

Apr 01, 2016, 4:15 pm

RECEIVED ELECTRONICALLY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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.

**SUPPLEMENTAL BRIEF OF PLAINTIFFS-PETITIONERS
COLUMBIA RIVERKEEPER AND NORTHWEST
ENVIRONMENTAL DEFENSE CENTER**

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

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

Attorneys for Plaintiffs-Petitioners
Columbia Riverkeeper and Northwest
Environmental Defense Center

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE PRESENTED FOR REVIEW.....3

III. SUPPLEMENTAL STATEMENT OF THE CASE.....3

 A. The State Environmental Policy Act.....3

 B. Proceedings Below.....6

IV. ARGUMENT.....8

 A. SEPA’s Implementing Regulations
 Unambiguously Prohibit the Port from
 Limiting its Own Alternatives Before
 the EIS.....9

 B. SEPA and EFSLA do not Conflict.....11

 C. The Lease Unlawfully Limited the
 Port’s Alternatives.....16

 D. The Port’s Failure to Await the Council’s
 EIS Before Negotiating the Lease
 Undermined SEPA’s Objectives.....18

V. CONCLUSION.....20

APPENDIX OF STATUTES AND REGULATIONS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

| | |
|--|---------------|
| <i>Ameriquest Mortg. Co. v. Office of the Attorney Gen.</i> , 170 Wn.2d 418, 241 P.3d 1245 (2010)..... | 10 |
| <i>Asarco, Inc. v. Air Quality Coal.</i> , 92 Wn.2d 685, 601 P.2d 501 (1979)..... | 13 |
| <i>Blair v. Wash. State Univ.</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987)..... | 12, 13 |
| <i>Columbia Riverkeeper v. Port of Vancouver USA</i> , 189 Wn. App. 800, 357 P.3d 710 (2015)..... | <i>passim</i> |
| <i>In re Forfeiture of One 1970 Chevrolet Chevelle</i> , 166 Wn.2d 834, 215 P.3d 166 (2009)..... | 14 |
| <i>Leschi Improvement Council v. Wash. State Highway Comm'n</i> , 84 Wn.2d 271, 525 P.2d 774 (1974)..... | 3, 15 |
| <i>Magnolia Neighborhood Planning Council v. City of Seattle</i> , 155 Wn. App. 305, 230 P.3d 190 (2010)..... | 17 |
| <i>Noel v. Cole</i> , 98 Wn.2d 375, 655 P.2d 245 (1982)..... | 20 |
| <i>Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council</i> , 87 Wn.2d 267, 552 P.2d 674 (1976)..... | 4 |
| <i>Overlake Hosp. Ass'n v. Dep't of Health</i> , 170 Wn.2d 43, 239 P.3d 1095 (2010)..... | 9, 10, 11 |
| <i>Pearce v. G. R. Kirk Co.</i> , 92 Wn.2d 869, 602 P.2d 357 (1979)..... | 12 |
| <i>Philippides v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 939 (2004)..... | 12 |
| <i>Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council</i> , 165 Wn.2d 275, 197 P.3d 1153 (2008)..... | 12 |

| | |
|--|-------|
| <i>Stempel v. Dep't of Water Res.</i> , 82 Wn.2d 109, 508 P.2d 166 (1973)..... | 4, 20 |
| <i>Tommy P. v. Bd. of Cnty. Comm'rs of Spokane Cnty.</i> , 97 Wn.2d 385, 391–92, 645 P.2d 697 (1982)..... | 12 |
| <i>United States v. Hoffman</i> , 154 Wn.2d 730, 116 P.3d 999 (2005)..... | 9, 10 |

Statutes

| | |
|---------------------|---------------|
| RCW 43.21C.010..... | 4 |
| RCW 43.21C.020..... | 1, 3, 4 |
| RCW 43.21C.030..... | <i>passim</i> |
| RCW 43.21C.095..... | 5, 15 |
| RCW 43.21C.110..... | 5, 15 |
| RCW 43.21C.400..... | 13 |
| RCW 53.08.080..... | 11 |
| RCW 80.50.180..... | 6, 13 |
| RCW 80.50.300..... | 14 |

Rules

| | |
|---------------------|------|
| WAC 197-11-030..... | 5 |
| WAC 197-11-050..... | 5 |
| WAC 197-11-055..... | 5 |
| WAC 197-11-070..... | 6, 9 |

| | |
|-----------------------------|-----------|
| WAC 197-11-600..... | 5 |
| WAC 197-11-714..... | 6, 10 |
| WAC 197-11-786..... | 6, 10, 11 |
| WAC 197-11-922 to -948..... | 5 |
| WAC 197-11-938..... | 6 |
| WAC 463-47-020..... | 6, 9, 10 |

I. INTRODUCTION.

Washington's State Environmental Policy Act ("SEPA") seeks to secure "healthful, productive, and aesthetically and culturally pleasing surroundings" for the people of Washington. *See* RCW 43.21C.020(2)(b). It does so by infusing human health and environmental considerations into all decision making of State agencies and subdivisions. Central to attaining the statute's objectives is a requirement that agencies wait until there has been environmental review before taking any action that would limit their ability to avoid or mitigate the impacts of a proposal. The Port of Vancouver USA ("Port") transgressed this fundamental tenet of SEPA by executing a lease that fixes the conditions under which the Port will host the nation's largest "crude-by-rail" oil terminal before completion of the environmental impact statement ("EIS") on the project.

