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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

ADVOCATES FOR A CLEANER TACOMA,)	No.
)	
Petitioner,)	
)	
v.)	PETITION FOR JUDICIAL REVIEW
)	OF AGENCY ACTION
WASHINGTON STATE DEPARTMENT OF)	
ECOLOGY,)	
)	
Respondents.)	
)	
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)	

Petitioner Advocates for a Cleaner Tacoma (“ACT”) hereby brings this action under
RCW 34.05.570 and allege as follows.

1 **I. PETITION FOR REVIEW UNDER THE**
2 **ADMINISTRATIVE PROCEDURES ACT, RCW 34.05**

3 **A. Petitioner**

4 Advocates for a Cleaner Tacoma ("ACT")
5 2661 N Pearl St #409
6 Tacoma, WA 98407

7 **B. Petitioner's Attorneys**

8 Knoll Lowney, WSBA No. 23457
9 Marc Zemel, WSBA No. 44325
10 Smith and Lowney PLLC
11 2317 E. John St.
12 Seattle, WA 98112

13 **C. Agency Whose Actions Is at Issue**

14 Washington State Department of Ecology
15 300 Desmond Drive SE
16 Lacey, WA 98504-7600

17 **D. Agency Action at Issue**

18 On June 10, 2019, the Department of Ecology denied ACT and Sierra Club's request
19 to reopen Ecology Administrative Order No. 13764, which granted a 401 Water Quality
20 Certification to Puget Sound Energy, Inc. ("PSE") for PSE's proposed liquefied natural gas
21 ("LNG") plant ("Project") in Tacoma, Washington. **Exhibit A.**

22 **E. Other Parties to Agency Proceeding**

23 This appeal is taken from the Department of Ecology's denial of a request filed by
24 ACT and Sierra Club, **Exhibit B**, making Sierra Club a party to this proceeding:

25 Sierra Club
26 180 Nickerson Street #202
Seattle, WA 98109

1 Although this appeal does not arise from an adjudicative proceeding, Puget Sound
2 Energy, as the recipient of Order 13764, is an interested party:

3
4 Puget Sound Energy
5 355 110th Avenue NE
6 Bellevue, WA 98004

7 A copy of this petition is also being served on the Attorney General of the State of
8 Washington and upon the attorney of record for the Department of Ecology:

9 Sonia Wolfman
10 Attorney General of Washington, Ecology Department
11 PO Box 40117
12 Olympia, WA 98504-0117

13 **F. Facts demonstrating that the petitioner is entitled to judicial review**

14 Advocates for a Cleaner Tacoma (ACT) is a 501(c)(3) non-profit corporation
15 comprised of local residents committed to preserving, protecting, and improving the quality
16 of the air, water, and land of Tacoma and surrounding communities. ACT strives to
17 ensure the health and safety of all residents for current and future generations. ACT promotes
18 sustainable industries and transparent and responsible decision-making in the public
19 interest.

20 This petition challenges Department of Ecology’s failure to follow proper procedures.
21 Petitioner contends that Ecology had a duty to reopen Order No. 13764 to exercise its
22 substantive authority under the State Environmental Policies Act, Chapter RCW 43.21C
23 (“SEPA”) in consideration of the updated SEPA documents for the Project. Ecology’s
24 compliance with such procedures may result in additional mitigation, which could reduce the
25 Project’s impacts on Petitioner’s members. Our Supreme Court in *Five Corners Family*
26

1 *Farmers v. State*, 173 Wn.2d 296, 303, 268 P.3d 892 (2011), held that standing requirements
2 are relaxed where the injury complained of is, like here, procedural in nature. Specifically, to
3 show a procedural injury:

4 a party must (1) identify a constitutional or statutory procedural right that the
5 government has allegedly violated, (2) demonstrate a reasonable probability that the
6 deprivation of the procedural right will threaten a concrete interest of the party's, and
7 (3) show that the party's interest is one protected by the statute or constitution.

8 *Five Corners Family Farmers*, 173 Wn.2d at 303.

9 This test applies here because the requested remedy – requiring Ecology to exercise
10 its substantive SEPA authority in consideration of the SEIS – preserves Ecology’s decision-
11 making power and therefore may, but will not necessarily, lead to greater environmental
12 protections. This is the nature of SEPA procedural claims.

13 Petitioner has members who reside in the immediate vicinity of the proposed Project.
14 Those members are within the Project’s “blast zone” in the event of an explosion. In
15 addition, they suffer injury in fact by their reasonable concerns that (1) they will be harmed
16 in the event of a catastrophic failure of the facility; (2) their health will be negatively
17 impacted by toxic air emissions from the facility; and (3) their enjoyment of their properties
18 will be negatively impacted by the ongoing flares from the facility. Some members are
19 considering selling their homes to avoid these dangers and they reasonably believe that the
20 value of their properties will be negatively impacted because many buyers do not wish to live
21 in the Project’s blast zone or air quality impact area. Petitioner has voluminous evidence
22 supporting their reasonable concerns. A photo of the Project for one ACT and Sierra Club
23 member’s home is attached as **Exhibit G**.
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1 As discussed below, if Ecology were to comply with SEPA and exercise its
2 substantive SEPA authority in consideration of the SEIS, it will have authority to condition
3 the project and thereby mitigate the Project's impacts on Petitioner's members. Petitioner
4 has standing because their members would have standing to sue, the environmental purpose
5 is germane to the issues in this suit, and neither the claim nor the relief requires participation
6 of individual members. *Five Corners Family Farmers*, 173 Wn.2d at 304.
7

8 Additionally, Petitioner's interests are within the zone of interests to be protected by
9 SEPA. According to Ecology's own rule on substantive SEPA authority:

10 (1)(a) The overriding policy of the department of ecology is to avoid or
11 mitigate adverse environmental impacts which may result from the department's
12 decisions.

