

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

2/3

Supreme Court No. 92335-3

Court of Appeals No. 46130-7-II

COLUMBIA RIVERKEEPER; and NORTHWEST ENVIRONMENTAL
DEFENSE CENTER,

Petitioners,

v.

PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver
USA Board of Commissioners President; BRIAN WOLFE, Port of
Vancouver USA Board of Commissioners Vice President; and NANCY I.
BAKER, Port of Vancouver USA Board of Commissioners Secretary,

Respondents.

**PETITIONERS COLUMBIA RIVERKEEPER AND NORTHWEST
ENVIRONMENTAL DEFENSE CENTER'S ANSWER TO BRIEF
OF AMICUS CURIAE WASHINGTON PUBLIC PORTS
ASSOCIATION**

Brian Knutsen, WSBA #38806
KAMPMEIER & KNUTSEN
833 S.E. Main, No. 318
Portland, Oregon 97214
Tel: (503) 841-6515

Miles Johnson, WSBA #50741
COLUMBIA RIVERKEEPER
111 Third Street
Hood River, Oregon 97031
Tel: (541) 490-0487

Knoll Lowney, WSBA #23457
SMITH & LOWNEY
2317 E. John Street
Seattle, Washington 98112
Tel: (206) 860-2883

*Attorneys for Petitioners Columbia Riverkeeper and
Northwest Environmental Defense Center*

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....2

a. Ports may not defer SEPA review when deciding whether, and under what conditions, to lease public land.....4

b. A binding lease is not a necessary precursor to SEPA review.....7

III. CONCLUSION.....9

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Columbia Riverkeeper v. Port of Vancouver USA,
189 Wash. App. 800, 815, 357 P.3d 710, 719 (2015)..... 3, 4

Int'l Longshore & Warehouse Union, Local 9 v. City of Seattle,
176 Wn. App. 512, 519, 309 P.3d 654 (2013).....8

Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council,
87 Wn.2d 267, 272, 552 P.2d 674 (1976).....1

Statutes

RCW 43.21C.110..... 5

RCW 43.21C.210 *through* 480 5

Rules of Appellate Procedure

RAP 10.3(f)..... 2

Washington Regulations

WAC 197-11-070(1)(b) 4, 5

WAC 197-11-600(3)(c) 4

WAC 197-11-704(2)(a)(ii)..... 2

WAC 197-11-786..... 4

WAC 197-11-800 *through* 890 5

WAC 197-11-800(5)(c) 5, 6

Federal Regulations

40 C.F.R. § 1500.1(c)..... 10

I. INTRODUCTION

Amicus curiae the Washington Public Ports Association (“Ports Association”) advances an interpretation of the State Environmental Policy Act (“SEPA”) that would exempt most leases of public land, and many other government decisions, from Washington’s basic environmental protection law.

Beyond the specific legal and factual errors discussed below, the Ports Association’s brief reflects two over-arching misconceptions about SEPA. First, the Ports Association mistakenly believes that SEPA is about requiring the preparation of Environmental Impact Statements (“EIS”). Not so. SEPA is about facilitating “fully informed decision making by government bodies.” *Norway Hill Pres. & Prot. Ass’n v. King Cnty. Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976). An EIS is merely a tool, and no EIS—even a detailed and informative one—can contribute to a decision after that decision has been made. The Ports Association’s form-over-function approach explains why the Ports Association believes that SEPA’s goals and policies were satisfied when the Port of Vancouver leased land for the nation’s largest oil terminal years before the EIS would be published.

Second, the Ports Association’s interpretation of SEPA improperly shifts responsibility and public accountability away from ports and the

elected officials deciding whether to lease public lands. The Ports Association acknowledges that the leasing process is where ports decide which activities to allow on public property. (*See* Ports Association Br., pp.4–5.) Letting ports decide whether and how hazardous projects will be built prior to an EIS invites port to ignore environmental considerations when leasing property and pretend that regulatory agencies are responsible for any harmful consequences of port leasing decisions. But SEPA requires environmental disclosure and environmentally conscious decision-making from *all* government entities—including public ports. These two fundamental misconceptions about SEPA and its role in local governance underlie, and undermine, the Ports Association’s brief.

