FILED
COURT OF APPEALS
DIVISION II
2012 OCT 10 PM 12: 00
STATE OF WASHINGTON
BY
DEPUTY

NO. 43408-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PT AIR WATCHERS; NO BIOMASS BURN; WORLD TEMPERATE RAINFOREST NETWORK; OLYMPIC ENVIRONMENTAL COUNCIL; OLYMPIC FOREST COALITION,

Appellants,

v.

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

Respondents.

RESPONDENT DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

ROBERT M. MCKENNA
Attorney General

KATHARINE G. SHIREY
Assistant Attorney General
WSBA No. 35736
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769
KayS1@atg.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES 2

III. STATEMENT OF THE CASE 3

IV. ARGUMENT 5

A. Standard Of Review 5

B. The State Environmental Policy Act (SEPA) 7

C. Operation Of The PTPC Cogeneration Project Will Not Result In Any Significant Adverse Environmental Impacts 9

1. The Amount Of Carbon Dioxide In The Atmosphere Will Decrease As A Result Of The PTPC Cogeneration Project 10

a. Replacing Fossil Fuel With Biomass For PTPC's Cogeneration Project Will Decrease The Amount Of Carbon Dioxide In The Atmosphere 10

b. In RCW 70.235.020(3), The Washington State Legislature Endorsed The Conclusion That Burning Biomass Does Not Add New Carbon Dioxide To The Atmosphere 13

c. The SEPA Checklist Supports The DNS 15

d. Appellants' References Challenging The Impacts From Burning Biomass Do Not Apply To The PTPC Cogeneration Project Because PTPC Will Not Be Burning Trees Cut Down To Be Burned As Fuel 16

e. The SEPA DNS Properly Addresses Emissions Of Greenhouse Gases From The Increased Transportation Of Biomass 21

f. Ecology's DNS Addressed Greenhouse Gases Consistent With Law And Science 25

2. Compliance With Existing Laws Will Ensure That The Removal Of Biomass From The Forests For The PTPC Cogeneration Project Will Have No Significant Adverse Effect On The Environment 26

D. RCW 70.95.700 Does Not Compel An Environmental Impact Statement Before Operation Of PTPC's Cogeneration Project Because The Facility Has Been An Energy Recovery Facility Since Before 1989 33

1. Although Hog Fuel, Forest Biomass, And Urban Wood Are Not Wastes, Power Boiler 10 Is An Energy Recovery Facility Because It Burns Wastewater Treatment Sludge 34

a. Hog Fuel, Forest Biomass, And Urban Wood Are Useful, Reusable, Tradable Commodities And Are Therefore Not "Waste" Under RCW 70.95 34

b. Wastewater Treatment Sludge Is A Solid Waste 36

2. The Project Is Exempt From The EIS Requirement Because Power Boiler 10 Has Been Operating As An Energy Recovery Facility Since Before 1989 36

V. CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Ancheta v. Daly
77 Wn.2d 255, 461 P.2d 531 (1969) 8

Anderson v. Pierce Cnty.
86 Wn. App. 290, 936 P.2d 432 (1997) 8

Bowers v. Pollution Control Hearings Bd.
103 Wn. App. 587, 13 P.3d 1076 (2000) 5–6

City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.
136 Wn.2d 38, 959 P.2d 1091 (1998) 9

Clay v. Portik
84 Wn. App. 553, 929 P.2d 1132 (1997) 6

Davis v. State ex rel. Dep't of Licensing
137 Wn.2d 957, 977 P.2d 554 (1999) 38

Eriks v. Denver
118 Wn.2d 451, 824 P.2d 1207 (1992) 6

Juanita Bay Valley Cmty. Ass'n v. City of Kirkland
9 Wn. App. 59, 510 P.2d 1140 (1973) 8, 9

Kilian v. Atkinson
147 Wn.2d 16, 50 P.3d 638 (2002) 37

King Cnty. v. Wash. State Boundary Review Bd.
122 Wn.2d 648, 860 P.2d 1024 (1993) 33

Littleton v. Whatcom Cnty.
121 Wn. App. 108, 86 P.3d 1253 (2004) 34, 35

Magula v. Benton Franklin Title Co.
131 Wn.2d 171, 930 P.2d 307 (1997) 6

Moss v. City of Bellingham
109 Wn. App. 6, 31 P.3d 703 (2001) 7–8, 9, 32

Murden Cove Pres. Ass'n v. Kitsap Cnty.
41 Wn. App. 515, 704 P.2d 1242 (1985) 8, 26

Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council
87 Wn.2d 267, 552 P.2d 674 (1976) 7, 8, 33

Overton v. Wash. State Econ. Assistance Auth.
96 Wn.2d 552, 637 P.2d 652 (1981) 9

Pierson v. Hernandez
149 Wn. App. 297, 202 P.3d 1014 (2009) 35

Port of Seattle v. Pollution Control Hearings Bd.
151 Wn.2d 568, 90 P.3d 659 (2004) 8, 9

Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council
165 Wn.2d 275, 197 P.3d 1153 (2008) 14

State v. Keller
143 Wn.2d 267, 19 P.3d 1030 (2001) 38

Woods v. Interstate Realty Co.
337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949) 35

Young v. Key Pharm., Inc.
112 Wn.2d 216, 770 P.2d 182 (1989) 6

Washington Statutes

RCW 34.05.510 5

RCW 34.05.570(1)(a) 5

RCW 34.05.570(3)(d) 5

RCW 34.05.570(3)(e) 5

RCW 43.21C.030(2)(c) 7, 38

RCW 43.21C.030(2)(c)(i) 14

RCW 43.21C.031(1) 7

RCW 43.21C.090 8

RCW 43.21C.110 8

RCW 70.235 13

RCW 70.235.020 ..... 15, 16

RCW 70.235.020(3) 13, 14

RCW 70.95 34

RCW 70.95.030(7) 37

RCW 70.95.700 ..... 2, 3, 33, 34, 36, 37, 38, 39

RCW 76.09.010(1) 27

RCW 76.09.020(15) 27

RCW 76.09.020(16) 27

RCW 76.09.020(17) 27

RCW 76.09.040(1)(b) 28

RCW 76.09.040(1)(c) 28

RCW 76.09.070 30

RCW 76.09.070(1) 30

RCW 76.09.100 28

RCW 76.09.160 28

RCW 76.09.370(7) 28

RCW 79.150.020(1) 30

RCW 79.150.030(5) 31

Federal Statutes

16 U.S.C. §§ 1531–1544 28

Washington Regulations

WAC 197-11-060 14

WAC 197-11-305(1) 7

WAC 197-11-310(1) 7

WAC 197-11-330(1) 14

WAC 197-11-340(1) 7

WAC 197-11-360(1) 7

WAC 197-11-797 7

WAC 222-16-010 27

WAC 222-16-080 28

WAC 222-16-085 28

WAC 222-16-086 28

WAC 222-16-087 28

WAC 222-24 29

WAC 222-30-020 ..... 28, 29

WAC 222-30-021 28

WAC 222-30-022 28

WAC 222-30-060 ..... 28, 29

WAC 222-30-065 28

WAC 222-30-070 ..... 28, 29

WAC 222-30-080 ..... 29, 30

WAC 222-30-100 29

WAC 371-08-485(3) 5

Federal Regulations

40 C.F.R. § 51.166(b)(48)(ii)(a) 19

40 C.F.R. § 52.21(b)(49)(ii)(a) 19

40 C.F.R. § 60.2265 37

40 C.F.R. § 70.2 19–20

40 C.F.R. § 71.2 20

Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs
76 Fed. Reg. 43,490 (Jul. 20, 2011) 20

