washington State and U.S. Constitutions, and/or other applicable state, federal, international, or common law, regulation, statute, and/or case law, et seq., requiring the release of such information held by such government agencies like yours to the public making such requests for information, especially when such information is required for petitioning the government for redress of grievances as it is here."(Id; not in Port's AR or Superior Court Docket).

Since the statute of limitations in effect at the time allowed two years for a PRA lawsuit actions to be filed in Superior Court after the date of the PRA request, Mr., Dierker's PRA and related lack of disclosure and lack of discovery claims in this case, were timely, even if Mr. Dierker did not immediately file a PRA lawsuit on the Port's failure to disclose these records to Mr. Dierker, like Mr. West did in West v. Port of Olympia, Cause # No. 06-2-00141-6, especially since Mr. Dierker was in continuing contact with the Port about this project throughout the 1 year and 4 month of time before Mr. Dierker filed claims in this case as part of the first Amended Complaint and Second Amended Complaint in this case concerning his public records requests and lack of disclosure relevant evidence.

While the statute of limitations in effect at the time allowed two years for a PRA lawsuit actions to be filed in Superior Court, almost immediately after Mr. West received Mr. West filed West v. Port of Olympia, Cause # No. 06-2-00141-6, a 2006 PRA case on these records withheld from Mr. West, Mr. Dierker and others, where Mr. West partially won the case in the Court of Appeals where some of these withheld records including "silently withheld" records were released to Mr. West,over a year after this 2007 case was filed, but which were not released to Mr. Dierker nor included by the Port in the Port's Administrative Record (AR) filed in 2007 this case, even after the Port "refiled" the AR on Jan. 21, 2013 for this case's appeal, almost exactly 7 years after Mr. Dierker had made his PRA request to the Port for these clearly disclosable public records still being withheld from this case by the Port. (Compare Port's AR to see if it has any of these same withheld documents in this case, that were released by the decisions of West v. Port of Olympia, Cause # No. 06-2-00141-6, a 2006 PRA case on these same records).

The evidence in these cases show that Mr. Dierker has a valid claim in this case of the Port's improperly withholding of those Port Public Records that were also improperly withheld

from Mr. Dierker for this case. Therefore, even if the Port and Superior Court proceedings acted to deny any hearing of the evidence and merits of Appellants claims in this case, so as to prevent inclusion of such key evidence of the Port's wrongdoing in the AR and Superior Court records reviewed by the Court of Appeals in this appeal case, and this alone shows that at least part of the records he originally requested from the Port on Jan. 27, 2006 that the Port has later released to Mr. West and/or others as of now, should have been released to Mr. Dierker and should have been included in the AR the Port filed in this case. (Id.; see below). The Port's AR in this case is incomplete for this reason alone and the Port failed to properly disclose these withheld records from Mr. Dierker, and he should have been granted PRA penalties and costs for the Port withholding of these records from Mr. Dierker, not denial of any hearing of his PRA type claims.

The Port's AR shows that during 2006 through Dec. 19, 2006, both Appellants in this case were involved in a number of administrative cases about this Port/Weyerhaeuser's large development project on Port Marine Terminal area, which culminated in Olympia Hearings Examiner Thomas Bjorgen's Dec. 19, 2006 Decision (AR 2094-2132) overturning the City of Olympia's mid-2006 SEPA decision and project approval of this same project, where after Mr. Dierker and Mr. West had both testified about such "piecemealing" Hearing Examiner Thomas Bjorgen found the City's project and SEPA approval had improperly "piecemealed" the many integral and interconnected parts of the Port/Weyerhaeuser's large development project on Port Marine Terminal area, to separate most of them out of the City's project and SEPA review process for such projects, in violation of the State Environmental Policy Act (SEPA), et seq. (See also e.g. AR 2203-2205; AR 2456 2458; AR 265; AR 2668-2670; AR 2350-2407; AR 2666; AR 2769-2770).

When in early 2007 the Port tried again to "resurrect" a piecemealed part of this project, on March 17, 2007, Mr. West submitted a public records request to the Port of Olympia (CP 1963; CP 1079) that sought, among other records, records from the Port's files concerning the Port's lease to Defendant and Respondent Weyerhaeuser Company, the Port's plans to construct and operate the Port/Weyerhaeuser's large development project on Port Marine Terminal area, and the Port's records concerning the then-proposed South Sound Logistics Center cargo container storage and train yard in Maytown, Washington, which was one of the Port's other interrelated development projects and actions needed for such a Port Marine Terminal development project to

be operated, which was evidence necessary to our continuing "interested party" review of this project and this site necessary for making complete SEPA Comments, SEPA Appeals, or judicial appeals of the Port's unlawful and sometimes illegal agency actions taken to a construct and operate this project without proper review. (See also CP 543-544; CP 1177-1178).

April 16, 2007, while continuing to withhold records silently from Mr. Dierker and West, the Port of Olympia's issued a Notice, Staff Report and SEPA MDNS(Mitigated Determination of Non-Significance) SEPA 07-2 (AR 2152-2156; CP 2380) for the Port of Olympia/Weyerhaeuser Company lease that is the subject of this appeal, requesting SEPA Comments on this Port SEPA action from Appellants and other listed known interested parties, where at AR 1252 of the Port's Staff Report made for the proposed issuance of the Port's SEPA 07-2 MDNS, it describes the unrecorded SEPA "reconsideration meeting" with the Port's Executive Director required by the Port's SEPA appeal process in the Port's SEPA policy.

April 25, 2007, Mr. Arthur West (later joined by Mr. Jerry Dierker) filed and paid for a Request for the Port's Executive Director Reconsideration of the Port's SEPA 07-2 MDNS. CP 2380.

May 3, 2007, the City of Olympia filed a SEPA Comment letter with the Port of Olympia (AR 2342-2344), complaining about the Port's April 16, 2007 SEPA MDNS 07-2 action, and claiming in subsection 1 of the City's Comment that the Dec. 19, 2006 City Hearing Examiner Thomas Bjorgen's Decision denying this same project for the same improper piecemealing of the project's environmental review under SEPA, legally barred the Port's April 16, 2007 SEPA MDNS 07-2 action on this same project since it also was the result of the same improper piecemealing of the project's environmental review under SEPA, and the City noted other problems with this SEPA MDNS 07-2 action on this same project, et al.

May 9, 2007, Mr. West filed a SEPA Comment and Request for Appeal /Reconsideration of Port's SEPA 07-2 MDNS action (AR 2005-2022) listed in the Port's Table of Comments Received section at AR 1981-1982, and Mr. Dierker submitted a 115 page SEPA Comment and Request for a withdrawal of Port SEPA 07-2 MDNS on this project (AR 2195-2309) plus about 100 pages of exhibits, that was **not** listed in the Port's Table of Comments Received section at AR 1981-1982.

May 10, 2007, Appellants submitted an Amended Comment and Request for

Reconsideration/Appeal of Port's SEPA 07-2 MDNS action (AR 2138-2151 et seq.) and joinder of Mr. Dierker into Mr. West's Reconsideration Request (AR 2157), including copies of the Army Corps of Engineers May 3, 2007 NEPA Notice, Draft Environmental Checklist, Draft Categorical Exemption from having to conduct any NEPA review, and Draft Finding of No Significant Impact (AR 2170-2180, AR 2547-2624) on the Corps and Port's planned dredging, widening, and deepening of Budd Inlet portion of this Port's project to make this a larger "deep water port" required by the Port's Lease to Weyerhaeuser, and a map of the Rail part of this project, et seq.

May 10, 2007, Thurston County Chamber of Commerce sent the Port a Comment letter in support of this large joint Port Weyerhaeuser project at the Port of Olympia because it would expand the export/import and other commerce of the local area. AR 2341.

May 17, 2007, together as Appellants Mr. Dierker and West submitted another 1 page Amended Port SEPA Comment and Request for Appeal /Reconsideration of Port's SEPA 07-2 MDNS action (AR 2458), with about 75 pages of exhibits (AR 2459-2524) on just some of various contamination problems with this site and some of the various piecemealed parts of this Port project.

May 21, 2007 the Port sent Appellants and other parties a letter (AR 2411-2412; AR 2625) explaining that the Port's "reconsideration meeting": 1) was not a public meeting; and 2) was unrecorded and no meeting minutes would be taken by the Port for recording of this required Port SEPA administrative appeal proceeding of the Port's SEPA Policy, which was the very first one the Port had ever conducted using the Port's new 2006 SEPA Policy.

May 23, 2007, the Port issued a SEPA 07-3 DNS on the rail part of this project for comment by Appellants and others (AR 2527-2528) based upon a Port SEPA Checklist (AR 2529-2546).

May 24, 2007, Appellants submitted a 2nd Amended Port SEPA Comment and Request for Appeal /Reconsideration (AR 2525-2624) on Port's newer amendments of its original SEPA 07-2 MDNS action now an "Amended Modified" MDNS action on this project; on the Port's issuance of the May 23, 2007 SEPA 07-3 DNS on the rail part of this project (AR 2527-2546); and on the Army Corps or Engineers Dredging of Budd Inlet for this project (AR 2547-2624).

May 31, 2007, the Port issued a "Modified Mitigated Determination of Non-Significance" (MMDNS) for the Port's SEPA 07-2 action, which **substantially changed** the analysis of

significant impacts of this SEPA 07-2 proposal.

June 1, 2007, Co-Appellants submitted a SEPA Comment and Request for Appeal /Reconsideration of Port's May 31, 2007 SEPA 07-2 "Modified Mitigated Determination of Non-Significance" (MMDNS) action (AR 2428-2429), claiming the new MMDNS along with the Corps May 3, 2007 dredging part of this project (AR 2170-2180), etc., had **substantially changed** the analysis of significant impacts of this SEPA 07-2 proposal and would clearly impact the Port's 2 "reconsideration meetings" on this SEPA 07-2 proposal scheduled for Monday June 4, 2007, since SEPA and the standards of due process require that Appellants and other parties must have time to read, research and draft new pleadings on these new issues brought forth in the Port's May 31, 2007 MMDNS issued for this SEPA 07-2 proposal before the June 4, 2007 "reconsideration meetings" on this changed SEPA 07-2 action.

The Port sent out notices for the Port's Executive Director's Reconsideration Meeting scheduled for June 4, 2007. AR 2626, AR 2640-2641, AR 2643.

June 4, 2007, the Port's Staff Report and Recommendations were for the Executive Director to deny Co-Appellants' Port SEPA Request for the Executive Director's Reconsideration of the Port's SEPA 07-2 MDNS action. AR 2760-2762.

June 4, 2007, the Port's Executive Director held the unrecorded "Reconsideration Meeting" on Appellants Request for Reconsideration they paid the Port for, where Appellants also submitted additional Exhibits in support of their pleadings for reconsideration/appeal of this SEPA 07-2 MDNS action. AR 2627-2634

June 6, 2007 Co-Appellants submitted a related SEPA Comment and Request for Withdrawal of the Port of Olympia's Mitigated Determination of Non-Significance (MDNS) issued for Port Case No. SEPA File No. 07-3, the Port of Olympia's Marine Terminal Rail Improvement project proposal being built on the Port's Marine Terminal Cargo Yard area in the middle of Budd Inlet of Puget Sound of the Pacific Ocean, et al.

June 7, 2007, the Port issued a Notice of Executive Director's Reconsideration Decision denying Co-Appellants' Port SEPA Request for Reconsideration AR 2666-2667, and the Port's "Responsible Official" issued his Executive Director's Reconsideration Decision denying Co-Appellants' Port SEPA Request for Reconsideration at AR 1-84 (CP 2381), is supported by about 1500 page of exhibits in the next three volumes of the Port's AR, most of which were not freely

provided by the Port to the Appellants during the Comment or Reconsideration proceedings time period as part of any "pre-adjudicative meeting discovery" necessary for SEPA "adjudicative" proceeding of any kind.

However, Exhibit 2 of Port's June 7, 2007 Executive Director's Reconsideration Decision denying Co-Appellants' Port SEPA Request for Reconsideration is a copy of the Port's August 2005 Lease of this Port property and facilities to Weyerhaeuser Co. that is missing the Port's and Weyerhaeuser Co.'s signed Schedule 6.1 at missing page 49 (AR 751.5, between AR 750 and AR 751; or "AR 1941 1/2" missing page 49 of the copy of the Lease AR 1895-1942, et seq.) and both of these two copies of the Lease are also missing the hundreds of pages of the June 2005 Environmental Site Assessment on this project which is incorporated into the Lease containing the details of Weyerhaeuser's terms and conditions of acceptance of occupancy of the Port property and facilities under the Lease for this project, as noted in this part of the Supplemental Records the Port released to Appellants in Sept. 2012. (See page 49 of the Lease and the ESA and Dierker's 2006 & 2012 public records requests to the Port and the Port's 2012 public records Responses attached to the June 3, 2013 Opening Brief, comprising the Supplemental Records in this case, et seq.).

Further, page 49 of the Lease and the hundreds of pages of the June 2005 ESA were "silently withheld" from Appellants by the Port's concealment of their existence through numerous adjudicative venues besides this one, since page 49 of the Lease and the ESA were not part of the Port's few **identified** public records withheld by the Port's public records responses to Appellants and others, like those few **identified** public records withheld in the "lost" "In camera review" records, though almost all of the few **identified** public records in the "lost" "In camera review" records were also released to Appellants in Sept. 2012 at the same time or before then. (See Dierker's 2006 & 2012 public records requests to the Port and the Port's 2012 public records Responses attached to the June 3, 2013 Opening Brief, comprising the Supplemental Records in this case, et seq.).

June 12, 2007, the Port made a Public Record Response (CP 543-544; CP 1058-1059) to Mr. West's March 17, 2007 public records request given to Mr. Dierker (CP 1164), his Co-Appellant in the Port SEPA Reconsideration/Appeal proceedings, the Port finally gave up some records with part of this relevant evidence that the Port had withheld from the Co-Appellants during

the entire pleading stage of the Port SEPA Reconsideration Request And SEPA Appeal to the Port Commissioners proceedings in the Port SEPA Appeal process, and this evidence was also withheld from the Port's Administrative Record (AR) filed in this case.

Further, after receiving Mr. West's March 17, 2007 public records request and after the Port's June 12, 2007 PRA Response to Mr. West, in its Sept. 5, 2007 Response to the PRA claims (AR 1175, et seq.) stemming only from Mr. West's March 17, 2007 public records request, (not Mr. Dierker 2006 requests), the Port later admitted that it had "silently withheld" other portions of these requested public records from Mr. West, Mr. Dierker and others, as the record in this case states:

> ....At the time Ms. Sevier initially drafted the Port response, several documents he [Mr. West] requested were still in "draft" form, and therefore exempt from public release.
> The Port provided the public documents and June 12 cover letter to Mr. West on Thursday June 14, 2007. The Port's Cover letter was initially drafted in mid-March, and included a list of draft and therefore exempt records. <u>However the cover letter had not been updated to reflect documents which had been in draft form and therefore exempt when the letter was initially drafted in mid-March, but in the intervening time had become final and thus subject to disclosure</u>. CP 1177-1178, emphasis added.

In the Port's Revised Public Records Response (CP 1177-1178 et seq.), the Port's Ms. Sevier identifies for the first time 15 separate records related to this Port project that the Port was still withholding from Mr. West, Mr. Dierker and others by the Port's June 12, 2007 public records response to Mr. West, which also should have been disclosed to Mr. West, Mr. Dierker, and others before the Port's June 12, 2007 public records response to Mr. West, during the Port SEPA Comment and SEPA Appeal process began for inclusion in the Port's AR filed in this case, and these other "silently" and/or improperly withheld Port records should have been disclosed to Mr. West, Mr. Dierker or others before the Port's June 12, 2007 public records response to Mr. West, and thereby, Public Records Act was violated by the Port here, and this evidence was also withheld from the Port's Administrative Record (AR) the Port filed and refiled in this case that is incomplete for this reason alone.

Mr. Dierker notes that Mr. West's 2006 and 2007 PRA requests for Port records related to this project and the Port's public records responses to Mr. West are also **not** contained within the Port's Administrative Record (AR) filed in this case, and notes that the public records requests to the Port of Mr. Dierker and the Port's public records responses to Mr. Dierker are also **not** contained in the Port's Administrative Record (AR) filed in this case, which is therefore incomplete

for that reason alone, and it is impossible for Appellants to cite to missing pieces of the Port's incomplete Administrative Record filed in this case and appeal. (See Motion to Supplement the Record, et seq.)

