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Supreme Court No. 92335-3

Court of Appeals No. 46130-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

**SUPPLEMENTAL BRIEF OF RESPONDENTS PORT OF
VANCOUVER USA, COMMISSIONER JERRY OLIVER,
COMMISSIONER BRIAN WOLFE, AND FORMER
COMMISSIONER NANCY BAKER**

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 ORIGINAL

TABLE OF CONTENTS

	Page (s)
I. INTRODUCTION	1
II. RESTATEMENT OF THE QUESTION FOR REVIEW	4
III. STATEMENT OF THE CASE.....	4
A. SEPA and EFSLA work together to centralize all environmental review through the Council.....	4
B. The Port’s lease is expressly contingent on the Council’s environmental review and the Governor’s certification.	6
IV. STANDARD OF REVIEW	7
V. ARGUMENT	7
A. For an energy facility, SEPA focuses on the choices available to the final decision makers, not the Port.....	7
1. SEPA prohibits actions that limit <i>the</i> choice of reasonable alternatives.	7
2. Focusing on the Council’s and Governor’s choices is consistent with EFSLA’s goal of consolidating the environmental review for energy facilities.....	10
3. Riverkeeper’s interpretation of the SEPA regulation would disrupt and duplicate the Council process.	12
B. The Port’s lease does not coerce a particular outcome by the final decision makers or the Port.....	15
VI. CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Conner v. Burford</i> , 848 F.2d 1441, 1447-48 (9th Cir. 1988)	18
<i>Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council</i> , 178 Wn.2d 320, 310 P.3d 780, 783 (2013).....	10
<i>Gale v. First Franklin Loan Servs.</i> , 701 F.3d 1240, 1246 (9th Cir. 2012)	8
<i>Int’l Longshore & Warehouse Union, Local 19 v. City of Seattle</i> , 176 Wn. App. 512, 309 P.3d 654, 660-61 (2013).....	16
<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 296 P.3d 860, 867 (2013).....	7
<i>Metcalf v. Daley</i> , 214 F.3d 1135, 1143 (9th Cir. 2000)	17
<i>Nat’l Audubon Soc’y v. Dep’t of Navy</i> , 422 F.3d 174, 202 (4th Cir. 2005)	17
<i>Overlake Hosp. Ass’n v. Dep’t of Health of State of Washington</i> , 170 Wn.2d 43, 239 P.3d 1095, 1099 (2010).....	8
<i>Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.</i> , 137 Wn. App. 150, 151 P.3d 1067, 1070 (2007).....	4, 16, 17
<i>Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council</i> , 165 Wn.2d 275, 197 P.3d 1153, 1158-59 (2008).....	5
<i>State v. Krall</i> , 125 Wn.2d 146, 881 P.2d 1040, 1041 (1994).....	14
<i>State v. Welty</i> , 44 Wn. App. 281, 726 P.2d 472, 473 (1986).....	8
 Statutes	
RCW 43.21C.030(2)(c).....	4
RCW 80.50.010	10, 11
RCW 80.50.040(8).....	5, 6

RCW 80.50.100	1, 5, 6, 10
RCW 80.50.180	11
RCW Ch. 43.21C	2
RCW Ch. 80.50.....	1, 3
WAC 197-11-055(2).....	11
WAC 197-11-070.....	7, 8, 10, 16, 19
WAC 197-11-786.....	14, 15
WAC 463-14-080(3).....	5
WAC 463-47-020.....	5
WAC 463-47-060(1).....	5
WAC 463-47-090(1).....	5
WAC Ch. 463.....	1
Other Authorities	
40 C.F.R. § 1506.1(a).....	16
SEPA Handbook § 3.3.2.2.	16

I. INTRODUCTION

The Port of Vancouver USA (together with the other respondents, the “Port”) takes its environmental and legal obligations seriously. When the Port considered whether to lease its property to Tesoro-Savage Joint Venture (“Tesoro-Savage”) to construct an energy facility that has the potential to generate substantial economic development in Clark County—but with potential environmental effects—the Port ensured that it followed the appropriate process. First, before the Port Commissioners voted on the proposed lease, the Port engaged the public through a series of workshops to provide and receive information about the project. Second, the Port recognized the importance of understanding the environmental impacts of the project, so it made the lease expressly contingent on completion of full environmental review.

