Exh. RXS-31

***Advocates for a Cleaner Tacoma, et al. v. Puget Sound Clean Air Agency, et al*.,**
Washington Court of Appeals Div. II No. 56938-8, Amicus Brief of the Attorney General of the State of Washington (July 1, 2022).

NO. 56938-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Advocates for a Cleaner Tacoma, et al.,

Appellants,

v.

Puget Sound Clean Air Agency, et al.,

Respondents.

AMICUS BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

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I. INTRODUCTION

As the State of Washington strives to meet the greenhouse gas emissions limits set by state law, policymakers should know which emissions assumptions are well-supported and which may be overly speculative or unrealistically optimistic. The Puget Sound Clean Air Agency had a statutory duty to conduct a thorough greenhouse gas emissions analysis preceding its Order of Approval to Construct the Tacoma Liquefied Natural Gas Project and to disclose any unreliability in its assumptions. Its Supplemental Environmental Impact Statement fell short of this duty by failing to disclose that three of its assumptions were speculative and lacked scientific certainty. First, it failed to disclose the uncertainty surrounding its assumption of a very low leak rate for methane between extraction at the wellhead and delivery at the Project. Second, it did not reveal the thin support for its assumption that the Project's marine fuel customers would all convert to liquefied natural gas from marine gas oil or diesel fuel (collectively,

marine gas oil). Third, it failed to reckon with the uncertainty in its assumption that current market conditions for marine gas oil would endure regardless of changes in technology.

By omitting the speculative nature of its assumptions, the Supplemental Environmental Impact Statement failed in its primary purpose under the State Environmental Policy Act: to ensure that Puget Sound Clean Air Agency made an informed decision on the Order of Approval. In turn, the Pollution Control Hearings Board erred in concluding that the Supplemental Environmental Impact Statement, despite these omissions, met the "rule of reason." Consequently, the Attorney General's Office files this brief in support of Petitioners' appeal.

II. IDENTITY AND INTEREST OF AMICUS

The Attorney General submits this brief as *amicus curiae* to ensure the integrity of greenhouse gas emissions analysis under the State Environmental Policy Act (SEPA), a critical step in agency understanding of the effects of decision-making

on climate change, and an essential step toward meeting the emissions limits in the Climate Commitment Act of 2021. That Act stated that "climate change is one of the greatest challenges facing our state and the world today, an existential crisis with major negative impacts on environmental and human health." It recognized the legislature had previously set and then updated state greenhouse gas emissions limits, and emphasized that "[m]eeting these limits will require coordinated, comprehensive, and multisectoral implementation of policies, programs, and laws, as other enacted policies are insufficient to meet the limits." RCW 70A.65.005(1)–(2). The effectiveness of any state law establishing limits on greenhouse gas emissions, however, depends on the reliability of projected and actual emissions figures. If SEPA analyses use unrealistically optimistic or unreliable greenhouse gas emissions figures, policymakers like the State and the Puget Sound Clean Air Agency (PSCAA) will be unable to meet the goals they set for themselves. Consequently, the Attorney General has a strong

interest in the thoroughness and reliability of greenhouse gas emission analyses. Moreover, the Attorney General has an interest in ensuring that state law, including SEPA, is interpreted and applied correctly and consistently. Where state law intersects with vital and urgent matters of public interest, such as SEPA analyses of climate impacts, the Attorney General has a clear interest in representing the State. This brief addresses only a narrow subset of the SEPA issues in this matter.

III. ISSUE OF CONCERN TO AMICUS

Whether SEPA requires an Environmental Impact Statement to thoroughly evaluate and disclose the uncertainty or speculative nature of its assumptions about greenhouse gas emissions?

IV. STATEMENT OF THE CASE

This brief relies on the Appellants' statement of the case.