June 14, 2007, Appellants filed a Port SEPA Determination Appeal Form and pleading as part of filing and paying for their Port SEPA Appeal to the Port Commissioners of the Port Executive Director's June 7, 2007 Reconsideration Decision denying Co-Appellants' Port SEPA Request for Reconsideration, where Mr. West submitted a pleading on the Port SEPA Appeal of Port's SEPA 07-2 MDNS action with joinder of Mr. Dierker or other parties who wished to join his SEPA Appeal. AR 2658-2665; AR 2668-2684; CP 2358. They stated: "The environmental review process violates SEPA and the project has a reasonably foreseeable significant impact. Appellants are subject to particular injury due to the impact of the project, noise, traffic, danger of spills and contamination due to increased marine traffic, degradation of the environment and air quality." CP 2358. They sought vacation of "The MDNS (SEPA) #07-2" and later including Port DNS SEPA 07-3 and requested that the Port prepare an EIS [environmental impact statement] where Co-Appellants argued that the Port had again improperly "piecemealed" the SEPA review of the integral parts of this project in these two Port SEPA actions, since the Port's SEPA actions on this project were barred by the Dec. 19, 2006 Decision denying approval of this project of the City of Olympia's Hearing Examiner Thomas Bjorgen for the Port's improper "piecemealing" the integral parts of this project in smaller pieces during a City of Olympia SEPA and project review of this same project. CP 2358. Mr. Dierker's Port SEPA Appeal of Port's SEPA 07-2 MDNS action (AR 2668-2684) cited to and incorporated by reference the Dec. 19, 2006 City Hearing Examiner Thomas Bjorgen's Decision barring the Port's SEPA 07-2 MDNS action; where he incorporated his June 6, 2007 Comment and Request for Withdrawal of the Port of Olympia's Mitigated Determination of Non-Significance (MDNS) issued for Port Case No. SEPA File No. 07-3, the Port of Olympia's Marine Terminal Rail Improvement project proposal being built on the Port's Marine Terminal Cargo Yard area in the middle of Budd Inlet of Puget Sound of the Pacific Ocean, into the SEPA Appeal of the related SEPA 07-2 action, et al; and where he cited to and included an exert of West v. Transportation decision (AR 2684) referenced in Dierker's SEPA Appeal, among other pleadings in support. Appellants SEPA Appeal pleadings also claimed the Port's SEPA Appeal to the Port Commission of the various Port SEPA 07-2 MDNS, MMDNS, and/or the later

Amended MMDNS piecemealed into being issued in three parts for this project, the Port's related DNS 07-3 on the Rail part of this project, and the Port's June 7, 2007 Executive Director's Reconsideration Decision on these Port decisions, also complained of the unrecorded SEPA "reconsideration meeting" with the Port's Executive Director required by the Port's SEPA appeal process in the Port's SEPA policy, where Appellants pleadings claimed this unrecorded SEPA "reconsideration meeting" as being unlawful, unconstitutional, and in clear violation of SEPA's "single SEPA appeal proceeding" requirements, among other reason to grant the SEPA Appeal, since as noted, Co-Appellants had to pay the second appeal fee for this second part of the Port's SEPA Appeal proceedings required by the Port's SEPA policy. CP 2360.

On June 19, 2007, the Port informed Co-Appellants:

> Please know that the Port Commissioners acted on Monday evening to decline to hold an administrative hearing on the appeal you filed of the above Project, and to adopt the Decision of the Responsible Official as the Port's Final Decision for SEPA 07-2. This decision was made by formal Commission vote at the June 18, 2007 Commission meeting. You may consider today's date of June 19, 2007 as the date this Decision was "entered," for purpose of any further appeal. CP 2362.

Pursuant to the Port Commission's adopted SEPA Policy Resolution 2006-3, Section 8(6), only "the parties to the appeal have standing to appeal to Court" (CP 2351) and the Port's SEPA policy provision for judicial appeal of such a Port environmental "Final Decision" states:

> (6) Appeal of Port Final Decisions. Port environmental Final Decisions shall be appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review or otherwise challenge the decision of the Port shall be commenced within 21 days of the entering of the decision by the Port unless otherwise provided by statute. CP 2382.

On June 18, 2007, Plaintiff and Appellant Arthur West filed this case against Defendants and Respondents the Port of Olympia and Weyerhaeuser Company. This was less than a week after the Port had informed Mr. West that it had been silently withholding and would continue to withhold responsive records to his Public Records Act request. Mr. West's complaint made Public Records Act ("PRA") claims and also made a SEPA appeal of the Port's SEPA actions. CP 07-17. Mr. West's complaint also named individual Port employees as defendants, Edward Galligan, Bill McGregor, Robert Van Schoorl, and Paul Telford. On this same day, Mr. West moved for and obtained an Order to Show Cause that was sent for hearing on June 29, 2007. CP 1056-1061. Unfortunately, the show cause hearing would have been set before the Honorable Gary Tabor (CP 1061), against whom Mr. West filed an affidavit of prejudice. CP 1062.

Mr. West, joined by his CoPlaintiff and CoAppellant Jerry L. Dierker, Jr., filed an amended complaint on July 6, 2007, and a second amended complaint on July 13, 2007. CP 18-54.

The day before the June 16, 2007 Ordered finally rescheduled public records Show Cause Hearing of August 17, 2007, on August 16, 2007 Weyerhaeuser filed a last minute Motion to Bifurcate and Stay (CP 1389-1392 et seq.) the claims in this case into two separated cases on the "PRA claims" and the so-called "nonPRA claims" in this case, and requesting a Stay the PRA case's claims from being heard before the Respondents Motions to Dismiss were heard, because part of the public records withheld by the Port in this case were being considered by the Court of Appeals in West v. Port of Olympia,Cause # No. 06-2-00141-6, a 2006 PRA case against the Port for at least part of the same public records withheld by the Port in this 2007 case, where the Port also argued with its CoRespondent Weyerhaeuser for the bifurcation and the requested Stay the PRA case's claims from being heard before the Respondents' Motions to Dismiss were heard.

Appellants' August 20, 2007 Hearing Brief CP 1748-1762, at 1751-1756, and 1758-1761 shows why the Motions to Bifurcate and Stay (CP 1389-1392 et seq.) were not lawful and no bifurcation should be granted, et seq.

Further, Mr. Dierker's August 21, 2007 Petitioners' Memo in Response (Sub No. 68) to the Defendants Weyerhaeuser Company's Motions to Bifurcate and Stay noted Weyerhaeuser's Motion to Bifurcate and Stay was barred under the doctrine of equitable estoppel, collateral estoppel, and/or res judicata as:

> "Weyerhaeuser's request to separate the Public Records Act each use from the SEPA issues in this case and stay the PRA issues in this case until an appeal court's decision on the PRA issues in Cause No. 06-2-00141-6 is absurd and frivolous, since the Norway Hill decision found that SEPA is an environmental full disclosure law, and since portions of SEPA's statutory scheme at WAC 197-11-504(1) incorporates the Public Records Act as part of the State Environmental Policy Act's (SEPA) regulations.
>
> Further, Weyerhaeuser's pleadings here requesting separation of this PRA and SEPA issues appear to be in conflict with Weyerhaeuser's pleadings to the State Supreme Court and to this Superior Court in Cause No. 06-2-00141-6 (West, et al, v. Port of Olympia) which noted that the Norway Hill decision found that SEPA is an environmental full disclosure law, and that portions of SEPA's statutory scheme at WAC 197-11-504(1) incorporates the Public Records Act as part of the State Environmental Policy Act's (SEPA) regulations.
>
> Therefore, this request and these pleadings by Weyerhaeuser would be barred under the doctrine of equitable estoppel, collateral estoppel, and/or res judicata, in this court should deny this motion.
>
> Further, this request for bifurcation and stay of the PRA issues in this case until an appeal court's decision on the PRA issues in Cause No. 06-2-00141-6 (West, et al, v. Port of Olympia) would necessarily require a stay and a long delay of the prosecution of Petitioners' SEPA issues in this case which rely upon those public records requested under the PRA and required to be disclosed under SEPA and the PRA, and any delay in this issue of lack of disclosure of public records under SEPA and the PRA would prejudice the Petitioners' judicial appeal of the Port's SEPA and other related and underlying actions of Defendants in this matter.
>
> This prejudice against Petitioners case would be very extensive since it would unreasonably and

unconstitutionally place "factual", "legal", and other burdens or restrictions on Petitioners' due process rights to plead their case, which are far beyond the capabilities of anyone to overcome, thereby again violating, chilling, and abridging Petitioners' fundamental due process rights to petition the government for redress of grievances by refusing to conduct a meaningful due process hearing of the merits of their appeal of this matter as the Port has previously done.

Therefore, even if the Court grants Weyerhaeuser's motion for stay, the Court also would necessarily be required to order a stay of all further proceedings on the SEPA appeal, and order a stay of all further actions of Defendants Port and Weyerhaeuser to commit any resources to the making any of the improvements on the Port's Marine Terminal property that Petitioners have complained of in this case as temporary injunctive relief.

Therefore, this Court should deny Weyerhaeuser's request to separate the Public Records Act each use from the SEPA issues in this case and to stay the PRA issues in this case." (Id.; see this pleading attached to Mr. Dierker's accompanying Clerical Correction of Clerk's Papers).

Mr. Dierker's 2006 Public Records Requests to the Port that are the subject of his never heard public records claims in this case were for the same records on this same project which Mr. West and other's had made to the Port in their Cause No. 06-2-00141-6 that Weyerhaeuser argued were necessary for the consideration of the PRA claims in this case, which under Weyerhaeuser's argument to the Superior Court and the Supreme Court in the West v. Port of Olympia Cause No. 06-2-00141-6 would necessarily require the Stay of **both** the Public Records claims and the SEPA and other claims based partly upon these discoverable public records withheld by the Port from the Appellants and the Superior Court in this case's incomplete Administrative Record (AR).

Again delaying the PRA Show Caused hearing, Judge Christine Pomeroy heard and granted Weyerhaeuser's Motion to Bifurcate while denying the requested "Stay" of the PRA case on August 24, 2007 (CP 71-72), ordering within the Clerk's Notes of the August 24, 2007 hearing (CP 69-70) that an accompanying Case Scheduling Order (CP 1797-1799) for the Superior Court's procedural setting of hearing dates for the PRA claims previously ordered Shows Cause hearing and Respondents numerous dispositive motions for summary dismissal of the "nonPRA" claims in this case which comprised the two sets of "bifurcated" claims, to set the dates for CoPlaintiffs Show Cause hearing of the "bifurcated" PRA claims <u>two weeks</u> **before** any hearing of Respondents' numerous motions to dismiss the so-called "non-PRA" claims in the case, which is all part of Judge Pomeroy's Motion to Bifurcate rulings that Respondents won upon the Court's granting of Weyerhaeuser's Motion to Bifurcate in this case. (See CP 2565-2566 West and Dierker v. Thurston County Superior Court Judge Richard Hicks, et al, Supreme Court Case No. 80733-7 CP 73-89).

Just after Judge Pomeroy made this ruling and case schedule that the Respondents did not

like, all of a sudden another entity, the Olympians for Public Accountability ("OPA"), not a party to the case, filed an affidavit against Judge Pomeroy in this case (CP 1070) claiming CoPlaintiffs' case was linked to OPA's case and OPA's case was settled and dismissed right after Judge Pomeroy was "administratively reassigned" from this case by Court Administrator Marti Maxwell, which pleased only the Port and Weyerhaeuser Respondents who apparently went "venue shopping" at that time, since then the case was assigned to one or two other judges who immediately recused themselves or were "administratively reassigned" by Court Administrator Maxwell, until this case was finally reassigned by Court Administrator Maxwell to Judge Richard Hicks. CP 79-80.

The Port then filed declarations and briefing in response to the show cause order. CP 1072-1211. CoPlaintiffs filed their reply on October 9, 2007. CP 1962-1980. The show cause hearing still did not take place.

December 19, 2007 filed Plaintiffs' Declaration re Undisclosed Records. CP 2070-2083.

While by this time Plaintiffs knew that the Port had violated the PRA in silently withholding responsive records and in claiming exemptions for the records it continued to withhold that did not conform with law, Mr. West later learned of additional violations by the Port of Olympia. Plaintiffs discovered that the Port had purged (CP 390), withheld (CP 307-310), and failed to disclose many additional responsive records (CP 1968; CP 2070-2083; (CP 96-298),

August 26, 2010, Mr. West independently discovered a crucial responsive record that the Port had been withholding from Plaintiffs: an environmental report dated July 12, 2005, that was prepared for the Port and that the Port had considered in issuing its MDNS for the Weyerhaeuser lease that Mr. West had challenged and upon discovering this environmental report, Mr. West submitted the same to the Superior Court. CP 368-373. After CoPlaintiffs had filed suit, the Port continued to withhold these six responsive records from them and the Administrative Record until after this case was "finally dismissed", making the Port's filed AR incomplete as Appellants have noted in their pleading in this case. CP 1181-1182.

Weyerhaeuser and the Port had filed multiple dispositive motions in the case, and Plaintiffs had also filed multiple motions (See, e.g., CP 1951-1952). At Judge Hicks' status conference on October 5, 2007, after having discussed all of Co-Plaintiffs' non-PRA claims and motions pertaining thereto as the Respondents wanted, the Judge Hicks asked about CoPlaintiffs' PRA

action. RP 10/05/07, p. 46,11. 7-8. However, instead of hearing first from the Co-plaintiffs about the PRA claims Show Cause hearing ordered in the case scheduling order in Judge Pomeroy's Motion to Bifurcate rulings (CP 69-70), interrupting any attempted pleadings of the Co-Plaintiffs, the Port's Counsel answered Judge Hicks' question, claiming without any proof that the Port had brought a collateral estoppel motion that related to CoPlaintiffs PRA case, when such a motion would have been barred by Judge Pomeroy's prior rulings (CP 69-70) on the case schedule's procedural posture and denying such a Respondents' request for a "stay" of the hearing of CoPlaintiffs public records claims Show Cause Hearing that had been previously ordered on June 16, 2007, and the Port's counsel asked Judge Hicks to hear this barred collateral estoppel motion that related to CoPlaintiffs' PRA case be heard before he allowed the hearing of CoPlaintiffs' PRA case to go further and be set (RP 10/05/07, p. 46-47,11. 11-25, l.1.). However, the Port made no citation to such a Port Motion for a stay of the PRA claims or any Notice of Issue for setting a hearing on the Port's "phantom motion" to stay the PRA case from going further which is in Superior Court docket in this case, and there is especially none that were granted by filed court order **before** the Port's motions to dismiss on the CoPlaintiffs' "nonPRA claims" (sic) in this case were later heard and granted by Judge Wickham, and no such order granting such a Port collateral estoppel motion related to CoPlaintiffs' PRA case appears anywhere in the Clerk's papers or Court Docket in this case, so that this Appellant cannot make a citation to the Port's motion that does not appear in the record for Mr. Dierker to comply with RAP 10.3(a)(5) as this Court has ordered to do for this brief, here.

The parties having been unable to schedule all the pending matters themselves due to the Port's and Weyerhaeuser's refusals to allow the setting of any PRA Show Cause hearing at all, and especially if the PRA Show Cause hearing was set **before** the hearing of the Respondents Motions to dismiss, the Superior Court issued a letter directing the parties to appear for a second scheduling conference, which also never happened. CP 1949-1953.

Upset with the reassignment of the case away from Judge Pomeroy at the affidavit of a nonparty, and upset at what they believed was a failure of the Superior Court to decide their claims, CoPlaintiffs filed an original petition with the Supreme Court No. 80733-7. CP 78-88. The Port of Olympia and Weyerhaeuser appeared in the Supreme Court matter, strenuously opposed Co-Plaintiffs' efforts, and succeeded. The Supreme Court dismissed the original petition and imposed

sanctions. CP 88. Ironically, Plaintiffs' Supreme Court action centered upon the delays in hearing the PRA claims, Plaintiffs sought a prompt hearing of those claims prior to any hearing of the SEPA (the non-PRA) issues. The Port and Weyerhaeuser prevailed in this Supreme Court action which delayed the hearing of the PRA claims so Respondents were not entitled to request dismissal in the Superior Court for any delay in setting of the Show Cause hearing on their PRA claims.

Meanwhile, after Judge Hicks recused himself the case was reassigned to Judge Chris Wickham, who both Appellant's filed Affidavits of Prejudice for Cause under the Court's decision in SAVE v. Bothel for his membership in the local Chamber of Commerce, a very powerful pro-development organization who helped the Port and Weyerhaeuser promote the approval, construction and operation of this project. (See CP 2117, et seq.; see AR 2341 the Thurston County Chamber of Commerce Comment letter to the Port in support of the Port SEPA 07-2 action to further the construction of this large project at the Port of Olympia).

However, though barred by the prior rulings of Judge Pomeroy's August 24, 2007 Case Scheduling Order setting the procedural stance of the dates for hearings of motions on these bifurcated claims Weyerhaeuser won when it won its Motion to Bifurcate in this case within the Clerk's Notes of the August 24, 2007 hearing granting Weyerhaeuser's Motion to Bifurcate, where Judge Pomeroy set the dates for CoPlaintiffs Show Cause hearing of the "bifurcated" PRA claims <u>two weeks</u> **before** any hearing of Respondents' numerous motions to dismiss the so-called "non-PRA" claims in the case, Weyerhaeuser and the Port Respondents filed a Joint Request for Status Conference and Proposed Case Schedule (CP 2084-2116) **only** concerning the non-PRA issues in the case eliminating any mention of a hearing of CoPlaintiffs' Show Cause PRA claims altogether, CP 2565-2566, and eliminating all mention of Judge Pomeroy's August 24, 2007 Case Scheduling Order for the hearings of these bifurcated claims that Weyerhaeuser had won when it won its Motion to Bifurcate.

Judge Wickham, ignoring Judge Pomeroy's August 24, 2007 Case Scheduling Order setting the procedural stance of the dates for hearings of motions on these bifurcated claims that Weyerhaeuser had won when it won its Motion to Bifurcate in this case, and ignoring both Appellant's filed Affidavits of Prejudice for Cause under the Court's decision in SAVE v. Bothel, (supra), where he held a status conference on March 21, 2008, where Judge Wickham signed the Port and Weyerhaeuser's proposed case schedule order **only** concerning the non-PRA issues in

the case completely eliminating all mention of the hearing of CoPlaintiffs' Show Cause PRA claims altogether. CP 2125-2126. The case schedule order provided for a dispositive motion deadline of April 25, 2008, only as to the non-PRA issues, completely eliminating all mention of the hearing of CoPlaintiffs' Show Cause PRA claims altogether. CP 2125.