Because the project involves a large energy facility, the project is also subject to rigorous review and certification by the Energy Facilities Site Evaluation Council (“Council”). The Council reviews the application, conducts initial public hearings, prepares a detailed environmental impact statement (“EIS”), and conducts adjudicative hearings on the proposed project. *See* RCW Ch. 80.50; WAC Ch. 463. The Council then makes a recommendation to the Governor whether to certify the project. *See* RCW 80.50.100. The Council may recommend a

smaller facility, an alternative location, denial of the project, or any other number of alternatives. The Governor, in turn, is not limited by the Council's recommendations, and can make his or her own determinations on whether, or under what conditions, the Governor will approve the project. *See id.*

To safeguard that crucial review by the Council and the Governor, the Port's lease does not constrain, coerce, or limit those decision makers' choice of reasonable alternatives for the project. The Port's lease does not bind the Port to the project regardless of the Council's recommendation or the Governor's decision. Even after the Port approved the lease, the lease language prevents Tesoro-Savage from initiating any construction until the Council's environmental review process is complete, and the ultimate decision maker (the Governor) has fully evaluated the impacts and approved the project.

Petitioners, Columbia Riverkeeper and Northwest Environmental Defense Center (collectively "Riverkeeper"), refuse to recognize this reality. Riverkeeper contends that the Port's approval of the lease violated the State Environmental Policy Act ("SEPA"), RCW Ch. 43.21C, because this action limits *the Port's* choice of reasonable alternatives on the project before the Council issues the final EIS. Not so. The relevant SEPA regulation prohibits a government agency from taking action on a proposal

that would limit *the* choice of reasonable alternatives on the project. As the Court of Appeals correctly determined, when a project is governed by the comprehensive review under the Energy Facilities Site Locations Act (“EFSLA”), RCW Ch. 80.50, the applicable SEPA regulation ensures that the choices available to the Council and the ultimate decision maker, the Governor, are not limited. Because the Port is not the final decision maker on the project, the Port’s approval of a contingent lease does not violate SEPA even if this Court assumes *arguendo* that the Port limited its own options.

Riverkeeper proposes a rule that would require all relevant agencies to conduct an EIS evaluation before taking any actions on an energy project subject to EFSLA, even actions contingent on the Council’s and Governor’s review and approval. Riverkeeper’s rule would disrupt the centralized environmental review process established under EFSLA.

This Court has accepted a narrow question for review that has a straightforward answer. Riverkeeper asks whether the Port’s approval of a contingent lease violated SEPA even though Riverkeeper concedes that the Port is not the final decision maker and the choice of alternatives available to the Council and the Governor have not been limited. The answer is no. This Court should therefore affirm the decisions by the Superior Court and

Court of Appeals, and uphold the centralized Council process that ensures full environmental review and plenary discretion by the Governor.

II. RESTATEMENT OF THE QUESTION FOR REVIEW

For a project subject to EFSLA, does a local agency comply with SEPA when it enters into a lease containing an express condition precedent that ensures the Council and the Governor will retain the full range of discretion and authority to review, approve, or reject alternatives for the project?

III. STATEMENT OF THE CASE

The Port agrees with the facts set forth in the Court of Appeals' August 25, 2015 decision. The Port repeats some of these facts here to provide context for its arguments.

A. SEPA and EFSLA work together to centralize all environmental review through the Council.

SEPA requires the government to fully consider the “environmental and ecological factors when taking actions that significantly affect the quality of the environment.” *Pub. Util. Dist. No. 1 of Clark Cnty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067, 1070 (2007) (“*Clark PUD*”). To fulfill this purpose, SEPA requires government agencies to prepare an EIS for every proposal or action that is likely to have a significant environmental impact. *Id.*; RCW 43.21C.030(2)(c).

For an energy facility subject to EFSLA, SEPA compliance and authority is vested with the Council. The Council determines whether the proposal is an “action” to which SEPA applies and then follows the standard SEPA process. WAC 463-47-060(1); WAC 463-14-080(3). The Council applies the SEPA regulations that it adopted by reference from the Department of Ecology. WAC 463-47-020. The Council prepares the EIS. WAC 463-47-090(1).