The Court of Appeals held that the Port did not violate this prohibition on actions that limit alternatives. The court found the applicable SEPA regulations—issued by the Washington Department of Ecology ("Ecology")—ambiguous as to whose alternatives cannot be limited. The Court of Appeals went on to hold that, for projects subject to the Energy Facilities Site Locations Act ("EFSLA"), the only actions that are prohibited are those that limit alternatives available to the Energy Facility Site Evaluation Council (the "Council"), which is charged with

preparing the EIS, and to the Governor, who ultimately determines whether to “certify” the project under EFSLA. The Port’s execution of the lease limiting its own alternatives was thus found to be “irrelevant.”

This Court should reverse. Ecology’s regulations unambiguously prohibit actions that limit alternatives available to *any agency* with jurisdiction over the project—not just those available to the agency preparing the EIS. SEPA regulations establish procedures under which one “lead” agency prepares the EIS, thus avoiding duplicative SEPA efforts, while prohibiting any other agency with decision-making authority from taking action that would limit its own alternatives until the EIS is complete. This carefully crafted regulatory structure effectuates SEPA’s fundamental objective of ensuring that *all* decisions are made with a full understanding of the human health and environmental consequences. The Court of Appeals’ decision undermines this paramount statutory objective and is inconsistent with the plain language of the applicable regulations.

The Port had important decisions to make as the owner of the public land for the proposal—decisions that provided the Port an opportunity to mitigate or avoid impacts from a large crude-by-rail terminal to be constructed on the banks of the Columbia River near downtown Vancouver, Washington. Those decisions should have been informed by the SEPA process currently underway. Instead, the Port

violated SEPA by signing a lease that extinguished its ability to mitigate or avoid the project's impacts before the EIS is complete. As one Port Commissioner noted, that was "putting the cart before the horse." CP 262.

II. ISSUE PRESENTED FOR REVIEW.

Regulations implementing SEPA prohibit agencies from taking actions that limit the choice of reasonable alternatives on a proposal before the preparation of an EIS. For a project subject to EFSLA, do SEPA's regulations prohibit actions that would limit the alternatives available to any agency with jurisdiction over the project?

III. SUPPLEMENTAL STATEMENT OF THE CASE.

A. The State Environmental Policy Act.

In enacting SEPA, the Legislature "recognize[d] that each person has a fundamental and inalienable right to a healthful environment." RCW 43.21C.020(3). "The choice of this language...indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state." *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 280, 525 P.2d 774 (1974). The statute directs that, "to the fullest extent possible," the "policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in [SEPA]." RCW 43.21C.030(1).

SEPA announces a policy to “encourage productive and enjoyable harmony between humankind and the environment” and seeks to “prevent or eliminate damage to the environment.” RCW 43.21C.010. The statute declares a “continuing responsibility” of agencies to “improve and coordinate plans, functions, programs, and resources” to “[a]ssure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.” RCW 43.21C.020(2)(b).

SEPA is a procedural statute—it “does not demand any particular substantive result in governmental decision making.” *Stempel v. Dep’t of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973). Instead, SEPA effectuates the “broad public policy promoted by the act” by requiring “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). “It is an attempt by the people to shape their future environment by deliberation, not by default.” *Stempel*, 82 Wn.2d at 118.

SEPA applies broadly to “state agencies” such as the Council and to “public corporations” such as the Port. *See* RCW 43.21C.030(2). The statute directs the preparation of a “detailed statement,” or EIS, for “major actions significantly affecting the quality of the environment.” RCW 43.21C.030(2)(c). SEPA includes several other mandates to ensure that

human health and environmental impacts are adequately considered in all government decision making. *See* RCW 43.21C.030(2)(a)–(b), (d)–(h).

SEPA assigns broad authority to Ecology to promulgate “rules of interpretation and implementation of [SEPA].” RCW 43.21C.110(1).

Ecology has issued extensive regulations under this authority that seek to ensure that all decisions are made with appropriate consideration of environmental consequences, while also avoiding duplicative processes. *See, e.g.*, WAC 197-11-030(2)(b)–(d). The Legislature directed that Ecology’s SEPA regulations “shall be afforded substantial deference in the interpretation of [the statute].” RCW 43.21C.095.

Multiple agencies often have authority over different aspects of a project. SEPA regulations establish procedures in such situations for designating one “lead” agency. *See* WAC 197-11-050, -055(5), -922 to -948. The lead agency prepares the EIS for the proposal. WAC 197-11-050(2)(b). Other agencies must use that EIS when making their own decisions, subject to limited exceptions. WAC 197-11-600(3)(c).

No “governmental agency” may take an action that would limit alternatives on the project before the EIS is completed:

Until the responsible official issues a...final [EIS], 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). “Reasonable alternative” is defined as:

...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.

WAC 197-11-786. An “agency with jurisdiction” is:

...an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal).

WAC 197-11-714(3).

For energy projects subject to EFSLA, that statute exempts certain actions taken by agencies other than the Council from the requirement to prepare an EIS. RCW 80.50.180 (an action is exempt to the extent it “approves, authorizes, [or] permits...the location, financing or construction” of the project). Ecology and the Council’s regulations designate the Council as the lead SEPA agency for such projects. WAC 197-11-938(1); WAC 463-47-020. The Council has adopted Ecology’s SEPA regulations quoted above that prohibit actions that limit alternatives before the EIS is complete and that define “reasonable alternative” and “agency with jurisdiction.” WAC 463-47-020.

