Exh. RXS-32

Order on Motion to Dismiss and for Partial Summary Judgment, PCHB No. 19-087c (3/26/2021)

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ADVOCATES FOR A CLEANER TACOMA, SIERRA CLUB, WASHINGTON ENVIRONMENTAL COUNCIL, WASHINGTON PHYSICIANS FOR SOCIAL RESPONSIBILITY, STAND.EARTH, and THE PUYALLUP TRIBE OF INDIANS, Appellants, v. PUGET SOUND CLEAN AIR AGENCY and PUGET SOUND ENERGY, Respondents.	PCHB No. 19-087c ORDER ON MOTION TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

On December 19, 2019, Advocates for a Cleaner Tacoma, Sierra Club, Washington Environmental Council, Washington Physicians for Social Responsibility, and Stand.Earth (collectively, ACT) appealed Puget Sound Clean Air Agency's (PSCAA) Order of Approval to Construct No. 11386 (Permit) the Tacoma Liquefied Natural Gas project (Tacoma LNG) issued to Puget Sound Energy (PSE) on December 10, 2019.

On December 19, 2019, The Puyallup Tribe of Indians (Tribe) also appealed the Permit. The two appeals were consolidated.[1] ACT and the Tribe will be referred collectively as Appellants.

[1] To avoid issues related to possible improper service, ACT also intervened in the Tribe's appeal of the Permit. *See* Order Granting Intervention, PCHB No. 19-087c (January 24, 2020).

PSE filed a Motion to Dismiss and for Partial Summary Judgment (PSE's Motion). PSCAA joined PSE's Motion. The Tribe opposed PSE's Motion. ACT joined the Tribe's opposition and filed a cross motion for partial summary judgment on Issue 1 (ACT's Cross Motion).

Attorneys Jan E. Hasselman and Jaimini Parekh represented ACT. Attorneys Andrew S. Fuller, Geoff Bridgman and Nicholas G. Thomas represented the Tribe. Attorneys Erin L. Anderson, Tadas A. Kisielius, Sara Leverette and Clara Park represented PSE. Attorneys Jennifer A. Dold and Jennifer Elias represented PSCAA. The Pollution Control Hearings Board (Board) considering the motions was comprised of Board Chair Neil L. Wise and members Carolina Sun-Widrow and Michelle Gonzalez. Heather C. Francks, Administrative Appeals Judge, presided for the Board.

The Board reviewed the following materials in deliberating on the Motions:

1. Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment (*PSE's Motion*);
2. Declaration of Tadas A. Kisielius in support of Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment and Exhibits 1-18 (*Kisielius Decl.*);
3. Puget Sound Clean Air Agency's Joinder in Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment (*PSCAA's Joinder*);
4. Appellant the Puyallup Tribe of Indians' Response to Respondent Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment (*Tribe's Response*);

5. Declaration of Ranajit Sahu in support of Appellant the Puyallup Tribe of Indians' Response to Respondent Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment and Exhibits A-B (*Sahu Decl*.);
6. Declaration of Andrew S. Fuller in support of Appellant the Puyallup Tribe of Indians' Response to Respondent Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment and Exhibits A-Q (*Fuller Decl*.);
7. Declaration of Nicholas G. Thomas in Support of Appellant The Puyallup Tribe of Indians' Response to Respondent Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment;
8. [ACT's] Opposition to Motion to Dismiss and for Partial Summary Judgment (*ACT's Opp. / Cross Motion*);
9. Declaration of Jaimini Parekh in support of Opposition to Motion to Dismiss and for Partial Summary Judgment and Exhibits 1-20 (*Parekh Decl*.);
10. Puget Sound Clean Air Agency's Reply in support of Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment (*PSCAA Reply*);
11. Declaration of Jennifer A. Dold and Exhibits A-F (*Dold Decl*.);
12. Puget Sound Energy's Response to ACT's Cross Motion and Reply in support of Motion to Dismiss and for Partial Summary Judgment (*PSE Response/Reply*);
13. Declaration of Tadas A. Kisielius in support of Puget Sound Energy's Reply in support of Motion to Dismiss and for Partial Summary Judgment and Exhibits A-J (*Second Kisielius Decl*.);

14. [ACT's] Reply in support of Cross Motion for Partial Summary Judgment and sur-reply in support of Opposition to Respondent's Motion to Dismiss (*ACT Reply/Surreply*);

15. Appellant the Puyallup Tribe of Indians' surreply, objections and Motion to Strike Improper reply arguments by PSE and PSCAA in support of Respondent Puget Sound Energy's Motion to Dismiss/Partial Summary Judgment (*Tribe Surreply/ Strike Motion*)[2];

16. Puget Sound Energy's and Puget Sound Clean Air Agency's Joint Response to Puyallup Tribe's Motion to Strike (*PSE/PSCAA Response to Strike Motion*);

17. Puyallup Tribe's Reply in support of Motion to Strike Improper reply arguments by PSE and PSCAA in support of Respondent Puget Sound Energy's Motion to Dismiss/Partial Summary Judgment (*Tribe Strike Reply*);

18. Declaration of Nicholas G. Thomas in support of Puyallup Tribe's Reply in support of Motion to Strike Improper reply arguments by PSE and PSCAA in support of Respondent Puget Sound Energy's Motion to Dismiss/Partial Summary Judgment and Exhibit A (*Thomas Decl*.);

19. Puget Sound Energy's Notice of Partial Withdrawal of Motion to Dismiss and for Partial Summary Judgment with respect to Issue 4(b) and limited reply to Puyallup

[2] The Tribe filed a motion to strike improper reply arguments by PSE and PSCAA. The presiding officer hereby denies the motion on the grounds that the replies responded to arguments raised by Appellants in their responses and cross motion.

Tribe of Indian's supplemental response;[3] second motion for CR 56(f) continuance (*PSE Withdrawal Notice*);

20. Declaration of Tadas A. Kisielius in support of Puget Sound Energy's Withdrawal of Motion to Dismiss and for Partial Summary Judgment with respect to Issue 4(b) and reply to Puyallup Tribe's supplemental response and Exhibits 1-2 (*Third Kisielius Decl.*);
21. Puget Sound Clean Air Agency's Joinder in Puget Sound Energy's Notice of Withdrawal of Motion to Dismiss and for Partial Summary Judgment with respect to Issue 4(b) (*PSCAA Withdrawal Joinder*);
22. Van Slyke Decl. in Support of PSCAA's Response to Motions for Stay; (*Van Slyke Stay Decl.*); and
23. The Board's file in the matter.

Based upon the evidence submitted and the written materials filed, the Board enters the following decision:

II. BACKGROUND

PSE proposes to construct Tacoma LNG, a liquefaction, storage and marine bunkering facility and marine fueling system, on land leased from the Port of Tacoma. The purpose of the project is to receive natural gas from PSE's distribution system, chill the natural gas to produce approximately 250,000 to 500,000 gallons of LNG daily, and to store up to 8 million gallons of

[3] As PSE withdrew its motion as to Issue 4(b), the Board did not consider Puyallup Tribe of Indian's Supplemental Response to PSE's Motion to Dismiss and/or Partial Summary Judgment re Issue 4(b) and second Motion for CR 56(f) continuance or the related declarations.

LNG on site. PSE planned to distribute LNG for use as marine transportation fuel by Totem Ocean Trailer Express (TOTE) at its Port of Tacoma Facility, along with other potential future regional LNG marine fuel customers. During times of peak gas demand, 66,000 dekatherms of LNG would be regasified and reinjected into PSE's distribution system. PSE is also proposing to load LNG onto trucks and barges for use by other regional markets seeking an alternative fuel source. As of December 2020, the TOTE vessel conversion to LNG was delayed until early 2022. *Bridgman Decl., Ex. 9 (Littauer Dep. p. 20)*. PSE is seeking other marine customers as well as trucking companies who would use LNG to fuel their vehicles. *Id., (Littauer Dep. pp. 21-22)*. PSE has a customer, Potelco, who anticipates using LNG to fuel its fleet of trucks. *PSE's Response to Puyallup Tribe's Motion to Bifurcate the Issues, p. 11*.

Tacoma LNG is located on the peninsula between the Blair and Hylebos waterways adjacent to the Puyallup Indian Reservation. *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency*, PCHB No. 19-087c, p. 5 (March 16, 2020).

