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

Appellants,

v.

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

Respondents.

**RESPONDENT PORT TOWNSEND PAPER
CORPORATION'S RESPONSE TO WASHINGTON
ENVIRONMENTAL COUNCIL'S AMICUS CURIAE
BRIEF**

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 ORIGINAL

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I. INTRODUCTION

Without shedding new light, the Washington Environmental Council (“WEC”) revisits arguments in its *amicus curiae* brief that the Pollution Control Hearings Board (“PCHB”) and the Superior Court have already rejected – namely, that Ecology improperly relied on RCW 70.235.020(3) when issuing the Determination of Nonsignificance (“DNS”) for Port Townsend Paper Corporation’s (“PTPC”) biomass cogeneration project (the “Project”). WEC’s argument misses the mark. RCW 70.235.020(3) unambiguously exempts CO₂ emissions from biomass combustion from the definition of “greenhouse gases,” thus establishing that biomass combustion is carbon neutral (i.e., does not contribute to climate change) for purposes of Washington law.

Like the Appellants, WEC attempts to sow a factual dispute concerning the carbon neutrality of biomass fuels. WEC’s arguments are based in large part on inadmissible, extra-record evidence. The Court should decline WEC’s invitation to second-guess the Legislature’s unambiguous policy decision. When a statute is unambiguous, as RCW 70.235.020(3) is, the Court’s role is limited to giving effect to the Legislature’s intent.

Here, the Legislature's intent is unmistakable – CO₂ emissions from biomass combustion are carbon neutral and are not considered a “greenhouse gas” for purposes of Washington law. Ecology properly relied on the Legislature's unambiguous pronouncement in concluding that the Project's replacement of hydrocarbons with biomass fuel produces a net reduction in GHG emissions, and its decision should be upheld.

II. ARGUMENT

A. The Court Should Disregard WEC's Extra-Record Evidence

The Court should decline WEC's invitation to consider extra-record evidence. In an effort to create a factual dispute over carbon neutrality, WEC cites to numerous documents that are not part of the administrative record, and were not before Ecology or the PCHB when they made their respective decisions. Indeed, the majority of WEC's extra-record evidence could not possibly have been part of the administrative record because it post-dates Ecology's decision.

WEC asks the Court to consider the following extra-record documents:

- Kelsi Bracmort, Cong. Research Serv., R41603, *Is Biopower Carbon Neutral?* (2013);¹
- U.S. EPA, *Inventory of US Greenhouse Gas (GHG) Emissions and Sinks: 1990-2008*, EPA 430-R-10-006 (Apr. 15, 2010);²
- U.S. EPA, *Land Use, Land-Use Changes, and Forestry Sector Emissions*, <http://www.epa.gov/climatechange/ghgemissions/sources/lulucf.html>;³
- Carrie Lee, *et al.*, Stockholm Env't Inst., *Greenhouse Gas & Air Pollutant Emissions of Alternatives for Woody Biomass Residues* (Nov. 2010);⁴
- U.S. EPA, *Scientific Advisory Board Review of EPA's Accounting Framework for Biogenic CO₂ Emissions from Stationary Sources* (Sept. 2011);⁵
- IPCC, *Special Report on Renewable Energy Sources and Climate Change Mitigation* (2011).⁶

As detailed in PTPC's Opposition to WEC's Motion for Leave to File Amicus Brief, WEC's efforts to supplement the administrative record squarely conflict with bedrock administrative law principles. Judicial review "is to be based on the full administrative record that was before the [agency]"

¹ WEC Brief at 3 and 6.

² WEC Brief at 5.

³ WEC Brief 5, n.4.

⁴ WEC Brief at 6, n.7.

⁵ WEC Brief at 7.