13 (b) The department of ecology shall use all practicable means, consistent with
14 other essential considerations of state policy, to improve and coordinate plans,
15 functions, programs, and resources to the end that the state and its citizens may:

16 (i) Fulfill the responsibilities of each generation as trustee of the environment
17 for succeeding generations;

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

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

23 (iv) Preserve important historic, cultural, and natural aspects of our national
24 heritage;

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

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

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

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

(d) The department shall ensure that presently unquantified environmental
amenities and values will be given appropriate consideration in decision making
along with economic and technical considerations.

1
2 WAC 173-802-110. Petitioner and its members are certainly within this broad zone of
3 interest.

4 Sierra Club, as a party to this proceeding, has an equally strong claim for standing,
5 since its members include a neighbor of the Project, its mission is germane to this suit, and
6 its members are within the zone of interest that Ecology was required to consider and protect.
7

8 **G. Statement of Facts Supporting Judicial Review and Reasons that Relief Should**
9 **be Granted.**

10 On September 16, 2016, Ecology issued Administrative Order No. 13764, **Exhibit C**,
11 which constituted the Department of Ecology’s exercise of its substantive authority under the
12 State Environmental Policies Act, Chapter RCW 43.21C (“SEPA”) and WAC 173-802-110
13 for the Project.

14 Ecology based its decision to issue Order No. 13764 on the Final Environmental
15 Impact Statement (“FEIS”) issued to the project on November 9, 2015.

16 Subsequent to the original issuance of Order 13764, the SEPA process for the Project
17 was reopened for the preparation of a Supplemental Environmental Impact Statement
18 (“SEIS”) analyzing the Project’s lifecycle greenhouse gas (“GHG”) emissions.

19 On November 21, 2018, the Department of Ecology and the Washington State
20 Attorney General submitted comments stating that the GHG analysis contained in the DSEIS
21 was inadequate. **Exhibits D, E.** Their comments were incorporated into the Final
22 Supplemental Environmental Impact Statement issued to the Project on March 29, 2019
23 (“FSEIS”).
24
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1 With Ecology’s participation, the SEPA process for the Project now, for the first
2 time, contains a lifecycle analysis of GHG emissions.¹

3 Ecology now has the legal responsibility to reconsider its exercise of substantive
4 SEPA authority in consideration of the updated SEPA analysis for the Project. Having
5 participated in the SEPA process analyzing lifecycle GHG emissions, Ecology must consider
6 those impacts in exercising its substantive SEPA authority over the Project.
7

8 The SEIS also identified significant changes to the Project, which Ecology must also
9 consider in exercising its substantive SEPA authority. Order 13764 envisioned a “LNG
10 Facility ... sized to produce 250,000 gallons of LNG per day from natural gas.” **Exhibit C.**²
11 However, the SEIS confirms that PSE instead sized the facility to produce twice that amount.
12 *See* SEIS Life Cycle Analysis, at p.28 (“The Tacoma LNG Facility will have a capacity to
13 produce an average of 500,000 gpd of LNG.”), **Exhibit F.** The SEIS states that this
14 increased capacity would increase annual GHG emissions from 683,000 mt/y to 1.3 million
15 mt/y. FSEIS at Table F-3.
16

17 Under WAC 173-802-110, Ecology has a duty to exercise its substantive SEPA
18 authority in consideration of the updated SEPA documents:
19

20 (2)(a) When the environmental document for a proposal shows it will cause
21 significant adverse impacts that the proponent does not plan to mitigate, the
responsible official shall consider whether:

22 _____
23 ¹ While Petitioner takes issue with the methodology and sufficiency of the SEIS, those issues
are beyond the scope of this lawsuit. Petitioner reserves the right to challenge the sufficiency
of the SEIS if and when an agency relies upon the SEIS in issuing a permit.

24 ² The Final Supplemental Environmental Impact Statement also acknowledges that “The
25 information originally provided by PSE for this life-cycle analysis reflected a facility
designed for 250,000 gpd production, which also matches the capacity of the facility
26 described in the Notice of Construction (NOC) application.” FSEIS, p. 2-1.

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- (i) The environmental document identified mitigation measures that are reasonable and capable of being accomplished;
 - (ii) Other local, state, or federal requirements and enforcement would mitigate the significant adverse environmental impacts; and
 - (iii) Reasonable mitigation measures are sufficient to mitigate the significant adverse impacts.
- (b) The responsible official may:
- (i) Condition the approval for a proposal if mitigation measures are reasonable and capable of being accomplished and the proposal is inconsistent with the policies in subsection (1) of this section.
 - (ii) Deny the permit or approval for a proposal if reasonable mitigation measures are insufficient to mitigate significant adverse environmental impacts and the proposal is inconsistent with the policies in subsection (1) of this section.

Ecology’s issuance of Order No. 13764 triggered its substantive SEPA authority. Ecology used this authority to deny a water quality certification to the Millennium Bulk Terminals proposal in Longview, Washington, and Ecology’s authority to deny or condition a project in this scenario was recognized by the Pollution Controls Hearings Board in *Millennium Bulk Terminals-Longview, LLC v. Wash. Dep’t of Ecology et al.*, PCHB No. 17-090, 2018 WA ENV LEXIS 43 (August 15, 2018).

Although the Army Corps of Engineers has already issued the 404 permit for the Project, Ecology’s duty to comply with SEPA in connection with Order 13764 is not moot. Ecology and the PCHB rejected a similar mootness argument in *Center for Environmental Law and Policy v. Washington*, PCHB 17-109. Ecology argued that the permit appeal was not mooted by the issuance of the federal permit because “[a]s a matter of federal law, a state’s 401 certification is independently enforceable under the CWA’s citizen suit provision, regardless of the fate of the federal permit.”³ The PCHB ruled that Ecology’s conditions on a 401 certification can provide relief even if it does not impact the federal permit. PCHB 17-

1 109 (May 14, 2018, order Denying Motion to Dismiss) (relying in part on *Deschutes River*
2 *Alliance v. Portland General Electric Company*, 249 F.Supp.3d 1182 (D. Or. 2017)).