CoPlaintiffs had not abandoned their PRA related claims. On March 21, 2008, Co-Plaintiff West filed a notice of issue for a show cause hearing on these claims, setting the matter for April 4, 2008. CP 2123. The Port filed a "reply." CP 2232-2254; 2255-2286. Co-Plaintiff Mr. Dierker, on April 3, 2008, also filed more pleadings for the April 4, 2008 scheduled show cause hearing, but again the Superior Court did not allow this shows cause hearing to take place.

Weyerhaeuser and the Port then re-filed several dispositive motions seeking dismissal of the non-PRA claims for, among other bases, lack of standing. CP 2135-2151; CP 2152-2174; CP 2175-2219. CoPlaintiffs had filed a Plaintiffs' Hearing Brief on the issue of standing in Aug. 27, 2007. CP 1748-1762. CoPlaintiffs had also filed a memorandum and declaration on the issue of standing (CP 1395-1408), where CoPlaintiffs argued:

> "Both Petitioner West and Dierker have resided in the Olympia area for over a decade. The allegations of residence in the vicinity of the project are undisputed. Dierker's declarations stating his particular susceptibility to toxic contaminants have not been controverted. Both petitioners have attested to employing the vicinity of the project area in the areas impacted by the project for recreation and leisure activities, and have identified their connections to the area and the animals and protected and threatened species that inhabit and pass through the project's vicinity- species which will be impacted by the effects of construction and the greater air [sic] traffic resulting from the project. CP 1404.
>
> Mr. West also declared:
>
> I currently reside on Legion Street in Olympia, within a half mile of the project site. I regularly drive on the roads that will be impacted by the traffic projected to result from this project. I spend a great deal of time in downtown Olympia, and regularly walk, drive, bicycle [sic], and operate small marine craft in the vicinity of and/or upon the Port of Olympia. I have an interest in preventing air, water, noise pollution that this project is certain to increase....
>
> I have a connection to the project site and to the animals and marine life that remains in the vicinity. As an individual whose federally protected bird watching activities have been recognized by the federal court, I also watch birds on or near the site. On infrequent occasions I observe seals and whales in the waters surrounding the project site. All of these activities, the species I observe, and the quality of my environment will be directly impacted by the increased traffic, noise, and increased traffic, noise, and increased discharge of water and air pollutants resulting from this project.
>
> As a person who spends time in the area surrounding the project site, and as one of the individuals who has repeatedly contacted Thurston County in an effort to have more explicit warning signs posted around the inlet, I am also concerned and specifically impacted by the contamination stemming from the Cascade Pole Containment Site, which is scheduled to be disturbed and used as a log yard, with a potential for further discharge of toxic waste.
>
> I was present at a recent meeting of the Commissioners of the Port of Olympia where a

projection was displayed that 60 additional marine vessels would call at the Port every year if the project described in this case were to be implemented. 60 additional vessels and the truck and automobile traffic resulting from the cargo that they will load and discharge in Olympia will have direct effects that are not speculative by any stretch of the imagination." CP 1406-1408.

CoPlaintiffs also filed a response to the two pending motions from the Port and Weyerhaeuser. CP 2414-2421. Weyerhaeuser and the Port both filed replies. CP 2422-2430; CP 2431 -2454. Mr. Dierker also filed an "Exhibit in Support of Standing of Petitioners." CP 2526-2531.

On April 25, 2008, the Superior Court dismissed the non-PRA claims for lack of standing. The Superior Court held:

> There are essentially two requirements for standing. One is that the plaintiffs be within the zone of interest protected by the statute. I think petitioners could arguably represent that they are within that zone of interest, but as to the second requirement, an injury in fact, I do not see any evidence of such injury in fact. There is some speculation that agency action might in the future provide injury to the plaintiffs, but I have seen nothing that is sufficiently specific or substantial to place plaintiffs in a situation different than any other members of the community. RP 04/25/08, pp. 28-29,1. 25,11. 1-11.

The Superior Court dismissed only CoPlaintiffs' non-PRA claims for lack of standing, though the order erroneously stated that CoPlaintiffs' entire case was dismissed. CP 2554; CP 90. CoPlaintiff West filed a Motion for Reconsideration of the dismissal for lack of standing (CP 2581 -2586) arguing that the PRA claims were not dismissed and he had standing because he was particularly impacted by the Port/Weyerhaeuser project. CP 2582. CoPlaintiff Dierker also filed a Motion for Reconsideration arguing he had standing because he was particularly impacted by the Port/Weyerhaeuser project and that the PRA claims were not dismissed. CP 2587-2608. However, Judge Wickham ignored both CoPlaintiffs' motions for reconsideration never even denying them. Weyerhaeuser moved specifically for dismissal of the PRA claims as to itself, and the Superior Court granted the motion, and where Weyerhaeuser also observed that the Superior Court's order of dismissal of the PRA claims was incorrect. CP 2509-2513, CP 91. Mr. West had opposed Weyerhaeuser's motion to dismiss the PRA claims by arguing that its motion was filed after the dispositive motion deadline April 25, 2008 - established by the Superior Court in its scheduling order. CP 2125; 2563-2564. Weyerhaeuser persuasively argued, however:

> The scheduling order at issue specifically applied to the SEPA and Harbor Improvement claims which remained after the PRA cause of action was bifurcated and as the result of a status conference held on March 21, 2008. The Court will recall that Petitioner filed an original action in the Supreme Court (No. 80733-7) seeking, among other things, relief against this Court arising out of one or more decisions entered in this case. After that original action was dismissed, the instant

action resumed with the Notice of Reassignment and Status conference. It was during that status conference that the Court established a briefing schedule for the already pending and fully briefed motions to dismiss the SEPA review and HIA claims. No order was entered that impacted the bifurcated PRA claim. CP 2565-2566.

Judge Wickham, who had signed this case scheduling order, agreed with Weyerhaeuser that Judge Wickham's case schedule order and the dispositive motion deadline of April 25, 2008, did not apply to the bifurcated PRA claims, and granted Weyerhaeuser's motion to dismiss the PRA claims as to Weyerhaeuser alone. CP 2509-2513; CP 91. Weyerhaeuser also observed that the Superior Court's order of dismissal of the non-PRA claims was incorrect. On May 30, 2008, the Superior Court issued a corrected and superseding order dismissing the non-PRA claims, an order that specified the PRA claims were not dismissed. CP 94-95.

On October 16, 2009, CoPlaintiff West filed a Declaration in Support of Motion for Show Cause Order, in which he put forth his evidence supporting a finding that the Port had violated the Public Records Act in its response to this CoPlaintiffs' PRA requests. CP 96-298. CoPlaintiff West argued that the records he attached to his declaration were records responsive to his request, (as well as CoPlaintiff Dierker's records requests) that should have been maintained by the Port of Olympia, were not produced to him by the Port of Olympia, and that he had obtained from another source. CP 96.

After not being able to get a hearing of the PRA claims set during the next couple of months, CoPlaintiff West then filed a notice of issue setting the matter for hearing on January 15, 2010 (CP 299) that never happened; another for a hearing on January 29, 2010 (CP 301) that was canceled after the parties had appeared in court, due to the recusal of Judge Paula Casey; another for a hearing on August 20, 2010 (CP 301; CP 304) that never happened because the notice of issue for August 20, 2010, was stamped by the Superior Court Administrator as "Incorrect Set; Rejected by Court Admin." (CP 304).

CoPlaintiff West attempted to file another Declaration of Prejudice for Cause against Judge Wickham, as both CoPlaintiffs had done when Judge Wickham was first assigned to this case. CP 306. However, Judge Wickham still did not recuse himself and CoPlaintiff West had already used up his one judicial affidavit to which he was allotted. CP 79.

CoPlaintiff West filed another Declaration concerning the Port's withholding of public records. CP 307-310. He also filed a notice of issue setting the matter for hearing on September 2,

2010. CP 311. The Port's counsel, Ms. Carolyn Lake, filed a Notice of Unavailability on September 16, 2010. CP 313. CoPlaintiff West, on October 26, 2010, filed another notice of issue setting the matter for hearing on December 9, 2010. CP 315. This date was, unfortunately, one of Ms. Lake's unavailable dates. CP 313. Ms. Lake filed another notice of unavailability adding additional unavailable dates. CP 317. The Port also, on November 29, 2010, filed an objection to CoPlaintiff West's having noted the matter for hearing on December 9. CP 320-348. The Port filed a second declaration as well. CP 349-361. CoPlaintiff West, attempting to renote the matter, filed another notice of issue. CP 362. He got it wrong again; he noted the matter for December 23, 2010, which was one of the new unavailable dates on Ms. Lake's second notice of unavailability. CP 362, CP 317. By coincidence, this date - December 23 - was one of the very few available dates on Judge Wickham's civil motion calendar (since Judge Wickham was on family and juvenile court rotation) and was also of the unavailable dates for the Port's counsel. The Port filed a third declaration in support of its objection. CP 364. So CoPlaintiff West again attempted to renote the matter, this time to January 13, 2011. CP 367. CoPlaintiff West then filed a reply declaration in support of the show cause hearing he was attempting to have heard. This reply declaration set forth additional facts relative to the delay in getting a show cause hearing heard:

"Although originally set for hearing before the Honorable Judge Pomeroy, an improper affidavit of prejudice by a nonparty [OPA] somehow was allowed to delay the scheduled hearing, which was never re-set by the Court.

When plaintiff attempted to set a hearing he was informed by the Superior Court's private ex officio legal counsel that the case had been dismissed. Intervention by the Office of the prosecuting Attorney was required to have the case reactivated.

Since that time, plaintiff repeatedly attempted to set a hearing, and the Superior Court has refused to accept his notices of issue. Delays have also resulted of the circumstance that, despite having been transferred to the Juvenile Court, Judge Wickham continues to exercise jurisdiction over this matter.

Due to the irregular and sporadic nature of the family and juvenile Court motion Calendar, and the difficulty of communicating with Juvenile Court, further delays have ensued, despite the constitutional guarantee that causes of action shall not fail for lack of an available judge. CP 369.

CoPlaintiff West's reply declaration sets forth salient facts showing: the Clerk's office had rejected Mr. West's attempts to set a hearing, believing the entire case to have been dismissed; Mr. West had experienced difficulty in attempting to set a hearing; and since the judge assigned to the case, Judge Wickham, was also assigned to the Family and Juvenile Court calendar, there were only a few available days on which Mr. West could attempt to set hearings, and the lack of available

hearing dates for this case was exacerbated by the fact that the Port counsel's unavailability dates coincided with the very few motion calendars before Judge Wickham.

There is further evidence in the record corroborating CoPlaintiff West's reply declaration. In an e-mail from Ms. Trina Wendel, judicial assistant, dated February 2, 2010, Ms. Wendel wrote: "Upon further review by court administration and consultation with our staff attorney, it has been determined that this case was closed by Order of Dismissal signed by Judge Wickham on 4-25-08. Based on that, the court is not going to reassign this case to another judge. No further motions will be heard in this case." CP 517. Later, on February 17, 2010, Ms. Wendel wrote that she had located the order of bifurcation and also the order dated May 30, 2008, that clarified that the PRA claims had not been dismissed. CP 516.

CoPlaintiff West's most recent attempt to set a hearing was for January 13, 2011, which appears to have been for a day on which Judge Wickham did not have a motion calendar, and Judge Anne Hirsch struck the show cause hearing in court. CP 376. CoPlaintiff West tried again and filed a notice of issue for a show cause hearing on April 28, 2011. CP 377. The Port filed a Declaration concerning relevant pleadings on file. CP 379. Unfortunately, CoPlaintiff West failed to confirm the hearing and it was stricken for nonappearance. CP 382.

The case was reassigned for judicial efficiency from Judge Wickham to the Judge Thomas McPhee, and a status conference was scheduled for June 10, 2011. CP 383. Mr. West filed a request to have the matter set for trial. CP 384. At the status conference on June 10, 2011, the Superior Court notified the parties that the records the Port had submitted for in camera review were missing and directed the Port to resubmit the records (CP 385), and also notified the parties that the case had been stayed and that the stay would have to be lifted (CP 533; CP 537). The Superior Court set a second status conference for June 24, 2011. CP 385. CoPlaintiff Dierker filed a Declaration of Prejudice for Cause against Judge McPhee. CP 386. CoPlaintiff West filed a declaration in support of CoPlaintiffs' PRA claims, attaching copies of records he received from the Port that were responsive to both CoPlaintiff records requests. CP 387.

The Port, for their individual Port employee defendants Mr. Galligan, Mr. McGregor, Mr. Van Schoorl, and Mr. Telford, filed a CR 12(b)(6) motion to dismiss and for sanctions, supported by a declaration from counsel. CP 452-464; CP 465-482. In fact, since CoPlaintiffs' PRA claims were directed to the Port, and since CoPlaintiffs' non-PRA claims had already been dismissed (CP

94-95), the claims against these individual Port employee defendants had already been dismissed, meaning the motion was unnecessary and improper. The Port also filed a Motion to Dismiss CoPlaintiffs' PRA claims against it. CP 487-503. Both motions were set for July 22, 2011.

Meanwhile, at the status conference on June 24, 2011, the Superior Court's Judge McPhee reviewed the information on the record with regard to the affidavits of prejudice against Judge McPhee filed by CoPlaintiffs Dierker (CP 386) and West (CP 530), and though Mr. West had already filed the one affidavit of prejudice to which he was allotted (CP 79), Judge McPhee recused himself, and the Superior Court determined the case would be reassigned to another judge. CP 486.

The Port's Motion to Dismiss the PRA and all claims in CoPlaintiffs' case sought dismissal for failure to prosecute, under CR 41(b)(1), and also pursuant to the Superior Court's independent authority to manage a case. CP 492-493. The Port argued that Mr. West was a labeled vexatious litigant, but, the Port did not argue that Mr. Dierker was a labeled vexatious litigant here or anywhere else. CP 496. The Port's motion was supported by the Declaration of Counsel. CP 504-529.

CoPlaintiff West, acting pursuant to the remarks by the Superior Court on June 10, 2011, at the status conference, filed a motion to strike and lift the "stay." CP 533-546.

However, neither the Port's motions to dismiss nor CoPlaintiff West's motion to strike and lift stay were ever heard as noted, because Judge McPhee had recused himself, all other Superior Court Judges in the County had recused themselves, and no new judge had been found to be assigned to this case. During this time, CoPlaintiff West retained counsel, who contacted the Superior Court administration to obtain assignment of a judge to hear the case, which ended up being the District Court Judge Sam Meyer, acting as pro tempore or visiting Superior Court judge for this case. CP 567; 577. CoPlaintiff West's counsel also began pursuing discovery on Mr. West's behalf, sending notice of CR 30(b)(6) deposition to the Port. CP 568-571. CoPlaintiff West filed a Motion for Superior Setting and Issuance of New Case Schedule Order (CP 557) as did CoPlaintiff Dierker later (CP 795).

The Port then filed a Motion to Quash Discovery & Motion for Protective Order (CP 547-556), CoPlaintiff West responded (CP 558-563; 564-581), the Port replied (CP 582-615), and CoPlaintiff West filed a surreply (CP 616-619; 620-624). The Port had refused to participate in a CR 26(i) conference with counsel for Mr. West, despite bringing a motion to quash under the

discovery rules (CP 558-563; 564-581; 616-619; 620-624). At the hearing on June 1, 2012, the Superior Court invited all of the parties in this case to conduct the CR 26(i) conference. RP 06/01/12, p. 8, l. 1-7. Counsel for the Port finally agreed to confer with CoPlaintiff West's counsel privately, but only without the Port's counsel allowing CoPlaintiff Dierker to be present at this conference. RP 06/01/12, p. 9, l. 19-20. After the CR 26(i) conference, Mr. West's counsel informed the Superior Court that she was willing to continue the noted depositions until after the Superior Court had ruled on the Port's pending motion to dismiss, which was noted for June 29, 2012. RP 06/01/12, p. 10, 1. 19-21.

CoPlaintiff Dierker filed his response to the Port's Motion to Dismiss. CP 626-654. CoPlaintiff West filed his response to both the individual Port Defendants' motion to dismiss (arguing it was unnecessary, that they had already been dismissed from the case, but opposing the request for sanctions) and also the Port's motion to dismiss. CP 655-662. CoPlaintiff West argued that the "Port has failed to show that any basis exists for dismissal of Mr. West's case, whether under CR 41(b), CR 41(b)(1), or under any other rule or statute providing for involuntary dismissal of a case." The Port filed its reply to CoPlaintiff Dierker (CP 663-674) and to CoPlaintiff West (CP 675-777). CoPlaintiff Dierker moved to strike the Port's briefs. CP 778-794. CoPlaintiff Dierker also moved for the setting of a trial date. CP 795. The Port filed a proposed order of dismissal. CP 802-818. The Port also opposed CoPlaintiff Dierker's motion to strike. CP 819-827. CoPlaintiff. Dierker filed a reply. CP 829-832.

At the hearing on the Port's motion to dismiss, the Superior Court heard argument and reserved ruling, taking the matter under advisement. RP 06/29/12, p. 54,11. 12-22. The Superior Court set the matter for July 13, 2012, at which it would announce its ruling. RP 06/29/12, p. 56,11. 13-25. CoPlaintiff Dierker filed a supplemental declaration on July 6, 2012, in which he stated:

> . . .many of the Superior Court Staff were aware of my and Mr. West's efforts to set a hearing for the PRA issues during the about 1 1/2 years of time when the Clerk's "mistake" about the dismissal of this case prevented us from filing any pleadings or setting any hearings in this case. CP 833.