B. Proceedings Below.

Petitioners Columbia Riverkeeper and Northwest Environmental Defense Center (collectively, “Riverkeeper”) alleged two SEPA violations

below. Only one is at issue here: that the Port violated SEPA by taking action—executing a lease for the oil terminal—that limited the Port’s choice of alternatives before completion of the EIS. *See* CP 15.

The Port argued that it did not violate this prohibition because the lease “preserves discretion for the Port to respond to [SEPA] review.” Br. of Resp’ts, p. 42. The Court of Appeals upheld the Port’s action, but on grounds never advanced by the Port. *See Columbia Riverkeeper v. Port of Vancouver USA*, 189 Wn. App. 800, 813–18, 357 P.3d 710 (2015).

The court held that the lease is a binding “action” for purposes of the prohibition on limiting alternatives, even though the lease is contingent on certification under EFSLA. *Id.* at 814–15. The court found, however, that the regulatory prohibition is ambiguous as to “*whose* choice cannot be limited.” *Id.* at 816 (emphasis in original). The Court of Appeals noted that EFSLA places “administrative responsibility..., including the necessary environmental review, on the Council.” *Id.* at 817. The court resolved the purported ambiguity by applying the principle of statutory construction under which precedence is given to the more specific of two conflicting provisions. *Id.* The court held that, for projects subject to EFSLA, the “regulation only prohibits an agency from limiting the choice of reasonable alternatives available to the Council and [G]overnor,” and

that “whether the Port has limited *its own* choices is immaterial.” *Id.* at 817–18 (emphasis in original).¹

IV. ARGUMENT.

SEPA regulations unambiguously prohibit actions before completion of an EIS that would limit alternatives available to any agency with authority to affect the project’s impacts. To the extent there is any ambiguity, it should be resolved consistent with the Legislature’s instruction to interpret all Washington statutes and regulations in accordance with SEPA’s policy of informed decision making.

The Port had decisions to make as the land owner of the site for the proposed terminal—decisions that enabled the Port to mitigate or avoid the project’s impacts. Those decisions should have been informed by the Council’s EIS, which will study and disclose the human health and environmental impacts of the proposed crude-by-rail terminal. The lease fixed the conditions under which the Port will host the oil terminal and thereby extinguished the Port’s ability to mitigate impacts. The Port thereby violated SEPA’s prohibition on limiting alternatives by entering into this lease before the SEPA process even begun, much less completed.

¹ The Port disingenuously represents that it argued this interpretation below. Answer to Petition for Review, p. 12. At oral argument, the Port indicated agreement with Riverkeeper’s position that the prohibition applies to the Port’s alternatives. *See id.* at Appendix E, pp. 17–20.

A. SEPA's Implementing Regulations Unambiguously Prohibit the Port from Limiting its Own Alternatives Before the EIS.

The Court of Appeals erred in finding the SEPA regulations ambiguous as to whose alternatives cannot be limited. The plain language of the regulations apply to the reasonable alternatives available to any agency with jurisdiction to affect a project's impacts. The Port plainly has such authority as the property owner of the site for the proposed terminal.

Ecology and the Council's SEPA regulations provide that, until an EIS is issued, "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); WAC 463-47-020. The court below found this ambiguous as to "*whose* choice cannot be limited." *Columbia Riverkeeper*, 189 Wn. App. at 816 (emphasis in original). In doing so, the court failed to give effect to the regulations' definitions of key terms.

This Court should "first look to the regulatory language...pursuant to the rules of statutory construction." *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51, 239 P.3d 1095 (2010). "It is an axiom of statutory interpretation that where a term is defined [the Court] will use that definition." *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). "If the meaning of a rule is plain and unambiguous on its face, then [the Court is] to give effect to the plain meaning." *Overlake Hosp.*,

170 Wn.2d at 52; *and see Hoffman*, 154 Wn.2d at 742 (adopting “plain language interpretation based on the statutory definitions”).

The SEPA regulations are not ambiguous as to whose alternatives cannot be limited. Rather, those regulations define the term “reasonable alternative” to include “those *over which an agency with jurisdiction has authority to control impacts*, either directly, or indirectly through requirement of mitigation measures.” WAC 197-11-786 (emphasis added); WAC 463-47-020. An “agency with jurisdiction” is one “with authority to approve, veto, or finance all or part of a nonexempt proposal.” WAC 197-11-714(3); WAC 463-47-020. The Court of Appeals “mistakenly failed to analyze the[se] definition[s].” *See Ameriquest Mortg. Co. v. Office of the Attorney Gen.*, 170 Wn.2d 418, 430, 241 P.3d 1245 (2010).

These regulations unambiguously prohibit the Port from taking actions that limit its own alternatives on the proposed terminal before an EIS. First, the Port is undoubtedly an “agency with jurisdiction” under the SEPA regulations because its leasing authority enables it to approve or veto all or part of the project. *See* WAC 197-11-714(3). The Port has plenary authority to determine whether, and under what terms, to lease public property under its control:

A [Port] district may lease all lands...owned and controlled by it, for such purposes and *upon such terms as the port commission deems proper...*

RCW 53.08.080 (emphasis added). Indeed, the Port Commission voted to approve the lease—an approval necessary for the project. *See* CP 263.