3 Here, similarly, when Ecology meets its legal obligations to exercise its substantive
4 SEPA authority in consideration of GHG emissions and project changes, Ecology will have
5 the authority to add conditions to Order 13764. For example, based upon the SEIS on GHG
6 emissions, Ecology could add SEPA conditions limiting LNG production or it could require
7 PSE to purchase carbon offset credits to mitigate the GHG impact as Ecology has done with
8 some other emitters.⁴ All such conditions could be enforced by Ecology and/or citizens
9 bringing a Clean Water Act citizens suit.
10

11 Given Ecology's participation in the SEIS, Ecology had the obligation to reopen
12 Order No. 13764 to exercise its SEPA substantive authority pursuant to WAC 173-802-110
13 in consideration of the SEIS. Ecology's refusal to do so was arbitrary and capricious.
14

15 Ecology's denial of ACT and Sierra Club's request to do so was also arbitrary and
16 capricious. Ecology's denial completely ignored the critical fact of the case: that the SEPA
17 process had been reopened – with Ecology's participation – and that the new environmental
18 documents raise climate change impacts that Ecology must consider in its exercise of
19 substantive SEPA authority. Ecology notes the existence of the SEIS only in a footnote,
20 without addressing how the SEIS process fundamentally changed the SEPA record and the
21 analysis of the Project's environmental impacts. **Exhibit A.**
22

23
24 ³Ecology's Response in Opposition to U.S. Fish and Wildlife Service's Motion to Dismiss.

25 ⁴Ecology proposed such mitigation for the GHG impacts of the WestRock Tacoma Steam Limit
26 Project. Ecology required the mill to offset GHG produced by the project above 30,000 tons per year
using purchased certified GHG offsets or an alternative approved by the Department of Ecology.
<https://fortress.wa.gov/ecy/publications/documents/1807023.pdf>

1 RCW 34.05.570(4) provides a right to appeal an agency action or failure to act under
2 an arbitrary and capricious standard. Ecology's failure to consider the changed
3 circumstances, including its participation in the SEIS, constitutes an action or inaction that is
4 "willful and unreasoning, and taken without consideration and in disregard of the facts and
5 circumstances." *Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9,
6 29 (1984).
7

8 Alternatively, Ecology had the discretion to reopen the 401 water quality certification
9 in light of the new impacts discussed in the SEIS. *See Preserve our Islands v. Ecology*,
10 PCHB No. 08-092 (Feb. 18, 2009) (citing 40 C.F.R. 121.2(b), WAC 173-220-150(1)(d),
11 WAC 173-226-240(1) and (2)). Ecology's failure to exercise its discretion to reopen the
12 permit was arbitrary and capricious, given the new impacts identified in the SEIS, Ecology's
13 decision in *Millennium Bulk*, and its policies and practices addressing climate change.
14

15 In the only previous challenge to Ecology's failure to reopen a water quality
16 certification, the Pollutions Control Hearings Board held that the proper procedure is through
17 a petition under RCW 84.05.570(4) filed in Superior Court within 30 days after Ecology
18 refuses the request to reopen the permit. *See Preserve our Islands*, at 18-19, 23. Petitioner
19 has followed that procedure here.
20

21 **REQUEST FOR RELIEF**

22 Petitioner requests the following relief:

- 23 (a) an order requiring the Department of Ecology to reopen Order 13764 and to
24 exercise its substantive SEPA authority in consideration of the new impacts and
25 project changes identified in the SEIS; and/or
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(b) an order requiring the Department of Ecology to exercise its discretion about whether to reopen the water quality certification in consideration of the new impacts and project changes identified in the SEIS; and
(c) such other relief as the Court deems just and equitable.


Respectfully submitted this 9th day of July 2019.

SMITH & LOWNEY, P.L.L.C.

By: /s/ Knoll Lowney
Knoll Lowney, WSBA # 23457
Mark Zemel, WSBA# 44325.
Attorneys for Petitioner and Sierra Club

CERTIFICATE OF SERVICE

I, Kai McDavid, hereby declare under penalty of perjury that on this day, the ninth day of July, 2019, I caused this petition to be served upon the Department of Ecology and other parties to this proceeding and the Attorney General of the State of Washington pursuant to the procedures of RCW 34.05.542(4) and (6).





Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Ecology Division
PO Box 40117 • Olympia, WA 98504-0117 • 360-586-6770

June 10, 2019

Mr. Knoll Lowney
Smith & Lowney PLLC
2317 E. John Street
Seattle, WA 98112

Re: Your Letter to the Department of Ecology dated May 16, 2019

Dear Mr. Lowney,

This letter is in response to your letter dated May 16, 2019, in which you requested that Ecology rescind Water Quality Certification Order No. 13764. I am an Assistant Attorney General assigned to Ecology and I was asked to respond on their behalf.

As you know, Ecology issued a Section 401 Certification (401 Cert.) on September 16, 2016, to Puget Sound Energy (PSE) and the Port of Tacoma for the in-water work associated with the construction of a Liquefied Natural Gas facility. Specifically, the 401 Cert. authorized the construction of a fueling pier, loading platform and access trestle, breasting dolphins, and associated upland pipeline. The 401 Cert. also authorized compensatory mitigation to offset the impacts of the in-water work, including the removal of 48 creosote-treated piles and overwater decking from various locations in Commencement Bay.