Other Authorities

Call for Information: Information on Greenhouse Gas Emissions Associated With Bioenergy and Other Biogenic Sources
75 Fed. Reg. 41,173 (Jul. 15, 2010) 19

Call for Information: Information on Greenhouse Gas Emissions Associated With Bioenergy and Other Biogenic Sources
75 Fed. Reg. 45,112 (Aug. 2, 2010) 19

Second Substitute H.B. 2481, 61st Leg., Reg. Sess. (Wash. 2010)..... 30

Webster's II New Riverside University Dictionary (1988)..... 1

TABLE OF ABBREVIATIONS

BTUs	British Thermal Units
CO2 or CO_2	Carbon Dioxide
DNS	Determination of Nonsignificance
DS	Determination of Significance
EIS	Environmental Impact Statement
MW	Megawatt
NOC	Notice of Construction
PTPC	Port Townsend Paper Corporation
SEPA	State Environmental Policy Act
WDNR	Washington Department of Natural Resources

I. INTRODUCTION

Port Townsend Paper Corporation (PTPC) burns fossil fuel and woody biomass to produce steam for use in its pulp and paper-making processes. PTPC is embarking on a project (the cogeneration[1] project) that will minimize the burning of fossil fuel, increase the burning of woody biomass, and add an electrical turbine to one of its steam boilers, in order to generate renewable green electricity to sell to the commercial power grid. As part of the cogeneration project, PTPC is installing up-to-date emission controls on the existing boiler.

PT Air Watchers and a number of other environmental organizations (Appellants) appealed the Washington State Department of Ecology (Ecology) air permit for the project, NOC Order No. 7850 (Permit), to the Pollution Control Hearings Board (Board), claiming deficiencies in the Permit as well as deficiencies in Ecology's determination of nonsignificance (DNS) for the project under the State Environmental Policy Act (SEPA). The Board granted summary judgment to PTPC and Ecology on all issues. Appellants appealed three SEPA-related issues to Thurston County Superior Court, which upheld the Board's decision. Appellants now appeal those three issues to this Court.

---

[1] Cogeneration is an industrial facility's use of its own waste energy to produce electricity. *Webster's II New Riverside University Dictionary* 278 (1988).

SEPA requires agencies to determine whether or not a proposed action will result in a significant environmental impact. In this case, Ecology correctly determined that the project will cause no significant environmental impact: carbon dioxide emissions will decrease, not increase as Appellants claim; and state and federal laws will protect the state's forests during the removal of woody biomass for the cogeneration project. In addition, an environmental impact statement is not required under RCW 70.95.700 because the PTPC facility meets the exemption for facilities that have been in operation since before 1989. Because the Board's decision is correct as a matter of law, and no material facts are in dispute, Ecology asks this Court to uphold the Board's decision and dismiss this lawsuit.

II. ISSUES

1. Did the Board correctly find that the SEPA checklist and DNS sufficiently considered the environmental impacts of carbon dioxide emissions from the PTPC cogeneration project?

2. Did the Board correctly find that the SEPA checklist and DNS sufficiently considered the environmental impacts of the withdrawal of woody biomass from northwest forests due to the PTPC cogeneration project?

3. Did the Board correctly find that RCW 70.95.700 does not require an environmental impact statement for the PTPC cogeneration project?

III. STATEMENT OF THE CASE

Port Townsend Paper Corporation is a Kraft pulp and paper mill in Port Townsend, Washington. Administrative Record (AR) 538.[2] As part of its pulp and paper process, PTPC burns wood fuel and fuel oil to produce steam. AR 358 ¶ 8[3]; AR 365.[4] This steam is used to power the pulp and paper mill and produce a small amount of electricity (approximately 3.5 aMW). AR 782 ¶ 3.[5] On May 28, 2010, PTPC's consultant, Trinity Consultants, sent Ecology PTPC's application to implement the cogeneration project. AR 536. With this project, PTPC proposed to modify power boiler 10 (one of the plant's steam boilers), and the recovery furnace, and to install a new steam turbine generator that will use steam from power boiler 10 and the recovery furnace to generate electricity before the steam is used in the pulp and paper process. AR 538. The cogeneration project will also require the installation of a new cooling tower. AR 562. As a result of the project, PTPC will increase the

---

[2] Notice of Construction Application Port Townsend Mill, May 2010 (Permit Application).

[3] Declaration of Marc Heffner in Support of Ecology's Motion for Summary Judgment.

[4] NOC Order No. 7850 (Permit).

[5] First Declaration of Eveleen Muehlethaler.

combustion of woody biomass and decrease the combustion of fuel oil in power boiler 10. AR 378.[6] The project therefore includes modifications to the plant's solid fuel handling system for power boiler 10 to accommodate the increased wood fuel that will be on site. AR 538.

On July 9, 2010, Ecology issued a DNS under SEPA for the PTPC cogeneration project. AR 357 ¶ 6. Ecology subsequently received supplemental information from PTPC for the SEPA checklist. AR 394–405.[7] On September 24, 2010, Ecology withdrew the July 9, 2010 DNS, issued a new DNS based on the new SEPA checklist, notified the public, and initiated a public comment period. AR 357 ¶ 6; AR 392.[8] On October 25, 2010, Ecology notified the public that the Permit had been issued. AR 497 ¶ 10.[9] On November 22, 2010, Appellants timely appealed the Permit and the underlying SEPA DNS to the Pollution Control Hearings Board (Board). On May 10, 2011, the Board granted summary judgment to PTPC and Ecology. AR 1516–1541.[10] On April 10, 2012, the superior court issued an order upholding the Board's

---

[6] Response to Comments, Port Townsend Paper Corporation (PTPC) Notice of Construction (NOC) Order No. 7850 (Response to Comments).

[7] Environmental Checklist.

[8] Determination of Nonsignificance (SEPA DNS).

[9] Declaration of Angela Fritz in Support of Ecology's Motion for Summary Judgment.

[10] Board's Order on Summary Judgment, dated May 10, 2011.

decision on all three issues. Clerk's Papers (CP) 46–47. This appeal followed.

IV. ARGUMENT

A. Standard Of Review

This case concerns the administrative appeal of a decision by the Thurston County Superior Court upholding the Pollution Control Hearings Board grant of summary judgment to Ecology and PTPC. As such, this case is governed by the state Administrative Procedures Act. RCW 34.05.510. Appellants have the burden of proof in challenging the Board's determination. RCW 34.05.570(1)(a). The Board's order shall be upheld unless the Court finds the Board erroneously interpreted or applied the law, or the Board's order is not supported by substantial evidence. RCW 34.05.570(3)(d), (e).