II. ARGUMENT

Riverkeeper’s answering brief will only address new issues raised by the Ports Association. *See* RAP 10.3(f) (limiting answers to amicus briefs to “new matters raised in the brief of amicus curiae”). The Ports Association identifies four issues to the Court. (*See* Ports Association Br., p.6.) Riverkeeper will address only the Ports Association’s third contention; that SEPA allows ports to execute final and binding leases without any SEPA process when another agency is expected to undertake SEPA review at a later date. (*See* Ports Association Br., pp.11–13.) Riverkeeper will explain why SEPA review must always precede leases

like the Port of Vancouver's and why a lease is not a necessary precursor to meaningful environmental review. Riverkeeper also notes that ports and prospective tenants have mechanisms to move projects forward short of executing final, binding leases.

Riverkeeper will not address the Ports Association's first contention; that this case is limited to its facts. (*See* Ports Association Br., p.6.) Riverkeeper explained that cases with similar facts are likely to come before Washington courts again. (Petition for Review, pp.11–15.)

Riverkeeper will not address the Ports Association's second and fourth contentions; essentially that the Port of Vancouver's lease was "contingent" on approval by the Energy Facility Site Evaluation Council ("EFSEC") and allowed the Port of Vancouver to change course if the EIS revealed serious environmental and human health risks. (*See* Ports Association Br., p.6.) Riverkeeper has addressed these issues at length in every stage of this case, and the Court of Appeals agreed with Riverkeeper that the lease was sufficiently binding and definite to constitute a SEPA action. *Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wash. App. 800, 815, 357 P.3d 710, 719 (2015).

////

////

a. Ports may not defer SEPA review when deciding whether, and under what conditions, to lease land.

The Ports Association's attempt to create a new SEPA categorical exemption for final and binding leases that defer SEPA review (*see* Ports Association Br., pp.11–13) violates the letter and spirit of SEPA and its implementing regulations.

SEPA's rules could hardly be clearer: port leases are actions that must be preceded by SEPA review. *See* WAC 197-11-704(2)(a)(ii) (defining the "actions" requiring SEPA review to include decisions to "lease . . . publicly owned land"); *see also Columbia Riverkeeper*, 189 Wn. App. at 814–15 (holding that "[T]he Port's entry into the lease agreement with Tesoro/Savage was an 'action' under SEPA"). When a port is not the lead agency preparing the EIS for a project, WAC 197-11-070(1)(b) and WAC 197-11-786 clearly prevent a port from taking actions, like executing a binding lease, that limit its alternatives before the EIS is published. (*See Riverkeeper's Supplemental Brief*, pp.9–11 (explaining how SEPA's rules prohibit non-lead agencies from limiting their own alternatives without an EIS).) Rather, the port must wait until the EIS is complete and then use that document to help decide whether, and under what terms, to lease public property. *See* WAC 197-11-600(3)(c).

Because most projects that need port leases also require permits that trigger SEPA, allowing port leases that push SEPA review off until a later date would let ports—in almost every instance—execute binding leases without the benefit of an EIS. Without citing any legal authority (*see* Ports Association Br., pp.11–13), the Ports Association invites the Court to create a *de facto* categorical exclusion from SEPA for port leases. Specifically, the Ports Association wants the Court to exclude leases of publicly owned land from the prohibition on limiting alternatives before an EIS is complete. *Cf.* WAC 197-11-070(1)(b).

This Court should refuse to expand the list of categorical exemptions to SEPA. The Legislature and the Washington Department of Ecology (“Ecology”)¹ have promulgated numerous categorical exemptions for actions otherwise subject to SEPA. *See, e.g.*, RCW 43.21C.210 *through* 230, 400, 410, 430, 470, *and* 480; *see also, e.g.*, WAC 197-11-800 *through* 890. Regarding leases, Ecology promulgated a rule that leases do not trigger SEPA review “when the use of the property for the term of the lease will remain essentially the same as the existing use” WAC 197-11-800(5)(c). Tellingly, the Ports Association never cites this, or any other, categorical exemption. Port leases for new projects, like the Port of

¹ Ecology is charged with writing rules to interpret and implement SEPA. *See* RCW 43.21C.110.