A year prior to Ecology's action, the Final Environmental Impact Statement (FEIS) for the project was issued by the City of Tacoma on November 9, 2015. The FEIS was not challenged.¹ The City issued a shoreline substantial development permit for the project on December 30, 2015. The shoreline permit was appealed. However, the permit was affirmed by both the Shorelines Hearings Board and by the State Court of Appeals.²

¹ The Puget Sound Clean Air Agency (PSCAA) determined on January 24, 2018 that they would prepare a supplemental environmental impact statement to further evaluate greenhouse gas emissions. The PSCAA issued the FEIS in April 2019 and did not find that the project would result in significant, unavoidable, and adverse impacts. Presumably, the PSCAA will be making a decision on PSE's application for an air permit in the near future.

² *Puyallup Tribe of Indians v. Wash. State Shorelines Hearings Bd.*, No. 77748-3-1, 2018 WL 2203442 (Wash. May 14, 2018).

ATTORNEY GENERAL OF WASHINGTON

Mr. Knoll Lowney
June 10, 2019
Page 2

The 401 Cert. and Coastal Zone Consistency Determination was appealed to the Pollution Control Hearings Board. The Board affirmed the 401 Cert. and the Coastal Zone Consistency Determination.³ A request to stay the permits was not made during the pendency of the Board proceeding, so PSE commenced the in-water work as authorized by the 401 Cert. In due course, all of the in-water work was completed. On appeal, the Pierce County Superior Court affirmed the Board's decision on the merits. The court additionally concluded that the appeal of the 401 Cert. was moot, finding "that all aspects of the Project subject to the 401 Certification are now complete."⁴

As this letter summarizes, reviewing tribunals have concluded that Ecology's issuance of the 401 Cert. was a valid exercise of the agency's permitting discretion. The Pierce County Superior Court's decision was not appealed and thus stands as the final decision on the 401 Cert.

I hope this helps clarify the current status of the 401 Cert. If you have further questions or require additional information regarding the above, please do not hesitate to contact me.

Sincerely,



SONIA A. WOLFMAN
Assistant Attorney General
360-586-6764

SAW/GC

³ *Puyallup Tribe of Indians v. Dep't of Ecology*, No. 16-120c, 2018 WL 7349360 (Wash. Jan. 16, 2018); *Puyallup Tribe of Indians v. Dep't of Ecology*, No. 16-120c, 2018 WL 7349356, (Wash. Feb. 23, 2018).

⁴ *Puyallup Tribe of Indians v. Dep't of Ecology*, No. 18-2-06632-3, 2018 WL 7349338, at *2 (Wash. Nov. 5, 2018). A copy of the judge's written ruling is attached for your convenience.

SMITH & LOWNEY, P.L.L.C.

2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

May 16, 2019

Director Maia Bellon
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
maia.bellon@ecy.wa.gov

Governor Jay Inslee
Office of the Governor
PO Box 40002
Olympia, WA 98504-0002

Attorney General Bob Ferguson
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

Director Bellon, Governor Inslee, and Attorney General Ferguson,

We are writing to demand that the Washington State Department of Ecology rescind Water Quality Certification Order No. 13764 (“401 Certification”), which was issued to Puget Sound Energy, Inc. (“PSE”) on September 16, 2016, for PSE’s proposed liquefied natural gas (“LNG”) plant (“Project”) in Tacoma, Washington. **Exhibit A.** Ecology violated the State Environmental Policies Act (“SEPA”) by issuing the 401 Certification without taking a hard look at the Project’s climate change impacts. In its recent letter on the Draft Supplemental Environmental Impacts Statement for the Project (“DSEIS”), Ecology acknowledged the insufficiency of the SEPA analysis on the Project’s climate change impacts. It follows that Ecology jumped the gun, violating SEPA and the climate change policies of the Inslee Administration, by issuing the 401 Certification years before any serious analysis of the Project’s climate change impacts.

Ecology has a legal and ethical responsibility to reconsider its permitting decision in light of the full environmental record, including an adequate SEPA analysis on greenhouse gas (“GHG”) emissions. The Inslee Administration and Department of Ecology have stressed the importance of evaluating climate change and recent court decisions have confirmed that environmental

review of climate change impacts must be completed *before* permits are issued. *See e.g., WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC), 2019 WL 1273181 (D.D.C March 19, 2019).

Ecology must reopen its review of the 401 Certification and exercise its substantive SEPA authority in light of the project’s impact on GHG emissions and climate change, and significant project changes made after Ecology issued the 401 Certification.

A. Ecology violated SEPA by issuing the 401 Certification years before anyone studied the lifecycle climate change impacts of the Project.

The following timeline shows that Ecology violated SEPA by issuing its 401 Certification without analyzing the Project’s impacts on climate change and GHG emissions:

- November 9, 2015. The City of Tacoma issued a Final Environmental Impact Statement (“FEIS”) for the project. It contained *no lifecycle analysis* of GHG emissions.
- September 16, 2016. Ecology issues 401 Certification for the Project based upon the 2015 FEIS.
- January 24, 2018. The Puget Sound Clean Air Agency (“PSCAA”) determines that “a Supplemental Environmental Impact Statement (SEIS) is required to identify and analyze greenhouse gas (GHG) emissions and impacts for the project.” PSCAA noted that the 2015 FEIS relied in part on outdated guidelines for identification and evaluation of GHG’s and did not contain a quantitative analysis of GHG emissions throughout the fuel cycle. **Exhibit B.**
- On October 8, 2018, PSCAA issues a Draft SEIS addressing GHG emissions. While flawed in numerous ways, the SEIS acknowledged that the 2015 FEIS grossly understated the Project’s direct GHG emissions. For example, the FEIS estimated that local GHG emissions would be only 20,751 mt/y. FEIS, at Table 3.2-3. In contrast, the SEIS states that direct emissions will be between 54,000 and 113,000 mt/y, and total (direct and indirect) emissions will be between 683,000 and 1.3 million mt/y. FSEIS, at Table 5-3.
- On November 21, 2018, two years after issuance of the 401 Certification, the Department of Ecology and the Washington State Attorney General submit comments stating that the GHG analysis contained in the DSEIS was inadequate. **Exhibits C, D.**
- On March 29, 2019, PSCAA issues the Final SEIS.