Before the Board, all parties moved for summary judgment. Because they were challenging an Ecology permit, Appellants had the burden of proof in front of the Board. WAC 371-08-485(3). The Board denied summary judgment to Appellants and granted summary judgment to Respondents. AR 1516–1541. The Board found no material facts in dispute. AR 1523. In reviewing a summary judgment order, the court engages in the same inquiry as the Board and applies the standard of review directly to the record before the administrative agency. *Bowers v.*

Pollution Control Hearings Bd., 103 Wn. App. 587, 623, 13 P.3d 1076 (2000); *Clay v. Portik*, 84 Wn. App. 553, 557, 929 P.2d 1132 (1997).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

If the moving party is a respondent and meets this initial showing, the inquiry shifts to the party with the burden of proof at trial. If, at this point, the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In making its responsive showing, the nonmoving party cannot rely on mere allegations, unsubstantiated opinions, or conclusory statements, but must set forth specific facts showing that there is a genuine issue for trial. *Young*, 112 Wn.2d at 225–26.

B. The State Environmental Policy Act (SEPA)

The State Environmental Policy Act (SEPA) requires government agencies to evaluate the effects on the environment of all government actions except those categorically exempt from review. RCW 43.21C.030(2)(c), .031(1); WAC 197-11-305(1). A detailed environmental impact statement (EIS) must be prepared for all major actions having a probable significant, adverse environmental impact. RCW 43.21C.031(1). A probable significant adverse effect on the environment exists whenever more than a moderate effect on the quality of the environment is a reasonable probability. *Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council*, 87 Wn.2d 267, 278, 552 P.2d 674 (1976).

As the first step in a SEPA analysis, the SEPA lead agency must make a threshold determination concerning whether or not an EIS is required. WAC 197-11-310(1), -797. If the agency determines that the probable effect of the action is significant, the agency issues a determination of significance (DS), and requires an EIS. WAC 197-11-360(1). If the agency determines that the probable effect of the action is not significant, the agency issues a determination of nonsignificance (DNS), and an EIS is not required. WAC 197-11-340(1). A DNS must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal." *Moss v. City of Bellingham*, 109 Wn. App. 6, 14,

31 P.3d 703 (2001); *Anderson v. Pierce Cnty.*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997).

A party challenging a SEPA analysis bears the burden of demonstrating noncompliance. *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 74, 510 P.2d 1140 (1973). An agency's DNS must be accorded substantial weight. RCW 43.21C.090; *Anderson*, 86 Wn. App. at 302. A court may overturn an agency's SEPA threshold determination only when the court finds that the agency's determination was "clearly erroneous." *Norway Hill*, 87 Wn.2d at 275. " 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Murden Cove Pres. Ass'n v. Kitsap Cnty.*, 41 Wn. App. 515, 523, 704 P.2d 1242 (1985) (quoting *Ancheta v. Daly*, 77 Wn.2d 255, 259–60, 461 P.2d 531 (1969)).

Ecology is the agency tasked with developing rules interpreting and implementing the requirements of SEPA. RCW 43.21C.110. Therefore, Ecology's interpretations of SEPA must be given great weight. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004) (a reviewing court gives great weight to Ecology's interpretations of the laws that it administers). Deference is also due to Ecology's judgments on technical issues, based on Ecology's specialized

expertise. *Port of Seattle*, 151 Wn.2d at 584, 591–95. *See also City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citing *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (an agency's interpretation of an ambiguous statute within the agency's expertise is accorded great weight, provided it does not conflict with the statute).

C. Operation Of The PTPC Cogeneration Project Will Not Result In Any Significant Adverse Environmental Impacts

A determination of nonsignificance is appropriate when, after reviewing "information reasonably sufficient to evaluate the environmental impact of a proposal" (*Moss*, 109 Wn. App. at 14), the lead agency determines that an action is not major and will not significantly affect the environment. *Juanita Bay Valley Cmty. Ass'n*, 9 Wn. App. at 73. In this case, Ecology evaluated the SEPA checklist for the cogeneration project in conjunction with information contained in PTPC's Permit Application, and appropriately issued a DNS, finding that PTPC's cogeneration project would not significantly affect the environment.

Appellants claim two defects in Ecology's determination. First, they claim increased emissions of carbon dioxide from the project will harm the environment. In fact, the amount of carbon dioxide in the atmosphere will decrease as a result of the cogeneration project, which

will benefit rather than harm the environment. Second, they claim the removal of biomass from the forest to provide fuel for the cogeneration project will harm the environment. But anyone removing biomass from the forest—including anyone providing biomass to PTPC—must comply with existing state and federal laws, which will protect the health of the affected forests. Accordingly, neither of Appellants' claims has merit.

1. The Amount Of Carbon Dioxide In The Atmosphere Will Decrease As A Result Of The PTPC Cogeneration Project

Appellants correctly note that increased amounts of carbon dioxide (a greenhouse gas) in the atmosphere will have adverse effects on the environment. Opening Brief of Appellants (Opening Br.) at 12–14. However, Appellants' concern is misplaced here: The PTPC cogeneration project will *decrease* the amount of carbon dioxide in the environment, not increase it.

a. Replacing Fossil Fuel With Biomass For PTPC's Cogeneration Project Will Decrease The Amount Of Carbon Dioxide In The Atmosphere

The decrease in carbon dioxide results from the fact that the PTPC cogeneration project will decrease the amount of fossil fuel (fuel oil) burned at PTPC by 1.8 million gallons per year. AR 397. Instead of burning fossil fuel, PTPC will burn biomass. AR 378, 784 ¶ 8. The forest biomass that will be burned for the PTPC cogeneration project consists of

"the by-products of current forest management activities, current forest protection treatments authorized by the agency, or the by-products of forest health treatment prescribed or permitted under Washington's forest health law." AR 365. Such biomass includes "residual branches, needles, and tree tops (slash) left over from ongoing logging operations; products of pre-commercial thinning (small saplings from overcrowded young forests); tree stems and tops thinned from forests that are at risk from wildfires, insects or diseases (forest health treatments) that are not currently utilized; clean, untreated wood construction and demolition waste (that would otherwise have gone to the landfill); and unused materials from lumber mills, such as sawdust, shavings, chips or bark." AR 414.[11]

The burning of biomass, like the burning of fossil fuel, emits carbon dioxide into the atmosphere. AR 408,[12] 415, 437. However, the burning of biomass does not add to the total amount of carbon dioxide in the atmosphere. *Id.* Burning biomass emits carbon dioxide into the atmosphere that will enter the atmosphere regardless of whether the biomass is burned or not. *Id.* This is because biomass is part of the Earth's ongoing carbon cycle, in which plants take in carbon dioxide from

---

[11] Washington State Department of Natural Resources, *Forest Biomass Initiative, Update to the 2011 Washington State Legislature*, 2010.

[12] Washington State Department of Natural Resources fact sheet titled, "Forest Biomass and Air Emissions."

the atmosphere to build plant material, then release carbon dioxide back into the atmosphere when they die and decay. AR 272,[13] 408, 415, 437. Left on the forest floor, biomass will naturally decompose to form carbon dioxide. *Id.* Biomass can also generate carbon dioxide through forest fires, or slash burning. *Id.*

Fossil fuels, on the other hand, are not part of the ongoing carbon cycle. AR 272, 415, 437. They and the carbon in them are permanently stored in the earth's crust. AR 272, 437. Burning fossil fuels emits into the atmosphere *new* carbon dioxide that *only* enters the atmosphere when the fossil fuels are burned. AR 272, 415, 437. When fossil fuel is replaced by biomass fuel, the new carbon dioxide emitted from fossil fuel is replaced by carbon dioxide that is already part of the earth's carbon cycle, and will be emitted into the atmosphere regardless of whether the biomass is burned. AR 272. The replacement of fossil fuel with biomass fuel thus decreases the total amount of carbon dioxide in the atmosphere. AR 272, 437.