After the Council finishes its review, including a final EIS, it recommends to the Governor an appropriate final decision for the proposed project. RCW 80.50.040(8); RCW 80.50.100. If the Council recommends approval, it must submit a draft certification agreement for the site. That draft must include conditions to protect governmental or community interests affected by the energy facility, as well as conditions designed to recognize the purpose of laws that are preempted by EFSLA, such as local EIS requirements. RCW 80.50.100(2). The Governor must then decide whether to approve or reject the draft certification, direct the Council to reconsider the draft certification, or impose additional conditions on the application. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 286, 197 P.3d 1153, 1158-59 (2008).

B. The Port's lease is expressly contingent on the Council's environmental review and the Governor's certification.

In October 2013, the Port entered into a contingent ground lease with Tesoro-Savage, which proposed to develop the Vancouver Energy Distribution Terminal. The lease contains a condition precedent requiring Tesoro-Savage to obtain all "licenses, permits, and approvals" before the lease will become effective. (CP¹ at 288.) The most significant of these approvals is a site certification by the Governor after publication of a final EIS, adjudication, and a recommendation by the Council. By statute, both the Council's recommendation and the Governor's final decision will have the benefit of full environmental review. *See* RCW 80.50.040(8); RCW 80.50.100.

To satisfy the lease's conditions precedent, Tesoro-Savage must also obtain a federal Clean Water Act permit. (CP 303, 392-96.) The lease further requires Tesoro-Savage to obtain the Port's approval for its operation and safety plans and to obey all environmental laws, including the conditions of all environmental permits, before it can begin construction. (CP 287-89.) Consequently, although the lease binds Tesoro-Savage to certain conditions and prevents the Port from leasing the property to another entity during the certification process, the lease is

¹ "CP" refers to the Clerk's Papers filed in the Court of Appeals.

subordinate to the Governor's discretion and ultimate decision on the project.

Riverkeeper brought suit alleging that the Port, by approving the contingent lease, violated SEPA in two ways: (1) executing the lease prior to completion of an EIS; and (2) improperly limiting the choice of reasonable alternatives to the project in violation of WAC 197-11-070 (1)(b). (CP 14-15.) The Superior Court granted the Port's motion for summary judgment, and a unanimous panel of Division II affirmed. Only the second issue is relevant to the question for review.

IV. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision to grant summary judgment. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860, 867 (2013). This Court performs the same analysis as the trial court, and should affirm an order of summary judgment when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

V. ARGUMENT

A. For an energy facility, SEPA focuses on the choices available to the final decision makers, not the Port.

1. SEPA prohibits actions that limit *the* choice of reasonable alternatives.

At issue here is *whose* choice of reasonable alternatives may not be limited prior to the completion of a final EIS. The plain language of the

relevant SEPA regulation shows that only a specific choice may not be limited while the lead agency prepares an EIS. For an energy facility project subject to EFSLA, the Council's and the Governor's specific choice may not be limited.

To determine the plain meaning of the applicable SEPA regulation, this Court follows traditional rules of statutory construction. *Overlake Hosp. Ass'n v. Dep't of Health of State of Washington*, 170 Wn.2d 43, 51, 239 P.3d 1095, 1099 (2010). This Court determines whether the regulation's meaning is unambiguous on its face, and gives effect to that plain meaning. *Id.* at 52. If the regulation is ambiguous, this Court uses legislative history and relevant case law to resolve the ambiguity. *Id.*

The relevant SEPA regulation (adopted by the Council) provides that “[u]ntil the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would . . . [l]imit the choice of reasonable alternatives.” WAC 197-11-070 (1)(b). The Legislature's use of the word “the” before the key subject (choice of reasonable alternatives) particularizes the subject, and is a word of limitation as opposed to “a” or “an.” *See Gale v. First Franklin Loan Servs.*, 701 F.3d 1240, 1246 (9th Cir. 2012); *State v. Welty*, 44 Wn. App. 281, 283, 726 P.2d 472, 473 (1986) (noting legislature often uses “a” in

the sense of “any” to apply to more than one individual object). The regulation, therefore, does not refer generally to actions that limit any choice, but instead focuses on a specific choice. For a project subject to the centralized Council process, the specific choice must refer to that of the Council and the Governor, the ultimate decision maker.