V. ARGUMENT

The Supplemental Environmental Impact Statement (SEIS)[1] for the Tacoma Liquefied Natural Gas (LNG) Project failed to present an accurate analysis of the Project's greenhouse gas emissions by not disclosing that three of its key assumptions were speculative, and lacked scientific certainty: (1) the assumption that the Project's methane leak rate would be very low, (2) the assumption that newly available LNG will only displace marine gas oil currently in use, and not offer supplemental marine fuel and (3) the assumption that current market conditions for marine gas oil will endure for the foreseeable future regardless of changes in technology. These three failures rendered the SEIS insufficient, meaning that PSCAA did not have available the analysis necessary to make an informed decision. A thorough SEIS would have informed

[1] Administrative Record (AR) 22205 et seq. This Brief will refer to it as "SEIS," and to the "PSE Tacoma LNG Project GHG Analysis Final Report," AR22260 et seq., as "SEIS Appendix B."

the Agency that the Project risked a net harmful effect on greenhouse gas emissions–a particularly important understanding in light of the State's longstanding commitment to greenhouse gas limits under state law. See RCW 70A.45.020. The Pollution Control Hearings Board (PCHB) erred in concluding that the SEIS met the "rule of reason" despite these infirmities.

A. SEPA Requires a Thorough and Reliable Greenhouse Gas Emission Analysis

SEPA "may be the most powerful legal tool for protecting the environment of the state."[2] The legislature clearly identified four objectives of SEPA:

> (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

[2] Washington Dep't of Ecology, *State Environmental Policy Act Handbook* at 5 (2018 Updates), available at https://ecology.wa.gov/DOE/files/4c/4c9fec2b-5e6f-44b5-bf13-b253e72a4ea1.pdf. (Handbook)

> ecological systems and natural resources important to the state and nation.

RCW 43.21C.010. SEPA, modeled after the National Environmental Policy Act (NEPA), "gives agencies the tools to allow them to both consider and mitigate for environmental impacts of proposals." Handbook at 6.

In short, SEPA "sets forth a state policy of protection, restoration and enhancement of the environment." *Polygon Corp v. City of Seattle*, 90 Wn.2d 59, 63, 578 P.2d 1309 (1978) (citing RCW 43.21C.020). One of the primary methods of implementing this policy is SEPA's requirement that covered agencies examine the environmental effects of decisions before they are made. This deceptively simple mandate—to look at environmental impacts before an agency leaps—produces better agency decisions and ensures public awareness and participation in those decisions. *See, e.g., Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990) ("The primary function of an EIS is to identify adverse

impacts to enable the decision-maker to ascertain whether they require either mitigation or denial of the proposal.").

In the current climate crisis, an accurate assessment of a project's effect on global warming is particularly important. Accordingly, SEPA requires that agencies take a hard look at greenhouse gas emissions, so that they know the full implications of the decisions they face, and have the information necessary to mitigate environmental harms. Thus, for projects involving transportation, storage, or use of fossil fuels, the SEPA review must consider the lifecycle impacts of producing, transporting, and using such fuels. WAC 197-11-444(1)(b)(iii) (listing "climate" among elements of environment to be considered in SEPA); WAC 197-11-60(4)(c) (requiring consideration of lifecycle impacts). *See also, e.g., Columbia Riverkeeper v. Cowlitz Cty.*, No. 17-010c, 2017 WL 10573749 (Shoreline Hearings Bd. Sept. 15, 2017) (holding that the EIS for methanol project was invalid for failing to consider lifecycle GHG emissions).

Recognizing that it can be difficult to determine future environmental impacts precisely, SEPA regulations require that agencies fully disclose "scientific uncertainty concerning significant impacts." WAC 197-11-080(2), -330(3)(d). SEPA, then, allows an agency to proceed in the face of uncertainty—so long as it discloses the uncertainty.

This court reviews the PCHB's decisions, in part, to determine whether "[t]he agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d). In turn, the determination of whether an EIS is adequate is a question of law subject to *de novo* review. *PUD No. 1 of Clark County v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 157, 151 P.3d 1067 (2007) ("We review the facts on the record before the PCHB to determine if substantial evidence supports them and we review conclusions of law de novo"); *see also OPAL v. Adams Cty.*, 128 Wn.2d 869, 875, 913 P.2d 793 (1996). EIS adequacy refers to the legal sufficiency of the environmental data contained in the impact statement. *Klickitat Cty. Citizens*

Against Imp'd Waste v. Klickitat Cty., 122 Wn.2d 619, 632–3, 860 P.2d 390 (1993), *amended*, 866 P.2d 1256 (1994) (citing R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14(a)(i) (4th ed. 1993)). Courts review the adequacy of an EIS under the "rule of reason," requiring a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Id.*

B. The Supplemental Environmental Impact Statement Failed to Disclose the Uncertainty of its Methane Leak Rate Assumption