1. Ecology had the duty to consider the Project’s climate change impacts before issuing the 401 Certification.

Ecology unquestionably had the legal obligation to evaluate the Project’s full range of environmental impacts, including its impact on climate change, before granting the 401 Certification. Ecology did just that when it denied a 401 water quality certification to the Millennium Bulk Terminals proposal in Longview, Washington (“Millennium Project”), and Ecology’s authority has since been confirmed by the Pollution Control Hearings Board (“PCHB”).

Ecology and the PCHB have confirmed that 401 Certification determinations are subject to SEPA and require Ecology to exercise its substantive authority under SEPA. Yet, Ecology granted the 401 Certification for Tacoma LNG before SEPA was complete and – just as concerning – Ecology did not look to other environmental impacts presented by the project or otherwise exercise its substantive SEPA authority in making its permitting decision.

The Millennium Project and PSE’s LNG proposal are remarkably similar. Both projects involve a proposed facility and terminal for receipt and transfer of petroleum products imported into the State of Washington. As reflected in Ecology Order No. 15417 (Sept. 26, 2017), Ecology denied a water quality certification for the Millennium Project based upon a wide range of impacts identified in the Final Environmental Impact Statement, including impacts relating to air quality, vehicle transportation, noise and vibration, social and community resources, rail transportation and safety, vessel transportation, cultural resources, and tribal resources. Order No. 15417, pp. 4-13. **Exhibit E.**

On appeal, the PCHB confirmed that Ecology properly exercised substantive SEPA authority in denying the water quality certification to Millennium. It ruled, “[u]nder the facts of this case, the 401 Certification is not categorically exempt from SEPA. Nor does Section 401 of the CWA preclude Ecology's use of substantive SEPA in this instance. The Board concludes that Ecology's use of substantive SEPA authority to deny Millennium's 401 Certification request was not clearly erroneous.” *Millennium Bulk Terminals-Longview, LLC v. Wash. Dep’t of Ecology et al.*, PCHB No. 17-090, 2018 WA ENV LEXIS 43 (August 15, 2018).

The PCHB specifically rejected Millennium’s position that Ecology’s analysis of a water quality certification was limited to the water quality impacts addressed in the substantive permitting decision:

The Board concludes that the text of CWA Section 401 does not preclude Ecology's use of substantive SEPA authority when acting on a Section 401 water quality certification request. As detailed above, SEPA's policies and goals are supplementary to "existing

authorizations of all branches of government." RCW 43.21C.060. SEPA serves as an "overlay" on existing authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65. A decision maker can use SEPA substantive authority to deny a permit even if it meets all of the requirements for approval under permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). Pursuant to RCW 43.21C.060, "[a]ny governmental action may be conditioned or denied" under SEPA. See WAC 197-11-660; *Polygon*, 90 Wn.2d at 64. There is no dispute that the granting or denial of a Section 401 water quality certification constitutes a governmental action within the meaning of RCW 43.21C.060. See WAC 197-11-704(2). The Board concludes that Ecology lawfully employed its SEPA substantive authority to deny Millennium's 401 Certification request based on the significant adverse environmental impacts identified in the FEIS.

Id.

Thus, since Ecology granted the 401 Certification to the LNG Project, Ecology has confirmed that in this identical situation it has the obligation to consider the full range of environmental impacts and, if appropriate, exercise its substantive SEPA authority to condition or deny water quality certification. The PCHB confirmed that Ecology's water quality certification decision is subject to SEPA and therefore *requires* Ecology to meet its SEPA obligations.

There is no good reason for treating the Tacoma LNG 401 Certification differently from Ecology's proper exercise of its substantive SEPA authority with regard to Millennium Bulk. Order 13764 and the record show that Ecology failed to exercise its substantive SEPA authority in issuing the 401 Certification to the Project, and that decision was made without an adequate evaluation of GHG emissions. Now that such information is available – and Ecology has participated in the SEIS process – Ecology must reopen the 401 Certification decision to meet its SEPA obligations.

2. Ecology must also reopen its SEPA analysis to consider significant changes to the Project.

Ecology's 401 Certification should be reopened to also consider significant changes made to the project. One of the most striking change is the apparent doubling of the Project's capacity. Ecology approved the 401 Certification for a "LNG Facility ... sized to produce 250,000 gallons of LNG per day from natural gas." 401 Certification, p. 2, **Exhibit A.**¹ However, the SEIS

¹ The Final Supplemental Environmental Impact Statement also acknowledges that "The information originally provided by PSE for this life-cycle analysis reflected a facility designed for 250,000 gpd production, which also matches the capacity of the facility described in the Notice of Construction (NOC) application." FSEIS, p. 2-1.

confirms that PSE instead sized the facility to produce twice that amount. *See* SEIS Life Cycle Analysis, at p.28 (“The Tacoma LNG Facility will have a capacity to produce an average of 500,000 gpd of LNG.”), **Exhibit F**. The admission in the Life Cycle Analysis that the facility will have a capacity of 500,000 gpd is presumably accurate since it was prepared *after* PSE built significant parts of the project.

A doubling of capacity dramatically changes the environmental analysis upon which Ecology based its decision, requiring Ecology to reevaluate its decision. Indeed, even the deeply flawed DSEIS² acknowledges that there is a dramatic difference between the GHG emissions of the Project depending upon whether the capacity is 250,000 gpd or 500,000 gpd. The DSEIS states that the increased capacity would increase annual GHG emissions from 683,000 mt/y to 1.3 million mt/y. FSEIS at Table F-3.

The SEIS continued to suppose the possibilities of a “no action alternative” or a smaller plant with only a 250,000 gpd capacity. As the Office of Washington’s Attorney General points out, the analysis of a no action alternative “can only be described as fictional” given that PSE already illegally commenced construction and completed large parts of the Project. *See* AGO letter, November 21, 2018, **Exhibit D**. This is also true of the supposition of a smaller-capacity Project, since it appears that PSE already, illegally, constructed the larger-capacity facility.