Second, reasonable alternatives include those available to the Port because it has “authority to control impacts, either directly, or indirectly through requirement of mitigation measures.” *See* WAC 197-11-786. The Port exercised this authority in the lease—albeit prematurely—by specifying pollution insurance requirements, establishing environmental remediation requirements, and requiring a “Facility Operation and Safety Plan.” *See* CP 278, 300–01, 309–10, 330. The Port had unfettered authority to insist on additional or different terms to avoid or mitigate the human health and environmental impacts from the proposed terminal.

Ecology and the Council’s SEPA regulations unambiguously prohibit the Port—as an agency with authority to mitigate the proposed terminal’s impacts—from limiting its own alternatives before preparation of the EIS. The Court should give effect to the plain language of these regulations. *See Overlake Hosp.*, 170 Wn.2d at 52.

B. SEPA and EFSLA do not Conflict.

To the extent the regulations are ambiguous—which they are not—the court below erred in finding a conflict between EFSLA and SEPA’s requirement for the Port to await the EIS before taking action. Any

ambiguity should be resolved in a manner that harmonizes EFSLA and SEPA and gives effect to the important policies underlying both statutes.

The Court of Appeals resolved the supposed ambiguity in the SEPA regulations by applying the principle of statutory construction where precedence is given to the more specific of two conflicting laws. *Columbia Riverkeeper*, 189 Wn. App. at 817 (citing *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008)). This was error.

“The rule is that legislative enactments which relate to the same subject and are not actually in conflict should be interpreted so as to give meaning and effect to both, even though one statute is general in application and the other is special.” *Pearce v. G. R. Kirk Co.*, 92 Wn.2d 869, 872, 602 P.2d 357 (1979). Indeed, “it is the duty of the [C]ourt to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used.” *Tommy P. v. Bd. of Cnty. Comm’rs of Spokane Cnty.*, 97 Wn.2d 385, 391–92, 645 P.2d 697 (1982); *see also Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004) (courts “must attempt to harmonize statutes and maintain [their] integrity”). Only where “two...provisions directly conflict[.]” should the Court apply principles of statutory construction aimed at resolving conflicts. *See Blair v. Wash. State Univ.*, 108 Wn.2d 558, 577, 740 P.2d

1379 (1987) (“This court...will give effect to two allegedly conflicting statutes whenever possible.”).

Here, the Legislature has explicitly directed that, “*to the fullest extent possible,*” the “policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in [SEPA].” RCW 43.21C.030(1) (emphasis added). It was thus incumbent on the Court of Appeals to attempt to reconcile any supposed conflict between SEPA’s prohibition on limiting alternatives and EFSLA—which it did not do. *See Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 707–713, 601 P.2d 501 (1979) (rejecting arguments that SEPA and the Washington Clean Air Act conflict and reconciling the statutes so that “the strong policy behind both [statutes] is furthered.”).

Prohibiting the Port from limiting its own alternatives until the Council completes the EIS does not conflict with EFSLA. Notably, EFSLA does not exempt the Port from all its SEPA obligations. Instead, it narrowly exempts agencies, other than the Council, from the requirement to prepare an EIS for certain actions taken on facilities subject to EFSLA. *See* RCW 80.50.180. This provision merely evinces the Legislature’s intent that the Council prepare the EIS for projects subject to EFSLA. By contrast, the Legislature explicitly exempts actions from all SEPA obligations when it so intends. *See, e.g.,* RCW 43.21C.400 (“Council

actions pursuant to the transfer of the site or portions of the site under RCW 80.50.300 are exempt from the provisions of [SEPA.]”); *and see In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009) (“Where the legislature uses different terms, we deem the legislature to have intended different meanings.”).

Without an actual conflict, this Court should harmonize the provisions at issue and apply an interpretation consistent with the SEPA’s policies. *See* RCW 43.21C.030(1). Prohibiting the Port from limiting its own alternatives until the Council issues the EIS achieves such a result.

Notably, the availability of the Council’s EIS would enable the Port to comply with SEPA obligations that are plainly outside of EFSLA’s limited exemption. For example, SEPA requires the Port “utilize ecological information in the planning and development of natural resource-oriented projects.” RCW 43.21C.030(2)(h). The Port is also required to “[s]tudy, develop, and describe appropriate alternatives to...any proposal which involves unresolved conflicts concerning alternative uses of available resources.” RCW 43.21C.030(2)(e). SEPA directs the Port to integrate natural and social sciences and give consideration to environmental amenities and values in all its decision making. *See* RCW 43.21C.030(2)(a)–(b). Requiring the Port to utilize the Council’s EIS when negotiating the terms of a lease for the oil terminal

would enable the Port to comply with these important SEPA mandates and furthers the statute's overarching goal of informed decision making. *See Leschi Improvement Council*, 84 Wn.2d at 285 (approval of a project "impliedly, if not expressly," determines that the project is consistent with SEPA's policies and requirements).

Regardless of the scope of EFSLA's exemption of the requirement for an agency other than the Counsel to prepare an EIS, it was well within Ecology's authority to issue rules prohibiting such non-lead agencies from limiting their own alternatives until the Council's EIS is complete. SEPA gives Ecology broad authority to promulgate "rules of interpretation and implementation of [SEPA]." RCW 43.21C.110(1). SEPA also authorizes Ecology to issue rules governing the "use of environmental documents in...decision making and the implementation of the substantive policies and requirements of [SEPA]." RCW 43.21C.110(1)(l); *see also* RCW 43.21C.110(1)(g), (j) (giving Ecology authority to issue rules governing SEPA obligations when more than one agency is involved in a project, including rules related to the use of an EIS for multiple actions).

