

From: John Karpinski <karpjd@comcast.net>
Sent: Wednesday, November 13, 2013 5:06 PM
To: EFSEC (UTC); John Karpinski (home)
Subject: EFSEC scoping comments of John Karpinski 11/13/13

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Energy Facility Site Evaluation Council
re Port of Vancouver/Tesoro Savage Vancouver energy distribution terminal
re: introductory and scoping comments
re: application number 2013 -- 01
re: Docket number EF --131590

I Introductory Comments

Thank you for the opportunity to provide comments on this issue of local, statewide national and international importance. Also thank you very much for your reasonable accommodation of my disability at the Vancouver hearing.

For those of you who are not familiar with me, I'm a (now retired) Vancouver attorney whose practice focused on protecting the environment for over 20 years. My CV is below.

As it is difficult for me to prepare formal legal documents anymore, please accept this more refined outline as my testimony in this case. Hopefully, it will be sufficiently clear.

II Objections/scoping comments for the record

- My comments focus on SEPA, but equally relevant to NEPA

A) PORT CANNOT TAKE ANY ACTION THAT WILL LIMIT THE CHOICE OF REASONABLE ALTERNATIVES DURING SEPA REVIEW

I) object to the Port of Vancouver entering into a lease with Tesoro prior to final EIS as a violation of WAC 197 -- 11 -- 070

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.**

B) LEASES NOT EXEMPT FROM SEPA

WAC 197 -- 11 -- 800 (5)(c) Categorical exemptions

(5) **Purchase or sale of real property.** The following real property transactions by an agency shall be exempt:

(c) The lease of real property **when the use of the property for the term of the lease will remain essentially the same as the existing use**, or when the use under the lease is otherwise exempted by this chapter.

C) PORT LEASE IS AN ACTION UNDER SEPA...A PUBLIC ACTION.

1) lease is an action under WAC 197-11-704

(1) "Actions" include, as further specified below:

(a) New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies;

(b) New or revised agency rules, regulations, plans, policies, or procedures; and

(c) Legislative proposals.

(2) Actions fall within one of two categories:

(a) **Project actions.** A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to **agency decisions to:**

(i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.

(ii) Purchase, sell, **lease**, transfer, or exchange natural resources, including **publicly owned land, whether or not the environment is directly modified.**

2) Lease is a **public proposal** under WAC 197-11-784

"Proposal" means a proposed action. A proposal includes both **actions** and regulatory decisions of **agencies** as well as any actions proposed by applicants.

D) NO ACTION ALTERNATIVE REQUIRED BY SEPA; obviated by lease

WAC 197-11-440 EIS contents

(5) Alternatives including the proposed action.

(a) This section of the EIS describes and presents the proposal (or preferred alternative, if one or more exists) and alternative courses of action.

(b) Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.

(i) The word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.

(ii) The "no-action" alternative shall be evaluated and compared to other alternatives.

(iii) 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.

(c) This section of the EIS shall:

(i) Describe the objective(s), proponent(s), and principal features of reasonable alternatives. Include the proposed action, including mitigation measures that are part of the proposal.

(ii) Describe the location of the alternatives including the proposed action, so that a lay person can understand it. Include a map, street address, if any, and legal description (unless long or in metes and bounds).

(iii) Identify any phases of the proposal, their timing, and previous or future environmental analysis on this or related proposals, if known.

(iv) Tailor the level of detail of descriptions to the significance of environmental impacts. The lead agency should retain any detailed engineering drawings and technical data, that have been submitted, in agency files and make them available on request.

(v) Devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action. The amount of space devoted to each alternative may vary. One alternative (including the proposed action) may be used as a benchmark for comparing alternatives. The EIS may indicate the main reasons for eliminating alternatives from detailed study.

(vi) Present a comparison of the environmental impacts of the reasonable alternatives, and **include the no action alternative**. Although graphics may be helpful, a matrix or chart is not required. A range of alternatives or a few representative alternatives, rather than every possible reasonable variation, may be discussed.

(vii) Discuss the benefits and disadvantages of reserving for some future time the implementation of the proposal, as compared with possible approval at this time. The agency perspective should be that each generation is, in effect, a trustee of the environment for succeeding generations. Particular attention should be given to the possibility of **foreclosing future options by implementing the proposal**.