Tacoma LNG required a number of permits from various agencies and jurisdictions. Among them was a shoreline substantial development permit that PSE sought from the City of Tacoma. In September 2014, the City of Tacoma, acting as lead agency under the State Environmental Policy Act (SEPA), ch. 43.21C RCW, determined that Tacoma LNG required an Environmental Impact Statement to assess the potential environmental impacts of the project. The review resulted in a Final Environmental Impact Statement (FEIS) in 2015. *Advocates for a Cleaner Tacoma*, PCHB No. 19-087c, pp. 5-6.

Meanwhile, construction of the project proceeded and is expected to be completed in the second quarter of 2021. In early 2020, the remaining work included construction of foundations and installation of equipment that was subject to the Permit; completion of plant-wide piping, electrical and controls systems; final site civil work and landscaping; frontage improvements; plant commissioning and testing. In 2017, PSE applied to PSCAA for a Notice of Construction (NOC) for Tacoma LNG. During PSCAA's review of PSE's Permit application, PSCAA concluded that the FEIS did not account for "upstream" greenhouse gas (GHG) emissions associated with natural gas extraction and transmission. PSCAA decided that a supplemental EIS using the "lifecycle" approach to characterizing GHG emissions was needed. Lifecycle analysis identifies and quantifies all GHG emissions associated with natural gas extraction and transmission, on site LNG production and storage, and "downstream" end uses of the LNG. PSCAA initiated a Final Supplemental Environmental Impact Statement (SEIS) process and hired consultants to assess lifecycle GHG emissions. Since the FEIS process, the Tacoma LNG project had changed to primarily supply fuel for marine and other uses rather than the peak shaving (supplying additional gas for PSE's customers during periods of peak demand) addressed in the FEIS. PSCAA issued a draft SEIS for public comment in late 2018. *Advocates for a Cleaner Tacoma* PCHB No. 19-087c, pp. 6-7.

The draft SEIS compared a No Action alternative to PSE's Proposed Action, construction of the Tacoma LNG facility to produce 250,000 to 500,000 gallons per day of LNG for use by marine customers, including TOTE, as well as regasification into the PSE natural gas system for peak shaving purposes. Additional uses would include providing LNG to other industries or

merchants such as fuel for long haul trucks or other marine transportation uses. Two scenarios were included in the SEIS lifecycle analysis: Scenario A (based on a PSE facility production rate of 250,000 gallons per day) and Scenario B (based on a PSE facility production rate of 500,000 gallons per day). The draft SEIS concluded that the use of LNG produced by the Proposed Action, instead of petroleum based fuels for marine vessels, trucks and peak shaving, is predicted to result in an overall decrease in GHG emissions in the Puget Sound region, a net beneficial impact compared to the No Action alternative. In response to comments, PSCAA had its consultants perform various new analyses to confirm the findings of the draft SEIS and to update the sensitivity analysis with new assumption comparisons including global warming and methane leakage.[4] The SEIS was finalized in March 2019. PSCAA issued a draft Permit Approval for public comment in July 2019. PSCAA issued the final Permit in December 2019. *Advocates for a Cleaner Tacoma*, PCHB No. 19-087c pp. 7-8. The Permit was signed by PSCAA staff, Ralph Munoz, Reviewing Engineer, and Carole Cenci, Compliance Manager. *Kisielius Decl., Ex. 9, p. 9*.

ACT and the Tribe separately appealed the Permit, challenging the SEIS and the Permit on numerous grounds. The Board consolidated the appeals for hearing.

III. ANALYSIS

The issues before the Board in this Motion are as follows**:**

[4] The sensitivity analysis illustrates in a summary fashion how different variables could affect the overall GHG emissions in the lifecycle analysis, both up and down. *Advocates for a Cleaner Tacoma*, PCHB No. 19-087c, p. 8 n.4.

1. Whether the Puget Sound Clean Air Agency's ("PSCAA") December 10, 2019 Order of Approval ("Order of Approval") is ultra vires and invalid because it was issued by PSCAA staff and not the PSCAA Board.

2. Whether the supplemental environmental impact statement ("SEIS") assessing lifecycle greenhouse gas emissions that supported the Order of Approval was arbitrary, unreasonable, incorrect, or otherwise not in compliance with the State Environmental Policy Act ("SEPA"), including but not limited to the following:
   a. The SEIS relies on an incorrect and unsupported claim of 1-for-1 fuel displacement, and an assumption that fuel use will not change over 40 years, that masks the greenhouse gas ("GHG") impacts of the Order of Approval.
   b. The SEIS fails to utilize best available science in assessing GHG impacts.
   c. The SEIS fails to acknowledge that maintenance of high-GHG-emissions status quo for the lifetime of the project is a "significant" impact under SEPA.
   d. The SEIS relies on displacement and/or mitigation that is unavailable under the project as currently configured, and otherwise fails to assess the current configuration of the project.
   e. The SEIS fails to properly address the facility's emissions of N2O, a potent greenhouse gas.
   f. The SEIS relies on scenarios that have not undergone SEPA review.

3. Whether the final environmental impact statement ("FEIS"), produced by the City of Tacoma, was arbitrary, unreasonable, incorrect, or otherwise not in compliance with SEPA, including but not limited to the following:
   a. PSCAA's reliance on the FEIS is erroneous when the project has changed substantially in scope and purpose since issuance of the FEIS in November of 2015.
   b. The FEIS fails to adequately disclose and analyze all non-GHG air and water emissions and impacts.
   c. The FEIS fails to adequately disclose and analyze project safety and accident risk, and deliberately withheld key documentation related to safety.
   d. The FEIS fails to evaluate the direct, indirect, and cumulative impacts of trains, vessels, and trucks traveling to and from Tacoma LNG.
   e. The FEIS fails to adequately disclose cumulative effects.
   f. The FEIS did not follow mandatory SEPA procedures in the FEIS process, including but not limited to inadequate notice.

4. Whether the Puget Sound Clean Air Agency's ("PSCAA") December 10, 2019 Order of Approval ("Order of Approval") violates PSCAA Regulations, the Washington Clean Air Act (RCW Ch. 70.94), and/or the federal Clean Air Act, including but not limited to the following:

a. Whether PSCAA's conclusions concerning Tacoma LNG's emissions and the impacts from those emissions are erroneous when PSCAA relied on modeling using non- representative meteorological data.
b. Whether PSCAA's Order of Approval is premature when the design of Tacoma LNG was not yet complete and continued to change at the time PSCAA determined PSE's NOC Application was complete and when the Order of Approval was issued, and it was likely that the facility's design and its operations would need to undergo revisions, which would likely result in changes to facility details having bearing on the facility's emissions.
c. Whether PSCAA's Order of Approval is invalid, when PSCAA's decision to grant the Order of Approval was made in reliance on performance specification and process details that were not provided to PSCAA, including those from Chicago Bridge & Iron and other unidentified "vendors."
d. Whether PSCAA erred in concluding that Tacoma LNG is not a Major Source of one or more pollutants, including volatile organic compounds (VOCs)?
e. Whether PSCAA erroneously concluded that Tacoma LNG's emissions are below the Clean Air Act's regulatory thresholds, emission, and air quality standards.
f. Whether PSCAA erroneously concluded that the emissions from Tacoma LNG will not violate WAC 173-400-111, WAC 173-400-112, and WAC 173-400-113 (i.e., not cause or contribute to a violation of any ambient air quality standard).
g. Whether PSCAA erroneously concluded that Tacoma LNG's emissions will not exceed applicable acceptable source impact levels (ASIL).
h. Whether PSCAA erroneously concluded that Tacoma LNG's emissions will not exceed applicable small quantity emission rate (SQER) limits.
i. Whether PSCAA's Order of Approval is invalid, where a first-tier ambient concentration screening analysis was performed before all emissions of HAPs and TAPs from the flare were estimated.
j. Whether PSCAA violated WAC 173-460-060 by failing to require a demonstration that Tacoma LNG will employ BACT for all TAPs for which the increase in emissions will exceed *de minimis* emission values found in WAC 173-460-150.
k. Whether the Order of Approval's requirement that "the sole source of natural gas supply used in all operations at the Tacoma LNG facility comes from British Columbia or Alberta, Canada" is enforceable.
l. Whether PSCAA's issuance of the Order of Approval is contrary to principles of environmental justice, including Executive Order 12898 as well as PSCAA's mandate concerning avoiding environmental injustices.
m. Whether PSCAA's issuance of the Order of Approval violates its obligations under Title VI of the Civil Rights Act (42 U.S.C. § 2000d et seq.)?
n. Whether PSCAA's issuance of the Order of Approval violates the Tribe's right to the equal protection of the laws?