---

[13] CH2MHill, *Final SEPA Environmental Impact Statement for Nippon Paper Industries USA Co., Ltd., Biomass Cogeneration Facility Project*, Sept. 3, 2010.

b. In RCW 70.235.020(3), The Washington State Legislature Endorsed The Conclusion That Burning Biomass Does Not Add New Carbon Dioxide To The Atmosphere

In 2008, the Washington State Legislature passed a law, now codified at RCW 70.235, outlining Washington State's approach to the regulation of greenhouse gas emissions. In enacting this statute, the state legislature determined,

> Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

RCW 70.235.020(3).

With this statute, the legislature recognized that emissions of carbon dioxide from the combustion of biomass will not cause an increase in the amount of carbon dioxide in the atmosphere as long as the region's forests maintain or increase their capacity to absorb carbon dioxide. At this time, the capacity of the region's forests to absorb carbon dioxide is increasing. AR 408, 415. *See also* AR 443 ("It is also important to note that Washington's existing Forest Practice rules require that forests be replanted after harvest, thus ensuring the continued sequestration capacity of forests under this approach to a neutrality determination.").

Appellants claim that RCW 70.235.020(3) does not exempt PTPC from identifying the quantity of carbon dioxide emissions in the SEPA checklist. Opening Br. at 17. They note that RCW 70.235.020(3) did not amend SEPA to exempt facilities from reporting the quantity of carbon dioxide in their emissions, and point out that, on its face, RCW 70.235.020(3) does not apply to the reporting of carbon dioxide emissions. *Id.* Appellants further claim that RCW 70.235.020(3) does not amend SEPA to exempt Ecology from taking a critical look at the environmental impacts of a proposal. *Id.*

Appellants' analysis is flawed. SEPA does not require the reporting of specific emissions; rather, SEPA requires agencies to assess environmental impacts. RCW 43.21C.030(2)(c)(i); WAC 197-11-060, -330(1). The adequacy of an environmental assessment is evaluated using the "rule of reason" standard. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 311, 197 P.3d 1153 (2008). When the assessment of environmental impacts can be effectively carried out without listing specific amounts of emitted pollutants, the rule of reason dictates that specific emission amounts are not necessary. Here, the SEPA checklist indicated that, as a result of the cogeneration project, PTPC would decrease the amount of fossil fuels burned by 1.8 million gallons per year (AR 397) which would, in turn,

substantially decrease the amount of carbon dioxide emitted from the burning of fossil fuels. Under these circumstances, SEPA did not require a statement of the exact amount of carbon dioxide that would be released as a result of the cogeneration project.

The SEPA checklist for the PTPC cogeneration project appropriately invokes RCW 70.235.020, noting that, although the mill's carbon dioxide emissions from burning additional wood will increase, these emissions are not considered greenhouse gases under the law, as the carbon dioxide emitted would have been released at the forest site in any case through natural decay or slash burning. AR 400.

c. The SEPA Checklist Supports The DNS

Appellants claim the "pre-decisional record was void of evidence of Ecology's actual consideration of the effects of [carbon dioxide] emissions . . . ." Opening Br. at 18. Specifically, Appellants claim that the record does not support Ecology's assertion that the combustion of biomass from the PTPC cogeneration project will not cause a net increase in the amount of carbon dioxide in the atmosphere. *Id.* at 14–16. Appellants further claim that this assertion "flies in the face of both common sense and scientific literature . . . ." *Id.* at 18. Appellants are incorrect. Statements in PTPC's SEPA checklist for the cogeneration

project support Ecology's arguments concerning greenhouse gas emissions.

For example, the SEPA checklist establishes that PTPC will be decreasing the amount of fuel oil burned by about 1.8 million gallons per year, and replacing that fuel oil with woody biomass. AR 397. The SEPA checklist acknowledges that carbon dioxide can be formed by decomposition of biomass as well as the combustion of biomass. AR 400. The SEPA checklist also indicates that the carbon dioxide emitted from the burning of biomass at PTPC would have been emitted into the atmosphere anyway from the decomposition of biomass. AR 400. The SEPA checklist notes that, under RCW 70.235.020, carbon dioxide emitted from the combustion of biomass is not considered a greenhouse gas. AR 400. Finally, the SEPA checklist embodies Mr. Heffner's determination that any increase in the emissions of greenhouse gases from the transport of biomass to PTPC is more than offset by the reduction in the amount of fuel oil the plant will be consuming. AR 397.

d. Appellants' References Challenging The Impacts From Burning Biomass Do Not Apply To The PTPC Cogeneration Project Because PTPC Will Not Be Burning Trees Cut Down To Be Burned As Fuel

Appellants cite one scientific paper and two letters to support their claim that carbon dioxide emitted from the burning of biomass has the

same impact on climate change as carbon dioxide emissions from burning fossil fuels. Opening Br. at 18–19. Although these three documents do cite problems with the impacts of the burning of biomass on climate change, they are not relevant to the situation at PTPC. All three of the documents discuss problems with emissions of carbon dioxide from the combustion of *trees cut down specifically to be burned as fuel.* AR 1282,[14] first column ("harvesting existing forests for electricity adds net carbon to the air"); AR 1284[15] ("if fuel is obtained by harvesting trees that would not otherwise be cut . . . then the carbon 'payback period' is decades to more than a century"); AR 1286[16] ("clearing or cutting forests for energy, either to burn trees directly in power plants or to replace forests with bioenergy crops, has the net effect of releasing otherwise sequestered carbon into the atmosphere, just like the extraction and burning of fossil fuels").

All three of these documents also note, however, that these problems are not present if the biomass that is burned is from timber residues, or waste wood. AR 1282, first column ("Energy use of manure or crop and timber residues may also capture 'additional' carbon.

---

[14] Timothy D. Searchinger et al., *Fixing a Critical Climate Accounting Error*, Science, v. 326, Oct. 23, 2009, at 528.

[15] Letter from Mark E. Harmon, Timothy D. Searchinger, and William Moomaw to Washington State Legislature (Feb. 2, 2011).

[16] Letter to from William H. Schlesinger et al. to Nancy Pelosi and Harry Reid (May 17, 2010).

However, harvesting existing forests for electricity adds net carbon to the air."); AR 1284 ("If the biomass burned is truly from 'waste' wood normally generated in the course of timber harvesting, then these combustion emissions are approximately equivalent to what would occur over the course of natural decomposition . . . ."); AR 1287 ("any legal measure to reduce greenhouse gas emissions must include a system to differentiate emissions from bioenergy based on the source of the biomass"); AR 1286 ("bioenergy can use some vegetative residues that would otherwise decompose and release carbon to the atmosphere rapidly").