When the Legislature incorporated the relevant SEPA regulation into the Council process, it did so knowing that the Council provided a consolidated environmental review where the Governor has exclusive authority on the outcome of the project. Only the Governor’s choice controls the viability, scope, and location of the project, after full environmental review and a recommendation from the Council. Even if the Port (or another underlying agency) bound itself completely to an energy facility project, that project could never come into existence without the Council’s and Governor’s approval. The underlying agency’s action is not dispositive on whether the project can proceed and under what terms. So when the SEPA regulation refers to “the” choice that cannot be limited during the environmental review, the choice of significance for an energy facility project belongs to the Governor after the Council’s recommendation, and SEPA requires that it be preserved until a final EIS is issued in accordance with EFSLA’s consolidated process.

2. Focusing on the Council's and Governor's choices is consistent with EFSLA's goal of consolidating the environmental review for energy facilities.

This Court should construe the SEPA regulation (WAC 197-11-070 (1)(b)) consistently with EFSLA's goal of consolidating environmental review with the Council and Governor. The Legislature created the Council to provide a centralized review for potential energy projects in Washington State. *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 328, 310 P.3d 780, 783 (2013). The Legislature recognized the pressing need for increased energy facilities and the associated requirement of efficient but thorough environmental review without costly duplication. RCW 80.50.010. To effectuate that purpose, the Legislature preempted local "regulation and certification" of energy facilities and provided that EFSLA would supersede any conflicting regulations to keep the process focused within the Council. RCW 80.50.110. The Council therefore serves as a "one stop shop" for the siting and permitting of large energy projects.

Interpreting the relevant SEPA regulation to focus on the Council's and Governor's choice of reasonable alternatives achieves that goal of centralized review. If maintaining the underlying agency's alternatives on an energy facility project were also critical, then the Legislature could

have required the underlying agency to engage in a subsequent or coextensive EIS process in addition to the full Council adjudication. But the Legislature did not. Instead, it expressly chose to preempt local agencies from conducting their own environmental review and consolidated all authority in the Council to balance the important ecological interests associated with energy facilities. *See* RCW 80.50.010 (recognizing need for procedure to provide abundant energy while preserving environment); RCW 80.50.180 (exempting local EIS requirements).

In addition, when SEPA and EFSLA are construed together, these rules reflect that the Legislature considered the Council process the beginning point in the decision-making process. For example, SEPA's rules make clear that the lead agency (here, the Council) shall prepare its threshold determination or EIS "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2). But EFSLA, which preempts and supersedes conflicting regulations, requires that the threshold determination or EIS be conducted as part of the Council process, rather than as part of the underlying agency's analysis. *See* RCW 80.50.180 (exempting actions related to approving an energy facility from the EIS requirement for local

government agencies). Those rules illustrate that the initial policymaking by the local government is not relevant to the ultimate “decision-making process” by the Governor and Council. This Court should therefore uphold the policies behind EFSLA and focus on the decision makers’ choice.

3. Riverkeeper’s interpretation of the SEPA regulation would disrupt and duplicate the Council process.

Riverkeeper’s request that the Port evaluate the Council’s EIS after the comprehensive Council review and before it enters into a contingent lease would frustrate the Council’s purpose of consolidated review. First, Riverkeeper’s interpretation creates practical problems. Due to the substantial expense (including a \$50,000 application fee paid to the Council) and time commitment for the extensive Council adjudication, a potential tenant requires some firm commitment that the real property at issue will be available at the conclusion of the process. Otherwise, the potential tenant’s investment of time and resources would be for naught. As the Superior Court recognized, “[i]t would be hard to imagine any possible lessees getting serious about major developments such as this unless they had some sort of guarantee of exclusivity from an owner such as the Port.” (CP 991.)

Yet, if upheld, Riverkeeper's argument would prevent the Port from providing a commitment to a potential tenant until *after* the Council process, and then only *after* the Port engages in its own comprehensive environmental review. That interpretation thwarts EFSLA's express goals of ensuring available energy through a stringent review without costly duplication. Allowing the Port to give assurances to the applicant before the lengthy permitting process is reasonable and complies with SEPA.