Ecology's SEPA regulations are entitled to "substantial deference." *See* RCW 43.21C.095. The Court should interpret these regulations and EFSLA, "to the fullest extent possible," in accordance with SEPA's primary objective of ensuring environmentally informed decision making.

See RCW 43.21C.030(1). So construed, the provisions are read in harmony to require that the Council prepare the EIS for the proposed oil terminal and to prohibit the Port from limiting its own alternatives until that SEPA process is complete.

C. The Lease Unlawfully Limited the Port's Alternatives.

The Court of Appeals correctly determined that the lease was an “action” for purposes of SEPA’s prohibition on actions that limit alternatives. *See Columbia Riverkeeper*, 189 Wn. App. at 814–15. “[U]pon certification by the Council the lease agreement essentially will be binding on the Port.” *Id.* at 815. The Port’s authority to mitigate impacts from the proposed oil terminal existed solely through its ability to negotiate the terms of the lease. The Port thus violated SEPA’s prohibition on limiting alternatives by executing the lease before the SEPA process was complete.

The lease constitutes the “entire agreement” between the Port and Tesoro-Savage and describes, with particularity, the oil terminal to be built and operated. *See* CP 332. The lease specifies, for example, the terminal’s design and “Permitted Uses,” CP 0273–74, 0277, the duration of the project, CP 0274, 0282–83, closure and environmental reclamation requirements, CP 0300–01, and the pollution insurance requirements. CP 278, 309–10. The Port is not free to renegotiate the express terms of the lease based upon information disclosed through the SEPA process.

The Port makes two arguments as to why the lease does not violate the prohibition on limiting alternatives. First, the Port points out that development of the terminal is contingent upon certification by the Council and the Governor under EFSLA. Br. of Resp'ts, p. 39. Second, the Port argues that it retained discretion to respond to impacts disclosed in the EIS. *Id.* at pp. 41–42. Neither argument is availing.

The Court of Appeals appropriately rejected the Port's first contention. Construction of the terminal is conditioned upon Tesoro-Savage obtaining the necessary approvals and it is expected that the Council will complete SEPA review before deciding whether to certify the project under EFSLA. *See* CP 281. However, that has no bearing on whether the Port violated its SEPA obligations by taking an action that limits the Port's alternatives before the EIS issued. *See Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 317, 230 P.3d 190 (2010) (SEPA review was required before city approval of a development plan, even though it would "not result in immediate land use changes," because "once adopted by the federal government..., it will bind the City as to the use of that property"). By signing the lease, the Port has taken an action because "upon certification by the Council the lease agreement essentially will be binding on the Port." *See Columbia Riverkeeper*, 189 Wn. App. at 815.

The Port's reliance on its own future decisions is similarly unavailing. The lease includes detailed preliminary premises descriptions, but explains that the parties "have not determined the precise boundaries" and it therefore provides that the Port and Tesoro-Savage "*shall develop mutually agreeable* depictions and legal descriptions" of the leased areas. CP 273 (emphasis added). Similarly, the lease provides that "a final Facility Operation and Safety Plan *shall be mutually approved* prior to operation of the Facility." CP 330 (emphasis added). Whatever limited discretion the Port has under these two terms, the Port plainly did not retain the ability to renegotiate the extensive, detailed, and express terms of the lease or to insist on new terms not contemplated by the lease. To the contrary, the Port committed itself to "work diligently and in good faith to pursue all necessary...approvals required for the development and construction" of the oil terminal as described in the lease—including these two final mutual approvals required under the lease. CP 281.

D. The Port's Failure to Await the Council's EIS Before Negotiating the Lease Undermined SEPA's Objectives.

Negotiating and finalizing the terms under which the Port would host the nation's largest crude-by-rail terminal without an EIS undermined SEPA's objective of informed and well-reasoned decision making. Indeed, the record demonstrates that the Port would have benefited from precisely

the type of information and analysis that would be contained in an EIS when negotiating the terms of the lease.

For example, local developer Barry Cain is considering a large riverfront multi-use project for downtown Vancouver near the site of the proposed oil terminal. *See* CP 217–18, 260–62. This proposed “Columbia Waterfront” development would involve around 15,000 residents and employees and likely provide a greater economic benefit than the proposed oil terminal. CP 217–18.

Mr. Cain informed the Port Commissioners that he is concerned about safety issues, noting recent oil train crashes and the amount of train traffic proposed for the terminal. CP 217–218, 252. Mr. Cain explained that the crude-by-rail facility may make it difficult to finance or insure his project. CP 217–18; *see also* CP 258 (a community member testified that the oil terminal “is putting the waterfront development in jeopardy”).

The Commissioners seemed to recognize such impacts. Commissioner Wolfe asked questions related thereto, which included a discussion of the need to develop an emergency response plan that includes the Columbia Waterfront development. *See* CP 260–61. Commissioner Baker told Mr. Cain that she “hopes the port can work through the issues with the waterfront group” and that “she wants the Columbia Waterfront to be successful as a portion of that property is

leased from the port.” CP 262. “Commissioner Wolfe stated *his frustration and biggest concern*” was the request for the Commissioners to “*approve a lease before the permitting process is complete*”—presumably a reference to the Council’s EIS and certification process. CP 261 (emphasis added). SEPA was designed to prevent such uninformed decision making.