Given the Inslee Administration’s and Ecology’s commitment to fighting climate change, the doubling in size of the Project certainly would warrant Ecology revisiting its exercise of substantive SEPA authority under SEPA.³ This is also true of other significant changes to the project. Attached as **Exhibit G** is ACT’s letter to the City of Tacoma discussing some of these changes. This includes an intensified use of the Blair Waterway which, despite being flatly denied in 2016 correspondence from PSE to the City,⁴ is now assumed to be a part of the facility. *See* FSEIS at Section 2.3.5. Intensified use of the Columbia was one of the bases cited by Ecology in denying a water quality certification to the Millennium Project. We also now have significant new information about the safety risks of this project, as reflected in the Puyallup Tribe of Indian’s April 9, 2019 letter and report to the Washington Utilities and Transportation Commission. **Exhibit H**.

The Inslee Administration and Ecology should also be particularly concerned that the “peak shaving” component of this project has become a guise for increasing production of fossil-fueled

² A full discussion of the flaws in the SEIS is beyond the scope of this letter and will be litigated at a different time.

³ While the FEIS and the SEIS examined a facility size from 250,000 gpd to 500,000 gpd, the application for the 401 Certification clearly stated that the project would be limited to 250,000 gpd. Thus, any decision by Ecology on the exercise of its substantive SEPA authority would have been based upon this smaller capacity project.

⁴ This correspondence is appended to the Tribe’s comments on the DSEIS.

electricity for the national market. Since this project was originally proposed, PSE has acknowledged that very little of the throughput of the LNG plant will now be devoted to “peak shaving.” Some of this capacity instead will facilitate burning of natural gas to produce electricity for the national market. For example, Ecology is in the process of approving WestRock to reconfigure its boilers to allow increased production of electricity from natural gas. The SEPA Checklist for that project admitted that “natural gas prices have fallen significantly. With the mill’s existing electrical power sales agreement, it is now more economical to [make changes to] the steam generation at the mill to maximize electrical power generation.” Ecology acknowledges that the WestRock project would increase GHGs by about 60,000 tons of carbon dioxide equivalents per year – facilitated by the Tacoma LNG Project for the purpose of producing dirty power for export to California.

B. Ecology must reopen the 401 Certification to comply with SEPA.

Ecology has the obligation and authority to reopen the 401 Certification to meet its obligations under SEPA.

Although the Army Corps of Engineers has already issued the 404 permit for the Project, this demand for Ecology to comply with SEPA is not moot. Ecology and the PCHB rejected a similar mootness argument in *Center for Environmental Law and Policy v. Washington*, PCHB 17-109. There, the US Fish and Wildlife Service sought to dismiss a challenge to a 401 Certification because the federal permit had already been issued. Ecology argued that the permit appeal was not moot because “[a]s a matter of federal law, a state’s 401 certification is independently enforceable under the CWA’s citizen suit provision, regardless of the fate of the federal permit.” Ecology’s Response in Opposition to U.S. Fish and Wildlife Service’s Motion to Dismiss, **Exhibit I**. The PCHB agreed, ruling that Ecology’s conditions on a 401 certification can provide relief even if it does not impact the federal permit. PCHB 17-109 (May 14, 2018, order Denying Motion to Dismiss) (relying in part on *Deschutes River Alliance v. Portland General Electric Company*, 249 F.Supp.3d 1182 (D. Or. 2017)).

Here, similarly, when Ecology meets its legal obligations to exercise its substantive SEPA authority in light of GHG emissions and project changes, Ecology will have the authority to add conditions to the 401 Certification. For example, based upon the SEIS on GHG emissions, Ecology could add SEPA conditions limiting LNG production to *below* 250,000 gpd, or it could require PSE to purchase carbon offset credits to mitigate the GHG impact as Ecology has done with some other emitters.⁵ Ecology may also add conditions addressing changes in the project or

⁵ Ecology proposed such mitigation for the GHG impacts of the WestRock Tacoma Steam Limit Project. Ecology required the mill to offset GHG produced by the project above 30,000 tons per year using purchased certified GHG offsets or an alternative approved by the Department of Ecology. <https://fortress.wa.gov/ecy/publications/documents/1807023.pdf>


the community's significant safety and health concerns, such as by requiring a Health Impact Analysis related to air pollutants, or an analysis of the Environmental Justice complaints brought by neighbors or the Puyallup Tribe. All such conditions could be enforced by Ecology and/or citizens bringing a Clean Water Act citizens suit.

The State's leadership could also cause the Army Corps of Engineers to reopen its own permitting process to address the significant GHG emissions and/or recent significant changes to the project. The Corps, like Ecology, was obligated to engage in environmental review and consider the full range of environmental impacts of the project. It was also required to conduct a meaningful environmental justice analysis.⁶

C. Conclusion.

The 401 Certification issued to the Tacoma LNG Project stands in stark contrast to the Inslee Administration's and the Department of Ecology's stated commitment to address climate change. In issuing the 401 Certification, Ecology failed to meet its legal obligations under SEPA, which Ecology has confirmed and is presently defending in connection with the Millennium Project. Having recently participated in the SEPA analysis of GHG emissions, and critiquing that analysis, Ecology should acknowledge that it jumped the gun by issuing the 401 Certification years before completion of the SEPA process for the project.

Sierra Club and ACT urge the Inslee Administration and Department of Ecology to meet their obligations under the law by reopening the 401 Certification process to exercise substantive SEPA authority in light of the SEIS and recent changes to the project. The Administration and Ecology have the opportunity to correct their SEPA violations and address the newly disclosed climate change impacts of the project. Should Ecology fail to do so, we intend to bring suit to force such actions. We ask that you provide us with a formal response to this demand within 30 days of this letter.