o. Whether PSCAA's Order of Approval incorrectly fails to include the requirements of NSPS Subpart OOOOa (40 C.F.R. § 60.5430a et seq.) relating to the handling of acid gas from the facility.
p. Whether PSCAA's Order of Approval incorrectly fails to include a requirement that Tacoma LNG monitor and control fugitive GHG and VOC emissions in accordance with NSPS Subpart OOOOa (40 C.F.R. § 60.5430a et seq.).
q. Whether PSCAA's Order of Approval incorrectly fails to require Tacoma LNG to comply with the National Emission Standards for Hazardous Air Pollutants (NESHAP) rules on marine tank vessel loading operations (40 C.F.R. § 63.560 et seq.).
r. Whether PSCAA's Order of Approval incorrectly fails to require the submission of risk management and hazard management plans as required under 40 C.F.R. Part 68.
s. Whether PSCAA's Order of Approval incorrectly fails to include the requirements of NSPS Subpart 1111 (40 C.F.R. 60.4200 et seq.) relating to the monitoring and performance of the facility's on-site emergency diesel generator.
t. Whether PSCAA's Order of Approval incorrectly fails to include the requirements of NSPS Subpart ZZZZ (40 C.F.R. 63.6580 et seq.) relating to the monitoring and performance of the facility's on-site emergency diesel generator.
u. Did PSCAA violate the Clean Air Act by allowing a known source of significant amounts of pollution to achieve BACT through "good combustion practices", when PSCAA fails to define that standard and when there are known and reasonably available methods which, if implemented, would better ensure the facility is not violating pollution standards?
v. Whether the Order of Approval is valid in light of PSCAA's failure to consider the impacts on the airshed of trains traveling to and from Tacoma LNG.
w. Whether PSCAA erred in claiming that it cannot consider cumulative effects of air pollution without "[n]ew legislation."

5. Whether respondents violated the Clean Air Act by constructing, and/or authorizing construction, prior to issuance of the Order of Approval.

In PSE's Motion, PSE moved to dismiss Issues 1; 3(b); 3(c); 3(d); 3(e); 3(f); 4(b)[5]; 4(f); 4(k); 4(l); 4(m); 4(n); 4(o); 4(p); 4(q); 4(r); 4(s); 4(t); 4(v); and 5. PSCAA joined PSE's Motion. The Tribe opposed PSE's Motion. In the course of briefing, the Tribe noted it did not

[5] PSE sought summary judgment on Appellants' Issue 4(b) on the basis that it improperly asks for an advisory opinion from the Board. Later PSE withdrew its Motion as to Issue 4(b). *PSE Withdrawal notice.*

oppose dismissal of Issues 4(n), 4(q), 4(r), 4(s), 4(t) and 5. *Tribe's Response*, p. 2. ACT filed a cross motion for partial summary judgment on Issue 1 and joined the Tribe's opposition. In its response to ACT's cross motion, PSE clarified that it inadvertently listed Issue 4(v) as among those it sought summary judgment, and that it was not seeking to dismiss 4(v) in its motion. *PSE's Response/Reply, p.1, n.2.* ACT sought and was granted a continuance to obtain discovery on Issue 4(b). *Order on Motion for Continuance and to Consolidate* (July 16, 2020). After determining that additional relevant discovery remained outstanding on Issue 4(b), PSE withdrew its Motion as to Issue 4(b). *PSE Withdrawal Notice.*

The issues remaining for the Board to decide in this Motion are: 1; 3(b); 3(c); 3(d); 3(e); 3(f); 4(f); 4(k); 4(l); 4(m); 4(o); and 4(p).

A. Standard of review[6]

Summary judgment is a procedure available to avoid unnecessary trials where there is no genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

[6] Because the parties relied on evidence outside of the pleadings (i.e., numerous declarations and attachments) and the Board reviewed those materials in considering PSE's Motion, ACT's cross motion, and other pleadings, the Board will treat the motions as requests for summary judgment even though PSE's Motion is partially entitled a motion to dismiss. *See*, CR 12(b) and (c) (if on a motion to dismiss matters outside the pleadings are presented to and not excluded by the court, motion shall be treated as one for summary judgment and disposed of as provided in CR 56)

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc*., 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

Summary judgment is subject to a burden shifting scheme. If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co*., 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Tario v. Dep't of Ecology*, PCHB No. 05-091, p. 12 (March 2, 2006). In a summary judgment proceeding, all facts and reasonable inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

B. Issue 1—Validity of Order issued by PSCAA staff

Issue 1 asks whether PSCAA's Permit is ultra vires and invalid under the Washington Clean Air Act, former ch. 70.94 RCW because it was issued by PSCAA staff and not the PSCAA Board.[7] PSE moves for summary dismissal on Issue 1, joined by PSCAA. PSCAA also separately filed a reply in support of PSE's Motion, in which PSCAA also urges dismissal of Issue 1 as a matter of law. ACT cross moves on Issue 1, joined by the Tribe. At bottom, Issue 1

[7] In 2020, the Legislature recodified former ch. 70.94 RCW as ch. 70A.15 RCW with no substantive changes. *See* Laws of 2020, ch. 20, (June 11, 2020). Because former ch. 70.94 RCW was in effect at the time of the relevant events here, citations will be to the former statute.

turns on interpretation of Clean Air Act statutes and implementing PSCAA regulations; thus, this issue can be decided as a matter of law as the parties urge.[8]

PSE and PSCAA both argue that Issue 1 should be dismissed as Clean Air Act statutes and implementing regulation authorize PSCAA staff to issue the Order of Approval at issue.[9] PSE further argues that because statute and implementing PSCAA regulation plainly authorize PSCAA staff to issue Order of Approvals, Appellants' challenge to the Order of Approval at issue amounts to a facial challenge to the statute and PSCAA regulation over which the Board lacks jurisdiction. *PSE's Motion, pp. 11-12; PSCAA Reply, pp. 21-26.*

ACT argues that the Permit is invalid because it was signed by PSCAA staff rather than the PSCAA Board, contending that former RCW 70.94.152 requires that the PSCAA Board issue the approval order on PSE's notice of construction application for a new source of air contaminant emission. The Board concludes that former RCW 70.94.170 and Agency Reg. I, § 3.01 authorize PSCAA staff to issue the Order of Approval.

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[8] On March 16, 2020, the Board issued an Order Denying Motions to Stay the effect of the Permit. *Advocates for Cleaner Tacoma v. Puget Sound Clean Air Agency (*March 16, 2020). Appellants jointly petitioned for judicial review of the Order under RCW 43.21B.320(5), and for summary judgment (party aggrieved by denial or grant of stay by the Board may petition Thurston County Superior Court for review under the Administrative Procedure Act, ch. 34.05 RCW pending appeal on the merits before the Board). The superior court issued an Order Denying Summary Judgment and Motion for Expedited Relief in which the court rejected the Appellants' claim that the Permit is ultra vires and invalid, concluding that the plain terms of RCW 70.94.170 allows for issuance of the Permit in the manner done so here by PSCAA. *See Advocates for Cleaner Tacoma v. Puget Sound Clean Air Agency*, No. 20-2-01371-34 (Thurston County Sup. Ct. Nov. 2, 2020). Appellants then appealed the decision to Court of Appeals, Div. II, Case No. 55448-8-II.

[9] Permits issued to sources of air contaminants under the state Clean Air Act are called Notice of Construction (NOC) Orders of Approval. Van Slyke Decl. in Support of PSCAA's Response to Motions for Stay, ¶4. A NOC application is required by the Act to establish a new source of air emissions, or to replace or substantially alter a source's control equipment that prevents or controls emission of any air contaminant. Former RCW 70.94.152-.153; PSCAA Reg. I, § 6.03, p. 6-3.

The fundamental purpose in interpreting statutes is to ascertain and carry out the intent of the legislature. *Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 468, 387 P.3d 670 (2017). If a statute's meaning is plain on its face, courts give effect to that plain meaning as an expression of legislative intent. *Id.* The plain meaning of words in a statute is not gleaned from words alone but from "all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." *State v. Evergreen Freedom Found*., 192 Wn.2d 782, 790, 432 P.3d 805, 809 (2019).

The Clean Air Act authorizes creation of local air authorities like PSCAA to implement the requirements of the Act to regulate stationary sources of air contaminant emissions. Former RCW 70.94.053; former RCW 70.94.141. Former RCW 70.94.170 provides that:

> [a]ny activated air authority which has adopted an ordinance, resolution, or valid rules and regulations . . . for the control and prevention of air pollution shall appoint a full time control officer, whose sole responsibility shall be to observe and enforce the provisions of this chapter and all orders, ordinances, resolutions, or rules and regulations of such activated authority pertaining to the control and prevention of air pollution.