The Council’s EIS will evaluate and disclose the full impacts of the proposed oil terminal. Such information would enable the Port to determine whether the terminal and the Columbia Waterfront project are compatible and whether mitigation measures are needed to ensure the success of both projects. The Port lost its ability to make informed decisions on such matters when it executed the lease before completion of the EIS. This undermined SEPA’s core function. *See Stempel*, 82 Wn.2d at 118 (SEPA “is an attempt by the people to shape their future environment by deliberation, not by default.”). As Commissioner Wolfe explained, that was “like putting the cart before the horse.” CP 262.

V. CONCLUSION.

WHEREFORE, Plaintiffs-Petitioners respectfully request the Court reverse the decision of the Court of Appeals and remand the matter with instructions to vacate the Port’s approval of the lease. *See Noel v. Cole*, 98 Wn.2d 375, 378–83, 655 P.2d 245 (1982) (action taken without SEPA compliance is *ultra vires* and void at its inception).

RESPECTFULLY SUBMITTED this 1st day of April, 2016.

KAMPMEIER & KNUTSEN, PLLC

By: s/ Brian A. Knutsen

Brian A. Knutsen, WSBA No. 38806
833 S.E. Main Street, No. 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; Fax: (206) 860-4187
Email: knoll@igc.org

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

**APPENDIX OF
STATUTES
AND
REGULATIONS**

TABLE OF CONTENTS

Statutes

| | |
|---------------------|----|
| RCW 43.21C.010..... | 1 |
| RCW 43.21C.020..... | 2 |
| RCW 43.21C.030..... | 4 |
| RCW 43.21C.095..... | 6 |
| RCW 43.21C.110..... | 7 |
| RCW 43.21C.400..... | 10 |
| RCW 53.08.080..... | 11 |
| RCW 80.50.180..... | 12 |

Rules

| | |
|---------------------|----|
| WAC 197-11-030..... | 13 |
| WAC 197-11-050..... | 14 |
| WAC 197-11-055..... | 15 |
| WAC 197-11-070..... | 16 |
| WAC 197-11-600..... | 17 |
| WAC 197-11-714..... | 18 |
| WAC 197-11-786..... | 19 |
| WAC 197-11-922..... | 20 |
| WAC 197-11-938..... | 21 |
| WAC 463-47-020..... | 22 |

RCW 43.21C.010

Purposes.

The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and [to] stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

RCW 43.21C.020

Legislative recognitions—Declaration—Responsibility.

(1) The legislature, recognizing that a human being depends on biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of a human being's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (a) Foster and promote the general welfare; (b) create and maintain conditions under which human beings and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

RCW 43.21C.030

**Guidelines for state agencies, local governments—Statements—
Reports—Advice—Information.**

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on the environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the worldwide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

RCW 43.21C.095

State environmental policy act rules to be accorded substantial deference.

The rules adopted under RCW 43.21C.110 shall be accorded substantial deference in the interpretation of this chapter.

RCW 43.21C.110

Content of state environmental policy act rules.

It shall be the duty and function of the department of ecology:

(1) To adopt and amend rules of interpretation and implementation of this chapter, subject to the requirements of chapter 34.05 RCW, for the purpose of providing uniform rules and guidelines to all branches of government including state agencies, political subdivisions, public and municipal corporations, and counties. The proposed rules shall be subject to full public hearings requirements associated with rule adoption. Suggestions for modifications of the proposed rules shall be considered on their merits, and the department shall have the authority and responsibility for full and appropriate independent adoption of rules, assuring consistency with this chapter as amended and with the preservation of protections afforded by this chapter. The rule-making powers authorized in this section shall include, but shall not be limited to, the following phases of interpretation and implementation of this chapter:

(a) Categories of governmental actions which are not to be considered as potential major actions significantly affecting the quality of the environment, including categories pertaining to applications for water right permits pursuant to chapters 90.03 and 90.44 RCW. The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment. The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review. An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter.

(b) Rules for criteria and procedures applicable to the determination of when an act of a branch of government is a major action significantly affecting the quality of the environment for which a detailed statement is required to be prepared pursuant to RCW 43.21C.030.

(c) Rules and procedures applicable to the preparation of detailed statements and other environmental documents, including but not limited to rules for timing of environmental review, obtaining comments, data and other information, and providing for and determining areas of public

participation which shall include the scope and review of draft environmental impact statements.

(d) Scope of coverage and contents of detailed statements assuring that such statements are simple, uniform, and as short as practicable; statements are required to analyze only reasonable alternatives and probable adverse environmental impacts which are significant, and may analyze beneficial impacts.

(e) Rules and procedures for public notification of actions taken and documents prepared.

(f) Definition of terms relevant to the implementation of this chapter including the establishment of a list of elements of the environment. Analysis of environmental considerations under RCW 43.21C.030(2) may be required only for those subjects listed as elements of the environment (or portions thereof). The list of elements of the environment shall consist of the "natural" and "built" environment. The elements of the built environment shall consist of public services and utilities (such as water, sewer, schools, fire and police protection), transportation, environmental health (such as explosive materials and toxic waste), and land and shoreline use (including housing, and a description of the relationships with land use and shoreline plans and designations, including population).

(g) Rules for determining the obligations and powers under this chapter of two or more branches of government involved in the same project significantly affecting the quality of the environment.

(h) Methods to assure adequate public awareness of the preparation and issuance of detailed statements required by RCW 43.21C.030(2)(c).

(i) To prepare rules for projects setting forth the time limits within which the governmental entity responsible for the action shall comply with the provisions of this chapter.