E) Lease in violation of SEPA is an *Ultra vires* act

Noel v. Cole, 98 Wash. 2d 375, 655 P.2d 245 (1982) Gov't approval issued in violation of SEPA is *ultra vires*

F) SCOPING NOTICE FROM EFSEC FAILS TO REQUIRE COMPREHENSIVE REVIEW

1) **fails to include impacts including**, but not limited to

- Exporting oil impacts
 - Only need for a deep water port is for oil export
 - In the alternative, if project claims only domestic use of the shale oil, EFSEC should put condition of approval that any change to allow export of the oil must go through another full EFSEC review, as well as a SEPA and NEPA EIS

- Extra jurisdictional impacts
- WAC 197 -- 11 -- 060 4 b
 - Includes entire transportation system

- indirect impacts including the precedent of future dirty energy related projects
- WAC 197 -- 11 -- 060 4 d

- cumulative impacts
- WAC 197 -- 11 -- 060 4 d
- catastrophic impacts...like explosions/dead people/spills who live everywhere the rail line, and river/ocean spills
- WAC 197- 11 -794

(1) "Significant" as used in SEPA means a **reasonable likelihood of more than a moderate adverse impact on environmental quality.**

(2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact.

The severity of an impact should be weighed along with the likelihood of its occurrence. An **impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.**

2) fails to discuss required alternatives

- No action/no lease alternative
- Other potential uses that create equal or greater # jobs at a lesser environmental impact

G.Object to the failure to circulate the EFSEC scoping notice to the mailing list the port of Vancouver

I am on the SEPA mailing list for the Port of Vancouver, and for the record I believe that EFSEC should've circulated its SEPA scoping notice to all interested parties on the Port of Vancouver's SEPA mailing list. If this was indeed circulated to the Port list, and I somehow did not get it, my apologies and I withdraw this objection.

III Conclusion

The environmental impact statement (EIS) in this case must be broadly scoped in terms of impacts and alternatives as humanly possible. It also must be deemed a public project and subject to a public projects alternatives and impacts analysis. On this crucial issue of international proportion, getting the best available knowledge in terms of impacts and alternatives is not only legally required, but it's in the best public interest.

Thank you again for the opportunity to comment.

Sincerely yours,

John S Karpinski

John S. Karpinski

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Summary Statement

The Law Office of John Karpinski represents neighbors, neighborhoods, and environmental groups regarding the impacts of development since 1985.
My practice area is in southwest Washington, but I have been fortunate to also have the opportunity to help preserve the environment in the San Juan's. **I am on an indefinite health sabbatical.**

About John S. Karpinski

Law School:

1982 University of Oregon School of Law
Advanced Certificate-Natural Resources Law: University of Oregon 1982

Honors and Awards:

Who's Who in American Law 2004-present
Sammy (Salmon protection award) award, Clark County 2008
Clark Skamania Fly Fishers Conservationist of the Year 2000
Outstanding Contributions Award from Audubon, Sierra Club, Clark County Water Quality Resources Council 1992

Special Licenses/Certifications:

WA Supreme Court 1983
US District Court-Western WA 1983
US Court of Appeals- 9th Cir. 1994

Bar/Professional Activity:

Current WA State Bar Assn. member #13142.
Former member of Clark Co. Bar Assn. Superior Court Bench/Bar Committee.

Pro bono/Community Service:

1998-2003 Vice President, WEC (Washington Environmental Council)
Former Chair and co-founder, Clark County Natural Resources Council

Clark College Paralegal Advisory Committee-former
Sierra Club- President/Chair Loo Wit Group (Vancouver) 1984-1986
Clark County Democratic Party Parliamentarian - former
Clark County's Project Habitek (Environmental Chair) which help protect the northern Vancouver Lake Lowlands from industrial development
Clark County Project TIPIT (Co Chair) 6 year road plan... recommended reserving road capacity on 192nd for jobs. (1993-5)
Clark County "Blue Ribbon" committee
Clark County Freeholder - 2nd highest # of votes
Vancouver Critical areas and water committees -numerous

Scholarly Lectures and Writings:

CLE WSBA-14th Annual Criminal Justice Institute "PUBLIC DISCLOSURE DISCOVERY STRATEGIES" 2007
CLE Univ of Oregon Law School: LAND USE AS A (PAYING) CAREER TO PROTECT THE ENVIRONMENT 2008
CLE Univ of Oregon Law School Baby NEPAs Grow Teeth: Adding Bite to Environmental Review SEPA 2010
CLE Univ of Oregon Law School COMMON LAW ENVIRONMENTAL REMEDIES 2000
CLE Univ of Oregon Law School Strategic Lawsuits Against Public Participation (SLAPPs) 2003
CLE Univ of Oregon Law School Local Science, Local Protection 2003
CLE Univ of Oregon Law School LAND USE STRATEGIES FOR ENVIRONMENTAL PRESERVATION 1990
CLE Univ of Oregon Law School HOW TO START YOUR OWN ENVIRONMENTAL LAW PRACTICE 1990
CLE Clark Co Bar Assn :Public Records Act
CLE Clark Co Bar Assn Growth Management Act

Verdicts and Settlements:

- Won two Washington Supreme Court cases on the same day 9/9/9 *Currens* and *CRA* (see below)
- *Currens v. Sleek, et al.*, 138 Wn.2d 858, 983 P.2d 626 (1999) changed the common law of Washington. It now protects neighbors from drainage damage by creating an exception to the "common enemy" rule.
- *Concerned Ratepayers Ass'n v. Public Util Dist. No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999). This Public Records Act case required the release of documents "used" by the CPU even if not currently "retained" in the CPU's possession.
- Got "3 strikes" attorney fees to a neighbor under RCW 4.84.370 as well as significant conditions on a Storedahl proposed expansion of gravel pit operations in *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn.App. 1 (2005).
- In *CCNRC v Clark Co.*, 96-2-0017 the Western Growth Board helped set "Best available Science" as a substantive GMA requirement.
- Filed first GMA appeal in WA history, *CCNRC v Clark Co.* 92-2-0001 (1992)

- Won numerous favorable rulings regarding Clark Co. and its City's GMA compliance in *CCNRC v Clark Co*, 96-2-0017 and *Achen v Clark Co* (Consolidated case) 95-2-0067
- *Lawrence v City of Camas*, 35592-2-II (2008) Division 2 Court of Appeals supported appeal for more tree protections

Other Outstanding Achievements:

Projects not built that Karpinski was involved in include:

- A Union Carbide Toxic Gas production facility in Washougal, WA,(1986-87)
- The "Pioneer Airport", a proposed Clark County Jet airport between 2 wildlife refuges (1989-91)
- The Circle C landfill, the County buying a Superfund site and using it for the County's garbage, just 5' above our drinking water supplies (1990-1992)
- Protected a salmon spawning bed from development, now the site of the Columbia Environmental Learning Center

Projects that Karpinski lost the legal proceedings, but the projects have not (YET) been built ,or the offending part has not been built:

- The power lines blocking the views of Prune Hills outside Camas, Wa (power lines on Prune Hills portion buried)
- The Lakeside Asphalt Batch Plant in Brush Prairie, WA (1999-2009)
- The Salmon Creek Walmart in Vancouver, WA

Projects that Karpinski had some notable results in other counties.

- Stopped the proposed GSX (Georgia Strait Crossing) natural gas Pipeline through a underwater nature preserve in the San Juan County 2004
- Getting the first EIS in Kelso history... on Geological stability (1994; about a year before the infamous Aldercrest landslide)
- Stopping a trade of a State Park in Long Beach for a sensitive area, the Bolstad dunes; helped get Dunes protected
- Got the 2nd and 3rd EIS's in Skamania County history, on 2 gravel pits (gravel pits not "built")

Other notable cases Karpinski was involved in:

- Spotted Owl Case. opposed the release of Old Growth Timber Cutting Moratorium before Judge Dwyer (1994-6)
- Co-Counseled the 4D regulations case regarding the federal salmon protection rules.(2000-2001)
- Co-Counseled various clean water act cases against the Clark Co and the City of Vancouver.

Educational Background:

JD Univ. of Oregon Law school 1982

Advanced Certificate-Natural Resources Law: University of Oregon 1982,

BS Biology and Environmental Sciences (Dual Majors) Northern Ill. Univ. 1978

Talented Student Scholarship-debate

National Merit Scholar