These documents all acknowledge that burning timber residue, or "waste" wood, does not increase the amount of carbon dioxide in the atmosphere. The Permit lists the fuels that may be burned as part of the PTPC cogeneration project. AR 365. PTPC may burn:

> Wood fuels including hog fuel,[17] forest biomass, and urban wood. . . .
>
> Forest biomass means the by-products of current forest management activities, current forest protection treatments authorized by the agency, or the by-products of forest health treatment prescribed or permitted under Washington's forest health law.

AR 365, Finding 6.

[17] PTPC has generally referred to the types of wood-derived fuels included in the definition of "forest biomass" as "hog fuel." AR 782–783 ¶ 5.

Under these conditions, the forest biomass that PTPC can burn does not include trees cut down specifically for fuel. Thus, the objections raised in the article from *Science* (AR 1281–1282) and the two cited letters do not reach the types of biomass that will be burned as part of the PTPC cogeneration project.

Appellants also cite two Federal Register articles to support their arguments. Opening Br. at 19 n.17. Rather than supporting Appellants' arguments, these articles undermine their arguments. At the time the Federal Register articles were published, EPA's rules concerning the regulation of greenhouse gas emissions did not differentiate between greenhouse gases emitted from the burning of fossil fuels and those emitted from the burning of biomass. AR 1296,[18] middle of second column. Both articles concern a call for information to help EPA determine whether it would be better to consider greenhouse gas emissions from the burning of biomass differently from greenhouse gas emissions from the burning of fossil fuels. *Id.*; AR 1300.[19,20] Thus, rather than

---

[18] Call for Information: Information on Greenhouse Gas Emissions Associated With Bioenergy and Other Biogenic Sources, 75 Fed. Reg. 41,173 (Jul. 15, 2010).

[19] Call for Information: Information on Greenhouse Gas Emissions Associated With Bioenergy and Other Biogenic Sources, 75 Fed. Reg. 45,112 (Aug. 2, 2010).

[20] In July 2011, as a result of information received in response to these articles, and recognizing that carbon dioxide emitted from the burning of biomass has a different impact on the environment than carbon dioxide emitted from the burning of fossil fuels, EPA finalized rules delaying until 2014 permitting requirements under the federal Clean Air Act triggered by emissions of greenhouse gases from the burning of biomass. *See* 40 C.F.R. § 51.166(b)(48)(ii)(a); 40 C.F.R. § 52.21(b)(49)(ii)(a); 40 C.F.R. § 70.2

indicating that EPA agrees that emissions from the burning of biomass should be treated the same as emissions from the combustion of fossil fuels, the articles indicate that EPA is backing off from its original determination.

Appellants point to the March 4, 2011, letter from Peter Goldmark, the Commissioner of Public Lands, expressing concern about the low efficiencies of using wood to generate electricity in the Adage project. Appellants' Opening Brief at 20. Mr. Goldmark notes that the Adage project proposed to burn biomass solely for the purpose of producing electrical power. AR 1304.[21] The efficiency of the Adage project was estimated to be approximately 27 percent. *Id.* Mr. Goldmark indicates that projects using biomass as a feedstock should put the biomass to "the most efficient uses possible." *Id.* In the PTPC cogeneration project, the heat provided by the burning of biomass will be used to generate steam that will be used both to generate electricity and to perform functions necessary to the production of pulp and paper. AR 538. The PTPC cogeneration project is therefore a combined heat and power project.

(definition of subject to regulation ¶ 2); 40 C.F.R. § 71.2 (definition of subject to regulation ¶ 2). The purpose of the delay is to allow EPA time to conduct further studies of the matter. Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs, 76 Fed. Reg. 43,490, 43,492 (Jul. 20, 2011).

[21] Letter from Peter Goldmark to Mason County Commissioners (Mar. 4, 2011).

AR 1471 ¶ 4.[22] Combined heat and power is an efficient approach to generating power and heat energy from a single fuel source. AR 1475–1477.[23] The EPA has estimated that combined heat and power systems typically achieve total system efficiencies of 60 to 80 percent for producing electricity and thermal energy. AR 1475. Thus, the PTPC cogeneration project is considerably more efficient than the Adage project, and is the type of project favored by Mr. Goldmark.

As described above, Ecology's SEPA DNS properly considered the emissions of greenhouse gases from the burning of biomass resulting from the cogeneration project.

e. The SEPA DNS Properly Addresses Emissions Of Greenhouse Gases From The Increased Transportation Of Biomass

Although greenhouse gas emissions due to combustion at PTPC will decrease as a result of the cogeneration project, the SEPA analysis must, and does, also account for any increase in greenhouse gas emissions from the transport of fuel to the facility.

PTPC estimated that, in the worst case scenario, 15 additional trucks per day will be needed to transport the additional biomass required

---

[22] Second Declaration of Marc Heffner in Support of Ecology's Motion for Summary Judgment.

[23] United States Environmental Protection Agency, *Combined Heat and Power Partnership: Efficiency Benefits*, *available at* http://www.epa.gov/chp/basic/efficiency.html (last visited Oct. 4, 2012).

to fire power boiler 10 once the cogeneration project is up and running. AR 405. Assuming the trucks are large diesel-powered, semi-tractor trailer trucks that get 5 miles per gallon, and each truck must travel 100 miles to transport biomass to the PTPC facility, if the trucks run 365 days per year, the trucks will use approximately 110,000 gallons of diesel fuel per year.[24] AR 358–359 ¶ 11. As noted above, PTPC expects to reduce the amount of fuel oil burned by about 1,800,000 gallons per year. AR 397. Burning one gallon of fuel oil releases approximately the same amount of greenhouse gas as burning one gallon of diesel fuel. AR 359 ¶ 11. The decrease in greenhouse gas emissions resulting from the 1,800,000 gallons/year reduction in the burning of fuel oil is more than 10 times any increase in greenhouse gas emissions from the 110,000 gallons of diesel fuel consumed in transporting biomass to the PTPC facility. In acknowledgement of this outcome, the SEPA checklist states: "The diesel emissions from any net increase in truck trips will . . . be more than offset by the reduction in the emissions from oil no longer burned in the boilers." AR 397.

Appellants fault Ecology for not assessing the emissions of greenhouse gases associated with the hauling of the increased amount of

[24] The calculation is as follows: (15 trucks x 100 miles per day x 365 days per year) divided by 5 miles per gallon = 109,500 gallons per year.

ash that will result from the PTPC cogeneration project. Opening Br. at 21. Appellants fail to note that Ecology knew that the number of trips to haul ash would decrease as a result of the project. AR 557. The ash bunker is approximately one mile from the landfill where ash is deposited. AR 1470 ¶ 3; AR 1473.[25] Currently, ash is hauled from the ash bunker to the landfill using front-end loaders. AR 557. Once the cogeneration project is in place, PTPC will use trucks to haul the ash. *Id.* Because the trucks can carry much more ash per load, the number of haul trips once the project is in place will decrease considerably. AR 1470 ¶ 3. The loaded weights of the haul vehicles before the project (loaded front-end loader = 38.3 tons) and after the project (loaded truck = 35.0 tons) are approximately the same, so there should be no increase in post-project fuel consumption due to a heavier load.[26] AR 1470. Given the short haul distance of approximately one mile, the similar loaded haul vehicle weights, and the projected decrease in number of trips, any changes in greenhouse gas emissions due to diesel fuel emissions associated with project ash hauling will be reductions, and will be on a much smaller scale than the 1.8 million gallon decrease in the amount of fuel oil burned. AR 1470–1471 ¶ 3. With this analysis, the SEPA DNS properly

[25] Map showing landfill location.