Vancouver's lease, clearly do not fit within the exemption in WAC 197-11-800(5)(c) because such leases expressly define and authorize changes to "the use of the property" during the lease term. The existence of an express categorical exemption for leases under which the use of the property will *not* change demonstrates that Ecology did not intend its SEPA rules to exclude leases like the Port of Vancouver's from SEPA review. This Court should not create a significantly broader SEPA exemption for leases than the one Ecology already promulgated.

The trouble with the Ports Association's position—besides a lack of any legal authority—is that deferring SEPA review undercuts the statute's substantive goal. From a port's perspective, *post hoc* or deferred SEPA review of a binding lease is the same as no SEPA review. The Ports Association's theory of SEPA compliance would deprive port officials, and the public, of important information about the consequences of port decisions. SEPA was enacted to avoid precisely this scenario.

Finally, a ruling from this Court approving the deferred SEPA review arrangement envisioned by the Port of Vancouver's lease and the Ports Association's briefing could greatly diminish the value of SEPA. Many, if not most, large projects require multiple permits or approvals from different government entities. For instance, a project in Clark County might require a lease from the county, a shoreline substantial

development permit, a zoning change, a water right, and a Clean Air Act permit. Currently, all of these permits would need to be issued by the responsible entities *after those entities reviewed the EIS for the project*. But under the Ports Association's theory of 'deferred' SEPA, Clark County could approve the lease and the zoning change—with conditions deferring SEPA review. And Ecology could approve the shorelines permit and the water right—with conditions deferring SEPA review. The Southwest Clean Air Agency would have to prepare an EIS before issuing the air pollution permit, but Clark County and Ecology's decisions would not benefit from SEPA. The Ports Association's theory would allow, for projects where multiple agencies have jurisdiction, almost all of the decisions to occur before SEPA, so long as one agency ultimately prepared an EIS. That would radically depart from how Washington agencies currently make decisions, and it would rob SEPA review of most of its meaning and effect.

b. A binding lease is not a necessary precursor to SEPA review.

There is no practical reason why the Port of Vancouver could not have waited—as EFSEC has waited—to make a final decision about the oil terminal until after SEPA review is complete. Fixing, through a binding lease, how and where the Port of Vancouver would allow Tesoro-

Savage to operate an oil terminal on publicly owned land was not a “preliminary step necessary to facilitate meaningful environmental analysis” by the Port or EFSEC. (Ports Association Br., p.16.) Despite the Ports Association’s protestations, there is no rational reason why a prospective tenant cannot sufficiently explain how it intends to use a piece of land without a final signed lease in hand. After all, if no other agency had jurisdiction over a project requiring a port lease, the port district would—even under the Ports Association’s theory of SEPA—prepare the EIS before executing the lease.

As Riverkeeper has explained, ports and potential tenants have adequate options for protecting their business interests prior to SEPA review and before making binding decisions. For instance, the Court of Appeals found that a non-binding memorandum of understanding between a developer and a municipality did not violate SEPA.² *See Int’l Longshore & Warehouse Union, Local 9 v. City of Seattle (ILWU)*, 176 Wn. App. 512, 519, 309 P.3d 654 (2013). Ports can also use exclusive bargaining agreements, like the one the Port of Vancouver signed with Tesoro-Savage while negotiating the lease at issue in this case. (CP 11.) Ports do not need

² Despite the Port Association’s assertions (*see* Ports Association’s Br., pp.15–16), the Port of Vancouver’s binding lease limited the Port of Vancouver’s choice of alternatives, unlike the non-binding memorandum of understanding in *ILWU*. *See Columbia Riverkeeper*, 189 Wash. App. at 815.

to agree to the terms under which they will host hazardous projects before the human health impacts and environmental risks of those projects are understood and publicized.