The Port had earlier filed copies of its proposed orders of dismissal with a large number of superfluous findings of fact and conclusions of law to support this final dismissal. CoPlaintiff West filed his objections to the Port's proposed orders (CP 873-880) and his counsel drafted the July 25, 2012 final order of dismissal amended and signed by Judge Meyer in this case, which also had a smaller number of these superfluous findings of fact and conclusions of law to support this

final dismissal that had been required by the actions of the Judge or the Port for this order, where Co-Plaintiff Dierker, objecting to such superfluous findings of fact and conclusions of law in this final dismissal order, did not make any order.

At the hearing on July 13, 2012, the Superior Court announced its decision. The Superior Court found that there was a period of approximately 17 months in which no action was taken on this case - from May 30, 2008, the date of the amended order excepting the PRA claims from dismissal (CP 94-95), through to October 16, 2009, when Mr. West filed his declaration in support of his PRA claims (CP 96-298) and attempted to note the matter for a show cause hearing (CP 299). RP 07/13/12, p. 4, ll. 4-11. The Superior Court found that the Port appeared ready to respond to a show cause hearing in April of 2008. RP 07/13/12, p. 4, 1. 19-20. The Superior Court observed that ordinarily, when a case languishes for a period of time and then starts up again, "while they're languishing, (there's) just a case sitting on two people's desks without any prejudice to any party or anyone else." RP 07/13/12, p. 6, 1. 12-14. The Superior Court distinguished this present case, however. RP 07/13/12, p. 6, 1. 15. The Superior Court held, in concluding that no lesser sanction than dismissal would suffice:

"As pointed out by Ms. Lake, and I think as everyone knows, on these public records cases, there's a daily penalty. There's nothing that can be done - there's no real discretion with regard to that daily penalty. There's no discretion with regard to the penalty, on a daily penalty, even if the delay was caused by the person who is getting the penalty." RP 07/13/12, p. 8,11. 4-9.

The Superior Court dismissed the case. RP 07/13/12, p. 8,11. 21-23. Both Mr. West and the Port submitted proposed orders to the Superior Court. CP 882-893; CP 894-910. At the presentation of orders hearing on July 27, 2012, the Superior Court signed the order of dismissal without Mr. Dierker being present and without Mr. Dierker's signature, showing he objected to this order. CP 932-940. In the order of dismissal, the Superior Court concluded:

5. The obligation of going forward in an action always belongs to the plaintiff and this Court concludes that Mr. West and Mr. Dierker have deliberately and willfully caused excessive delays in this case. And those delays have hindered the efficient administration of justice and prejudiced the defendant Port of Olympia. 6. This Court concludes that the delays caused by Mr. West and Mr. Dierker have prejudiced the Port of Olympia, since the Port of Olympia, if found to have violated the Public Records Act, will be subject to a daily penalty. 7. This Court concludes that lesser sanctions than dismissal will not suffice, since a court would have no discretion to reduce the number of days for which the Port of Olympia would be subject to a daily penalty. CP 938.

After the Superior Court dismissed the case, Mr. West timely filed a motion for reconsideration (CP 948-949) supported with a declaration (CP 943-947) where Mr. West

declared:

The representations that there ever was any failure to prosecute this case are false and untrue. For the entire time that the court administration has obstructed any progress in this case I have done everything possible, up to the point of being arrested and escorted out of the courthouse, to attempt to prosecute this case.

The period during which there were no filings in 2007-2008 resulted from the circumstance that the Clerk would not assign a judge to hold hearings, accept pleadings or filings or allow motions to be heard.

At one point, I became so frustrated that I attempted to appear before the judge nominally assigned to the case in open court to present a motion, and was escorted out of the courthouse by armed Thurston County Sheriff Deputies. ....

During the periods when the Court refused to accept pleadings or hold hearings, I contacted judicial assistant Debbie Requa on a regular (and almost weekly basis at some times) to attempt to arrange for a judge to be assigned to hear the case. She told me that Thurston County Court Administrator Marti Maxwell was responsible for assigning judges.

I also repeatedly attempted to contact Marti Maxwell, but she refused to respond to my many repeated requests to set a hearing....

The fact that there are periods when no progress was made in this case resulted from the periodic refusal of the Court to accept filings and the continuing pattern of actions on the part of the court administration to refuse to assign a judge to hear the case.

I do not believe there has been any lack of prosecution in this case. I tried repeatedly to attempt to get a judge assigned to the case, tried repeatedly to file pleadings and note hearings in the case, and tried to seek assistance from the court administration in getting a judge assigned and in allowing me to file pleadings and note hearings. This Court has already read the e-mails where at one point I was told that I could not file a pleading since the case has been dismissed. The docket does not reflect my efforts in this regard. If I am not allowed to file a pleading or note motion, that does not show up on the docket. CP 943-946.

Mr. West filed one motion for reconsideration and Mr. Dierker filed another where he made similar claims concerning the final dismissal and had made other further claims as noted by the Port's Response to Mr. Dierker's motion for reconsideration (CP 969-991). The Port responded to Plaintiffs' two motions for reconsideration (CP 952-968, CP 969-991). In the two motions for reconsideration, Plaintiffs argued that the Superior Court's dismissal rested on the conclusion that there was a lack of prosecution in the case that was not cured by subsequent activity. (See e.g. -- CP 948). Plaintiffs argued that the delays during the time period complained of were systemic rather than caused by Plaintiffs. CP 949. Plaintiffs argued that concluding that lesser sanctions that dismissal would not suffice was error, in that it was based on the finding that if the Port were found in violation of the PRA it would be subject to a statutory daily penalty, when the Port itself, the responding agency, is in control of the timing and adequacy of its response to Plaintiffs' records requests. (See e.g. -- CP 948-949. Finally, Plaintiffs argued that the Port's accusations and allegations amount to a complaint that there were delays in prosecution, meaning that CR 41(b)(1) applies. CP 949. Application of CR 41(b)(1) would result in a denial of the

motion to dismiss, because Plaintiffs had cured any delays in prosecution. CP 949. The Superior Court denied the motions for reconsideration. CP 1004; CP 1017-1019. This appeal followed.

IV. ARGUMENT

In the interests of judicial economy in the long case Mr. Dierker incorporates his pleadings in the Introduction and Error and Issues sections into the Argument section of this Opening Brief.

A. Standard of Review

1. There are multiple standards of review in this appeal for the 3 most important Orders of the 3 different Judges that granted these 3 of Respondent's many motions filed in the Superior Court in this case, where all of Appellants' claims were dismissed in two Superior Court Orders of Dismissal in two summary judgment type of proceedings, based solely on pleadings and affidavits where no testimony was permitted or reviewed, in a summary judgment type of proceeding, where the Superior Court even required the Final Order of Dismissal to have "findings of fact", some on disputed factual claims and "conclusions of law" in this Order, both of which the Superior Court used to justify it's Final Dismissal of this case.

When considering any motion, including a motion to bifurcate or dismiss claims in a case, the Superior Court must consider the pleadings, facts and inferences therefrom in the light most favorable to the non-moving parties, the Appellants in this case. (Gaines v. Northern Pacific R. Co., 62 Wn.2d 45, 380 P.2d 863 (1963).

"This court reviews questions of law and conclusions of law de novo." Weyerhaeuser Co. v. Calloway Ross, Inc., 133 Wn. App. 621, 624, 137 P.3d 879 (2006).

2. On August 24, 2007 Judge Christine Pomeroy signed an Order to Bifurcate the PRA claims of the Port's withholding of public records about this project from Appellants, to separate the. claims from Appellants' misnamed "non-PRA" claims about the Port withholding of public records from the Port's Administrative Record (AR) of the Port's SEPA actions, the Port's SEPA Appeal and other claims in this case only partly recorded in the Port's AR as Appellants claimed.

Any judicial review of such a failure to disclose SEPA and PRA required documents matters is to be done by a Court's review of the entire agency record (Administrative Record AR) of the agency's decisions and/or recommendations in this matter under the "de novo" and "clearly erroneous" standards of review on the case's merits, when the AR has to be complete by the Port

when filed with the Court and served to Appellants in this case. (See PCCE, Inc. v. United States, 159 F. 3d 425, 427 (9th Cir. 1998); Marriage of Wolfe, 99 Wn. 2d 531, at 536 663 P. 2d 469 (1983); Weyerhaeuser v. Pierce County, 124 Wn. 2d 26, at 38 (1994); Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, at 274-275, 552 P.2d 674 (1976).

Bifurcation of these claims appears improper under the Court's decision Norway Hill, at 274-275, where it found that portions of the State Environmental Policy Act's (SEPA) statutory scheme at WAC 197-11-504(1) of SEPA's regulations, incorporates by reference the "liberal" disclosure of public records provisions of the Public Records Act (PRA), finding SEPA is an "environmental full disclosure law", and therefore, it appears that the PRA is an integral part of SEPA's statutory scheme on how the Port's SEPA required documents were supposed to be disclosed to both Appellants in this case under the PRA, etc., together with being supposed to be disclosed to both Appellants, the Superior Court, and this Court of Appeals in this case for the Administrative Record under SEPA.

3 In April and May 2008, without ever conducting a previously June 2007 Ordered PRA Show Cause Hearing in this case to produce evidence necessary for consideration of Appellants' so-called "non-PRA" claims about the Port's SEPA actions, the Port's SEPA Appeal and other claims in this case partly in the Port's Administrative Record, Appellants' so-called "non-PRA" claims were summarily dismissed for lack of standing by a Superior Court

This Court reviews standing determinations de novo. Wolstein v. Yorkshire Ins. Co., 97 Wn. App. 201, 206, 985 P.2d 400 (1999). Orders of dismissal are reviewed for an abuse of discretion. Will v. Frontier Contractors, 121 Wn. App. 119, 128, 89 P.3d 242 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, 121 Wn. App. at 128. Any judicial review of SEPA matters is also to be done by the Court's full review of the complete agency record of the agency's decisions and/or recommendations in this matter under the "de novo" and "clearly erroneous" standards of review on the case's merits. (See PCCE, Inc. v. United States, 159 F. 3d 425, 427 (9th Cir. 1998); Marriage of Wolfe, 99 Wn. 2d 531, at 536 663 P. 2d 469 (1983); Weyerhaeuser v. Pierce County, 124 Wn. 2d 26, at 38 (1994); Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976).

4.1 Appellants' PRA claims and all claims were finally summarily dismissed pursuant to the

Superior Court's authority under CR 41(b).

These orders of dismissal under CR 41(b) are reviewed for an abuse of discretion. Will v. Frontier Contractors, 121 Wn. App. 119, 128, 89 P.3d 242 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, 121 Wn. App. at 128. CR 41(b) allows a defendant to move for involuntary dismissal of an action based on the plaintiff's failure to comply with court rules or any order of the court. Will, 121 Wn. App. at 128. "Dismissal is an appropriate remedy where the record indicates that (1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction probably would have sufficed." Will, 121 Wn. App. at 129.

4.2 If the Superior Court had "sanctioned" Appellants by dismissal of their case pursuant to Superior Court's inherent authority, that sanction of dismissal decision would be reviewed for abuse of judicial discretion, since it clearly was an abuse of judicial discretion to have this dismissal be supported by only these "merely superfluous" reasons which the Superior Court could not use to "prejudice" the Appellants by dismissing their case.

" '[D]ecisions either denying or granting sanctions ... are generally reviewed for abuse of discretion.' Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). But, the 'choice of sanctions remains subject to review under the court's inherent authority applying the arbitrary, capricious, or contrary to law standard of review.' Butler v. Lamont Sch. Dist., 49 Wn. App. 709, 712, 745 P.2d 1308 (1987)." State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000). "Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration or regard for facts or circumstances." Helland v. King Cnty. Civil Serv. Comm'n, 84 Wn.2d 858, 865-66, 529 P.2d 1058 (1975) (internal citations omitted).

4.3 Further, the Superior Court's Final Order of Dismissal by "summary judgment" also had findings of fact and conclusions of law in it as support for the Superior Court's dismissal of Appellants' case under CR 41(b), or as support for a "sanction" of dismissal of their case pursuant to Superior Court's inherent authority, if it has or had done so.

The Superior Court's orders were made and based upon erroneous and/or disputed findings of fact and conclusions of law, that "(a)n appellate court (normally) reviews a trial court's findings of fact for substantial evidence in support of the findings." In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. Bering v. SHARE 106 Wn.2d 212, 220, 721

P.2d 918 (1986). " Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

This Court would "normally" review such findings of fact for substantial evidence and would normally review conclusions of law de novo, but, in this case, the Superior Court clearly conducted these dismissal hearings as hearings on motions for summary judgment, based solely on pleadings and affidavits, where no testimony is permitted or reviewed, and where a Superior Court is not permitted to weigh evidence or to resolve any existing factual issues between the parties in a case, which legally bars any Superior Court's making any "findings of fact" on such disputed factual issues in such an order to dismiss. (Access Rd. Builders v. Christenson Elec. Contracting Eng' Co., 19 Wn. App. 477, 481, 576 P.2d 71 (1978); Fleming v. Smith, 64 Wn.2d 181, 390 P.2d 990 (1964). Therefore, Judge Meyer's findings of fact and conclusions of law appear not only improper, but, they are "merely superfluous and (can be) of no prejudice to the appellant(s)" in this case (State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962), and, therefore, it appears improper for Judge Meyer to have used these "merely superfluous" findings of fact and conclusions of law in this Order as the only support for Judge Meyer's "prejudiced" dismissal of Appellants' case under CR 41(b), or as the only support of Judge Meyer's "sanction" of dismissal of their case pursuant to Superior Court's inherent authority, if it has done so, both of which would prejudice Appellants.

B. Argument of the Decisions, Errors and Issues in this case.

Appellant here incorporates by reference into this pleading his pleadings in the accompanying Motion for Overlength Brief, to Supplement the Record, and for Relief under RAP 1.2, RAP 9.10, RAP 9.11, RAP 10.4(b), and the ADA, et al.

1. The Superior Court erred in hearing, granting, and/or construing the granting of Respondents' Motion to Bifurcate and accompanying case scheduling order, and erred in hearing and granting both of the Port's two Motions to Dismiss Appellants' bifurcated claims in this case, et seq. (This argument covers the issues in both Errors 1 and 2).

As the record in this case shows Judge Christine Pomeroy erred by hearing Weyerhaeuser's legally barred Motion to Bifurcate (CP 1389-1392) and granting it, bifurcating the PRA claims from the SEPA and other "non-PRA" claims in this case with the August 24, 2007 Order Granting Bifurcation (and Stay) in this case, which, thereby eliminated part of the key

relevant evidence in those withheld public records about this Port action that Appellants had requested from the Port but the Port withheld by the Port's improper PRA claims.

Weyerhaeuser's own Motion to Bifurcate and Stay is based upon Weyerhaeuser's argument that that those Port public records that had been withheld from both Appellants since Jan. 2006, were also part of Mr. West's 2006 PRA case against the Port, supra, in the Court of Appeals at that time, was key relevant evidence necessary for the Superior Court's proper consideration of the SEPA and other "non-PRA" claims in this case, and thereby, if the Court of Appeals found at that time in Mr. West' 2006 case that Port was supposed to disclose them to Mr. West then, they also would have had to disclose them to Mr. Dierker and others back in 2006 when the Port first withheld them from everyone who asked for these records. (Supra; see e.g.- CP 2565-2566).

However, Weyerhaeuser's own Motion to Bifurcate and Stay was directly barred under portions of State Environmental Policy Act's (SEPA) statutory scheme at WAC 197-11-504(1) where it incorporates by reference the full disclosure of public records provisions of the Public Records Act (PRA) as part of SEPA's regulations and and this bifurcation is legally barred and has no basis in law, since the Court's Norway Hill decision found that SEPA is an environmental full disclosure law, and therefore, it clearly appears that the PRA is the integral part of SEPA's statutory scheme on how the Port's SEPA required documents were supposed to be disclosed to both Appellants in this case. (Id.; see Weyerhaeuser v. Pierce County, 124 Wn. 2d 26, at 38 (1994); Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, at 274-275, 552 P.2d 674 (1976); Fritz v. Gorton, 83 Wn.2d 275 (1974); Physicians Insurance Exchange v. Fisons Corporation, 122 Wn. 2d 299, 858 P.2d 1054 (1993); Doctrine of Fraudulent Concealment; Discovery Rule Doctrine.

Further, Mr. Dierker's August 21, 2007 Petitioners' Memo in Response to the Defendants Weyerhaeuser Company's Motions to Bifurcate and Stay (Sub # 68) noted that Weyerhaeuser's Motion to Bifurcate and Stay was barred under the doctrines of equitable estoppel, collateral estoppel, and/or res judicata as:

> "Weyerhaeuser's request to separate the Public Records Act each use from the SEPA issues in this case and stay the PRA issues in this case until an appeal court's decision on the PRA issues in Cause No. 06-2-00141-6 is absurd and frivolous, since the Norway Hill decision found that SEPA is an environmental full disclosure law, and since portions of SEPA's statutory scheme at WAC 197-11-504(1) incorporates the Public Records Act as part of the State Environmental Policy Act's (SEPA) regulations.
>
> Further, Weyerhaeuser's pleadings here requesting separation of this PRA and SEPA issues

appear to be in conflict with Weyerhaeuser's pleadings to the State Supreme Court and to this Superior Court in Cause No. 06-2-00141-6 (West, et al, v. Port of Olympia) which noted that the Norway Hill decision found that SEPA is an environmental full disclosure law, and that portions of SEPA's statutory scheme at WAC 197-11-504(1) incorporates the Public Records Act as part of the State Environmental Policy Act's (SEPA) regulations.