By: 

Knoll Lowney
Smith & Lowney PLLC
2317 E. John St.
Seattle, WA 98112
Direct: (206) 860-2976
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⁶ See Executive Order 12898; *Crenshaw Subway Coal. v. L.A. Cnty. Metro. Transp. Auth.*, No. CV 11-9603 FMO (JCx), 2015 U.S. Dist. LEXIS 143642, at *109-10 (C.D. Cal. Sep. 23, 2015); *Allen v. NIH*, 974 F. Supp. 2d 18, 22 (D. Mass. 2013).

Cc:

The Puyallup Tribe of Indians

Bill Sherman, Office of the Attorney General

Victoria Woodards, Mayor, City of Tacoma



EXHIBIT

C

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

*PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341*

September 16, 2016

Puget Sound Energy, Inc.
ATTN: Larry Tornberg
P.O. Box 97034 EST 09E
Bellevue, WA 98009-9734

Port of Tacoma
ATTN: Tony Warfield
P.O. Box 1837, 1E Sitecum Plaza
Tacoma, WA 98401-1837

RE: Water Quality Certification Order No. 13764 for Corps Public Notice No. NWS-2014-128-WRD, Tacoma Liquefied Natural Gas Project, Pierce County, Washington

Dear Mr. Tornberg and Mr. Warfield:

The Department of Ecology (Ecology) has completed its review of the Puget Sound Energy, Inc. (PSE) and Port of Tacoma, request for a Section 401 Water Quality Certification (401 Certification) under the federal Clean Water Act for the Tacoma Liquefied Natural Gas (LNG) Project in Pierce County, Washington.

The construction of the Totem Ocean Trailer Express (TOTE) Marine Vessel LNG fueling pier and associated upland facility is proposed to be on a 33 acre site at the Port of Tacoma. The LNG would be available to use as a reduced emissions fuel, as well as for utility peak shaving. The liquefaction facility would receive natural gas from PSE's existing natural gas pipeline distribution system to which two new segments would be added; one in unincorporated Pierce County, and one from the City of Fife into Tacoma.

On behalf of the State of Washington, Ecology certifies that the work described in the JARPA and the public notice complies with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, as amended and applicable state laws. This certification is subject to the conditions contained in the enclosed Order.

If you have any questions, please contact Kerry Carroll at (360) 407-7503. The enclosed Order may be appealed by following the procedures described in the Order.



Sincerely,



Brenden McFarland
Shorelands and Environmental Assistance Program

Enclosure

cc: Olivia Romano, Corps of Engineers

by certified mail 91 7199 9991 7037 0278 3010
91 7199 9991 7037 0278 3027

e-cc: ECY RE FEDPERMITS
Loree Randall - HQ, SEA
Joyce Mercuri - SWRO, TCP
Carol Serdar - SWRO, WQ
Lisa A. Brautigam - Puyallup Indian Tribe
Dorothy Walker- Sierra Club
Donna Walters - Tacoma Citizen
Char Naylor - Puyallup Indian Tribe

IN THE MATTER OF GRANTING A) ORDER # 13764
WATER QUALITY) Corps Reference No. NWS-2014-1128-WRD
CERTIFICATION TO) Tacoma LNG Facility located in Pierce County,
Puget Sound Energy, Inc. and Port of) Washington.
Tacoma)
 in accordance with 33 U.S.C. 1341)
 (FWPCA § 401), RCW 90.48.120, RCW)
 90.48.260 and Chapter 173-201A WAC)

Puget Sound Energy, Inc.
 Larry Tornberg
 P.O. Box 97034 EST 09E
 Bellevue, WA 98009-9734

Port of Tacoma
 Tony Warfield
 P.O. Box 1837, 1E Sitcum Plaza
 Tacoma, WA 98401-1837

On January 16, 2015 the Department of Ecology (Ecology) received the first of several Joint Aquatic Resources Permit Applications (JARPA) from Puget Sound Energy, Inc. (PSE) and Port of Tacoma requesting a Section 401 Water Quality Certification (WQC) for the Tacoma Liquefied Natural Gas (LNG) facility. On December 21, 2015 Ecology received its second JARPA and then on April 6, 2016 Ecology received a revised scope of work, removing all in-water work in the Hylebos Waterway. Two public notices were issued for the project. The first was a Joint Public Notice issued by the Army Corps of Engineers on September 18, 2015 and then Ecology issued a second public notice for the project on December 21, 2015.

This Clean Water Act Section 401 Water Quality Certification is only authorizing the construction of the Totem Ocean Trailer Express (TOTE) Marine Vessel LNG fueling pier, loading platform and access trestle, breasting dolphin in Blair Waterway and associated upland facility and pipeline.

- The propose fueling pier consists of 81-foot long by 33-foot wide trestle (2,673 square feet) supported by twelve 30-inch diameter steel piles and a 69-foot long and 32-foot wide LNG loading platform (2,208) supported by twenty 30-inch diameter steel piles. The loading platform and access trestle would be constructed of pre-cast concrete panels or poured-in-placed concrete.
- The loading platform would have a fender system that would include up to ten 14-inch diameter steel piles with rub strips on the breasting face of each fender pile. Loading platform would be outfitted with cryogenic marine hoses or loading arms to facilitate the transfer of LNG from the LNG fueling system into the fueling system of TOTE vessels.