The Ports Association's real complaint is that SEPA review of port leases, and perhaps the public scrutiny that such SEPA review entails, is inconvenient for potential port tenants. But Riverkeeper is only asking ports to play by the same SEPA rules as all other public entities. The Legislature decided that what ports and potential tenants may see as 'inconvenience'—namely, gathering, considering, and publicizing the pertinent environmental information before making a binding decision—is essential to good governance. Accordingly, the Legislature concluded that such 'inconveniences' outweigh the expedience of making decisions without understanding the environmental consequences. This Court should not disturb the balance that the Legislature struck.

III. CONCLUSION

The Ports Association would elevate form over function in the SEPA process. The point of SEPA is not to require an EIS; the point is to compel all government entities, including ports, to consider the information *in* the EIS before making binding decisions. As the Council on Environmental Quality succinctly stated with respect to SEPA's federal analog: the "purpose is not to generate paperwork—even excellent

paperwork—but to foster excellent action.” 40 C.F.R. § 1500.1(c). Unless this Court allows EFSEC’s EIS to inform the Port of Vancouver’s actions, the spirit and letter of SEPA will remain unfulfilled.

RESPECTFULLY SUBMITTED this 8th day of June, 2016.

COLUMBIA RIVERKEEPER

By: 
Miles B. Johnson, WSBA No. 50741
COLUMBIA RIVERKEEPER
111 Third St.
Hood River, OR 97031
Tel: (541) 490-0487
Email: miles@columbiariverkeeper.org

KAMPMEIER & KNUTSEN, PLLC
Brian A. Knutsen, WSBA No. 38806
833 S.E. Main Street, Mail Box 318
Portland, Oregon 97214
Tel: (503) 841-6515
Email: brian@kampmeierknutsen.com

SMITH & LOWNEY, PLLC
Knoll Lowney, WSBA No. 23457
2317 E. John Street
Seattle, WA 98112
Tel: (206) 860-2883
Email: knoll@igc.org

*Attorneys for Petitioners Columbia
Riverkeeper and Northwest Environmental
Defense Center*

CERTIFICATE OF SERVICE

I, Miles B. Johnson, declare under penalty of perjury of the laws of the State of Washington, that I am counsel for Petitioner Columbia Riverkeeper and that on June 8, 2016, I caused the foregoing Notice of Appearance to be served on the following in the manner indicated:

David Markowitz Kristin Asai Anna Joyce Lynn Gutbezahl 1211 SW Fifth Ave., Suite 3000 Portland, OR 97204 davidmarkowitz@markowitzherbold.com kristinasai@markowitzherbold.com annajoyce@markowitzherbold.com lynngutbezahl@markowitzherbold.com	✓ E-mail (per agreement with counsel)
Frank Chmelik, WSBA No. 13969 Jonathan Sitkin, WSBA No. 17604 Chmelik Sitkin & Davis P.S. 1500 Railroad Avenue Bellingham, WA 98225	✓ U.S. Mail (postage prepaid)


Miles Johnson, WSBA No. 50741

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, June 08, 2016 4:15 PM
To: 'Miles Johnson'
Cc: knoll@igc.org; brian@kampmeierknutsen.com; Kristin Asai; Anna Joyce; David Markowitz; lynngutbezahl@markowitzherbold.com
Subject: RE: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al. Supreme Court Case No. 92335-3

Received 6/8/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Miles Johnson [mailto:miles@columbiariverkeeper.org]
Sent: Wednesday, June 08, 2016 4:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: knoll@igc.org; brian@kampmeierknutsen.com; miles@columbiariverkeeper.org; Kristin Asai <kristinasai@markowitzherbold.com>; Anna Joyce <annajoyce@markowitzherbold.com>; David Markowitz <davidmarkowitz@markowitzherbold.com>; lynngutbezahl@markowitzherbold.com
Subject: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al. Supreme Court Case No. 92335-3

Attached for filing please find Petitioners' Answer to Brief of Amicus in the above-referenced case.

Thank you,
Miles Johnson



Miles Johnson | Clean Water Attorney
Columbia Riverkeeper | 111 Third St. Hood River, OR 97031
541.490.0487 | miles@columbiariverkeeper.org



www.columbiariverkeeper.org