Therefore, this request and these pleadings by Weyerhaeuser would be barred under the doctrine of equitable estoppel, collateral estoppel, and/or res judicata, in this court should deny this motion." (Sub 68, at pages 1-2; attached to Mr. Dierker's accompanying Motion to Supplement the Record, supra).

Clearly, Weyerhaeuser Company's Motions to Bifurcate and Stay was barred, the Superior Court's "bifurcated" Order of Dismissal in this case leading from the granting of this Motion are merely unlawful "Fruits of the Poisonous Tree" of this barred and improper "bifurcation" of the claims in this case, and thereby, those Superior Court "bifurcated" Dismissals of the "bifurcated" claims in this case are improper and should be overturned by this Court for this reason alone.

Also, the Motion to Bifurcate and any judicial review of SEPA or any other such matters is to be done by the Court's review of all relevant evidence within the entire completed administrative record containing all of the agency's records considered for making the decisions and/or recommendations complained of in this matter under the "de novo" and "clearly erroneous" standards of review on the case's merits, and therefore, all "non-PRA" claims in this case based in the Port's AR required that this Port evidence be produced to the complaining Appellants in a completed AR that must be considered by the Judge hearing a matter before that Judge can make a decision on a case. (See Norway Hill, supra; see also administrative record requirements for judicial review in Weyerhaeuser v. Pierce County, supra; Marriage of Wolfe, 99 Wn. 2d 531, at 536 663 P. 2d 469 (1983); PCCE, Inc. v. United States, 159 F. 3d 425, 427 (9th Cir. 1998); Fritz v. Gorton, supra; Physicians Insurance Exchange v. Fisons Corporation, supra; Doctrine of Fraudulent Concealment; Discovery Rule Doctrine).

The adequacy of an agency's SEPA action "involves the legal sufficiency of the data" in the record and is assessed under the "rule of reason", which requires a reasonably thorough discussion of the significant aspects of the probable consequences of the agency's decision. (See Weyerhaeuser v. Pierce County, supra, at 38; Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn. 2d 619, 632-633, 860 P. 2d 390 (1993); Blue Mountains Biodiversity Project v. Blackwood, 161 F. 3d 1208, 1211 (9th Cir. 1998); Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn. 2d 769, 776, 947 P. 2d 732 (1997); Postema v. PCHB, 142 Wn. 2d 68 (2000); see also Department of Ecology v. Theodoratus, 135 Wn. 2d 582, 589, 957 P. 2d 1241

(1998); RCW 34.05.010; RCW 40.16.010-030; Norway Hill, supra).

The withheld evidence concerns the Port's actions and/or failures of to properly and legally act to protect the public's interests here to prevent the Port's subsequent unlawful use of millions of dollars in public funds and resources for this project, clearly shows that this is a "agency action" where the Port and Weyerhaeuser were significantly involved in this specific matter as "partners" on the project, and shows Weyerhaeuser aided, encouraged, and/or connoted approval of the Port's unreasonable withholding of public records from the Appellants. (Long v. Chiropractic Society, 93 Wn.2d 757, 761–762, 613 P.2d 124 (1980). Any other finding would violate PRA's (RCW 42.56) requirement for all courts to liberally construe the Act to promote disclosure and narrowly construe the acts exemptions to disclosure, and Appellants' rights to equal protection of the law of the State Constitution and U.S. Constitution Fourteenth Amendment. (Long, supra; Kuzinich v. Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982); and Yick Wo v. Hopkins, 6 S. Ct. 1064 (1886).

Further, the two Motions to Dismiss appear barred under this Appeals Court's ruling in Marriage of Wherley, 34 Wn. App. 344, 348–349 (1983), which shows that the Appellants cannot be penalized for the Port's actions or failures to act to reasonably disclose these records after Appellants' requested these Port public records about this project in Jan. 2006 so that Appellants could have this evidence to reasonably act to protect their own interests in this matter through the Court of this State. (Bly v. Henry, supra; Bonney Lake v. Delany, supra; State v. Miller, supra).

However, as the record in this case shows Judge Pomeroy's Aug. 24, 2007 Bifurcation of the alleged "nonPRA" claims in this case in the Port SEPA appeal's AR from the PRA claims in this case was in error, allowing the "nonPRA" claims in this case to be dismissed without consideration of evidence within those the public records the Port withheld using the PRA's exemptions from Appellants, the Courts and everyone else who asked for this relevant evidence, and the record shows this order of Bifurcation was "misconstrued" repeatedly and mistakenly to delay the PRA portion of this case for 6 years until the PRA portion was finally improperly dismissed in an irregular proceeding, based upon the Port's barred Motion to Dismiss and the Port's false allegation that Appellants' had delayed the PRA case which even the Superior Court E-mail evidence submitted by the Port showed to be false, but which was ignored by the Judge hearing it. (Supra).

It appears that later Judges in this case used Judge Pomeroy's August 24, 2007 Order to

delay this case for almost 6 years to withhold relevant evidence from Appellants in this case to deny them a meaningful opportunity to be heard on the merits of their claims in this case. (Physicians Insurance Exchange v. Fison Corp., 122 Wn.2d 299, 339; 858 P.2d 1054 (1993).

The later orders by the later Judges transferred onto this case after Judge Pomeroy which dismissed both the PRA claims and "non-PRA" claims in this case were merely legally barred erroneous "Fruits of the Poisonous Tree" erroneously given as relief to the Respondents, which acted to deny Appellants' fundamental rights to have a meaningful opportunity to be heard on the merits of their claims on the evidence contained in the Port's public records withheld from the Port's incomplete Agency Record Appellants' requested as part of SEPA and the PRA, a clear violation of Appellants' rights to due process and equal protection of the law and an abuse of judicial discretion. (Supra; see also below).

It therefore appears that Judge Pomeroy's August 24, 2007 Order Granting Bifurcation itself was an abuse of her discretion, was manifestly unreasonable and was based upon untenable grounds, since Judge Pomeroy based her ruling upon an erroneous view of the law, and

Further it appears from the Court documents filed in this case that Judge Pomeroy's Order Granting Bifurcation and Denying "Stay" of the PRA claims, had been mistakenly construed by the Superior Court to delay all consideration of any of Appellants' "Bifurcated" PRA claims in this case for over 5 years, denying Appellants any meaningful opportunity to be heard by by any judge during this time on the merits of their PRA claims, until the case was finally assigned to Visiting Pro Tem Superior Court Judge Meyer on April 4, 2012 who later issued the various Orders dismissing the underlying "PRA" claims or failure to timely prosecute the PRA claims, etc., and making a "final dismissal" of the entire case, with denial of reconsideration (Dk. # 330, 342).

Because of Judge Pomeroy's erroneous Bifurcation, the Superior Court's later erroneous "staying" of the PRA claims for almost 5 years by the later Judges and Court Staff who were transferred onto this case after Judge Pomeroy were merely erroneous "Fruits of the Poisonous Tree" in this case, which erroneously gave Respondents' the "Stay" relief Respondent Weyerhaeuser requested in that "Motion for Bifurcation and Stay", when Judge Pomeroy did not grant that "stay" request in the signed August 24, 2007 Order Granting Bifurcation where the "stay" portions are crossed-out, a clear violation of Appellants' rights to due process and equal

protection of the law and an abuse of judicial discretion. (See the signed certified copy of Judge Pomeroy's August 24, 2007 Order Granting Bifurcation where the "stay" portions are crossed-out attached to Dierker's Response to Respondent Weyerhaeuser's Motion to Dismiss the Appeal; see definition of "Fruit of the Poisonous Tree" Doctrine and "Fruits of the Crime" in Black's Law Dictionary, Fifth Edition page 603).

Clearly, this bifurcation was in error, legally barred, was misconstrued to delay this case for almost 6 years causing it to be dismissed for lack of prosecution, and the Court must remand this case.

The Port's Motions to Dismiss seeking dismissal of the non-PRA claims for, among other bases, lack of standing (CP 2135-2151; CP 2152-2174; CP 2175-2219), and Judge Wickham's erred hearing and granting of the Port's Motion to Dismiss for lack of standing in his April and May 2008 dismissals of the "nonPRA" claims in this case were legally barred under controlling law of:

1) the same provisions of SEPA's WAC 197-11-504(1) incorporating the PRA as part of SEPA in such cases, supra, that barred Judge Pomeroy's Bifurcation;

2) the Port's own SEPA Policy provisions on standing (CP 2351; CP 2382) for Appellant's gaining judicial appeal of the Port's SEPA Appeal decision denying Appellants' Port SEPA appeal documented in the 2800 page Port Administrative Record (AR) filed in this case the Judge Wickham had to ignore to make this dismissal for lack of standing; and/or

this dismissal for lack of standing is also in direct conflict with other controlling standing law, some of which has directly overruled Judge Wickham's rulings on standing in similar cases, as noted below.

Judge Wickham's erred hearing and granting of the Port's Motion to Dismiss was also legally barred under controlling law of the case in the procedural requirements of Judge Pomeroy's August 24, 2007 Case Scheduling Order for scheduling of hearings of the bifurcated claims that accompanied the Order to Bifurcate, where Judge Wickham had repeatedly made a "mistake" or refused to hear the PRA claims **before** the Port's Motion to Dismiss the "nonPRA" claims was heard, and then Judge Wickham continued to misconstrue Judge Pomeroy's August 24, 2007 Case Scheduling Order on the bifurcated claims that accompanied the Order to Bifurcate, so allow him to make these "mistakes" for 4 years erroneously claiming the case was dismissed until his judicial

assistant finally admitted in the E-mail that the Superior Court had "made mistake" here, and later Judge Wickham ended up recusing himself after he had refused to do so before when the Appellants requested him to do so, at one time due to this delay of the PRA claims hearing. (Supra).

The hearing and/or granting of the Port's Motion to Dismiss the "nonPRA" claims for lack of standing is also barred since it was based upon findings of fact and conclusions that are improper, merely superfluous, and that could not be used to prejudice the Appellants by dismissal of their case, either from from Judge Wickham's Order granting dismissal of the "nonPRA" claims. (State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962).

For these reasons alone this Court must overturn Judge Wickham's dismissal of the "nonPRA" claims for lack of standing and remand it back to the Superior Court.

Further, for these same reasons alone this Court must also overturn Judge Meyer's 3 "final" July, August, and September, 2012 Orders of Dismissal and denials of reconsideration, supra, which dismissed all the claims in this case, including again those "non-PRA" issues, and this case must be remanded for proper proceedings.

However, the Port's Motion to Dismiss for lack of prosecution of the PRA claims in this case CP 492-493 and its hearing and granting by Judge Meyer appears to be barred under the doctrines of collateral estoppel and res judicata, since the Port is judicially estopped from arguing that Plaintiffs had not acted to secure a prompt hearing of the delayed PRA claims by the Port and Weyerhaeuser's prevailing in the West and Dierker v. Thurston County Superior Court Judge Richard Hicks, et al, Supreme Court Case No. 80733-7, when the Port and Weyerhaeuser "Intervener/Respondents" argued against Plaintiffs' efforts to try prevent the Superior Court's repeated delays of the PRA show cause hearing caused by Respondents and the Superior Court's improper bifurcation of the integral claims in this case and other improper actions, to eliminate any hearing of this case on the relevant evidence in those withheld records. Cunningham v. Reliable Concrete Pumping. Inc., 126 Wn. App. 222, 224, 108 P.3d 147 (2005). If the Port was barred from making this Motion to Dismiss, Judge Meyer was barred from hearing and granting this Motion to Dismiss. (See CP 2565-2566).

The Port's Motion to Dismiss for lack of prosecution CP 492-493 is also barred under this Appeals Court's ruling in Marriage of Wherley, 34 Wn. App. 344, 348–349 (1983), which shows

that the Appellants could not be penalized by dismissal of this case, for the Port's actions or failures to act to reasonably disclose these records after Appellants' requested these Port public records about this project in Jan. 2006 so that Appellants could have this evidence to reasonably act to protect their own interests in this matter through the Court of this State, especially since some of those 2006 withheld public records had been disclosed to Mr. West due to this Court's decision to grant his first appeal of Mr. West's 2006 PRA case against the Port, the same case that Weyerhaeuser based the Motion to Bifurcate on to begin with. (Bly v. Henry, supra; Bonney Lake v. Delany, supra; State v. Miller, supra).

The hearing and/or granting of the Port's Motion to Dismiss for lack of prosecution is also barred under the provisions of CR 41(b)(1) as noted herein, and is barred since it was based upon findings of fact and conclusions that are improper, merely superfluous, and that could not be used to prejudice the Appellants by dismissal of their case, either from Judge Meyer's Order or from Judge Wickham's prior Order granting dismissal of the "nonPRA" claims. (State ex rel. Carroll v. Simmons, supra).

2. The Superior Court erred in hearing and granting the Port's Motion to Dismiss Appellants' "Non-PRA" claims in this case, et seq. (Argument covers the issues in Error 3).

Judge Wickham erred when hearing the Port's Motions to Dismiss seeking dismissal of the non-PRA claims for, among other bases, lack of standing (CP 2135-2151; CP 2152-2174; CP 2175-2219), and erred in granting it with his April 25, 2008 Order of Dismissal and Findings of Fact and Conclusions of Law, et al, for lack of standing, and his May 30, 2008 Order of Dismissal (Amended) of all claims except for the PRA claims, and these orders were manifestly unreasonable, based upon untenable grounds, based upon an erroneous view of the law, or are they abuses of discretion, since these Orders had the effect avoiding Superior Court review of the underlying merits of Appellants' claims in this case about this Port's project approval and SEPA actions, et seq., complained of in this case, by Judge Wickham's misinterpretation/misapplication of the case law on Appellants' "standing" needed for seeking judicial review of these claims, and by in SEPA's and the PRA's harmonized statutory scheme under WAC 197-11-504(1)'s "incorporation by reference" of the PRA as part of SEPA. (United States v. Zerbst, 111 F.Supp. 807; Physicians Insurance Exchange v. Fison Corp., 122 Wn.2d 299, 339; 858 P.2d 1054 (1993).

While Judge Wickham's Findings of Fact and Conclusions of Law in the April 25, 2008 Order of Dismissal for lack of standing in this summary dismissal were in error, and are superfluous and could not have legally been used to prejudice the Appellants by dismissal of their "nonPRA" claims (State ex rel. Carroll v. Simmons), and these mistakes, finding and conclusions lead to the Superior Court's over 5 year later denial any hearing of Appellants' claims on the Port's withholding of relevant evidence from them in their PRA claims by dismissal for lack of prosecution, because Judge Wickham made a "mistake" or refused to hear the PRA claims for 4 years erroneously claiming the case was dismissed, and because Judge Wickham would not let the PRA claims be timely heard as required by Judge Pomeroy's August 24, 2007 Case Scheduling Order for the bifurcated claims that accompanied the Order to Bifurcate. (Supra).

Judge Wickham's summary dismissal in this manner of these claims in this case was clearly an abuse of his discretion, and his rulings were manifestly unreasonable and based upon untenable grounds, since he based his rulings upon an erroneous view of the law, when Judge Wickham had erroneously found and/or concluded that "standing" for judicial review of all of Appellants' various "no-PRA" claims must be determined under **only** the Land Use Petition Act (LUPA) RCW 36.70C.060(1)-(2) statute's strict standards of "standing" for judicial review of a action, when the Port did not make a LUPA decision in this case and no "LUPA" decision exists in the Port's Administrative Record, since the Port lacks authority under LUPA to make any "Land Use Decision" under RCW 36.70C that can only be made by Counties, Cities, and incorporated Towns, **not** ports, like the Port of Olympia. Judge Wickham's decision to apply LUPA's standing requirements as a basis for his April 15, 2008 Order of Dismissal and his May 30, 2008 Order of Dismissal (Amended) are not based upon any law or any facts within the record of this case and were in direct conflict with the law, and would be merely superfluous and could not be used to prejudice Appellants in any case to justify Judge Wickham's dismissal of Appellants' "nonPRA" claims based upon the Port's public records and its 2800 page AR that Judge Wickham may never have reviewed at all. (Supra).

In the appeal of a similar case Judge Wickham dismissed for lack of standing, the Supreme Court found recently that Judge Wickham's interpretation of the strict "standing" requirements of the LUPA was in error, and the Supreme Court found the Plaintiffs in that case had standing. (See Knight v. City of Yelm 173 Wn.2d 325, at 340-347 (Dec. 2011). Also, a review of the Port's

Administrative Record of in light of this case shows Plaintiffs in this case would have even met LUPA's strict "standing" requirements in Knight, if Judge Wickham ever properly reviewed the AR and considered it and Appellants pleadings at that time, which he failed to do.

Another recent Court of Appeals decision found a Plaintiff had "standing" for having judicial review of their issues in that case, where they were attempting to protect the legal sanctity of one agency's administrative appeal decision on a defending agency party to prevent violation of that agency decision by prohibited actions of that defending agency party, exactly the same kind of administrative appeal decision like that of Plaintiffs' issue on protecting the sanctity of the City of Olympia Hearing Examiner's Dec. 19, 2006 Decision denying the Port's Weyerhaeuser Log Yard project complained of in at least part of the non-PRA issues of this case. (See Stevens v. Washington State Growth Management Hearings Board, 163 Wn. App. 680 (June 2011).