Former RCW 70.94.170; *see also* former RCW 70.94.130 (air pollution control authority board "may appoint a control officer, and any other personnel," and pay their salaries from authority funds).

Consistent with former RCW 70.94.170, PSCAA in 1968 adopted Regulation I, § 3.01, which mainly mirrors the statute. The regulation has been amended a few times, but the current regulation, which was in effect at the time relevant to the events of this case, provides that:

> Pursuant to the provisions of the "Washington Clean Air Act" (Chapter 70.94 RCW), the Board has appointed a Control Officer whose sole responsibility is to observe and enforce the provisions of the Act and all orders, rules, and regulations pursuant thereto, including but not limited to Regulations I, II, and III of the Puget Sound Clean Air Agency. The Control Officer is empowered by the Board to sign official complaints, issue citations, initiate court suits, or use other legal means to enforce the provisions of the Act.

PSCAA Reg. I, Art. 3, § 3.01 ("Duties and Powers of the Control Officer").

The plain terms of RCW 70.94.170 authorize PSCAA to appoint a full time control officer responsible for observing and enforcing "all orders, ordinances, resolutions, or rules and regulations" of air authorities. In other words, once a local air authority has adopted rules and regulations consistent with the Clean Air Act, the control officer implements those rules and regulations. And PSCAA Regulation I, § 3.01, which implements former RCW 70.94.170, further specifies that the "orders" that a control officer is responsible for implementing include PSCAA "Regulations I, II, and III." Because the PSCAA regulation addressing issuance of Orders of Approval for PSE's Notice of Construction application is contained in Regulation I, Article 6 (New Source Review), Regulation I, § 3.01 specifically authorizes the control officer to issue orders of approval.

Here, the challenged Order of Approval for Notice of Construction 11386 was issued by a reviewing engineer and a compliance manager. *Kisielius Decl., Ex. 9.* Although "control officer" is only defined as the "air pollution control officer of any authority," the parties do not dispute that PSCAA staff engineers constitute control officers.[10] They are therefore authorized

[10] Former RCW 70.94.030(9).

to issue the order of approval here under former RCW 70.94.170 and PSCAA Regulation I, § 3.01.[11]

Construing former RCW 70.94.170 as allowing PSCAA staff engineers to issue orders of approval also comports with the fact that notice of construction applications and resulting orders of approval involve a complex review of relevant law and many different types of sources and equipment to determine whether the new source of air contaminant will cause any exceedances of ambient air standards. *Van Slyke Stay Decl.*, ¶¶ *3-6, 8-10*; former RCW 70.94.152(4). The Order of Approval here is indicative of the complexity, as it authorizes PSE to construct the following equipment: one 66 MMBtu/hr LNG vaporizer, an enclosed ground flare with four burners, one 9MMBtu/hr water propylene glycol pretreatment heater, one 1.6 MMBtu/hr regeneration pretreatment heater and one 8 million gallon LNG storage tank. *Kisielius Decl., Ex. 9, p. 1*. Since the determination of whether to approve the air emissions from the listed new equipment, and whether to place conditions on the approval is a technical and complex one, Board staff with the required expertise are better suited than the PSCAA Board to issue orders of approval. *ACT's Opp. /Cross Mot., p. 8* (PSCAA Board members are elected officials under WAC 173-440-220(a)).

[11] This Board has previously concluded that an air authority's control officer is authorized to issue order of approvals under former RCW 70.94.152 and former RCW 70.94.170. *Inland Foundry Co. v. Spokane County Pollution Control Auth.*, PCHB No. 98-279, p. 2 (Conclusions of Law and Order Granting SCPCA's Mot. for Summ. J., June 10, 1999) ("SCAPCA's control officer is authorized to approve a notice of construction and issue a letter of approval pursuant to RCW 70.94.152 and RCW 70.94.170"). The Board's decision was affirmed by the Court of Appeals in an unpublished decision. *Inland Foundry Co. v. Spokane County Pollution Control Auth.,* No. 19210-5-III, 106 Wn. App. 1007, 2001 Wash. App. LEXIS 924, (Ct. App. May 1, 2001). In its Order denying Stay, the Board provided an incorrect cite to the unpublished decision affirming the Board's case. *Order denying Stay*, p. 15 n. 6 (March 16, 2020) (incorrectly citing 98 Wn. App. 1019, 1999 WL 1080108, at *2 (1999)).

The Board disagrees with Appellants' arguments to the contrary. Specifically, interpreting former RCW 70.94.170 to allow control officers to issue orders of approval will not create a slippery slope where control officers would assume other PSCAA duties such as adopting regulations. As Respondents note, the language of former RCW 70.94.170 prevents such slippery slope by specifying that control officers only observe and enforce those rules and regulations that have first been adopted by an air authority.

Appellants rely on former RCW 70.94.152 to support their claim that only the PSCAA Board can issue order of approvals. That statute sets out the process to apply for a Notice of Construction Order of Approval for a new source of air contaminant, and states in relevant part that:

> (3) Within thirty days of receipt of a notice of construction application, the department of ecology or board may require, as a condition precedent to the establishment of the new source or sources covered thereby, the submission of plans, specifications, and such other information as it deems necessary to determine whether the proposed new source will be in accord with applicable rules and regulations in force under this chapter. If on the basis of plans, specifications, or other information required under this section, the department of ecology or *board* determines that the proposed new source will be in accord with this chapter, and the applicable rules and regulations adopted under this chapter, *it* shall issue an order of approval for the establishment of the new source or sources, which order may provide such conditions as are reasonably necessary to assure the maintenance of compliance with this chapter and the applicable rules and regulations adopted under this chapter. Every order of approval under this chapter must be reviewed prior to issuance by a professional engineer or staff under the supervision of a professional engineer in the employ of the department of ecology or board.

RCW 79.94.152(3) (emphasis added). "Board" means the Board of Directors of PSCAA, and "Authority" means any air pollution control agency whose jurisdictional boundaries are

coextensive with the boundaries of one or more counties. Former 70.94.030(5), (8); PSCAA Reg. I, § 1.07(a), (e). Appellants emphasize the word "board" and "it" in former RCW 70.94.152(3) to argue that the plain language of the statute required that only PSCAA Board, not staff, issue the order of approval. *ACT's Opp./Cross Motion, p. 6.* Such an interpretation is not supported by the terms of the statute, ignores former RCW 70.94.170, and runs contrary to the principle that plain meaning is derived from reading "all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." *State v. Evergreen Freedom Found*., 192 Wn.2d 782, 790.

Indeed, other subsections of former RCW 70.94.152 also refer to "board" with respect to actions the board takes in connection with a notice of construction for a new source. Former RCW 70.94.152(9) ("board shall notify . . . applicant in writing that the application is complete"); former RCW 70.94.152(10) (notice of construction approval required under subsection (3) must include determination that new source achieve best available control technology). In arguing that PSCAA Board approval of notice of construction is not delegable to staff because it calls for exercise of discretion, Appellants agreed with PSCAA that sending application completeness letters is the kind of ministerial act that the PSCAA Board can and should delegate, whereas issuing approval orders cannot be delegated because it calls for the exercise of discretion. Appellants' position that the board task of sending out letters to applicants (also stated as a task that the "board shall" do) in subsection (9) can be done by PSCAA staff undercuts their argument that the terms of subsection (3) plainly require that only

the PSCAA board can issue orders of approval. *ACT Reply, p.12*. All subsections of former RCW 70.94.152 must be read consistently.

Because the Board resolves Issue 1 on the basis of the plain meaning of former 70.94.170 and former RCW 70.94.152, it need not consider whether the PSCAA board delegated its authority to issue orders of approval to its staff by way of resolution, or whether the claim that the order of approval is ultra vires is an impermissible facial challenge to former RCW 70.94.170 and PSCAA Reg. I, § 3.01. The Board grants PSE's Motion on Issue 1 and dismisses it.