(j) Rules for utilization of a detailed statement for more than one action and rules improving environmental analysis of nonproject proposals and encouraging better interagency coordination and integration between this chapter and other environmental laws.

(k) Rules relating to actions which shall be exempt from the provisions of this chapter in situations of emergency.

(l) Rules relating to the use of environmental documents in planning and decision making and the implementation of the substantive policies and requirements of this chapter, including procedures for appeals under this chapter.

(m) Rules and procedures that provide for the integration of environmental review with project review as provided in RCW 43.21C.240. The rules and procedures shall be jointly developed with the department of commerce and shall be applicable to the preparation of environmental documents for actions in counties, cities, and towns planning under RCW36.70A.040. The rules and procedures shall also include procedures and criteria to analyze planned actions under RCW 43.21C.440 and revisions to the rules adopted under this section to ensure that they are compatible with the requirements and authorizations of chapter 347, Laws of 1995, as amended by chapter 429, Laws of 1997. Ordinances or procedures adopted by a county, city, or town to implement the provisions of chapter 347, Laws of 1995 prior to the effective date of rules adopted under this subsection (1)(m) shall continue to be effective until the adoption of any new or revised ordinances or procedures that may be required. If any revisions are required as a result of rules adopted under this subsection (1)(m), those revisions shall be made within the time limits specified in RCW 43.21C.120.

(2) In exercising its powers, functions, and duties under this section, the department may:

(a) Consult with the state agencies and with representatives of science, industry, agriculture, labor, conservation organizations, state and local governments, and other groups, as it deems advisable; and

(b) Utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies, organizations, and individuals, in order to avoid duplication of effort and expense, overlap, or conflict with similar activities authorized by law and performed by established agencies.

(3) Rules adopted pursuant to this section shall be subject to the review procedures of chapter 34.05 RCW.

RCW 43.21C.400

Unfinished nuclear power projects—Council action exempt from this chapter.

Council actions pursuant to the transfer of the site or portions of the site under RCW 80.50.300 are exempt from the provisions of this chapter.

RCW 53.08.080

Lease of property—Authorized—Duration.

A district may lease all lands, wharves, docks and real and personal property owned and controlled by it, for such purposes and upon such terms as the port commission deems proper: PROVIDED, That no lease shall be for a period longer than fifty years with option for extensions for up to an additional thirty years, except where the property involved is or is to be devoted to airport purposes the port commission may lease said property for such period as may equal the estimated useful life of such work or facilities, but not to exceed seventy-five years: PROVIDED FURTHER, That where the property is held by the district under lease from the United States government or the state of Washington, or any agency or department thereof, the port commission may sublease said property, with option for extensions, up to the total term and extensions thereof permitted by such lease, but in any event not to exceed ninety years.

RCW 80.50.180

Proposals and actions by other state agencies and local political subdivisions pertaining to energy facilities exempt from "detailed statement" required by RCW 43.21C.030.

Except for actions of the council under chapter 80.50 RCW, all proposals for legislation and other actions of any branch of government of this state, including state agencies, municipal and public corporations, and counties, to the extent the legislation or other action involved approves, authorizes, permits, or establishes procedures solely for approving, authorizing or permitting, the location, financing or construction of any energy facility subject to certification under chapter 80.50 RCW, shall be exempt from the "detailed statement" required by RCW 43.21C.030. Nothing in this section shall be construed as exempting any action of the council from any provision of chapter 43.21C RCW.

WAC 197-11-030

Policy.

(1) The policies and goals set forth in SEPA are supplementary to existing agency authority.

(2) Agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and laws of the state of Washington in accordance with the policies set forth in SEPA and these rules.

(b) Find ways to make the SEPA process more useful to decisionmakers and the public; promote certainty regarding the requirements of the act; reduce paperwork and the accumulation of extraneous background data; and emphasize important environmental impacts and alternatives.

(c) Prepare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made.

(d) Initiate the SEPA process early in conjunction with other agency operations to avoid delay and duplication.

(e) Integrate the requirements of SEPA with existing agency planning and licensing procedures and practices, so that such procedures run concurrently rather than consecutively.

(f) Encourage public involvement in decisions that significantly affect environmental quality.

(g) Identify, evaluate, and require or implement, where required by the act and these rules, reasonable alternatives that would mitigate adverse effects of proposed actions on the environment.

WAC 197-11-050

Lead agency.

(1) A lead agency shall be designated when an agency is developing or is presented with a proposal, following the rules beginning at WAC 197-11-922.

(2) The lead agency shall be the agency with main responsibility for complying with SEPA's procedural requirements and shall be the only agency responsible for:

- (a) The threshold determination; and
- (b) Preparation and content of environmental impact statements.

WAC 197-11-070

Limitations on actions during SEPA process.

(1) Until 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:

- (a) Have an adverse environmental impact; or
- (b) Limit the choice of reasonable alternatives.

(2) In addition, certain DNSs require a fourteen-day period prior to agency action (WAC 197-11-340(2)), and FEISs require a seven-day period prior to agency action (WAC 197-11-460(4)).

(3) In preparing environmental documents, there may be a need to conduct studies that may cause nonsignificant environmental impacts. If such activity is not exempt under WAC197-11-800(17), the activity may nonetheless proceed if a checklist is prepared and appropriate mitigation measures taken.

(4) This section does not preclude developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection (1).

WAC 197-11-600

When to use existing environmental documents.

(1) This section contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA.

(2) An agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents.

(3) Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:

(a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may assume lead agency status (WAC 197-11-340 (2)(e) and 197-11-948).