[26] The small difference in loaded weights is due to the fact that the empty front-end loader (33.6 tons) weighs much more than the empty truck (10.0 tons). AR 1470.

addressed emissions of greenhouse gases from the transportation of biomass.

Appellants finally claim that Ecology's lack of knowledge of the expected carbon dioxide emissions from the PTPC cogeneration project undermines Ecology's arguments. Opening Br. at 22–23. Appellants are incorrect. The fact that PTPC did not provide actual carbon dioxide emissions due to the project is irrelevant. Given that the future emissions of carbon dioxide from the combustion of woody biomass would not add greenhouse gas to the atmosphere, all Ecology needed to know was that fossil fuel use would decrease, causing a decrease in carbon dioxide emissions. With the knowledge that the decrease in fossil fuel use would be 1.8 million gallons per year, Ecology had sufficient information to evaluate the change in greenhouse gas emissions without the actual future carbon dioxide emissions data.[27]

---

[27] Appellants claim that Ecology did not know how many BTUs would be needed to produce the proposed increase of 25 MW of electricity. Opening Br. at 22–23, citing AR 1313–1314 (internal Ecology e-mail from Teddy Le to Kim Schmanke (Dec. 22, 2010)). Appellants are misinterpreting the Ecology e-mail they cite. The number of BTUs to be generated by power boiler 10 is stated in the Permit. It is 414 MMBtu/hour (414 million BTUs per hour). AR 363. The cited e-mail refers to the fact that Ecology does not know how much woody biomass will be needed to generate that number of BTUs, which is understandable given that the ability of wood to generate BTUs varies with the type of wood being burned. AR 1313–1314. Finally, Appellants claim Ecology knew PTPC's assertion that the carbon dioxide emissions from power boiler 10 would double as a result of this project was a "back-of-the-envelope" calculation made by an Ecology engineer. Opening Br. at 23–24, citing AR 1313–1314. Again, Appellants are incorrect. The e-mail to which they cite states that the paperwork online indicates the emissions would double. AR 1313. This number comes from the SEPA checklist on page 7 where it states, "The mill's CO2 [carbon dioxide] emissions

f. Ecology's DNS Addressed Greenhouse Gases Consistent With Law And Science

Appellants claim "there is no evidence that Ecology actually considered the effects of carbon dioxide emissions" before issuance of the DNS. Opening Br. at 24. As noted above, the SEPA checklist provides evidence that the required greenhouse gas analysis was performed. The SEPA checklist notes that the legislature has determined that carbon dioxide from the combustion of biomass is not considered a greenhouse gas. AR 400. Any carbon dioxide emitted from the burning of biomass from the PTPC cogeneration project would have been emitted anyway from burning in the forest or natural decay. AR 400. Emissions from the burning of fossil fuel will decrease by 1.8 million gallons per year. AR 397. The decrease in emissions resulting from this decrease will more than offset any increase in emissions due to transportation—either of biomass or ash. *Id.*

Because Ecology's SEPA DNS addressed greenhouse gases in accordance with law and science, the Court should uphold the Board's summary judgment ruling that the DNS is not clearly erroneous on this issue.

---

from burning additional wood are expected to increase by more than double." AR 400. The information in the SEPA checklist was provided by PTPC.

2. Compliance With Existing Laws Will Ensure That The Removal Of Biomass From The Forests For The PTPC Cogeneration Project Will Have No Significant Adverse Effect On The Environment

One of the fuels PTPC is authorized to burn for the cogeneration project is forest biomass. AR 365. Forest biomass consists of byproducts of forest management activities that would likely otherwise be "burned in slash piles, sent to a landfill, or remain[] in overcrowded forests to slow forest growth, create conditions conducive to disease, or unnaturally increase the severity of wildfires." AR 490.[28] Appellants believe that Ecology's SEPA analysis did not adequately address the effects of removing this forest biomass from the forest. Opening Br. at 26–27. Appellants are wrong. The record shows that in issuing the SEPA DNS, Ecology relied on compliance with state and federal laws and regulations to ensure that removal of biomass from forest lands would not adversely affect forest lands or endangered species. AR 390. In addressing environmental impacts under SEPA, a lead agency may assume compliance with applicable law. Although one could speculate on the possibility of noncompliance, SEPA does not require consideration of every remote and speculative consequence of an action. *Murden Cove*, 41 Wn. App. at 526–27.

---

[28] Washington Department of Natural Resources, *Forest Biomass HOT Topics* (Sept. 2010).

The main state law governing Washington's forests is Washington's Forest Practices Act. Washington's Forest Practices Act explicitly includes the removal of biomass from the forest as a regulated forest practice. WAC 222-16-010. The Act maintains a viable forest products industry while protecting forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty. RCW 76.09.010(1). The Act reaches all forest practices conducted on private and other non-federally-owned forest land in the state. *See* RCW 76.09.020(15) (definition of forest land); RCW 76.09.020(16) (definition of forest landowner); RCW 76.09.020(17) (definition of forest practice). In addition to biomass removal, forest practices include road and trail construction, harvesting, precommercial thinning, reforestation, fertilization, prevention and suppression of diseases and insects, salvage of trees, and brush control. RCW 76.09.020(17); WAC 222-16-010.

In accordance with the Act, all persons conducting activities related to the collection of forest biomass must apply for a forest practice permit and comply with the state's strict forest practices guidelines. Permits will only be issued if the applicant can demonstrate compliance with forest practice rules that are in place to protect ecosystem health. AR 491.

The main responsibility for administering and enforcing the Forest Practices Act lies with the Washington Department of Natural Resources (WDNR). RCW 76.09.040(1)(c). However, the Forest Practices Board must obtain Ecology's approval before adopting rules related to water quality. RCW 76.09.040(1)(b). Ecology also has enforcement authority over forest practices that fail to comply with forest practices rules related to water quality and statutory authority to enter onto forest land to administer the Forest Practices Act and state Water Pollution Control Act. RCW 76.09.100, .160. The Forest Practices Board uses an adaptive management program so it can make adjustments as quickly as possible to forest practices that are not meeting the resource objectives. RCW 76.09.370(7).

WDNR's forest practice rules include provisions to protect wetlands (WAC 222-30-020) and riparian areas (WAC 222-30-021, -022, -060, -070), as well as safeguards and requirements for forest practices that may impact threatened or endangered species. WAC 222-16-080, -085, -086 (spotted owls); WAC 222-16-087 (marbled murrelets); WAC 222-30-060, -065.

The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration—Fisheries Service administer the Endangered Species Act, 16 U.S.C. §§ 1531–1544. A Habitat

Conservation Plan and Incidental Take Permits have been approved by these federal agencies for the state forest practices forests and fish rules, ensuring that landowners and operators conducting forest practices in compliance with the rules will meet Endangered Species Act requirements for covered aquatic species. AR 1489.[29]

The forest practices rules restrict the manner and location of harvest. The operator must consider the general environmental impact of the particular logging system selected. WAC 222-30-020. Harvest methods are restricted when a site contains streams and wetlands. *See, e.g.*, WAC 222-30-060, -070. The operator must clean up the site after the operation is concluded and ensure proper erosion control measures are in place. *See, e.g.*, WAC 222-30-080 (post-harvest treatment of ditches and culverts, unstable soils, and slash); WAC 222-30-100 (slash disposal and burning).