Second, it is not "illogical"—as Riverkeeper suggests—for a port district to prepare its own EIS for a smaller energy project but to not evaluate an EIS when the project is subject to the Council's review. (Pet. at 14.) The Council process *is* the logical distinction, as was expressly contemplated and codified by the Legislature. In the first situation, the port district is the lead agency preparing the EIS and the sole decision maker on the project. In the second situation, the Council prepares the EIS, engages in thorough SEPA review, and then recommends a decision to the Governor, who then has complete discretion to adopt, modify, reject, or return the recommendation for additional review. A project subject to the Council's review receives more, not less, review than a smaller energy project, so it is entirely reasonable that a port district need not engage in a secondary EIS review after the Council process. Moreover, the port

district is not the decision maker in the second situation; the Council and the Governor hold that power.

Third, Riverkeeper's citation to Ecology's definition of a "reasonable alternative" does not establish an illogical result if this Court interprets SEPA to focus on the choice available to the decision makers.

WAC 197-11-786 provides

"Reasonable alternative" means an action that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation. Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts, either directly, or indirectly through requirement of mitigation measures.

Riverkeeper argues that this regulation prohibits actions that would "limit the 'reasonable alternatives' of *any* agency with jurisdiction to control project impacts." (Pet. at 17.) Riverkeeper is incorrect.

WAC 197-11-786 provides that reasonable alternatives *may* include actions to control impacts, but does not mandate that those options be considered as potential alternatives. *See State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040, 1041 (1994) (noting "may" is directory while "shall" is mandatory). That regulation instead provides guidance about the type of alternatives that could be relevant for decreasing a proposal's environmental costs.

In addition, the regulation refers to an agency that “has authority” to control impacts of the project by requiring mitigation measures. *See* WAC 197-11-786. For a project subject to EFSLA, the Council and the Governor are the entities with the authority to decide whether the project proceeds, not the Port. The Council and Governor also can require conditions to mitigate environmental impacts, and the Port may not reduce those conditions.

B. The Port’s lease does not coerce a particular outcome by the final decision makers or the Port.

This Court’s inquiry should end here because the parties agree that the Port’s lease does not constrain the Council’s or Governor’s choice of reasonable alternatives. The Port’s lease with Tesoro-Savage is expressly contingent on the environmental review and permitting decision by the Council and Governor, and it does not restrict the options available to these decision makers. This Court can, and should, affirm the Superior Court’s and Court of Appeals’ decisions on that basis alone.

Nevertheless, even if the Court determines that the Port’s choice of alternatives is relevant to SEPA (which it is not), the Port’s lease does not bind the Port’s choices on the project. This Court therefore has an additional basis to affirm the lower courts’ decisions that the Port did not violate SEPA by approving a contingent lease.

SEPA does not prohibit preliminary actions, such as “developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal,” before the responsible official issues a final EIS. WAC 197-11-070(1), (4). This is true so long as the preliminary actions do not have adverse environmental impacts or limit the choice of reasonable alternatives. *Id.*

An action limits the choice of reasonable alternatives if it has a “coercive effect” on the final decision, *Clark PUD*, 137 Wn. App. at 161, 151 P.3d at 1072, or similarly “restricts the lead agency’s final decisions” prior to issuance of the EIS, Wash. Dep’t of Ecol., SEPA Handbook § 3.3.2.2, p. 55. For example, government agencies do not violate SEPA by signing a memorandum of understanding unless the memorandum has a “coercive effect” on future decisions on the proposed project or precludes consideration of alternative sites by the decision makers. *Int’l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 524-26, 309 P.3d 654, 660-61 (2013) (citing *Clark PUD*, 137 Wn. App. at 161, 151 P.3d at 1072). Similarly, when analyzing the federal counterpart to SEPA (which includes identical language prohibiting actions that will limit the choice of reasonable alternatives, *see* 40 C.F.R. § 1506.1(a)), courts have focused on whether the action made an irreversible and irretrievable

commitment of resources that prejudices the final outcome. *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000); accord *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 202 (4th Cir. 2005) (noting that an action limited alternatives when it “would virtually require the agency to finish the project regardless of what that analysis revealed”).