C. Issue 3(b)-(f) – Validity of City of Tacoma FEIS

Issue 3 asks whether the 2015 City of Tacoma FEIS was arbitrary, unreasonable, incorrect, or otherwise not in compliance with SEPA, including but not limited to the following:

> **3(b) —Adequacy of FEIS' disclosure and analysis of non-GHG air and water emissions**
> **3(c) —Adequacy of FEIS' disclosure and analysis of project safety and accident risk, and deliberate withholding key documentation related to safety**
> **3(d) —Failure of FEIS to evaluate of direct, indirect, and cumulative impacts of trains, vessels, and trucks traveling to and from Tacoma LNG**
> **3(e) —Adequacy of FEIS' disclosure of cumulative effects**
> **3(f) —Failure of FEIS to follow mandatory SEPA procedures in FEIS process, including but not limited to inadequate notice.**

PSE moves for summary dismissal on Issues 3(b) – 3(f), joined by PSCAA. PSCAA also separately filed a reply in support of PSE's Motion, in which PSCAA also requests dismissal of the same issues as a matter of law. Respondents PSE and PSCAA argue that challenges to the FEIS are barred as untimely under the SEPA provision requiring appeals to EIS be filed within 21 days of issuance of a notice of action. RCW 43.21C.080(2)(a). Respondents further argue that challenges to the FEIS in Issues 3(b) – 3(f) are also barred by Appellants' failure to exhaust

administrative remedies and by the prohibition on collateral attacks. *PSE's Motion, pp. 15-19; PSCAA's Reply, pp. 33-40.* ACT opposes summary dismissal on these issues, joined by the Tribe. *ACT's Opp./Cross Motion, pp. 20-33.*

SEPA establishes a "notice of action" procedure that, if used, imposes a 21-day time period for appealing a substantive governmental action and any accompanying procedural determination such as the City of Tacoma FEIS at issue. RCW 43.21C.080(2); RCW 43.21C.075(8). The statute provides in relevant part that:

> (1) Notice of any action taken by a governmental agency may be publicized by the acting governmental agency, the applicant for, or the proponent of such action, in substantially the form as set forth in rules adopted under RCW 43.21C.110: . . . (a) [b]y publishing notice . . . in a legal newspaper . . .
> (2)(a) Except as otherwise provided in RCW 43.21C.075(5)(a), . . . any action to set aside, enjoin, review, or otherwise challenge any such governmental action *or subsequent governmental action* for which notice [of action] is given as provided in subsection (1) of this section on grounds of noncompliance with the provisions of this chapter *shall be commenced within twenty-one days from the date of last newspaper publication of the notice pursuant to subsection (1) of this section, or be barred*.
> (b) Any subsequent governmental action on the proposal for which notice has been given as provided in subsection (1) of this section shall not be set aside, enjoined, reviewed, or otherwise challenged on grounds of noncompliance with the provisions of RCW 43.21C.030(2)(a) through (h) unless there has been a substantial change in the proposal between the time of the first governmental action and the subsequent governmental action that is likely to have adverse environmental impacts beyond the range of impacts previously analyzed, or unless the action now being considered was identified in an earlier detailed statement or declaration of nonsignificance as being one which would require further environmental evaluation.

RCW 43.21C.080 (emphasis added). Here, the City of Tacoma published its FEIS for the Project on November 9, 2015. The City published a notice of action on November 19, 2015, on its action of administratively authorizing PSE to do demolition work at the Tacoma LNG site.

Kisielius Decl., Ex. 7. Under RCW 43.21C.080(2)(a), appeals of a SEPA determination like the City's FEIS must be brought within 21 days of the last date of publication of the notice of action. The City's notice of action itself stated that the 21-day deadline for any challenges was December 21, 2015. *Id.* Moreover, the notice of action procedure also precludes administrative or judicial challenges to the adequacy of SEPA review in any appeal of subsequent governmental action that rely on the same SEPA review. In other words, when notice of action has been issued, opponents must challenge the accompanying SEPA procedural determination (DNS, MDNS, or EIS) in relation to the action (here, the City authorizing demolition on Tacoma LNG site), and cannot wait to challenge the DNS, MDNS, or EIS in conjunction with an appeal of subsequent action on that proposal (here, PSCAA issuing order of approval). RCW 43.21C.080(2)(a); R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 20.05[3] (2019) (expiration of 21-day limitation period bars SEPA procedural challenges of any subsequent government action on same proposal unless two exceptions are met). Here, no party timely challenged the FEIS by the December 21, 2015, deadline. Thus, the challenges to the FEIS in issues 3(b) – 3(f) must be dismissed as time barred under RCW 43.21C.080(2)(a), unless Appellants demonstrate exceptions to the notice of action's preclusive effect in subsection 2(b) applies. *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 152, 19 P.3d 453 (2001); *Walker v. Dep't of Ecology*, PCHB No. 01-034 (June 5, 2001) (applying RCW 43.21C.080 to bar untimely SEPA challenge); *Millennium Bulk Terminals v. Cowlitz County*, SHB No. 17-017c, pp. 8, 19-21 (Apr. 20, 2018) (where notice of action had

been issued and no appeal filed, adequacy of previously unappealed FEIS could not be challenged in subsequent proceeding using earlier FEIS to deny a shoreline permits).

ACT nonetheless contends that PSCAA "reopened" SEPA review when it supplemented the FEIS with the SEIS on lifecycle greenhouse gas emissions, making the preclusive effect of the notice of action inapplicable. *ACT Opp./Cross Motion, pp. 21-25.* This is unsupported by the plain terms of RCW 43.21C.080(2)(b), case law, and the SEPA provisions on preparing supplemental EISs.

As stated, PSCAA determined that the FEIS did not account for "upstream" greenhouse gas (GHG) emissions associated with natural gas extraction and transmission and determined that a supplemental EIS using the "lifecycle" approach to characterizing GHG emissions was needed for its review of PSE's NOC application. *Dold Decl., Ex. B.* PSCAA then followed its own regulation and SEPA regulations on supplementing EISs. When PSCAA is not the SEPA agency, as here, PSCAA regulation directs that PSCAA "shall not prepare or require preparation of a DNS or EIS in addition to that prepared by the lead agency, unless required under WAC 197-11-600," but in some cases, PSCAA "may conduct supplemental environmental review under WAC 197-11-600." PSCAA Reg. I, § 2.04(b).

In turn, WAC 197-11-600 governs the use of existing environmental documents. Subsection (3) provides in part that an agency acting on the same proposal "shall use an environmental document unchanged except that for EISs, preparation of a supplemental EIS is required if there are "(i) [s]ubstantial changes . . . likely to have significant adverse environmental impacts . . . or (ii) [n]ew information indicating probable significant adverse

impact." WAC 197-11-600(3). Subsection (4) then gives agency the discretion to use existing environmental documents by *one or more of the following*: adoption (where an agency may use all or part of an existing environmental document), incorporation by reference, addendum or preparation of a SEIS, if there are, among other things, substantial changes likely to have significant adverse environmental impacts or new information indicating a proposal's probable significant adverse environmental impacts. WAC 197-11-600(4)(a)-(d). PSCAA was allowed under WAC 197-11-600(4) to use the FEIS and prepare an SEIS, thus refuting Appellants' claim that PSCAA committed procedural error by not adopting or incorporating by reference the City's FEIS.[12]

More importantly, Appellants provide no authority for the claim that by availing itself of the methods under WAC 197-11-600 of using an existing EIS and supplementing it, PSCAA somehow "reopened" SEPA review of the FEIS and bypassed the preclusive effect of the notice of action procedure in RCW 43.21C.080(2)(a). Indeed, the Court of Appeals in *Wells* differentiated between the standards for preparing an SEIS under WAC 197-11-600(3)(b)(ii) and the standard for applying the exception to RCW 43.21C.080(2)(b)'s preclusive effect.

In *Wells*, the water district had issued a SEPA notice of action to build a sewage interceptor for which an EIS had been prepared. No one appealed the EIS within the 21-day period triggered by the notice of action. *Wells*, 105 Wn. App. at 150. Later, the water district obtained a conditional use permit which opponents of the project challenged, arguing that a

[12] Furthermore, WAC 197-11-620(1) directs that the SEIS should not include analysis of actions, alternatives, or impacts that is in the previously prepared EIS.

supplemental EIS should have been prepared because of "new information" under WAC 197-11-600(4). The Court of Appeals held that opponents did not satisfy the "new information" standard, and that even if the standard was met, the claim that the EIS should have been supplemented was precluded by the notice of action unless the two exceptions to the notice of action's preclusive effect under RCW 43.21C.080(2)(b) could be established. *Id*., at 152-53. Since neither exception applied, the court rejected the claim that a supplemental EIS should have prepared. *Id*. In sum, the weight of authority does not support Appellants' claim that PSCAA's use of the City's FEIS and preparation of the SEIS in reviewing PSE's NOC application eliminates the preclusive effect of the notice of action. *See also*, *Settle*, *supra*, at § 20.05[3]; *May v. Robertson*, SHB No. 06-031 (Apr.16, 2007) (issuance of correction and addendum to environmental document did not justify reopening earlier environmental document unless challenger can establish exceptions to the preclusive effect of notice of action under RCW 43.21C.080(2)(b)). The preclusive effect of the notice of action still applies unless Appellants can show that one of the two exceptions to the preclusive effect applies.