⁶ WEC Brief at 7.

at the time [it] made [its] decision.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

Washington law makes clear that judicial review of the PCHB’s decisions is confined to the administrative record before the agency at the time of its decision. RCW 34.05.558 (“Judicial review of disputed issues of fact ... must be confined to the agency record ...”); *Ault v. Washington State Highway Comm’n*, 77 Wn.2d 376, 378, 462 P.2d 546 (1969) (“[R]eview of the order or decision of an administrative tribunal must be heard on, and limited to, the record before the agency, as prepared and certified by the agency.”)⁷

The Washington Administrative Procedures Act allows record supplementation under narrow circumstances. RCW 34.05.562(1); *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 611, 13 P.3 1076 (2000). WEC, however, made no effort to demonstrate why the Court should consider its extra-record evidence, most likely because none of the narrow exceptions for permitting extra-record evidence have been

⁷ The Rules of Appellate Procedure echo the principle that review of agency action is limited to the administrative record. For example, RAP 9.1(a) provides that the “‘record on review’ may consist of (1) a ‘report of proceedings’, (2) ‘clerk’s papers’, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.” Furthermore, RAP 9.12 provides that “[o]n review of an order granting or denying summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”

satisfied. RCW 34.05.562(1).

When the narrow exceptions do not apply, this Court has rejected efforts, like WEC's, to supplement agency records via *amicus curiae* briefs. *See, e.g., Nw. Steelhead & Salmon Council of Trout Unlimited v. Washington State Dep't of Fisheries*, 78 Wn.App. 778, 786 n.2, 896 P.2d 129 (1995) (“We reject amici’s attempt to supplement the record with the two exhibits attached to its brief. The requirements for taking new evidence not contained in the agency record have not been met.”)

The Court should reject WEC’s invitation to consider extra-record evidence. The Court’s review should be limited to the record before agency. RCW 34.05.558; *Ault*, 77 Wn.2d at 378, 462 P.2d 546.

B. The Washington Legislature has Resolved the Debate Over Biomass Carbon Neutrality

Like the Appellants, WEC asks the Court to second-guess the Legislature’s judgment, contending that the carbon neutrality of biomass is still being debated. But there is no controversy in Washington. When it adopted RCW 70.235.020(3), the Legislature determined that biomass is a carbon neutral fuel source, and that the emissions of CO₂ from biomass combustion would not impede the State’s efforts to reduce greenhouse gas emissions.

The statute is unambiguous, and the Legislature's policy judgment is clear – biomass is carbon neutral for purposes of Washington law. "It is not the province of this Court to second guess the wisdom of the Legislature's policy judgment so long as the Legislature does not offend constitutional precepts." *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 976, 977 P.2d 554 (1999). When reviewing unambiguous statutes like RCW 70.235.020(2), "the [C]ourt must give effect to the plain meaning as expressing what the legislature intended." *Campbell v. State, Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 894, 83 P.3d 999 (2004) (*en banc*).

The Legislature unambiguously determined that biomass combustion does not add CO₂ to the atmospheric cycle and does not contribute to climate change. Put into SEPA's parlance, CO₂ emissions from biomass combustion are not a "significant, adverse environmental impact." RCW 43.21C.031(1). WEC and the Appellants may not agree with that conclusion; however, the proper forum for airing their grievance is political, not judicial.

C. WEC Asks the Court to Amend SEPA

The "primary role of environmental review" under SEPA "is to focus on the gaps and overlaps that may exist in applicable laws and requirements related to a proposed

action.” *Bellevue Farm Owners Ass’n v. Wash. Shorelines Hearing Bd.*, 100 Wn.App. 341, 353, 997 P.2d 380 (2000) (quoting Laws of 1995, Chapter 347, § 210(2)). Put another way, SEPA is “*supplemental* to the existing mandates and authorizations of [state] agencies.” *Id.* at 353, n.27 (quoting 115 Cong. Rec. 19,009 (daily ed. July 10, 1969)).⁸ *See also* RCW 43.21C.050 (SEPA does not affect other specific statutory obligations.)

WEC would flip that standard on its head by asking Ecology to treat greenhouse gases differently under SEPA than they are treated under other laws. There are no “gaps or overlaps” for SEPA to fill with respect to greenhouse gases. RCW 70.235.020(3) unambiguously exempts CO₂ from biomass combustion from the definition of “greenhouse gas.” But according to WEC, CO₂ from biomass combustion *should* be accounted as a greenhouse gas under SEPA.