The PCHB erred in concluding that the SEIS's "range of methane emission data" was reasonable under SEPA, because the SEIS failed to disclose the uncertainty of its assumptions.[3] The SEIS's bottom-line assessment of greenhouse gas impacts relies on its assumption that the gas the Project uses will be extracted and piped from British Columbia to Tacoma, using an impressively low "leak rate" – specifically, it assumes that less than one-third of one percent of the methane will leak between

[3] AR15678, ¶ 98.

the well and the Project.[4] This extraordinarily optimistic assessment of efficiency is significant because leaked methane has a very severe greenhouse gas impact. Unfortunately, however, the SEIS fails to disclose the severity of the uncertainty underlying its 0.32 percent leak assumption: it relies on a single study, and attributes the significant differences in leak rates to geophysical considerations and regulatory regimes, rather than the fact that its preferred study omits methane releases that are accidental or irregular, despite the availability of other, more thorough data. AR22374; AR19017.

To be sure, SEPA allows an agency to choose among experts, methods of analysis, or calculations so long as it has a sufficient reason for its choice.[5] But SEPA does not allow an agency to use a method of analysis and refuse to disclose its speculative nature, weaknesses, or lack of scientific support.

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[4] AR15674, ¶ 87.

[5] *See, e.g., City of Des Moines v. PSRC*, 98 Wn. App. 23, 36–37, 108 Wn. App. 836, 988 P.2d 27 (1999).

WAC 197-11-080(2) ("When there are gaps in relevant information or scientific uncertainty concerning significant impacts, agencies shall make clear that such information is lacking or that substantial uncertainty exists.").

It would not have been difficult for PSCAA to disclose this uncertainty. The Department of Ecology has shown the way in a final EIS for the Kalama Manufacturing and Marine Export Facility.[6] There, Ecology reviewed a number of potentially applicable leak rates, from 0.32 to 2.3 percent. That project is expected to use 99.4 percent British Columbia natural gas and 0.6 percent U.S. Rocky Mountain natural gas – substantially similar to the 100 percent British Columbia gas supply planned for the Tacoma LNG Project. Although Ecology concluded that a medium leak rate would be 1.46 percent (or more than four times PSCAA's assumed rate for

[6] AR17595 et seq. (Dep't of Ecology, *Kalama Manufacturing and Marine Export Facility Final Second Supplemental Environmental Impact Statement*, 2020).

the Tacoma LNG Project), it included a variety of emissions scenarios, including two low-emissions scenarios, a medium scenario, and a high scenario with their associated estimated methane emissions rates. It presented that information in the main body of the Second SEIS, alongside its analysis from a prior SEIS, like this:

Table 3.4-1. Upstream Methane Emission Rates from First and Second SEIS

First SEIS

Emissions	Units	Low	Baseline	High
Upstream Methane Emission Rate	Percent of Natural Gas Used	0.71	0.71	0.97

Second SEIS

Emissions	Units	Low Emissions Scenario 1	Low Emissions Scenario 2	Medium	High
Upstream Methane Emission Rate	Percent of Natural Gas Used	0.71	0.97	1.46	3

AR17636. Ecology further disclosed the uncertainty in a number of estimates, and explained the limitations in several applicable models.[7] The Tacoma LNG SEIS, however, did no

[7] AR17635 ("Due to this uncertainty, this study has included a fourth upstream methane emission rate of 3 percent defined as the 'high emission scenario'. This fourth emission rate estimate is significantly higher than the three values presented

such thing. Although an appendix lists various gas leakage rates—incidentally, demonstrating that PSCAA chose the lowest possible leak rate on the list[8]—it does not disclose the uncertainty and consequences of error in its choice. SEPA requires, though, that an agency fully disclose "scientific uncertainty concerning significant impacts."[9] The SEIS's appended list is not a sufficient substitute for an analysis that truly reckons with uncertainty. *See, e.g., Center for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003) (noting "that the agency must disclose responsible opposing scientific opinion and indicate its response in the text of the final statement itself"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv*., 482 F. Supp. 2d 1248, 1255 (W.D. Wash. 2007) (holding that "relegation" of

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below … and provides a useful mechanism to explore how the uncertainty that exists in upstream methane emission rates can impact the overall GHG lifecycle emissions [for the project].").

[8] AR22373.