Forest landowners are obligated to properly construct, maintain, and abandon roads. WAC 222-24. The forest practices rules restrict the location of new roads and stream crossings and impose detailed requirements for the construction of ditches and installation of culverts. *Id.*

---

[29] Forest Practices Habitat Conservation Plan Annual Report, July 1, 2009–June 30, 2010.

Sites must be cleaned up after operations are concluded. The operator must clean ditches and culverts, institute proper drainage and erosion controls, and properly dispose of slash and inorganic debris such as cables and machine parts. WAC 222-30-080. Forest land must be reforested if it is not being converted to a non-forest use. RCW 76.09.070. Reforestation must be completed within three years after completion of an operation. RCW 76.09.070(1).

At the federal level, the Northwest Forest Plan ensures that forestry activities on federal land in Washington will not harm threatened and endangered species. AR 1493–1495.[30]

A law passed by the 2010 Washington Legislature, Second Substitute H.B. 2481, provides additional protection for state-owned lands. That law prohibits WDNR from entering into long-term contracts for biomass supply from WDNR managed lands until a complete biomass supply assessment has been completed. RCW 79.150.020(1).

In addition, SSHB 2481 requires WDNR to develop procedures for biomass contracts that: (1) ensure that biomass is being harvested from public lands in a manner that retains organic components of the forest necessary to restore or sustain forest ecological functions; (2) include

[30] Regional Ecosystem Office, *Northwest Forest Plan (NWFP) Overview* (Nov. 28, 2006).

utilization standards and operational methods in recognition of the variability of on-site conditions; and (3) authorize the agency to unilaterally amend the volume to be supplied with six months notice to the contracting party. RCW 79.150.030(5).

Appellants do not contest the fact that these laws and regulations will effectively prevent the removal of biomass from adversely affecting the environment. Rather, they argue that Ecology's analysis is post-hoc rationalization (Opening Br. at 25) and that it fails to take into account whether competition from other biomass-consuming projects may result in adverse environmental impacts by forcing the cutting of trees solely to provide fuel for the projects (Opening Br. at 25–26).[31] Appellants are incorrect.

First, the record shows that Ecology articulated its analysis on this issue in its Response to Comments, noting that the removal of biomass due to the PTPC cogeneration project would not harm the environment because "suppliers must comply with applicable portions of the WA Forest Practices Act (Chapter 76.09 RCW) and WA Forest Practice Rules

[31] Appellants also cite the March 4, 2011, letter from the Commissioner of Public Lands questioning the Adage project. Opening Br. at 27 n.27. In that letter, Commissioner Goldmark makes the point that "projects utilizing [forest biomass] as a feedstock [should] put it to the most efficient uses possible." AR 1304. As noted in section IV.C.1.d above, the PTPC project is the type of project favored by the Commissioner because it will use the biomass, not only to generate electricity, but also to provide needed support for the pulp and paper process.

(Title 222 WAC)." AR 390. The Response to Comments was developed as part of the SEPA public comment process, before the final Permit was issued. Thus, the reliance on the laws and regulations that protect Washington's forests was not a post-hoc rationalization—it was the basis for Ecology's determination that the removal of biomass would not cause significant adverse environmental effects to the forest. Therefore, Ecology's SEPA determination was "based upon information reasonably sufficient to evaluate the environmental impacts of [the] proposal." *Moss*, 109 Wn. App. at 14.

Second, the argument that the PTPC cogeneration facility may lead to the cutting of trees solely for the purposes of feeding the project fails to take into account that PTPC's Permit (which will govern the operation of the cogeneration project for the life of the project) only allows PTPC to burn biomass that is "by-products of current forest management activities, current forest protection treatments authorized by the agency, or the by-products of forest health treatment prescribed or permitted under Washington's forest health law." AR 365, Finding 6. In accordance with this Permit, new trees will not be cut down in order to feed the PTPC cogeneration project.

A court may overturn an agency's threshold SEPA determination only when the court determines that the agency's determination was

clearly erroneous. *Norway Hill*, 87 Wn.2d at 275. *See also King Cnty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 661, 860 P.2d 1024 (1993) (court may overturn an agency's threshold SEPA determination only when the court on the entire evidence is left with the definite and firm conviction that a mistake as been committed). Given all the protections described above, Ecology correctly determined that the removal of biomass from the forest to supply the PTPC cogeneration project would not have a significant adverse effect on endangered species or forest lands. Therefore, the Court should uphold the Board's summary judgment ruling that Ecology's DNS was not clearly erroneous on this issue.

D. RCW 70.95.700 Does Not Compel An Environmental Impact Statement Before Operation Of PTPC's Cogeneration Project Because The Facility Has Been An Energy Recovery Facility Since Before 1989

RCW 70.95.700 requires any solid waste incineration or energy recovery facility to complete an environmental impact statement (EIS) before beginning operation. RCW 70.95.700 carves out one exception to the EIS requirement: "This section does not apply to a facility operated prior to January 1, 1989, as a solid waste incineration facility or energy recovery facility burning solid waste." RCW 70.95.700. Appellants claim that the materials to be burned as part of PTPC's cogeneration project (woody biomass, urban wood, waste water sludge, etc.) are solid waste,

and therefore the facility is an energy recovery facility subject to the RCW 70.95.700 EIS requirement. Opening Br. at 28–32. Ecology agrees that the burning of wastewater treatment sludge makes power boiler 10, the unit that is being modified for the cogeneration project, an energy recovery facility. However, the project is exempt from the EIS requirement because power boiler 10 has been an energy recovery facility since before 1989.

1. Although Hog Fuel, Forest Biomass, And Urban Wood Are Not Wastes, Power Boiler 10 Is An Energy Recovery Facility Because It Burns Wastewater Treatment Sludge

a. Hog Fuel, Forest Biomass, And Urban Wood Are Useful, Reusable, Tradable Commodities And Are Therefore Not "Waste" Under RCW 70.95

A reusable substance does not constitute waste for the purposes of RCW 70.95. *Littleton v. Whatcom Cnty.*, 121 Wn. App. 108, 117, 86 P.3d 1253 (2004) (finding that chicken manure, as a reusable substance, did not constitute waste for purposes of RCW 70.95). In *Littleton*, the County argued that manure fit under the definition of "all putrescible and nonputrescible solid and semisolid wastes." *Littleton*, 121 Wn. App. at 116–17. The court responded that manure was not covered by this

definition because, as a reusable substance, it did not constitute waste. *Id.* at 117.[32]

Because the wood materials burned in power boiler 10 are a reusable substance, they are not solid waste. AR 1084–1085.[33] Forest biomass is not waste because, as the state legislature has recognized, it is a useful, tradable commodity. AR 1084. Other woody materials, including urban wood, are solid waste when discarded, but are no longer solid waste once they have been rendered into a form suitable for industrial combustion. AR 1085. Thus, when PTPC purchases the chipped, shredded, ground or otherwise processed woody materials for fuel for power boiler 10 to burn as part of the cogeneration project, those materials are not solid waste. PTPC's combustion of forest biomass and other woody materials, therefore, does not make power boiler 10 an energy recovery facility, and does not trigger the RCW 70.95.700 requirement that PTPC complete an EIS prior to operating the cogeneration project.