Two exceptions to the preclusive effect of the notice of action procedure are provided in RCW 43.21C.080(2)(b). Appellants only argue that the first of the two exceptions apply here: "a substantial change in the proposal between the time of the first governmental action and the subsequent governmental action that is likely to have adverse environmental impacts beyond the range of impacts previously analyzed." RCW 43.21C.080(2)(b).

Specifically, Appellants contend that PSE made changes to the Tacoma LNG project after the City issued its FEIS that qualifies as a substantial change under RCW 43.21C.080(2)(b).

The change ACT identifies is eliminating bunkering on the Hylebos waterway (with ships refueling only on the Blair waterway) and the possible attendant increased risk of fire and explosion from concentrating refueling in one place. *ACT's Opp./Cross Motion, pp. 25-27.* ACT claims that neither the City nor PSCAA evaluated or further analyzed the possible risks associated with this change, and thus urges the Board "to review whether safety risks were adequately disclosed pursuant to SEPA" under the exception in RCW 43.21C.080(2)(b). *ACT's Opp./Cross Mot., p. 27.*

PSCAA replies that ACT's argument above falls under Issue 3(a), which ACT so acknowledges. *ACT Opp./Cross Mot., p. 25.* Issue 3(a) is not the subject of dismissal in PSE's instant motion. Issue 3(a) challenges the City's FEIS on the basis that PSCAA's reliance on the FEIS is erroneous when the project has changed substantially in scope and purpose since the FEIS was issued in November of 2015. *PSCAA Reply, p. 40.* Indeed, PSE states in its motion that "PSE does not seek to dismiss Appellants' claim that PSE has made substantial changes in the proposal that are likely to have adverse environmental impacts beyond the range of impacts previously analyzed in the FEIS. PSE contests these assertions, but is not seeking to dismiss those claims in this motion." *PSE's Motion, pp. 17, n.71.*[13]

[13] PSE's position shifts and becomes unclear as briefing progressed. In a lengthy footnote in its reply, PSE characterizes Issue 3(a) as challenging PSCAA's evaluation of the need for supplemental review under WAC 197-11-600 (requiring supplemental review when there are "substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts"). *PSE's Reply, p. 43, n.161.* PSE then states that the fact that Respondents did not seek to dismiss Issue 3(a) has no bearing on the Board's resolution regarding the preclusive effect of the notice of action on Issues 3(b) – 3(f) since the standard for supplemental review under WAC 197-11-600 in Issue 3(a) is different than the standard for notices of action in RCW 43.21C.080(2)(b).

Regardless of how the parties characterize Issue 3(a), that issue is not before the Board in the instant motion. With respect to LNG project changes made after the FEIS, ACT is only arguing that the change of eliminating vessel fuel bunkering in the Hylebos waterway qualifies as an exception to the preclusive effect of the notice of action under RCW 43.21C.080(2)(b), i.e., whether it's a substantial change that is likely to have adverse environmental impacts beyond the range of impacts previously analyzed in the FEIS. In the end, given PSE's statement in its motion that it was not seeking to dismiss such a claim, and ACT's acknowledgment that its argument falls under Issue 3(a), the Board does not consider it. To the extent Appellants claim that eliminating fuel bunkering at the Hylebos waterway or other changes to the project occurring after the issuance of the FEIS in November 2015 required supplemental environmental review under SEPA or otherwise violated SEPA, those arguments could be made under another issue.

Appellants also argue that that the City's notice of action was invalid, rendering its preclusive effect of RCW 43.21C.080(2)(b) inapplicable. *ACT's Opp./Cross Motion, pp. 28-29.* They contend that the City's notice of action was invalid because SEPA allows an agency to provide only one process for appealing a FEIS under RCW 43.21.075(3)(a), and the City had already provided such a process to the Shorelines Hearings Board when it issued its shoreline substantial development permit. *See* RCW 43.21.075(7) (shorelines hearings board has sole jurisdiction over both SEPA appeal and appeal under Shoreline Management Act). Given that under the City's municipal code and SEPA the shoreline permit already provided the sole basis

for an EIS appeal, Appellants conclude that the City created an impermissible second, separate process for appealing the FEIS by issuing a notice of action on its demolition permits.

The Board rejects Appellants' contention that the notice of action was invalid because it is premised on an incorrect understanding of when the shoreline permit was issued. At the time the City gave its notice of action on the demolition permits on November 19, 2015, no shoreline permit existed; and there was still no final shoreline permit at the expiration of the notice of action's 21-day time period on December 21, 2015. *Kisielius Decl., Ex. E, p. 11*; *Puyallup Tribe of Indians v. City of Tacoma*, SHB No. 16-002, p. 5 (April 27, 2016) (after reconsideration, City issued final shoreline permit with amended conditions in December 2015). Thus, the City did not create a second impermissible FEIS appeal process at the time it issued its notice of action.

Additionally, assuming, without deciding, that it was invalid, RCW 43.21C.080(2)(a) bars Appellants' invalidity challenge as untimely. The statute's time limit for SEPA challenges applies to "*any action* to set aside, enjoin, review, or otherwise challenge any such governmental action or subsequent governmental action for which notice [of action] is given . . . on grounds of noncompliance with the provisions of this chapter shall be commenced within twenty-one days[.]" RCW 43.21C.080(2)(a) (emphasis added). Here, Appellants filed the instant action challenging, among other things, that the notice of action was invalid under SEPA. The plain terms of RCW 43.21C.080(2)(a) precludes this untimely action. *See* RCW 43.21C.080(8) ("[f]or purposes of RCW 43.21C.080, the words "action", "decision", and "determination" mean substantive agency action including any accompanying procedural determinations under [SEPA] (*except where the word "action" means "appeal" in RCW 43.21C.080(2)* (Emphasis added)).

Because the Board's decision on these issues rests on the preclusive effect of the notice of action under RCW 43.21C.080(2)(a), the Board does not consider Respondents' additional claims that collateral estoppel principles and Appellants' alleged failure to exhaust administrative remedies bars their challenges to the FEIS in this proceeding.

The Board concludes that Issues 3(b)-(f) is dismissed; however, Appellants may raise the claim that changes PSE made to the LNG project after the issuance of the FEIS in November 2015 required supplemental environmental review under SEPA or otherwise violated SEPA.

D. Issue 4(f) —Violations of WAC 173-400-111, WAC 173-400-112, and WAC 173-400-113

Issue 4(f) provides:

> Whether PSCAA's December 10, 2019 Order of Approval violates PSCAA Regulations, the Washington Clean Air Act (RCW Ch. 70.94), and/or the federal Clean Air Act, including but not limited to the following: …
>
> f. Whether PSCAA erroneously concluded that the emissions from Tacoma LNG will not violate WAC 173-400-111, WAC 173-400-112, and WAC 173-400-113 (i.e., not cause or contribute to a violation of any ambient air quality standard).

PSE moves to dismiss Issue 4(f), joined in by PSCAA. PSCAA also separately filed a reply in support of PSE's Motion, in which PSCAA specifically requested that WAC 173-400-111 and WAC 173-400-112 be stricken from Issue 4(f). *PSCAA's Reply, pp. 43.* The regulations referenced in this issue relate to the process for reviewing a notice of construction for a new source of air pollutant emissions. Appellant Tribe filed a response to PSE's motion, joined in by ACT. In its response, the Tribe agreed with PSE that WAC 173-400-112 does not

apply. *Tribe's Response, p. 6.* Thus, Issue 4(f) only involves whether PSCAA erroneously concluded that Tacoma LNG emissions will not violate WAC 173-400-111 and WAC 173-400-113.

Entitled "Processing notice of construction applications for sources, stationary sources and portable sources," WAC 173-400-111 provides requirements for processing notice of construction applications, including: requirements for a complete application, coordination with ch. 173-401 WAC, criteria for approval, final determination, appeals, revisions, fees, and enforcement. WAC 173-400-111(1)-(10). Subsection (3) of the regulation states that order of approvals cannot be issued until the following criteria are met, and lists the requirements of WAC 173-400-113 as one of the criteria. WAC 173-400-111(3)(c). In turn, WAC 173-400-113 establishes substantive requirements in reviewing new source applications. WAC 173-400-113 (permitting authority reviewing new source application shall issue order of approval if the proposed project satisfies enumerated requirements). Those requirements include compliance with national and state emission standards for hazardous air pollutants, use of best available control technology, and compliance with ambient air quality standard. WAC 173-400-113.