Also, a review of recent case law occurring after these decisions by Judge Wickham, shows that the Uniform Declaratory Judgments Act (UDJA) and its more liberal "standing" requirements may still be be used in cases which might involve land use, such as this one did, and Appellants' case has Declaratory Judgments claims (CP 33-54). (See Family Farmers v. State of Washington, 173 Wn. 2d 296 (Dec. 2011). Appellants' numerous pleadings citing to evidence in the Port's Administrative Record in this case shows that Plaintiffs clearly would have met the more liberal "standing" requirements of Appellants' UDJA claims in the Complaints filed in this case which were part of the dismissed nonPRA issues in this case.

A review of Appellants' pleadings (CP 1748-1762, CP 1395-1408) for Judge Pomeroy's August 24, 2007 Hearing shows Superior Court Judge Wickham erred by dismissing the SEPA and other "non-PRA" claims in this case for lack of standing, when even the Port's incomplete Administrative Record (AR) shows Appellants' SEPA Comments, Administrative Reconsideration, Administrative Appeal, and their requests for public documents, etc., concerning these Port's actions concerning the Port/Weyerhaeuser project complained of in this case, which shows Appellants had "standing" to bring this case in that Superior Court as procedural due process for gaining redress of Appellants' grievances to gain judicial review of the Port's agency action and the Port's dismissal decisions denying Appellants' administrative appeal, and this is an abuse of judicial discretion. (Supra; see AR 2350-2407; AR 2666; AR 2769-2770; AR 2203-2205; AR 2456-2458, AR 2658, AR 2668-2670; see also Appellant Dierker's August 9, 2007 Declaration on

Standing; see Appellants' August 20, 2007 Hearing Brief CP 1748-1762, at 1751-1756, 1758-1761).

Further, Appellants' April 14, 2008 Declaration on Standing, et al., made in support of their Motion to Strike the Port's Motions to Dismiss that Judge Wickham considered for dismissing the "non-PRA" claims, shows that there were other reasons for the application of estoppel and res judicata doctrines to bar any dismissal for Appellants' lack of standing, since both Appellants had also previously been granted "standing" to get judicial review under the Port's administrative SEPA appeal actions in the Port SEPA Policy, concerning impacts to the lower Puget Sound area including but not limited to Budd Inlet where this Port/Weyerhaeuser project was constructed:

a) Mr. West had specifically been granted standing to have judicial review of agency actions occurring in a decision of the Ninth Circuit Court of Appeals he won in West v. Secretary of Department of Transportation, 206 F. 3d 920 (9th Cir. 2000), another of Mr. West's environmental cases attempting to protect the environment of this area of South Puget Sound; and

b) Mr. Dierker had specifically been granted standing to have judicial review of agency actions occurring on the Cascade Pole Site's portion of the where this Port/Weyerhaeuser project was constructed in a unpublished decision of the Ninth Circuit Court of Appeals he won. (See unpublished decision Dierker v. John Iani, Ninth Circuit Case No. 01-36016 (2002).

As noted in those Declarations on Standing, et al., Mr. Dierker also is one of the "Stakeholders" in the U.S. Endangered Species Act (ESA) Listing of the Puget Sound Salmon, and was one of those persons who filed comments or gave testimony on the ESA Listings of the Puget Sound Orca, the Marbled Murrellet, and the Northern Spotted Owls in this area which have been impacted by this Port project and these types of projects already. (Id.).

Further, Petitioners West and Dierker also appear to have "standing" to appeal in this case under the controlling law and legal precedents on standing in such environmental related cases which show the Washington Courts have adopted the very liberal "federal approach to standing" under National Environmental Policy Act (NEPA) cases. (See SAVE v. Bothel, 89 Wn. 2d 862, at 868, 574 P. 2d 401 (1978); Asarco Inc. v. Air Quality Coalition, 92 Wn. 2d 685, 709, 601 P. 2d 501 (1979); Kucera v. Department of Transportation, 140 Wn. 2d 200, 212 and 216, 995 P. 2d 663 (2000); Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 854, at 860 (Ninth Circuit);

also Petitioner West's June 15, 2007 Memo on Standing in Case No. 06-2-02116-6). Plaintiffs' non-PRA claims were dismissed for lack of standing, by mis-applying standing case law in SEPA, declaratory judgment, and constitutional writ actions like Appellants here (CP 33-54). Much of the main thrust of Plaintiffs non-PRA claims was, indeed, a SEPA appeal of the Port's SEPA approvals for the joint Port-Weyerhaeuser project.

In SEPA actions, a challenger must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests protected by SEPA and (2) the party must allege an injury in fact. Kucera v. Dep't of Transp., 140 Wn.2d 200, 212, 995 P.2d 63 (2000) (citing Leavitt v. Jefferson County, 74 Wn. App. 668, 678-79, 875 P.2d 681 (1994).

However, in this case Judge Wickham made an erroneous, superfluous, and non-prejudicial finding and conclusion that Plaintiffs lacked standing because they had not shown an injury in fact:

> "The Plaintiffs have not alleged immediate, concrete, specific injury required to establish standing or injury particular to them beyond any other member of the public." CP 94.

The injury in fact element is satisfied when the plaintiffs allege the challenged action will cause them "specific and perceptible harm." Leavitt, 74 Wn. App. at 679. A sufficient injury in fact is properly pleaded when a plaintiff alleges direct impacts to his or her property and/or interests, even if the alleged impacts are speculative and undocumented, even if they are possible, not necessary, impacts of the challenged action, as long as the allegations are of direct impacts. Leavitt, 74 Wn. App. at 678-79. Allegations of injury in fact are:

> "not mere pleading requirements but rather an indispensable part of the plaintiff's case. ...
> [E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i. e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Here, Appellants' "nonPRA" claims were dismissed at the pleading stage of the litigation, on Weyerhaeuser's and the Port's motions to dismiss for lack of standing.

> "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Lujan, 504 U.S. at 561, quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).
> "Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. ...
> But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.' Sierra Club, 405 U.S. at 734-735. To survive [the moving party's] summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being

threatened [the challenged action], but also that [respondents] would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." See, e.g., Sierra Club v. Morton, 405 U.S. 727, 734-735, 92 S.Ct. 1361 (1992); Lujan, 504 U.S. at 562-63.

Appellants appear to have "standing" to appeal in this case in this Superior Court since this Superior Court has recently adopted the liberal "federal approach to standing" for environmental case under the U.S. Ninth Circuit Court of Appeals' NEPA rulings made in the case of West v. Secretary of Department of Transportation, 206 F. 3d 920 (9th Cir. 2000), another of Mr. West's environmental cases attempting to protect the environment of this area of South Puget Sound. (Id.; see also Court's recent use of this West v. Secretary of Department of Transportation case in the Transcript of June 1, 2007 Oral Ruling of Judge Hicks, at page 8 lines 13-14 in Case No. 06-2-02116-6).

Further, Defendants and other officials failed to properly enforce these statutes in the manner prescribed by law, even after Petitioners have made numerous inquiries, requests, comments, and appeals about such actions of the agency Defendants and others, and this causes Petitioners harm which is different from the harm caused to the general public by the Defendants' actions here, although the public may share in some of this harm. (See Campbell v. Bellevue, 85 Wn. 2d 1, at 12-13, 530 P. 2d 234 (1975), Mason v. Bitton, 85 Wn 2d 321, at 326-327, 534 P. 2d 1360 (1975).

For these reasons, this appeal should be granted since Appellants clearly had "standing" for judicial review of Appellants' "Non-PRA" claims about the Port's actions concerning this project, and this Appellant requests that the Court of Appeals grant this appeal of Judge Wickham's April 25, 2008 Order of Dismissal and his May 30, 2008 Order of Dismissal (Amended) along with his other various underlying decisions on those "non-PRA" issues the Superior Court erroneously bifurcated previously in this case August 24, 2007, which would necessarily also grant the appeal of Judge Meyer's 3 "final" July, August, and September, 2012 Orders of Dismissal and denials of reconsideration in this case which dismissed all the claims in this case, including again those "non-PRA" issues, and this case must be remanded for proper proceedings.

3) The Superior Court erred in hearing and granting the Port's Motion for Dismissal of Appellants' "PRA" claims and for final dismissal of all claims in this case under CR 41(b) for lack of prosecution or for sanctions, et seq. (Argument covers issues in Errors 4-10).

Mr. Dierker incorporates by reference into this pleadings his the accompanying Motion for Overlength Brief, to Supplement the Record, and for Relief under RAP 1.2, RAP 9.10, RAP 9.11, RAP 10.4(b), and the ADA, et al, applying to the records withheld by the Port in this case.

The Superior Court erred in hearing the Port's Motion to Dismiss CP 492-493, and summarily dismissing PRA and all of Appellants' claims in this case under CR 41(b) based upon findings of fact and conclusions that are improper, merely superfluous, and could not be used to prejudice the Appellants by dismissal of their case. (State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962).[1]

Normally, CR 41(b) allows a defendant to move for involuntary dismissal of an action based on the plaintiff's failure to comply with court rules or any order of the court. Will, 121 Wn. App. at 128.

> "Dismissal is an appropriate remedy where the record indicates that (1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction probably would have sufficed." Will, 121 Wn. App. at 129.

Judge Meyer concluded as a matter of law that Mr. West, not Mr. Dierker, had "deliberately and willfully caused excessive delays in this case", but this is not a conclusion of law that Mr. West had willfully or deliberately disobeyed a court order, or even that Mr. West had disobeyed a court order, let alone that Mr. Dierker had done so -- this is merely delay Judge Meyer claimed was Mr. West's fault without Judge Meyer ever considering Appellants' evidence and pleadings properly using the proper burden of proof. (Supra).

1 Footnote 1. Assuming for the moment that this Court is called upon to review the findings of fact for substantial evidence (even though the findings here are merely superfluous and of no prejudice to the appellant; Carroll, 61 Wn.2d at 149), the findings of facts that the Trial Court made supporting its conclusion that Mr. West willfully and deliberately caused excessive delay in the case were also erroneous. In a set of two findings of fact, the Trial Court found that no action by anyone was taken in this case between the time that the amended order of dismissal was entered and the time that Mr. West filed his PRA declaration, a period of 17 months. In doing so, the Trial Court weighed evidence and credibility, and found unpersuasive Mr. West's and Mr. Dierker's evidence that the Thurston County Superior Court Clerk's office had refused to accept filings or set the matter for hearing. "This is somewhat of a collateral point, but I will say I tend to agree with Ms. Lake with the fact that had there been a year and a half pattern of refusing to accept pleadings from Mr. West, we would have heard about it." RP 06/29/12, p. 54, ll. 7-11. But here, the matter was decided completely on affidavits; no testimony was taken or reviewed, making it akin to a matter decided on summary judgment. And in ruling on motions for summary judgment, a trial court is not permitted to weigh evidence or to resolve any existing factual issues. Fleming v. Smith, 64 Wn.2d 181, 390 P.2d 990 (1964). Continuing the analogy, the Trial Court erred in not viewing facts and inferences therefrom in the light most favorable to the non-moving party. Gaines v. Northern Pacific R. Co., 62 Wn.2d 45, 380 P.2d 863 (1963).

This Court reviews conclusions of law de novo, supra, (even though the conclusions of law in this matter were merely superfluous, and of no prejudice to the appellant), and this Court should examine this conclusion carefully. There is no basis in case law or precedent that Appellants have found for equating "delay" with "disobeying a court order." The two are entirely different and distinct.

Judge Meyer did find as a matter of fact - a superfluous finding -- that the case scheduling order of March 21, 2008 provided for a deadline of April 25, 2008, for hearing dispositive motions, and found as a matter of fact - a superfluous finding -- that no show cause hearing (that is, a dispositive hearing in the PRA context) had ever been held in this case. CP 935.

But Judge Meyer did not find that Mr. West or Mr. Dierker had disobeyed the case scheduling order of March 21, 2008. And indeed, substantial evidence would not support such a hypothetical finding. Recall that when Appellants opposed Weyerhaeuser's motion to dismiss the PRA claims as to Weyerhaeuser itself, that Mr. West argued that Weyerhaeuser hadn't filed the dispositive motion in accordance with the case schedule order. CP 2563-2564. And Weyerhaeuser persuasively argued to the Superior Court that the case schedule order in question only pertained to the non-PRA claims, since the PRA claims had been bifurcated in the case. CP 2565-2566. There is thus no evidence supporting even a hypothetical finding of fact that Co-Plaintiffs disobeyed the case schedule order. The first prong for dismissal under CR 41(b) - that the party must have disobeyed a court order- is missing.

Judge Meyer also made another superfluous Finding, (actually a "mixed" issue of fact and law), that somehow both Mr. West and Mr. Dierker had prejudiced the Port (though there is no Finding that Mr. Dierker had done so in this ruling), where Judge Meyer found that:

> "since the Public Records Act requires a mandatory daily penalty in the event that a court finds an agency to have violated the act and does not vest a court with discretion to reduce the number of days for which a penalty may be imposed. Mr. West and Mr. Dierker should not be allowed to benefit from the delays that they themselves cause." CP 937-938.

This superfluous Finding of Fact is actually a superfluous Conclusion of Law, and is not supported by substantial evidence or law, since, while the PRA does requires a mandatory daily penalty, it does not follow that this is prejudicial to the Port who wants to withhold these records.

It was also an error for Judge Meyer to conclude that he could dismiss Appellants' PRA case because the delay in this case increased number of penalty days for which a mandatory daily

penalty must be imposed constitutes "prejudice" when "'Prejudice means a damage or detriment to one's legal claims (Black's Law Dictionary 1299 (9th ed. 2009)." Nat'l Sur. Corp. v. Immunex Corp., Wn.2d , 297 P.3d 688, 696 (2013), and the Port's risk of being forced to pay an increased penalty based on number of days is not damage or detriment to legal claims or defenses cannot be used by Judge Meyer to penalize Appellants in this matter for the Respondents' improper litigation actions which delay this case and/or the Superior Court's actions or failures to in hearing and granting these three legally barred improper motions, all without the superior Court ever reasonably reviewing these withheld Port public records after Appellants' requested them in an ordered Show Cause Hearing, so that Appellants could have this information to reasonably act to protect their own interests in this matter. (See Marriage of Wherley, supra; Bly v. Henry, supra; Bonney Lake v. Delany, supra; State v. Miller, supra, Weyerhaeuser v. Pierce County, supra, et seq.).

This Court should conclude that Judge Meyer erred in finding that Mr. West's delays caused substantial prejudice to the Port, which required dismissal of both Plaintiffs' claims in this case. Further, as Mr. West argued in his Motion for Reconsideration, the Port, as the responding agency, has control over its own response to CoPlaintiffs' public records requests. If the Port does not wish to risk a mandatory daily penalty, it is in complete control of the means by which to avoid such a penalty, by swiftly and fully responding to a public records request.

There is also no basis in case law or precedent that Mr. Dierker has found for showing that a party like Mr. Dierker who has **not** been found to have "deliberately and willfully caused excessive delays in this case", would be liable for the same sanctions for any pleading improprieties of another party in a case.

There is no substantial evidence or law that would support even a hypothetical finding Appellants violated a Court order in this case, and the first prong for dismissal under CR 41(b) - that the party must have disobeyed a court order is missing.

Further, the Superior Court erred in not applying CR 41 (b)(1) to the case which provides:

> "Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff. . . neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined....If the case is noted for trial before the hearing on the motion, the action shall not be dismissed."

Here, Judge Meyer's conclusion that Mr. West, **not** Mr. Dierker, had deliberately and willfully caused excessive delays amounts, essentially, to a conclusion that Mr. West, **not** Mr.

Dierker, had failed to prosecute this case. And indeed, Appellants' failing to be able to properly re-note the Ordered PRA records show cause matter for hearing resulted, simply, in the matter not being noted for hearing. Accordingly, CR 41(b)(1), a mandatory rule applies, and there is only one exception to the mandatory application of the italicized portion of the rule:

> "Where dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains." Snohomish County v. Thorp Meats, 110 Wn.2d, 163, 169, 750 P.2d 1251 (1988) (citing Gott v. Woody, 11 Wn. App. 504, 508, 524 P.2d 452 (1974). Such dilatoriness "refers to unacceptable litigation practices, other than mere inaction. Wallace v. Evans, 131 Wn.2d 572, 577, 934 P.2d 662 (1997)." Bus. Servs. of Am. II Inc v. WaferTech LLC 174 Wn.2d 304 308, 274, P.3d 1025 (2012).

While a judge has discretion to ignore the prohibition of granting dismissal under CR 41(b)(1) where delay was caused by 'unacceptable litigation practices other than mere inaction," Judge Meyer did not find that Appellants had done any such unacceptable litigation practices - like failure to appear at trial or failure to appear at a status conference combined with other dilatory behavior -- here. Bus. Servs., 174 Wn.2d at 310. Even the failure to properly re-note an ordered show cause hearing amounts to nothing more than failing to re-note the matter for trial. Accordingly, Judge Meyer should have applied CR 41(b)(1) and erred in not doing so. Since both Mr. West and Mr. Dierker noted the matter for trial before the hearing on the Port's Motion to Dismiss, and even re-noted the PRA show cause hearing before the hearing on the Port's Motion to Dismiss, Judge Meyer lacked discretion, under CR 41(b)(1), to dismiss the case. See, e.g., Caldwell v. Caldwell, 30 Wn.2d 430, 191 P.2d 708 (1948); State ex rel. Hayes v. Superior Court, 12 Wn.2d 430, 121 P.2d 960 (1942).