---

[32] In briefing below, Appellants claimed the court's determination that chicken manure did not constitute waste was dicta. However, because this interpretation of the statute was necessary to decide the case, it is not dicta. *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009) ("When an interpretation of a statute is essential to a judicial decision, it is not dicta."). *See also Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.").

[33] Memorandum from Chuck Matthews to Waste 2 Resources Staff (Dec. 8, 2010).

b. Wastewater Treatment Sludge Is A Solid Waste

Power boiler 10 also has burned, and will continue to burn, wastewater treatment sludge. Wastewater treatment sludge *is* solid waste. AR 1086. Power boiler 10 burns the sludge along with woody biomass to generate steam and electrical energy. AR 782 ¶ 3. Therefore, with respect to wastewater treatment sludge, power boiler 10 is an energy recovery facility, and PTPC is required to complete an EIS unless power boiler 10 began burning wastewater treatment sludge in an energy recovery facility before January 1, 1989. RCW 70.95.700.

2. The Project Is Exempt From The EIS Requirement Because Power Boiler 10 Has Been Operating As An Energy Recovery Facility Since Before 1989

Port Townsend Paper Corporation's power boiler 10 has been in operation since 1976. AR 782 ¶ 5. PTPC has been burning wastewater treatment sludge in power boiler 10 since before January 1, 1989. AR 1361 ¶ 3.[34] Furthermore, power boiler 10 has been burning wastewater treatment sludge (and woody biomass) to produce steam energy for use at the mill since before January 1, 1989. AR 782 ¶¶ 3, 5. Because power boiler 10 has been burning wastewater treatment sludge (and woody biomass) to produce steam energy since before January 1, 1989, RCW 70.95.700 does not compel an EIS prior to operation of

[34] Second Declaration of Eveleen Muehlethaler.

PTPC's cogeneration project. Contrary to Appellants' assertions, nothing in the definition of energy recovery facility limits energy recovered to electrical energy or, for that matter, electrical energy produced for sale. RCW 70.95.030(7) (" 'Energy recovery' means a process operating under federal and state environmental laws and regulations for converting solid waste into usable energy and for reducing the volume of solid waste.").[35]

Appellants point out that PTPC is spending money to install a steam generator and other equipment, the project will increase the firing rate of power boiler 10 and it will add a new use for the steam. Opening Br. at 33–34. Appellants claim these modifications trigger the need for an EIS. *Id.* Appellants' argument ignores the plain language of RCW 70.95.700. RCW 70.95.700 states that *any* facility operating as an energy recovery facility before January 1, 1989, is exempt from preparing an EIS. It does not limit the exemption to facilities that are not being modified or expanded. Appellants' interpretation thus impermissibly reads into the statute language that is not there, requiring an EIS for the modification of an existing facility. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) ("Courts may not read into a statute matters that are

[35] Note that under federal law, "energy recovery" is defined as "the process of recovering thermal energy from combustion for useful purposes such as steam generation or process heating." 40 C.F.R. § 60.2265.

not in it and may not create legislation under the guise of interpreting a statute.").[36]

Statutes must also be construed so that "all language is given effect with no portion rendered meaningless or superfluous." *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Appellants' interpretation would render the RCW 70.95.700 exemption for existing facilities meaningless. SEPA review is triggered by agency action. RCW 43.21C.030(2)(c). SEPA for an existing energy recovery facility would only be triggered by some action modifying that facility. Under Appellants' interpretation, any action modifying an existing facility would not be eligible for the exemption, and would require an EIS. Therefore, the exemption for existing facilities would never apply. "A fundamental canon of construction holds a statute should not be interpreted so as to render one part inoperative." *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 969, 977 P.2d 554 (1999).

As discussed above, power boiler 10 is an energy recovery facility. However, it has been an energy recovery facility since before 1989.

---

[36] Appellants note that the Nippon project in Port Angeles was required to prepare an EIS based on the City's determination that RCW 70.95.700 applied. Opening Br. at 32 n.33. The Nippon project is distinguishable because, as Appellants also note, Nippon will be constructing a new boiler in which to burn waste and recover energy. The new boiler was not in operation before January 1, 1989. AR 270–276. In this case, PTPC is modifying an existing boiler. AR 538.

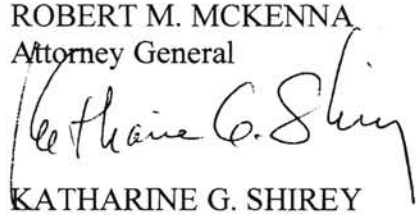
Therefore, the exemption in RCW 70.95.700 applies, and that provision does not require an EIS for the cogeneration project.

V. CONCLUSION

For the reasons set forth above, Ecology respectfully requests that the Court affirm Ecology's decision to issue a DNS and to not require an EIS pursuant to RCW 70.95.700.

RESPECTFULLY SUBMITTED this 8th day of October 2012.

ROBERT M. MCKENNA
Attorney General



KATHARINE G. SHIREY
WSBA No. 35736
Assistant Attorney General
Attorneys for Respondent State of Washington, Department of Ecology

FILED
COURT OF APPEALS
DIVISION II

2012 OCT 10 PM 12: 00

STATE OF WASHINGTON

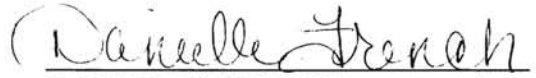
BY
DEPUTY

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the ~~laws of the state of~~ Washington that I caused to be served Respondent Department of Ecology's Response Brief in the above-captioned matter upon the parties herein as indicated below:

David S. Mann Gendler & Mann, LLP 1424 Fourth Avenue, Suite 715 Seattle, WA 98101 *Attorneys for Appellants*	[x] U.S. Mail on 10/9/12* [ ] State Campus Mail [ ] Hand Delivered [ ] Overnight Express [x] By Email on 10/8/12: mann@gendlermann.com
Svend A. Brandt-Erichsen Dustin T. Till Martin Law Group PLLC 1191 2nd Avenue, Suite 2200 Seattle, WA 98101-3421 *Attorneys for Respondent Port Townsend Paper Corporation*	[x] U.S. Mail on 10/9/12* [ ] State Campus Mail [ ] Hand Delivered [ ] Overnight Express [x] By Email on 10/8/12: svendbe@martenlaw.com dtill@martenlaw.com
Diane L. McDaniel Sr. Assistant Attorney General Licensing & Administrative Law Div. P.O. Box 40110 Olympia, WA 98504-0110 *Attorneys for Respondent Pollution Control Hearings Board*	[ ] U.S. Mail [x] State Campus Mail on 10/9/12* [ ] Hand Delivered [ ] Overnight Express [x] By Email on 10/8/12: dianem@atg.wa.gov

DATED this 8th day of October 2012, at Olympia, Washington.



DANIELLE FRENCH
Legal Assistant

*Due to Columbus Day, a federal holiday.