(b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

(c) For EISs, the agency concludes that its written comments on the DEIS warrant additional discussion for purposes of its action than that found in the lead agency's FEIS (in which case the agency may prepare a supplemental EIS at its own expense).

**** *

**** *

**** *

WAC 197-11-714

Agency.

(1) "Agency" means any state or local governmental body, board, commission, department, or officer authorized to make law, hear contested cases, or otherwise take the actions stated in WAC 197-11-704, except the judiciary and state legislature. An agency is any state agency (WAC 197-11-796) or local agency (WAC 197-11-762).

(2) "Agency with environmental expertise" means an agency with special expertise on the environmental impacts involved in a proposal or alternative significantly affecting the environment. These agencies are listed in WAC 197-11-920; the list may be expanded in agency procedures (WAC 197-11-906). The appropriate agencies must be consulted in the environmental impact statement process, as required by WAC 197-11-502.

(3) "Agency with jurisdiction" means an agency with authority to approve, veto, or finance all or part of a nonexempt proposal (or part of a proposal). The term does not include an agency authorized to adopt rules or standards of general applicability that could apply to a proposal, when no license or approval is required from the agency for the specific proposal. The term also does not include a local, state, or federal agency involved in approving a grant or loan, that serves only as a conduit between the primary administering agency and the recipient of the grant or loan. Federal agencies with jurisdiction are those from which a license or funding is sought or required.

(4) If a specific agency has been named in these rules, and the functions of that agency have changed or been transferred to another agency, the term shall mean any successor agency.

(5) For those proposals requiring a hydraulic project approval under RCW 75.20.100, both the department of game and the department of fisheries shall be considered agencies with jurisdiction.

WAC 197-11-786

Reasonable alternative.

"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. (See WAC 197-11-440(5) and 197-11-660.) Also see the definition of "scope" for the three types of alternatives to be analyzed in EISs (WAC 197-11-792).

WAC 197-11-922

Lead agency rules.

The rules for deciding when and how an agency is the lead agency (WAC 197-11-050) are contained in this part. The method and criteria for lead agency selection are in WAC 197-11-924. Lead agency rules for different types of proposals as well as for specific proposals are in WAC 197-11-926 through 197-11-940. Rules for interagency agreements are in WAC 197-11-942 through 197-11-944. Rules for asking the department of ecology to resolve lead agency disputes are in WAC 197-11-946. Rules for the assumption of lead agency status by another agency with jurisdiction are in WAC 197-11-948.

WAC 197-11-938

Lead agencies for specific proposals.

Notwithstanding the lead agency designation criteria contained in WAC 197-11-926 through 197-11-936, the lead agency for proposals within the areas listed below shall be as follows:

(1) For all governmental actions relating to energy facilities for which certification is required under chapter 80.50 RCW, the lead agency shall be the energy facility site evaluation council (EFSEC); however, for any public project requiring such certification and for which the study under RCW 80.50.175 will not be made, the lead agency shall be the agency initiating the project

**** ****

**** ****

**** ****

CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the State of Washington, that I am co-counsel for Plaintiffs-Petitioners Columbia Riverkeeper and Northwest Environmental Defense Center and that on April 1, 2016, I caused the foregoing Supplemental Brief of Plaintiffs-Petitioners Columbia Riverkeeper and Northwest Environmental Defense Center to be served on the following in the manner indicated:

| | |
|---|---|
| David Markowitz Kristin Asai Lynn Gutbezahl 1211 SW Fifth Ave., Suite 3000 Portland, OR 97204 davidmarkowitz@markowitzherbold.com kristinasai@markowitzherbold.com lynnngutbezahl@markowitzherbold.com | <input type="checkbox"/> Messenger (hand delivery) <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail (per agreement with counsel) |
| Lawson Fite Attorney at Law 5100 SW Macadam, Suite 350 Portland, OR 97239 lawsonfite@gmail.com | <input type="checkbox"/> Messenger (hand delivery) <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail (per agreement with counsel) |

s/ Brian A. Knutsen
Brian A. Knutsen, WSBA No. 38806

OFFICE RECEPTIONIST, CLERK

To: Brian Knutsen
Cc: David Markowitz; Kristin Asai; lynngutbezahl@markowitzherbold.com; lawsonfite@gmail.com; 'knoll lowney' (knoll@igc.org)
Subject: RE: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., No. 92335-3

Received 4/1/16

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: Brian Knutsen [mailto:brian@kampmeierknutsen.com]
Sent: Friday, April 01, 2016 4:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: David Markowitz <davidmarkowitz@markowitzherbold.com>; Kristin Asai <kristinasai@markowitzherbold.com>; lynngutbezahl@markowitzherbold.com; lawsonfite@gmail.com; 'knoll lowney' (knoll@igc.org) <knoll@igc.org>
Subject: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., No. 92335-3

Clerk of the Court,

Please accept for filing in the matter of Columbia Riverkeeper, et al. v. Port of Vancouver, et al., No. 92335-3, the attached Supplemental Brief of Plaintiffs-Petitioners Columbia Riverkeeper and Northwest Environmental Defense Center.

Thank you, Brian.

Brian A. Knutsen, WSBA No. 38806
Kampmeier & Knutsen PLLC
833 S.E. Main Street
Mail Box No. 318; Suite 327
Portland, OR 97214
Tel: (503) 841-6515
Email: brian@kampmeierknutsen.com
<http://kampmeierknutsen.com>