WEC’s argument that the Legislature did not amend SEPA when it enacted RCW 70.235.020(3) is illogical. There is no need for new legislative enactments to expressly amend or reference SEPA since SEPA is supplemental to, and must be interpreted in light of, other statutory enactments

⁸ SEPA was modeled after the federal National Environmental Policy Act (“NEPA”), and NEPA’s legislative history is relevant when interpreting SEPA. *Id.*

(including RCW 70.235.020(3)).⁹ Ecology is not authorized to treat CO₂ emissions differently under SEPA than they are treated under other laws. But that is precisely what WEC would require. In effect, WEC asks the Court to judicially amend SEPA and require Ecology to treat biogenic CO₂ emissions differently during the environmental review process than they are treated in other statutory contexts.

D. The Washington Legislature’s Policies Support Biomass Cogeneration Projects

As detailed in PTPC’s Respondent’s Brief, unambiguous state policy favors the combustion of forest biomass as a renewable alternative to fossil fuels. “[T]he utilization of forest biomass materials located on state lands will ... facilitate and support the emerging forest biomass market and clean energy economy.” RCW 79.150.010. Energy generated from biomass combustion qualifies as renewable for purposes of Washington’s renewable portfolio standard. RCW 19.285.030(20); WAC 480-109-007(18)(i).

To that end, the Legislature has incentivized the

⁹ WEC cites numerous SEPA categorical exclusions to support its argument that Legislature did not amend SEPA to exempt biomass emissions. The cited provisions exempt certain categories of projects from review under SEPA. Here, Ecology did not exempt biomass cogeneration projects from review under SEPA; indeed, Ecology performed a SEPA review here. Instead, the agency’s SEPA analysis concluded that the Project’s switch to biomass fuel produces a net reduction in greenhouse gas emissions under Washington law, which is beneficial for the environment.

production of biomass for renewable energy generation. *See, e.g.*, RCW 79.150.030 (authorizing DNR to enter into long-term contracts for sale of forest biomass from DNR-managed lands); RCW 82.04.4494 (establishing B&O tax credit and sales/use tax exemption for biomass “used for production of electricity, steam, heat, or biofuel ...”)

SEPA is a procedural statute that does not “dictate particular substantive result.” *See Save Our Rural Env’t v. Snohomish Cnty.*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983) (citing *Norway Hill Preserv. & Protec. Ass’n v. King Cnty. Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976)). WEC expressly recognizes that standard.¹⁰ SEPA requires Ecology to make fully informed decisions, and that is precisely what happened here.

The SEPA Checklist expressly compared pre- and post-Project greenhouse gas emissions in light of relevant Washington law, and revealed that the Project will reduce the facility’s greenhouse gas emissions by over 89,000 tons per year.¹¹ The use of fossil fuels will be reduced by 1.8 million gallons per year.¹² The SEPA Checklist does not hide the fact

¹⁰ Amicus Brief at 9.

¹¹ A.R. 1032. The SEPA Checklist demonstrates that pre-Project GHG emissions totaled 151,661 metric tons of carbon dioxide equivalents (“MtCO₂e”), while post-Project emissions will be reduced to less than 62,000 MtCO₂e. *Id.*

¹² A.R. 1029.

that emissions of biogenic CO₂ will increase, but it is the significant decrease in geologic (i.e., fossil fuel) CO₂ emissions that is relevant in evaluating the Project's environmental impacts.¹³

The SEPA Checklist's quantification of GHG emissions from burning fossil fuels is precisely the type of analysis that SEPA requires, and Ecology's determination that an EIS was not required with respect to GHG emissions should be afforded "substantial weight." RCW 43.21C.090; *Norway Hill*, 87 Wn.2d at 275, 552 P.2d 674.

III. CONCLUSION

For the reasons set forth herein, and in its response brief, PTPC respectfully requests that the Court affirm Ecology's decision to issue a DNS based in RCW 70.235.020(3).

Dated this 10th day of May, 2013.

¹³ A.R. 1032.

Respectfully submitted,
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Please find attached Port Townsend Paper Corporation's Response to Washington Environmental Council's Amicus Curiae Brief to be filed in Case Number 88208-8, PT Air Watchers, et al., Appellants, v. State of Washington, Department of Ecology, et al., Respondents. This document is filed by Svend A. Brandt-Erichsen, WSBA #23923, svendbe@martenlaw.com, of Marten Law PLLC, 206-292-2611.

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