[9] WAC 197-11-080(2).

dissenting views to "the appendix was improper under NEPA").

A policymaker reading the SEIS would not be informed that it chose a methane leak rate with severe vulnerabilities, leading to a risk of significantly underestimating the project's greenhouse gas emissions. SEPA and its regulations require more.

C. The Supplemental Environmental Impact Statement Failed to Sufficiently Examine the Impacts of LNG Displacement of Marine Gas Oil

The PCHB erred in concluding that the SEIS reasonably assumed, in the face of substantial doubt, that all of the Project's LNG used by marine shipping would displace marine gas oil currently used.[10] The SEIS relied on the notion that every gallon of LNG from the Project in the marine market will result in an offsetting reduction in the use of marine gas

[10] AR15643 ¶ 15 ("As part of the SEIS and [Life Cycle Analysis], several assumptions were made, including: 100 percent of the project's LNG will displace conventional marine fuel."); AR15664 ¶ 70; *See also* AR22278.

oil. This assumption is important because, if greenhouse gasses from the Project fail to displace any portion of existing emissions from marine gas oil, then the Project's bottom-line greenhouse gas analysis is wrong, and understates the Project's greenhouse gas emissions.

This assumption, however, is unreliable, because the availability of LNG as a fuel may generate some demand for it from sources other than current marine gas oil users. Similarly, some new customers for marine gas oil may arise to use the newly unpurchased and available supply. In addition, some current users of marine gas oil may switch to a different fuel without the project at all. The SEIS should have evaluated these potential market effects, but the PCHB was satisfied that the assumption of perfect displacement of LNG-for-marine gas oil was reasonable.[11]

[11] AR15672 ¶ 84. An example of a dynamic market analysis and disclosure of uncertainty is Ecology's Kalama Manufacturing and Marine Export Facility Final Second

Under SEPA, an agency has the obligation to examine impacts of "reasonably foreseeable future actions." *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 381, 183 P.3d 324 (2008). S*ee also* RCW 43.21C.031 (mandating preparation of an EIS for major actions having a probable significant environmental impact); WAC 197-11-782 (defining "probable" to mean "reasonably likely to occur" as opposed to being "remote or speculative"). As noted above, SEPA regulations also require that agencies fully disclose "scientific uncertainty concerning significant impacts." WAC 197-11-080(2).

The Agency's omission of this examination violates SEPA. As a general matter, the impacts considered under SEPA must be reasonably foreseeable, and not speculative, as the "perfect displacement" assumption is in the SEIS. But more specifically, the law does not permit an agency to avoid

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Supplemental Environmental Impact Statement, at AR17739–43.

an assessment of the effect of increased availability of a fuel source merely because the effect may be speculative. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–550 (8th Cir. 2003) (analyzing requirements under NEPA); *see also Kucera v. State*, 140 Wn.2d 200, 215 n.10, 995 P.2d 63 (2000) (discussing applicability of NEPA caselaw to SEPA analyses). Even if the precise *extent* of the effect is difficult to determine, the agency must consider the *nature* of the effect. *Mid States Coal. for Progress*, 345 F.3d at 549–50. In *Mid States*, the agency failed to take into account that the increased availability of a fuel source may have an effect on the demand for that source. *Id.* at 549 (noting that "the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price . . . is illogical at best"). Similarly, an agency may not assume that newly available fuel will substitute for previously available fuel on a 1:1 basis: "Even if we could conclude that the agency had enough data before it . . . we would still conclude this perfect

substitution assumption arbitrary and capricious because the assumption itself is irrational (i.e., contrary to basic supply and demand principles)." *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222, 1234–1236 (10th Cir. 2017).

Moreover, insofar as the SEIS claims the benefits of newly available LNG fuel but avoids an analysis of the potential harms from continued consumption of marine gas oil, it fails the rule of reason. It is akin to taking the benefit of a doubt, but discounting its downside risk. *See, e.g., High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) ("[I]t was nonetheless arbitrary and capricious to quantify the benefits of the lease modifications and then explain that a similar analysis of the costs was impossible when such an analysis was in fact possible and was included in an earlier draft EIS."); *see also Montana Envtl. Info. Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097 (D. Mont. 2017).