PSE argues that PSCAA's order of approval on its notice of construction application cannot violate WAC 173-400-111 as a matter of law because the regulation establishes only procedural requirements that PSCAA must follow in processing its application for Tacoma LNG, and does not prohibit or limit any emissions from Tacoma LNG that could be violated. *PSE Motion, pp. 24-25*. The Tribe responds that WAC 173-400-111 is not merely "ministerial" because subsection (3) states that a notice of construction approval cannot be issued unless

substantive criteria are met, including requirements in ch. 173-460 WAC for control of new sources of toxic air pollutants which are in Issues 4(g)-(j) in this case. WAC 173-400-113(3)(h).

The Board concludes that WAC 173-400-111 does not limit or prohibit emissions except by reference in subsection (3) to other enumerated WACs that do contain emission requirements. Appellants have identified ch. 173-460 WAC as one such enumerated emission requirement, which they claim PSCAA erroneously concluded Tacoma LNG emissions will not violate. Appellants may raise such claim in the remaining issues. Neither PSE nor PSCAA addressed Issue 4(f)'s reference to WAC 173-400-113 in their briefing. Thus, PSE's motion to dismiss Issue 4(f) is granted only in part, with Issue 4(f) remaining for hearing solely as to compliance with WAC 173-400-113. Reference to other WACs in Issue 4(f) is stricken.

E. Issue 4(k) —Enforceability of requirement that the sole source of natural gas supply used in all operations at the Tacoma LNG facility comes from British Columbia or Alberta, Canada

Issue 4(k) asks whether PSCAA's December 10, 2019, Order of Approval violates PSCAA Regulations, the Washington Clean Air Act (RCW Ch. 70.94), and/or the federal Clean Air Act, including but not limited to the following: … (k) the Order of Approval's requirement that "the sole source of natural gas supply used in all operations at the Tacoma LNG facility comes from British Columbia or Alberta, Canada" is enforceable. The requirement is contained in condition 41 of PSCAA's Order of Approval. PSE moves to dismiss this issue on two bases: (1) lack of Board jurisdiction over hypothetical future enforcement of a condition of approval "to the extent" that Appellants in this issue is challenging PSCAA's likelihood or manner of future

enforcement, and (2) Appellants' lack standing to raise the issue. PSCAA joins in PSE's motion, and also provided its separate arguments in its reply supporting PSE's motion. The Tribe and ACT oppose dismissal of Issue 4(k).

Condition 41 of the order of approval states that pursuant to provisions in SEPA statute and regulations, and PSCAA agency regulation relating to SEPA substantive authority to condition or deny a proposal, "[t]he owner and/or operator shall ensure" that Tacoma LNG's sole source of natural gas supply comes from British Columbia or Alberta, Canada." *Kisielius Decl., Ex. 9.* It further states that compliance with the condition "shall be verified by the owner and/or operator maintaining the following records," and specifies in great detail the required records/reports: monthly records on natural gas purchasing, delivery, receipt, and flow; reporting requirements in case gas flow is not north to south (from Canada to Tacoma LNG); and semiannual reporting requirements. *Id.*

Respondents argue that Issue 4(k) is essentially a claim that condition 41 may be violated and therefore concerns PSCAA's future enforcement of the condition, which the Board lacks jurisdiction to consider. *PSE's Motion, pp. 9-11; PSCAA's Reply, pp. 15-21.* Respondents cite numerous Board cases generally stating that the Board lacks jurisdiction to consider future violations and enforcement of those violations. Alternatively, Respondents argue that Appellants lack standing to raise Issue 4(k) because the alleged injury is a threatened, future one and therefore fails to satisfy the injury in fact element of standing. *Green v. Dep't of Ecology,* PCHB No. 07-012 (Aug. 22, 2007); *Magnolia Neighborhood Planning Council v. City of Seattle,* 155 Wn. App. 305, 312, 230 P.3d 190, *review denied,* 170 Wn.2d 1003 (2010).

The Board rejects the argument that Appellants lack standing to raise Issue 4(k) for failure to allege a concrete, immediate, and specific injury required to satisfy the injury in fact element of standing. This Board has repeatedly rejected claims that the Tribe lacked standing to challenge other permit approvals for Tacoma LNG. *The Puyallup Tribe of Indians v. Dep't of Ecology*, PCHB No. 16- 120C, pp. 16-17 (Jan. 16, 2018). Moreover, the Board agrees with Appellants that condition 41 is intertwined with Issue 2's challenge to the SEIS's analysis of greenhouse gas emissions that relies on mitigation such as condition 41 (discussed below). Respondents do not contest, and the Board does not find, that Appellants lack standing to challenge the SEIS.

As to whether Issue 4(k) is an improper order of approval enforcement matter, Appellants respond that the Board has jurisdiction over Issue 4(k) because it is essentially a SEPA issue in that it asks whether PSCAA can even rely on the condition as a means of ensuring SEPA compliance.[14] Respondents object to what they allege as the Tribe's recasting of Issue 4(k) from a future enforceability issue over which the Board lacks jurisdiction to a SEPA issue of whether PSCAA properly relied on condition 41 as mitigation to ensure compliance with SEPA and the Clean Air Act. However, both PSE and PSCAA agree that Appellants can indeed challenge

[14] Appellants explain that condition 41 is central to PSCAA's conclusion in its SEIS that operating the Tacoma LNG facility will result in overall decrease in greenhouse gas emissions in the Puget Sound region compared to the no action alternative because one of the key assumptions underlying that conclusion is that gas sourced from BC and Alberta has a very low rate of methane loss. SEIS, pp. 4-11 (in Ex. 1 to Bridgman Decl. in support of Tribe's Opp'n to PSE's Second Dispositive Mot.). The Tribe provides evidence that the natural gas pipeline feeding into Tacoma LNG has multiple sources and therefore cannot be traced to ensure that only BC and Alberta natural gas arrives at Tacoma LNG. *Sahu Decl., ¶¶ 7-8.*

condition 41 as part of their challenge to PSCAA's exercise of SEPA substantive authority to condition a proposal in Issue 2(d).

Appellants also argue that Issue 4(k) presents a fact dispute as to whether condition 41 can ensure that only British Columbia and Alberta natural gas arrives at Tacoma LNG. *Sahu Decl.*, ¶¶ *7-8.* The Board agrees that material questions of fact remain in Issue 4(k) since PSCAA contests Dr. Sahu's declaration, and contends that monthly records can prove the direction of natural gas flow to ensure that condition 41 is satisfied. *PSCAA Reply, pp. 19-20.*

Given that all parties agree that condition 41 is intertwined with the challenge to PSCAA's exercise of SEPA substantive authority to condition a proposal in Issue 2(d), and the Board's conclusion that genuine issues of material fact remain as to condition 41 of the Permit, the Board denies PSE's motion to dismiss Issue 4(k).

F. **Issue 4(l) —Whether order of approval is contrary to principles of environmental justice, including Executive Order 12898 as well as PSCAA's mandate concerning avoiding environmental injustices**.

PSE moves to dismiss Issue 4(l), joined in by PSCAA, on the basis that the Board lacks jurisdiction to consider it. PSCAA also separately argues in its reply that the Board lacks authority to consider this issue under RCW 43.21B.110. Executive Order 12898 is entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," and directs federal agencies to, among other things, identify and address disproportionately high and adverse human health or environmental effects of their actions on

minority and low income populations, and develop a strategy for implementing environmental justice.[15] 59 Fed. Reg. 7629, § 6-609 (Feb. 11, 1994); *Dold Decl*., *Ex. F*.

The Tribe identifies a PSCAA report on "Highly Impacted Communities" within its jurisdiction as an example of PSCAA's mandate to avoid environmental injustices. *Tribe's Response, p. 37, n.30.*

The Board is a creature of statute and has only those powers expressly granted to it or necessarily implied therein. RCW 43.21B.010; *Skagit Surveyors and Engineers LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998); *Kailin v. Clallam County*, 152 Wn. App. 974, 979, 220 P.23d 222 (2009). RCW 43.21B.110 defines the Board's subject matter jurisdiction, conferring authority on the Board to hear and decide appeals from certain enumerated "decisions" of state agencies and air pollution control authorities related to "the issuance, modification, or termination of any permit, certificate, or license by . . . [any air authority]." RCW 43.21B.110(1)(d). The Board also has jurisdiction to review "[a]ny other decision by the department [of Ecology] or air authority which pursuant to law must be decided as an adjudicative proceeding under ch. 34.05 RCW [APA]" RCW 43.21B.110(1)(i). An adjudicative proceeding under the APA results in an order that is limited to resolving the rights and duties of specific persons. *Am. Waterways Operators v. Dep't of Ecology*, 7 Wn. App. 2d 808, 818-19, 435 P.3d 856 (2019). Accordingly, the Board's jurisdiction to hear appeals of

[15] Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. United States Environmental Protection Agency, environmental justice webpage, https://www.epa.gov/environmentaljustice.

decisions from PSCAA is limited to permits, certificates, licenses, or an order resolving addressing the rights and duties of specific persons.