Further, even if the Superior Court had Dismissed the case pursuant to its own inherent authority, that Dismissal would have been in error, since:

> "Every court of justice has power... [t]o enforce order in the proceedings before it, ... [and] to provide for the orderly conduct of proceedings before it.'" RCW 2.28.010(2)-(3). "When jurisdiction is ... conferred on a court or judicial officer all the means to carry it into effect are also given[.]" RCW 2.28.150. Where sanctions are not expressly authorized, "the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation." In re Firestorm 1991, 129 Wn.2d 130, 139 P.2d 411 (1996) applying the principles embodied in CR 11, CR 26(g), and CR 37 to CR 26(b) violations). State v. S.H., 102 Wn. App. at 473.

Here, it does not appear that the Superior Court dismissed Appellants' case under its own inherent authority to control litigation. But if it had, that would be error since:

> "Under RCW 2.28.010(3), a trial court has the power to provide for the orderly conduct of proceedings before it. Further, 'in Washington, trial courts have the authority to enjoin a party from engaging in litigation upon a "specific and detailed showing of a pattern of abusive and

frivolous litigation." ' Yurtis v. Pipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008) (quoting Whatcom County v. Kane, 31 Wn. App. 250, 253, 640 P.2d 1075(1981).

"Proof of mere litigiousness is insufficient to warrant limiting a party's access to the court." Yurtis, 143 Wn. App. at 693, 181 P.3d 849. Bay v. Jensen, 147 Wn. App. 641, 657, 196 P.3d 753 (2008). Here, the Superior Court did expressly did not find a pattern of abusive and frivolous litigation by Appellants. Though the Port argued that Mr. West, not Mr. Dierker, had intentionally scheduled sham hearings, the Superior Court did not find that Mr. West or Dierker had intentionally scheduled sham hearings. All that the Superior Court found is that while for over 5 years CoPlaintiffs had filed numerous notices of issue for the Court scheduling of a previously Ordered Show Cause Hearing on the Port's withholding of public records about this project that never took place for one reason or another, the Superior Court could only claim that it found that none of the delays were caused by the Port of Olympia. CP 936. That is, while it is possible to infer that the Superior Court may have erroneously found the delays at that time were caused by Mr. West and not the Port, the Superior Court did not find an improper motive or a pattern of abuse by either Mr. West or Mr. Dierker. The Superior Court's conclusion that Mr. West, not Mr. Dierker, deliberately and willfully caused excessive delays amounts, essentially, to a conclusion that there was a want of prosecution by both Appellants. And indeed - Appellants' failing to properly note the show cause matter for hearing resulted, simply, in the matter not being noted for hearing. Accordingly, CR 41(b)(1), a mandatory rule, applies.

The Order of Dismissal reflects that the dismissal was granted pursuant to CR 41(b), not to the Superior Court's inherent powers to control and manage the cases before it. Nor did the Superior Court make any (superfluous) findings that would support such an order of dismissal.

This Court should not affirm the dismissal on this hypothetical but erroneous basis.

This Court should conclude that substantial evidence does not support any of Judge Meyer's findings or implied findings that Appellants disobeyed a court order, prejudiced the Port, or that no lesser sanction would suffice. In the absence of substantial evidence supporting these findings, this Court should conclude that the conclusions of law supporting Judge Meyer's exercise of discretion in dismissing the case pursuant to CR 41 (b) were in error, and should be remanded.

The several findings of facts on disputed factual issues Judge Meyer used to support its conclusion of law that Mr. West, not Mr. Dierker, willfully and deliberately caused excessive delay

in the case, were also clearly erroneous.

In ruling on motions for summary judgment, a court is not permitted to weigh evidence or to resolve any existing factual issues (Fleming v. Smith), and a Court errs in not viewing facts and inferences therefrom in the light most favorable to the non-moving party (Gaines v. Northern Pacific R. Co.).

Though the matter was decided completely on affidavits where no testimony was taken or reviewed, making it a manner decided on summary judgment, Judge Meyer stated at the hearing on the Port's Motion to Dismiss for lack of prosecution and sanctions that:

> "This is somewhat of a collateral point, but I will say I tend to agree with Ms. Lake with the fact that had there been a year and a half pattern of refusing to accept pleadings from Mr. West, we would have heard about it." RP 06/29/12, p. 54,11. 7-11.

In doing so, Judge Meyer improperly weighed the opposing parties evidence and credibility, and found unpersuasive Appellants' evidence and pleadings that the Thurston County Superior Court Clerk's office had delayed this case by "mistakenly" refusing to accept filings or set the matter for hearing from May 2008 until mid-2011, by the Superior Court's prior admitted "mistakes" in thinking the case had be completely dismissed when the PRA claims had not been. In this set of findings of fact with many on disputed factual claims Judge Meyer's final orders of dismissal improperly and erroneously found and/or concluded: 1) that Mr. Dierker had filed no pleadings in this case from August 2007 until June 2011 when he filed an Affidavit of Prejudice against Judge McPhee, a period of 3 years 10 months; 2) that no action was taken by Mr. West or anyone else between the May 30, 2008 amended order of dismissal and June 2011 when Mr. West filed his PRA Show Cause Hearing Notice of Issue with declaration, a period of 17 months for Mr. West; 3) that the Port did not cause any of the delays in this case during this time; 4) finding Mr. West, not Mr. Dierker, had acted improperly to cause the delays; 5) finding or concluding that the plaintiffs caused the delays, and finding that Judge Meyer's misinterpretation of the PRA's daily penalty provision and its alleged "prejudice" of the Port from this delay. (Supra).

Though the matter was decided completely on affidavits where no testimony was taken or reviewed, making it a manner decided on summary judgment, Judge Meyer stated at the hearing on the Port's Motion to Dismiss for lack of prosecution and sanctions that:

"This is somewhat of a collateral point, but I will say I tend to agree with Ms. Lake with the fact that had there been a year and a half pattern of refusing to accept pleadings from Mr. West, we would have heard about it." RP 06/29/12, p. 54,11. 7-11.

In doing so, the Superior Court's Judge Meyer improperly weighed the opposing parties evidence and credibility, and found unpersuasive the Appellants' evidence and pleadings that 1) the Superior Court had delayed this case by "mistakenly" refusing to accept filings or set the matter for hearing from May 2008 until mid-2011, by the Superior Court's admitted "mistake" in thinking the case had be completely dismissed when the PRA claims had not been, even sending back the AR and PRA in camera review records, and 2) that at least part of the delay in this case was caused or aided by the Port's attorney's actions or failures to properly act.

However, the Court's set of findings of fact on disputed factual claims are clearly erroneous since the record in this case shows clearly shows that the Superior Court itself took a number of "mistaken" actions in this case from April 2008 until mid 2011 that delayed this case, by the Superior Court's "mistaken" belief that the case had been completely dismissed in April 25, 2008 and thereby, the Superior Court refused to allow Appellants to file any pleadings in this case, and even sent the Port's AR and PRA in camera review records back the Port though Appellants were not notified of this until Feb. 2013, all of which delayed this case for almost 4 years. (See the Court Docket, the Clerk's Papers, the Court E-mails filed by the Port and Mr. Dierker and the recent letters and pleadings Mr. Dierker filed in Court of Appeals and the Superior Court and the recent Superior Court Clerk's letters about the AR and PRA in camera review records which the Superior Court had sent back to the Port). Therefore, any delay in this case from mid-2008 until mid 2011 was caused by these "mistakes" or "errors" of the Superior Court.

The Port had failed to correct this "mistake" of the Superior Court at the time in mid-2009 when the Superior Court had sent the Port's AR and PRA in camera review records back the Port that Appellants were not notified of the Superior Court's admitted "mistake" until Feb. 2013. (See the recent letters and pleadings Mr. Dierker filed in Court of Appeals and the Superior Court and the recent Superior Court Clerk's letters about the AR and PRA in camera review records which the Superior Court had sent back to the Port). Therefore, any delay in this case of the PRA records Show Cause Hearing from mid-2009 was caused by the Port's failure to correct this "mistake" of the Superior Court in mid-2009, and any delay in this case of the PRA records Show Cause Hearing from mid-2008 was caused by the admitted "mistakes" of the Superior Court itself starting in mid-2008 which continued through at lease Jan. 2013 when the Port sent the AR and PRA In Camera Review Records back to the Superior Court for this appeal.

Further, a review of the Superior Court Docket, the Clerk's Papers, and transcripts of hearings of the Superior Court between August 2007 and mid-2011 filed in the Appeal on this case clearly show Mr. Dierker: 1) filed numerous pleadings and repeatedly argued at hearings in he Superior Court between August 2007 and mid-2011; 2) filed two later Motions for Reconsideration of the April 25 and May 30, 2008 dismissals of the "non-PRA claims" for standing.

Judge Meyer refused to consider any of the relevant documented evidence in the court files and pleadings submitted to the Court even by the Port showing that the "delay" of the PRA claims in this case was due to the Court's "mistake" of acting as if the "stay" of the PRA claims had been granted for about 5 years, where just before Judge Meyer took this case, even Judge #8 McPhee told Appellant West that the "stay" of the PRA claims prevented him from considering the Motion to Show Cause on the PRA claims, again denying them a meaningful opportunity to be heard on the merits of their claims, a clearly violation of Appellants' rights to due process and equal protection of the law and an abuse of judicial discretion. (Supra; see the Clerk's Notes (CP 385) of the June 10, 2011 Status Conference/PRA Show Cause hearing Dk. # 25 and the Clerk's Notes (CP 486) of the June 24, 2011 hearing in front of Judge McPhee, where Judge #8 McPhee told Appellant West that the "stay" of the PRA claims prevented him from considering the Motion to Show Cause on the PRA claims; see Dk. # 272 and Dk. # 273 Petitioner's Motion to Strike/Lift Stay and his Declaration in support of lifting the stay; see Dk. # 274 Judge McPhee's Show Cause Hearing canceled by Court's Request; and see the Declaration of Appellant West attached to Dierker's Response to Respondent Weyerhaeuser's Motion to Dismiss part of this Appeal).

Clearly, had Judge Meyer ever looked at just the page of the Superior Court Docket in this case that the April 4, 2012 Letter from the Court Administrator assigning Judge Meyer to this case is listed on at Dk. # 280, he might have noted at the top of that same page Dk. # 272 and Dk. # 273 Petitioner West's Motion to Strike/Lift Stay and his Declaration in support of lifting Judge Pomeroy's "stay", (though that "stay" had actually not been granted by Judge Pomeroy), and with just this small amount of due diligence Judge Meyer would not have dismissed this case by erroneously finding in at least one of his "Findings of Fact" or Conclusions of Law that the Appellants were the ones who unlawfully delayed this case, not the mistake about this "Stay" that had been denied.

Judge Sam Meyer's three 2012 Orders dismissing this case and denying reconsideration

were also abuses of discretion, since they also had the effect of avoiding review of the underlying merits of Appellants' PRA and avoiding review of the underlying merits of Appellants' reconsideration of those other alleged "non-PRA" claims made in this case, mostly about the SEPA claims, since the Orders were manifestly unreasonable, based upon untenable grounds, based upon an erroneous view of the facts and the law controlling the case, or are abuses of discretion. (United States v. Zerbst, 111 F.Supp. 807; Physicians Insurance Exchange v. Fison Corp., 122 Wn.2d 299, 339; 858 P.2d 1054 (1993); see also the Sept. 14, 2012 Order Denying Motion(s) for Reconsideration Signed Nunc Pro Tunc to the August 29, 2012 Letter Order Denying the Motions for Reconsideration; the August 29, 2012 Letter Order Denying the Motions for Reconsideration; and the July 27, 2012 Order of Dismissal and Findings of Fact and Conclusions of Law).

Further, Judge Meyer's rulings were also abuses of his discretion, and his rulings were manifestly unreasonable and based upon untenable grounds, since Judge #8 Sam Meyer based his rulings upon his erroneous view of the law and his erroneous view of the "facts of the case", as noted in Pro Se Appellants' Consolidated Response to Weyerhaeuser's Motion to Dismiss in this appeal. (Id.; see Physicians Insurance Exchange v. Fison Corp., 122 Wn.2d 299, 339; 858 P.2d 1054 (1993). For these reasons alone this appeal must be granted to at least "remand" this case back to the Superior Court directing the Superior Court to conduct a proper meaningful opportunity for the Appellants to be heard on the merits of their claims on the evidence contained in the Port's public records withheld from the Port's incomplete Agency Record Appellants' requested as part of SEPA and the PRA. (Norway Hill, supra; RCW 34.05.010; RCW 40.16.010-030).

Judge Meyer erred in dismissing this case when concluding that no lesser sanction than dismissal under CR 41(b) would suffice. "This Court concludes that lesser sanctions than dismissal will not suffice, since a court would have no discretion to reduce the number of days for which the Port of Olympia would be subject to a daily penalty." CP 938.

However, the Appellants in this matter cannot be penalized for the Port's actions or failures to act to reasonably review these records after Appellants' requested these Port public records so that Appellants could have this information to reasonably act to protect their own interests in this matter. (Marriage of Wherley, supra; Bly v. Henry, supra; Bonney Lake v. Delany, supra; State v. Miller, supra (1978). Also, since all of Judge Meyer's findings of fact and conclusions of law in this order are "merely superfluous" and cannot be used to prejudice Appellants in any way, State

ex rel. Carroll v. Simmons, supra, therefore Judge Meyer could not have used any of them to "prejudice" Appellants by final dismissal of Appellants' claims in this case and Judge Meyer's dismissal is therefore barred since it lacks any sufficient factual or legal reason for this dismissal or for any sanction of Appellants by this dismissal.

Even if the risk of being subject to a monetary daily penalty for an increased number of days is prejudicial, it still does not follow that such hypothetical prejudice can only be cured by the severe sanction of dismissal. Indeed, the 5-100 per day daily penalty under the PRA is a monetary one, and if the "prejudice" can be measured in monetary terms, it could likewise be "cured" in monetary terms by the Court lowering any per day amount the Appellants might receive under the PRA. However, the Superior Court did not consider, much less reject, a monetary sanction against appellants, even where it had found that Mr. West had "deliberately and willfully caused excessive delays in this case", even when it had **not** found that Mr. Dierker had caused delays in the hearing of the public records claims in this case Mr. Dierker had been party to for over 6 years. RP 07/13/12, pp. 7-8,11. 19-25, 1-10.

This Court should conclude that substantial evidence does not support any of the Superior Courts' superfluous findings or implied findings that Appellants disobeyed a court order, prejudiced the Port, or that no lesser sanction would suffice. In the absence of substantial evidence supporting these superfluous findings, this Court should also conclude that the superfluous conclusions of law supporting the Superior Court's exercise of discretion in dismissing the case pursuant to CR 41(b) were in error.

Further, since the Superior Court never even concluded as a matter of fact or law that Mr. Dierker had "deliberately and willfully caused excessive delays in this case", there can be no sanction of dismissal of Mr. Dierker claims to prejudice him in this case and his dismissal by sanction would be in error if it occurred here.

Since a Superior Court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons, Will, 121 Wn. App. at 128) in the absence of substantial evidence, where the conclusions of law are erroneous, the "reasons" supporting Judge Meyer's exercise of discretion are untenable. This Court should conclude that Judge Meyer erred in dismissing the case pursuant to CR 41(b) and should reverse and remand.

Judge Meyer erred in dismissing Appellants' PRA claims under CR 41(b) when even the

incomplete record in this case showed the Port's violations of the public records act. (See West v. Port of Olympia, Cause # No. 06-2-00141-6; CP 1389-1392; CP 390; CP 307-310, CP 1968; CP 2070-2083; CP 368-373, et seq.

The public record portion of the case was ready for Judge Pomeroy's determination at the Sept. 7, 2007 Show Cause hearing with presentation of Mr. Dierker's evidence showing his two 2006 public records requests in this case along with that evidence of Mr. West about his PRA request, and the Port's Responses to us about these records, which never happened at all becuase the Superior Court refused to allow him to file any pleadings or get any Show Cause Hearing on the public records claims for presentatoin of Mr. Dierker's evidence related to his public records requests in this case, where in dismissing the case without a Show Cause Hearing on the withheld evidence, the Superior Court erred in failing to broadly construe and harmonize the APA, SEPA and the PRA to effectuate their purposes and provide due process. (Dragonslayer, Inc. v. Wash. State Gambling Comm'n, 139 Wn. App. 433, 447, 161 P.3d 428 (2007); see also Norway Hill, supra; Weyerhaeuser v. Pierce County, supra; Long v. Chiropractic Society, supra; Kuzinich v. Santa Clara, supra; Yick Wo v. Hopkins, supra; APA's RCW 34.05.010; RCW 40.16.010-030).

This Court should conclude that the Superior Court erred in dismissing the case and should reverse and remand, granting Appellants Public records requests and their following requests for costs, fees and PRA penalties under RCW 42.56.550 against the Port now, so as to conserve the public funds of the Port taxpayers money which would have to pay a larger PRA per day penalty for any future Superior Court disclosure of these same records, that are necessary for the Port's AR filed in this case ordered under remand of this case. (RCW 34.05.010; RCW 40.16.010-030).