This conclusion is reinforced by the Ninth Circuit's recent holding in *Center for Biological Diversity v. Bernhardt*, also in the context of the error of an agency's decision to ignore market effects of a new source of fuel. *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 739 (9th Cir. 2020). That court favorably discussed the Department of the Interior's process for discussing and disclosing uncertainty in assumptions: it "requires the agency to include a statement explaining that the information is lacking, its relevance, a summary of any existing credible evidence evaluating the foreseeable adverse impacts, and the agency's evaluation of the impacts based upon 'theoretical approaches or research methods generally accepted in the scientific community.'" *Id.* (citing 40 C.F.R. § 1502.22(b)(1)).

In sum, the SEIS was required to take a hard look at reasonably foreseeable consequences of the newly available fuel, and disclose uncertainty in its "perfect displacement" assumption. Because it did not do either, the SEIS was

insufficient under SEPA, and the PCHB erred in concluding otherwise.

D. The Supplemental Environmental Impact Statement Failed to Disclose the Uncertainty of its Assumption that Marine Transport Energy Technology Will Not Advance in the Future

Finally, the PCHB erred in concluding that the SEIS need not disclose the uncertainty behind its assumption that Alaska-bound transport would rely only on marine gas oil or LNG for the life of the Project.[12] This assumption amounted to a determination by the PCHB that "the marine industry as it exists today will remain unchanged of the next 40 years."[13]

An accurate assessment of energy sources for marine shipping require foresight into future supply, demand, fuel technology, and other market forces. While perfection is not required, an agency must make a "reasonable" effort to determine and disclose such impacts. *Sierra Club v. U.S. Dep't*

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[12] AR15672 ¶ 84 ("Based on the evidence presented, the Board finds the SEIS made a reasonable assumption ….").

[13] AR15669 ¶ 76. *See also* AR15672 ¶84.

of Energy, 867 F.3d 189, 198 (D.C. Cir. 2017) (holding that, in determining what effects are "reasonably foreseeable," an agency must "engage in reasonable forecasting and speculation"). Rather than make these reasonable efforts, the SEIS attempts to give an easy answer to the hard question: it assumes that, for the life of the Project, the only available fuel sources for TOTE Marine and similar ships will be marine gas oil or LNG. This allows the SEIS to compare its optimistic projection of LNG's future greenhouse gas impacts with a baseline of the diesel-powered present, not with a future without the Project. In other words, it imagines the emissions under "No Action" alternative to be the same as those at the present – even decades into the future. Where PSCAA makes such assumptions, they must be supportable, and it must disclose their uncertainty.[14] This it did not do.

[14] *See, e.g.*, WAC 197-11-080(2) (SEPA regulations requiring that agencies fully disclose "scientific uncertainty concerning significant impacts"); *Ctr. for Biological Diversity*, 982 F.3d at 738 (rejecting agency contention that there was no

Assuredly, SEPA does not command an agency to make guesses about the future. But just as SEPA does not permit rank speculation about future changes, it also does not permit one to assume without basis that current technology and economic conditions will remain static. In other words, one may not, on the one hand, claim that any assumptions about the future are speculative and therefore not permitted, and, on the other hand, assume that the future will be exactly what it is today. If, as here, the assumption of the perpetuation of the status quo is itself a speculative estimate, the agency must say so.

VI. CONCLUSION

If the State of Washington is to meet its statutory commitments to reduce greenhouse gas emissions, agencies must plainly disclose when their emissions assumptions are overly speculative or unrealistically optimistic. In approving the

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way to estimate "reasonably foreseeable" indirect effects of project); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 68 (USDC D.C.) (rejecting agency's position that quantifying GHG emissions would be too speculative).

Tacoma LNG's SEIS, the PCHB erroneously interpreted or applied SEPA. Therefore, the Attorney General's Office respectfully asks this court to reverse the Board, vacate the SEIS and the Notice of Approval, and remand to PSCAA to initiate a new SEPA analysis.

This document contains 3345 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 1st day of July, 2022.

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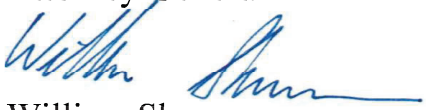

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 1st day of July, I caused the Amicus Brief of the Attorney General of the State of Washington in the above-captioned matter to be electronically filed with the Washington State Appellate Courts' Portal, which automatically serves all parties of record. I also served a true and correct copy upon the parties herein as indicated below:

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