Resolving whether PSCAA's order of approval is contrary to environmental justice principles, including Executive Order 12898 and PSCAA's mandates on environmental injustices, would require the Board to adjudicate and/or enforce a federal executive order and PSCAA plans and policies, matters which the Board has ruled that it lacks subject matter jurisdiction.[16] Such a conclusion compels the Board to dismiss Issue 4(l). *Inland Foundry Co. Inc. v. Spokane County Air Pollution Control Authority*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999) (without subject matter jurisdiction, administrative tribunal can only enter dismissal order). However, the Board's dismissal of Issue 4(l) is not a comment on environmental justice principles implemented or being implemented.

Because the Board concludes that it lacks jurisdiction to consider compliance with federal executive orders, broad principles of environmental justice, and PSCAA's mandate in the form of PSCAA reports and strategic plans, the Board does not decide the parties' dispute over

[16] *West v. Dep't of Ecology,* PCHB No. 09-077, p. 11 (Oct. 29, 2009) (Board had no authority under RCW 43.21B.110 to consider claim that Ecology's issuance of NPDES permit violated National Environmental Policy Act, Open Public Meetings Act, and harbor improvement plan); *Kavanagh v. Spokane County Air Pollution Control Agency*, PCHB No. 89-127, p. 4 (Dec. 7, 1989) (Board lacked jurisdiction over claim that air permit violated county solid waste plan); *Devine v. Dep't of Ecology*, PCHB Nos. 09-075 and 09-082, p. 11. (Apr. 9, 2010) (Board lacked jurisdiction to consider water right transfer application's compliance with federal law; Board does not have jurisdiction to enforce federal law provisions); *Harrison v. Dep't of Ecology*, PCHB No. 04-074 (Nov. 10, 2004) (Board lacked jurisdiction over claim that water right transfer did not comply with Growth Management Act where water right transfer statute did not make compliance with Act a requirement); *West v. Weyerhaeuser Co*., PCHB No. 08-076, pp. 2-3 (Jan. 14, 2009) (Board had no jurisdiction over Ecology stormwater coverage determination under RCW 43.21B.110, which limits jurisdiction to orders issued pursuant to specific statutory provisions; referencing federal statutes does not confer jurisdiction absent showing that statutes provide right to adjudicate matter before Board).

whether Executive Order 12898 creates a right of action for judicial review or any other dispute under Issue 4(l) that does not concern the Board's jurisdiction under RCW 43.21B.110.

G. Issue 4(m) — Violation of PSCAA's obligations under Title VI of the Civil Rights Act (42 U.S.C. § 2000d et seq.)

Issue 4(m) asks whether PSCAA's issuance of the order of approval violates Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq. PSE, joined by PSCAA, contends the Board lacks jurisdiction to review the issue. The analysis and authorities discussed above on Issue 4(l) also compels the conclusion that the Board lacks jurisdiction to review compliance with federal civil rights law. Appellants have provided no authority to the contrary. Issue 4(m) is also dismissed.

H. Issue 4(o) —Failure to include the requirements of NSPS Subpart OOOOa (40 C.F.R. § 60.5430a et seq.) relating to the handling of acid gas from the facility. Issue 4(p) —Failure to include a requirement that Tacoma LNG monitor and control fugitive GHG and VOC emissions in accordance with NSPS Subpart OOOOa (40 C.F.R. § 60.5430a et seq.)

Finally, Issues 4(o) and 4(p) concern the order of approval's compliance with federal regulations establishing standards for controlling acid gas, GHG, and volatile organic compounds (VOC) from affected facilities in the crude oil and natural gas production source category. 40 C.F.R § 60.5360a. Appellants contend in Issue 4(o) that PSCAA's order of approval incorrectly fails to include the requirements of new source performance standards (NSPS) Subpart OOOOa (40 C.F.R. § 60.5430a et seq.) relating to the handling of acid gas from the facility. In Issue 4(p) the Appellants argue that the order of approval incorrectly fails to

include a requirement that Tacoma LNG monitor and control fugitive greenhouse gas and volatile organic compounds (VOC) emissions in accordance with NSPS Subpart OOOOa (40 C.F.R. § 60.5430a et seq.).[17]

PSE asserts that 40 C.F.R. Part 60, Subpart OOOOa ("Subpart OOOOa"), which establishes emission standards and compliance schedules for control of GHG, cannot apply to Tacoma LNG because it only applies to facilities in the "crude oil and natural gas source category" as defined in 40 C.F.R. § 60.5430a. PSE claims that Tacoma LNG is not a facility in the "crude oil and natural gas source category" (and therefore not subject to Subpart OOOOa) because the term is defined to include "natural gas production, processing, transmission and storage, which include the well and *extends to, but do not include, the local distribution company custody transfer station*." Former 40 C.F.R. § 60.5430a (2019) (emphasis added).

Under this definition, PSE asserts that Subpart OOOOa does not apply to Tacoma LNG because it is downstream of the LDC custody transfer station, and the regulation does not apply to any equipment downstream of the LDC custody transfer station. *PSE Motion, p. 26-27.* PSCAA, in its Reply, also argues that the Environmental Protection Agency (EPA) made clear in published presentation (with graphics) that Subpart OOOOa does not apply downstream of the "*City Gate*", which PSCAA states is defined as the "*Local distribution company (LDC) custody transfer station."* 40 C.F.R. §60.5430a. PSCAA explains that according to the EPA graphic, Tacoma LNG is a "Large Volume Customer," which is depicted in the graphic as downstream of

[17] These EPA regulations at issue were amended in September 2020, after briefing on the motions were completed. *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 85 Fed. Reg. 57018 (Sept. 14, 2020)].

the "City Gate" or LDC custody transfer station, making Subpart OOOOa inapplicable to Tacoma LNG. *PSCAA Reply, pp. 45-46.*

In response, the Tribe states that PSE's interpretation is counter to EPA's statements in proposed rulemaking on Subpart OOOOa that it is intended to regulate the natural gas sector "from the well to the customer." *Tribe's Response, p. 9*; *Fuller Decl., Ex. F, p. 50247*; 84 Fed. Reg. 50247 (Sept. 24, 2019). In addition, the Tribe argues that such a reading would create an unlimited exemption when Subpart OOOOa already provides definitions of facilities and specific circumstances where those facilities may be exempt. *Tribe's Response, p. 9.* The Tribe also claims other LNG facilities similar to the Tacoma LNG facility have been subject to Subpart OOOOa.[18]

Based on the evidence presented by the parties, the Board concludes there are material issues of fact regarding whether Tacoma LNG is downstream of the LDC custody transfer station, as defined under 40 CFR § 60.5430a, and whether it is part of the natural gas distribution segment. PSE's motion to dismiss issue 4 (o) and (p) is denied.

In accordance with the analysis above, the Board issues the following Order:

IV. ORDER

Puget Sound Energy's Motion to Dismiss and for Partial Summary Judgment is **GRANTED in part and DENIED in part**. Issues 1, 3(b)-(f), 4(f) (as to WAC 173-400-111 and

[18] The Tribe claims the Texas, Freeport LNG facility is similar and regulated by Subpart OOOOa. The Freeport LNG facility, they claim, also includes an amine sweetening system; gas dehydration unit; natural gas liquids (NGL) extraction unit; liquefaction unit, storage vessels, and flare system. *Tribe's Response, p. 11*; *Fuller Decl., Ex. C*, Sections 2.1, 2.2 and 3.4.

-WAC 173-400-112), 4(l) and 4(m) are **DISMISSED**. Issues 4(n), 4(q), 4(r), 4(s), 4(t) and 5 are **DISMISSED** by agreement of the parties. Issues 4(b), 4(f) (solely as to WAC 173-400-113), 4(k), 4(o) and 4(p) remain for hearing.

SO ORDERED this 26th day of March, 2021.

POLLUTION CONTROL HEARINGS BOARD

NEIL L. WISE, Board Chair

CAROLINA SUN-WIDROW, Member

MICHELLE GONZALEZ, Member

HEATHER C. FRANCKS, Presiding
Administrative Appeals Judge