Here, the Port's lease does not coerce an outcome, restrict full consideration of the proposed terminal, or require completion of the project prior to the issuance of an EIS. Riverkeeper concedes that the Council's and Governor's choices are not limited by the lease because they retain plenary authority through the Council process. The Port lacks the ability to override or even influence the decisions by those decision makers, so the lease does not restrict the reasonable alternatives.

The Port also did not bind itself to go forward with the project regardless of the outcome of the Council's environmental review. Like the approval of a preliminary permit in *Clark PUD*, the Port's lease does not influence or coerce the decision makers to certify the project “simply because” the Port approved the lease. See *Clark PUD*, 137 Wn. App. at 162, 151 P.3d at 1072. And unlike the agency in *Metcalf*, the Port expressly conditioned the lease on the successful completion of SEPA review and the related permits. Cf. *Metcalf*, 214 F.3d at 1144 (holding the agency violated NEPA because it did not make its promise to participate in

the whaling proposal conditional upon a NEPA determination). The Port's lease also does not permit Tesoro-Savage to occupy the premises or to begin construction until thorough review through the Council (including SEPA) is completed, and the Governor issues the required certification. The Port's lease therefore is akin to the leases approved in *Conner v. Burford*, which did not allow the tenant to occupy or use the leased land before complying with environmental review. 848 F.2d 1441, 1447-48 (9th Cir. 1988).

The lease here does not coerce a final outcome, nor does it irretrievably commit the Port and its resources to the project even if the Council recommends denying the project. Riverkeeper is concerned about a scenario that simply does not exist. If following SEPA review the Council does not recommend approval of the project, the Port may terminate the lease. If the Governor denies certification, the project will never come into existence and the Port may terminate the lease. If the Council and Governor approve the project, but Tesoro-Savage is unable to obtain all necessary permits following SEPA review, the Port may terminate the lease. (CP at 281, 288-89.) The only scenario where the project moves forward is if the Council recommends approval after full environmental review, the Governor certifies the project, and the Port is

satisfied that Tesoro-Savage has obtained all necessary permits and complied with all environmental conditions.

Thus, even after the Council has issued its final EIS, the lease remains fully contingent on future events and approvals. Those post-EIS contingencies defeat Riverkeeper's argument that the lease could violate SEPA. *See* WAC 197-11-070 (prohibiting actions limiting the choice of alternatives only "[u]ntil the responsible official issues a final determination of nonsignificance or final environmental impact statement"). Accordingly, the Port's approval of the contingent lease did not tie the hands of the Council, the Governor, or the Port, so this action did not violate SEPA.

VI. CONCLUSION

The final decisions on this and every energy facilities project subject to EFSLA will be made by the Council and the Governor. SEPA and EFSLA mandate that a government agency not take action that limits the Council's or the Governor's choice of reasonable alternatives, and the Port followed this directive. This Court should affirm the decisions on

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summary judgment issued by the Superior Court and the Court of Appeals,
finding that the Port did not violate SEPA.

DATED this 1st day of April, 2016.

By: *s/ Kristin M. Asai*

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DECLARATION OF SERVICE

I, Kristin M. Asai, declare under penalty of perjury under the laws of the State of Washington that I am an attorney employed by Markowitz Herbold PC and that on April 1, 2016, I caused to be mailed, via first-class U.S. Mail, a copy of the original **SUPPLEMENTAL BRIEF OF RESPONDENTS PORT OF VANCOUVER USA, COMMISSIONER JERRY OLIVER, COMMISSIONER BRIAN WOLFE, AND FORMER COMMISSIONER NANCY BAKER**, to the following counsel for parties at the addresses shown below:

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Subject: Columbia Riverkeeper, et al v. Port of Vancouver USA, et al., Supreme Court No. 92335-3

Attached for filing is the Supplemental Brief of Respondents Port of Vancouver USA, Commissioner Jerry Oliver, Commissioner Brian Wolfe, and Former Commissioner Nancy Baker with regard to the above-referenced case.

Respectfully,

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