C. Request for Award of Public Records Act Penalties, and Cost and Fees

Mr. Dierker became part of this case after July 6, 2007 as Co-Plaintiff with Mr. West in all claims in this case including the PRA, after filing the "Amended Complaint for Violation of the PRA, Declaratory Relief, Judicial Review of Violations of SEPA Review, Certiori/Prohibition" (CP 18-33) and the July 13, 2007 "2nd Amended Complaint" et seq. (CP 33-54), where Mr. Dierker's public records claims concerned his 2006 public records requests under various laws to the Port, and the Port's use of the PRA and "piecemealing" of the project into many integral pieces in order to "compartmentalize" this project's parts, in order to withhold discoverable public records considered by the Port for the Port's complained of SEPA actions in this case to make an

incomplete record, in violation of the basic rules of discovery and other standards of due process. (See CP 2070-2083, the Dec. 19, 2007 Plaintiffs' Declaration re Undisclosed and Unidentified Records; Plaintiffs' Aug. 13, 2007 discovery requests CP 1409-1421; CP 307-310; also see Mr. Dierker's 2006 public records requests to the Port, et seq., also withheld from the Port's AR in this case attached to Mr. Dierker June 3, 2013 Opening Brief which are now part of the Motion to Supplement the Record, et al, in this case).

However, while on June 18, 2007, Mr. West had at least a partial Court review of his Public Records claims when Mr. West obtained an Order to set a June 29, 2007 date for a Show Cause Hearing of his Public Records claims (CP 1056-1061) (that was never heard in 6 years), Mr. Dierker never had any even "pre-hearing" consideration of his public records claims in this case by the Superior Court, since the Superior Court and Respondents had already started to delay, cancel or deny any setting of the show cause hearing and continued to repeatedly improperly act to prevent any filing of any pleadings or any meaningful hearing or consideration of the merits of any of the Plaintiffs' pleadings on the Port's failures to disclose these records to either Plaintiff for the next 6 years until final dismissal CP 932-940. (See e.g. -- CP 626-654; CP 829-833; CP 533-546; CP 943-949; CP 969-991; CP 2565-2566)

The Superior Court's and Respondents' repeatedly acted improperly to allow the Port to withhold these records from Mr. Dierker and Mr. West during this case, when these records were discoverable key relevant evidence necessary for supporting Appellants' pleadings of the Port SEPA appeal issues in this case, and when these records are still missing from the 2007 Administrative Record "re-filed" Jan. 21, 2013 by the Port in this case. (See accompanying Motion for Overlength Brief, to Supplement the Record, and for Relief under RAP 1.2, RAP 9.10, RAP 9.11, RAP 10.4(b), and the ADA, et al.).

Since it clearly appears that the Port unlawfully withheld requested public records from Mr. Dierker since Jan. or Feb. 2006 as they did to Mr. West in this 2006 case, and it clearly appears that the Port unlawfully withheld "silently" and "loudly" these and other requested public records from Mr. Dierker and Mr. West and the AR by the Port's improper use of the PRA, when those withheld public records contained key relevant evidence necessary for appeal of the Port's SEPA actions complained of in this case which should have been in the Port's Administrative Record needed for this Superior Court case, Mr. Dierker requests an award of the maximum $100.00 per

day PRA daily penalties pursuant to RCW 42.56.550 and fees and costs pursuant to RAP 18.1 and RCW 42.56.550, since the PRA had a two year statute of limitations at the time this case was filed in 2007. (See also Yousoufian, 2010, 229 P. 3d. 735, 168 Wash. 2d at 260-268, on judicial consideration of "bad faith" factors, etc.; Weyerhaeuser v. Pierce County, supra; Meza v. Washington State Dept. of Social and Health Services, 633 F. 2d 314 (1982, 9th Cir.); Physicians Insurance Exchange v. Fisons Corporation, supra; CP 1963; CP 1079; CP 543-544; CP 1177-1178; see Weyerhaeuser's Aug. 16, 2007 Motion to Bifurcate CP 1389-1392, citing to the 2006 PRA records withheld from Dierker and West in the case of West v. Port of Olympia, Cause # No. 06-2-00141-6 and withheld by the Port from both Appellants and the AR in this 2007 case; see Dierker's attached 2006 and 2012 PRA requests and Port's 2012 Responses with records, though the Port failed to file any copies of Dierker's 2006 or 2012 PRA requests and failed to file the Port's 2006 and 2012 PRA responses to Dierker's PRA requests, for the Superior Court Record or Port's incomplete AR necessary for this Court's review, since Dierker's PRA claims were never heard, and thereby, there is NO proper record for this Court's review, in violation of RCW 34.05.010, RCW 40.16.010-030, CR 5(a), RAP 9.1, RAP 9.8, SEPA, the PRA, due process; and the accompanying Motion for Overlength Brief, to Supplement the Record, and for Relief under RAP 1.2, RAP 9.10, RAP 9.11, RAP 10.4(b), and the ADA, et al.).

Appellants have a constitutional due process right to be granted discovery of correct information concerning this case, which was denied by the Port's withholding of relevant evidence from Appellants, and such nondisclosure of relevant evidence constitutes bad faith and is sanctionable under CR 11, etc. (Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1957); Physicians Insurance Exchange v. Fison Corp., 122 Wn.2d 299, 338–356; 858 P.2d 1054 (1993).

In this State, an essential corollary of State Constitution's and U.S. Constitutions First Amendment's rights freedom of speech and to petition the government for redress of grievances, et al, is the public's right to receive information concerning actions of their governments, and that right is superior to the rights to privacy. (Fritz v. Gorton, 83 Wn. 2d 275 (1974). Fritz quoted the U.S. Supreme Court's decision in the case of New York Times v. Sullivan, 84 S. Ct. 710 (1964), noting that, "The interest of the public here outweighs the interest of appellant and any other individual. The protection of the public requires not merely discussion but information." (Id.).

Prior restraints of first amendment rights, like the Port's piecesmealing, the delays of this case, the delays and denials of public records hearings for Appellants to obtain disclosure relevant evidence by the Port's before the Court's hearing of other claims in this case based upon the concealed evidence, and the Port's silently concealing of relevant evidence from the Appellants and Courts when it is necessary for petitioning the Courts for redress of grievances Appellants have against the Port, "must be narrowly drawn" or are prohibited. (See also Broderick v. Oklahoma, 413 US 601, 37 L. Ed. 2d 830 (1973); see also New York Times v. Sullivan, 376 US 254, 11 L. Ed. 2d 686 (1964).

In this case, the record shows in this case that Appellants were both clearly denied even a basic Show Cause Hearing for the presentation of evidence to the Superior Court by both sides in the public records claims, where Mr. Dierker and Mr. West could have presented evidence of their 2006 and 2007 requests for Port public records about this project withheld by the Port, and where the Port could have presented evidence of the Port's public records responses, public records disclosures to Appellants, and Port's Exemption Logs made for Port public records about this project withheld by the Port from Mr. Dierker and Mr. West's 2006 and 2007 requests for Port public records about this project. (Supra).

Consequently, the evidence of Mr. Dierker's two 2006 public records requests never made it into the Court Clerk's Papers because he was never allowed to ever present it to the Superior Court in that Show Cause Hearing that never happened, due to the Superior Court's and Respondents' improper and erroneous concerted actions to delay and deny any hearing of the merits of Appellants' claims in this case. (Supra).

Thereby, the evidence contained in the Mr. Dierker 2006 Requests for Port public records about this project that included the key evidence in this case on the Port's falsification of the Port's filed and refiled Administrative Record in this case by the Port Attorney concealing and removal of of the Port 2005 Lease's missing page 49 and its incorporated ESA from that AR, which the Port's attorney "silently withheld" in this case from Appellants public records request, the Port's SEPA files on this actions, the Port's filed and refiled Administrative Record in this case, the Port's filed but lost "In Camera Review" records, and/or has and is being otherwise "silently withheld" from being discoverable evidence necessary for any proper consideration of the merits of Appellants' claims in this case by the three Courts in this case.

Since the Port's attorney "silently withheld" the Port 2005 Lease's missing page 49 and its incorporated ESA from **both** the Port's AR and the Port's filed but lost "In Camera Review" records, and since the Superior Court conducted the Show Cause Hearing on the public records claims to allow Mr. Dierker and other to present their evidence supporting their public records claims to the Superior Court, and thereby the record in this appeal was not properly completed by improper actions or failures to properly act of the Port, Weyerhaeuser, and the Superior Court in this case, not by the actions of Appellants who have tried for over 7 years just to correct the record of the Ports actions taken in this case, so that Appellants could gain redress of grievances against the Port, et seq. (Supra).

Clearly if the later judges of the Superior Court had **not** erroneously failed to follow the procedural progression of the setting of the date for the Show Cause Hearing **before** the date of the Motions to Dismiss the so-called "nonPRA" issues was heard and decided by Judge Wickham, at least part of the withheld public records in this case would have been included in the Port's incomplete Administrative Record in the Superior Court before the Superior Court's consideration of the SEPA Appeal and other "nonPRA" claims in this case, and would have made the record on appeal complete, instead of Judge Wickham erroneously dismissing for lack of standing those "nonPRA" claims without apparently ever looking at any of the In Camera Review" records or any of the 2770 pages of the two large boxes with 5 volumes of a the Port's incomplete Administrative Record on the SEPA Appeal and other "nonPRA" claims in this case, so as to complete the record necessary for this appeal pursuant to RAP 9. (Supra)

Further, since 2005, the Port's attorney has also "silently withheld" the Port 2005 Lease's missing page 49 and its incorporated ESA from numerous other cases of Appellants and other complaining parties in these 3 Courts and in many other appeal venues and adjudicative agencies with jurisdiction over approvals, permits, etc., necessary for this project to be completed and operated, and the Court should the judicial notice of this and correct any decisions it may have made in similar matters without this key evidence being considered in those case

Clearly, the record shows in this case that Appellants were clearly denied all fundamental procedural and substantive due process rights by the Port's withholding of these records and falsification of the Port's Administrative Record, and by Respondents' three improper and legally barred motions to bifurcate and dismiss, thereby denying these Appellants any fundamental due

process rights to gain redress of their grievances, requiring the highest award under the PRA's RCW 42.56.550. (See Yousoufian, 2010, 229 P. 3d. 735, 168 Wash. 2d at 260-268, on judicial consideration of "bad faith" factors, etc.).

This Court should grant this relief request for the reasons noted herein and in the "Supplement the Record" part of Mr. Dierker's accompanying Motion for Leave to File an Overlength Opening Brief, to Supplement the Record, and for Relief under RAP 1.2, RAP 9.10, RAP 9.11, RAP 10.4(b), and the ADA, et al., incorporated by reference.

CONCLUSION

For these reasons Appellants' appeal and requests for relief must be granted by this Court, as follows.

A. To overturn the relevant orders and rulings of the Superior Court to find that: the claims in this case were erroneously bifurcated August 24, 2007; the "nonPRA" claims were erroneously dismissed for lack of standing April 25, and May 30, 2008; and the "PRA" claims were erroneously dismissed for lack of prosecution under CR 41(b) or as a sanction, especially against Mr. Dierker where the Superior Court made no finding that Mr. Dierker had acted improperly to delay the case; and this Court should sanction the Respondents under CR 11 for these three legally barred Motions that delayed and denied Appellants' fundamental due process rights to redress of grievances in the proper procedure of this case in the Superior Court that resulted in this Court not having a complete record for review.

B. To overturn the relevant orders and rulings of the Superior Court to find that the Port had improperly withheld records records from Appellants, the Port should be severely sanctioned for this withholding of relevant evidence from this case (Fisons, et seq., supra), and Appellants should be awarded the highest public records penalties (Yousoufian, supra) from the following dates:

1) when they requested these records from the Port in 2006 and 2007; 2) when the SEPA Comment period started in 2007; 3) when the SEPA Appeal period began, was being briefed, and heard by the Port in 2007; 4) when the Port dismissed Appellants' SEPA Appeal and the judicial appeal period began in 2007; 5) when the Port improperly filed the incomplete Administrative Record in this case in 2007 (RCW 40.16.010-030); 6) when the Port refused to produce these records after Plaintiffs' discovery requests of 2007 and 2012 for these records; 7) when the Port asked the Superior Court

to dismiss the "nonPRA" issues with out these relevant records; and 8) when in Jan. 2013 the Port again refiled the same incomplete Administrative Record in this case for this Appeal, again without including those withheld Port public records about this project, 4 months after the Port had already disclosed these records to Appellants by Sept. 2012, which this Court should also sanction the Port for doing under CR 11 again since this action was again done in violation of RCW 40.16.010-030.

C. To overturn the relevant orders and rulings of the Superior Court to find that the Port and/or Weyerhaeuser should be sanctioned for having:

1) knowingly violated CR 11, RCW 40.16.010-030, SEPA and the PRA [Norway Hill, supra; WAC 197-11-504(1)], the Discovery Rule Doctrine and the Doctrine of Fraudulent Concealment, by withholding these records about this project from Appellants, the Public, the Courts, and other agencies with jurisdiction over the approval, permitting, construction, and operation of the various piecemealed pieces of this project, like when the Port did not submit these relevant records to the City of Olympia necessary for then Hearing Examiner Thomas Bjorgen's Dec. 19, 2006 denial of this project for improper piecemealing of this project and its SEPA actions and project approvals; 2) knowingly violated the PRA, SEPA again and doctrines of res judicata and collateral estoppel of Examiner Thomas Bjorgen's Dec. 19, 2006 denial of this project's approval for improper "piecemealing", which barred the Port from taking from improperly taking these two "piecemealed" 2007 Port SEPA 07-2 and 07-3 actions on this same project complained of in this case; 3) knowingly violated the PRA, SEPA and the doctrines of res judicata and collateral estoppel of Weyerhaeuser's own pleadings to the Superior and Supreme Courts about [Norway Hill, supra; WAC 197-11-504(1)] in West v. Port of Olympia Cause No. West, et al. v. Port of Olympia, Cause No. 06-2-00141-6, by making the Motion to Birfucate and Stay the two sets of related issues in this 2007 case concerning this same Port project its public records disclosure and other 2007 SEPA actions on this same project complained of in this case; 4) knowingly violated the PRA, SEPA, the doctrines of res judicata, equitible estoppel, and collateral estoppel of the Port's SEPA Policy, the Port's Decision Denying the Port SEPA Appeal, and the paid-for SEPA Appeal's contractual agreement between the Port and Appellants under the Port's SEPA Policy, by the Port's filing, arguing and winning of the Port's Motion to Dismiss the so-called "nonPRA" claims for lack of standing; and 5) knowingly violated the PRA, SEPA, the doctrines of res judicata, equitible estoppel, and collateral estoppel of the Port's SEPA Policy, the Port's Decision Denying the Port

SEPA Appeal, the paid-for SEPA Appeal's contractual agreement between the Port and Appellants under the Port's SEPA Policy, and the Port/Weyerhauser's winning of the delays of this case in West and Dierker v. Thurston County Superior Court Judge Richard Hicks, et al, Supreme Court Case No. 80733-7, and Fruits of the Poisonous Tree Doctrine and Fruits of the Crime Doctrine, (Black's), by the Port's filing, arguing and winning of the Port's Motion to Dismiss the so-called "nonPRA" claims and final dismissal of all claims in this case for lack of prosecution.

D. And/or to at least overturn the relevant erroneous orders and rulings of the Superior Court to "remand" this case back to the Superior Court, directing it have the Port disclose these relevant records to Appellants and the Superior Court in a corrected Administrative Record (AR) (RCW 40.16.010-030) to correct the AR and the judicial record in this case, and directing it to conduct a proper meaningful opportunity for the Appellants to be heard on the merits of their claims based upon a corrected Port AR, and the Court should sanction the Port under CR 11 this.

E. Finally, if Appellants have prevailed in their appeal, this Court should award them the hights public records penalties under RCW 42.56.550 (Yousoufian, 2010), all costs and fees under RAP 18.1, and CR 11 sanctions against the Respondents for their barred and improper actions and the Port's filing an incomplete Administrative Record in violation of RCW 40.16.010-030, et seq., which together repeatedly delayed and denied Appellants any meaningful access to due process in this case for over 6 years.

I certify the foregoing to be true and correct to the best of my knowledge, beliefs and/or abilities, under penalty of perjury of the laws of the State of Washington and the United States of America, this 20th day of June, 2013 in Olympia, Washington.

Jerry Lee Dierker Jr., Appellant
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COURT OF APPEALS
DIVISION II
2013 JUN 21 PM 2:33
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE WASHINGTON STATE COURT OF APPEALS
Division II

ARTHUR S. WEST, and	)	**No. 07-2-01198-3**
JERRY L. DIERKER JR.,	)	**COA II # 43876-3**
Appellants;	)	
v.	)	**Affidavit of Service**
PORT OF OLYMPIA, et al,	)	
Defendants.	)	

Comes now Appellant Jerry Lee Dierker Jr., the undersigned, who declares and makes the following Affidavit of Service.

On June 20, 2013, I, the undersigned, caused this Court of Appeals and the following parties in this matter to be served at their addresses of record by personal service, by mail and/or by electronic service, with copies of the Appellant's corrected Opening Brief; Motion for Leave to File an Overlength Opening Brief, to Supplement the Record, et al, in this case; and the Clerical Correction of Clerk's Papers also served to the Thurston County Superior Court Clerk's Office:

1) Defendants Port of Olympia, et al, through their attorney of record;
2) Mr. West's attorney of record; and
3) Defendant Weyerhaeuser through their attorney of record.

I certify the foregoing to be true and correct to the best of my knowledge, beliefs and/or abilities, under penalty of perjury of the laws of the State of Washington and the United States of America, this 20th day of June, 2013 in Olympia, Washington.

Jerry Lee Dierker Jr., Appellant
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