- The access trestle would include a roadway for fire truck access, pipe racks, utility corridor, a walkway for personnel, and a spill channel for conveying spills from the loading platform to an onshore containment sump in the event of a spill. The spill channel and containment sump would be sized for a maximum spill event. A steel pile supported catwalk would provide line-handlers access to the onshore mooring point and capstan from the aft loading ramp. The open steel grated catwalk with hand rails would connect the loading platform to the onshore mooring point and capstan. Two 18-inch diameter piles would be used to support the catwalk.
- A breasting dolphin would be installed, just north of the existing loading pier, to protect the existing pier and the proposed LNG loading platform from impacts by TOTE vessels. This breasting dolphin would consist of four 30-inch diameter steel piles with six foot cone fender. Up to 20 cubic yards of sand would be placed in any holes left from the removal of existing piles in the Blair Waterways as part of proposed work.
- The Tacoma LNG Facility would be constructed on a 33 acre site along the northern half of the Blair-Hylebos peninsula and bordered by the Hylebos Waterway to the northeast, the TOTE facility to the northwest and southwest, and East 11th Street to the southeast. The LNG Facility would be sized to produce 250,000 gallons of LNG per day from natural gas.
- The project would include improvement to the existing Puget Sound Energy (PSE) natural gas distribution system to facilitate supply of natural gas to the new facility. These improvements include the construction of two new underground natural gas distribution pipeline segments, a new natural gas limit station, and modifications to an existing natural gas gate station. These improvements would be located in City of Tacoma, the City of Fife and unincorporated Pierce County and were designed to avoid impacts to wetlands and waterbodies.

This Clean Water Act Section 401 Water Quality Certification also authorizes the proposed compensatory mitigation to offset the impacts to aquatic resources from the in-water work. A total of 48 creosote-treated piles will be removed from two locations, Blair Waterway adjacent to the existing TOTE facility and Sperry Terminal Site in Commencement Bay. In addition to the pile removal the applicant proposed to remove overwater decking from the several existing pier structure in the Blair Waterway, Hylebos Waterway and Commencement Bay.

AUTHORITIES

In exercising authority under Section 401 of the Clean Water Act (33 U.S.C. § 1341), RCW 90.48.120, and RCW 90.48.260, Ecology has reviewed this application pursuant to the following:

1. Conformance with applicable water quality-based, technology-based, and toxic or pretreatment effluent limitations as provided under 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306 and 307);
2. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. §1313 and by Chapter 90.48 RCW, and with other applicable state laws; and
3. Conformance with the provision of using all known, available and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

WATER QUALITY CERTIFICATION CONDITIONS

Through issuance of this Order, Ecology certifies that it has reasonable assurance that the activity as proposed and conditioned will be conducted in a manner that will comply with applicable water quality standards and other appropriate requirements of state law. In view of the foregoing and in accordance with 33 U.S.C. §1341, RCW 90.48.120, RCW 90.48.260 Chapter 173-200 WAC and Chapter 173-201A WAC, water quality certification is granted to the Applicant subject to the conditions within this Order.

Certification of this proposal does not authorize Puget Sound Energy, Inc. (PSE) and/or the Port of Tacoma (Port) to exceed applicable state water quality standards (Chapter 173-201A WAC), ground water quality standards (Chapter 173-200 WAC) or sediment quality standards (Chapter 173-204 WAC). Furthermore, nothing in this certification absolves PSE and/or the Port from liability for contamination and any subsequent cleanup of surface waters, ground waters or sediments resulting from project construction or operations.

A. General Conditions

1. In this Order, the term "Applicant" shall mean Puget Sound Energy, Inc. (PSE) and the Port of Tacoma (Port) and its agents, assignees, and contractors.
2. The Applicant shall hire third party personnel to ensure all notifications, conditions and monitoring are done in compliance with this Order and reported to the Ecology Federal Permit Manager as required.
3. The Applicant shall comply with the conditions of the applicable National Pollutant Discharge Elimination System (NPDES) Stormwater Permits issued for the construction and operations of this facility.
4. All submittals required by this Order shall be sent to Ecology's Headquarters Office, Attn: Kerry Carroll, P.O. Box 47600, Olympia, WA 98504 or via e-mail (preferred), if

possible, to kerry.carroll@ecy.wa.gov. The submittals shall be identified with Order No. 13764 and include the Applicant's name, project name, project location, the project contact and the contact's phone number.

5. Work authorized by this Order is limited to the work described in the revised scope of work document submitted April 6, 2016 and the following documents, unless otherwise authorized by Ecology.

Table # 1

Plan Name	Prepared By	Date
In-water Impacts Mitigation Plan	Joel Shaich	Revised April 25, 2016
Applicant-prepared Biological Evaluation for the Puget Sound Energy Tacoma LNG Project	CH2MHILL	Resubmitted December 3, 2015
Geotechnical Report	GeoEngineers	January 16, 2015

6. The Applicant shall obtain Ecology review and approval before undertaking any change to the proposed project that might significantly and/or adversely affect water quality (other than project changes required or considered by this Order).
7. Within 30 days of receipt of any updated information, Ecology will determine if the revised project requires a new water quality certification and public notice or if a modification to this Order is required.
8. This Order shall be rescinded if the Army Corps of Engineers (Corps) does not issue a Corps permit for the project.
9. The Applicant shall send (per A.2.) a copy of the final Corps permit to Ecology within two weeks of receiving it.
10. The Applicant shall keep copies of this Order and other documents required by this Order on the job site and readily available for reference by Ecology personnel, the construction superintendent, construction managers and lead workers, and state and local government inspectors.
11. The Applicant shall provide access to the project site and all mitigation sites upon request by Ecology personnel for site inspections, monitoring, necessary data collection, and/or to ensure that conditions of this Order are being met.

12. Nothing in this Order waives Ecology's authority to issue additional orders if Ecology determines that further actions are necessary to implement the water quality laws of the state. Further, Ecology retains continuing jurisdiction to make modifications hereto through supplemental order, if additional impacts due to project construction or operation are identified (*e.g.*, violations of water quality standards, downstream erosion, etc.), or if additional conditions are necessary to further protect water quality.
13. The Applicant shall ensure that all project engineers, contractors, and other workers at the project site with authority to direct work have read and understand relevant conditions of this Order and all permits, approvals, and documents referenced in this Order. The Applicant shall provide Ecology's Federal Permit Manager a signed statement (see Attachment A for an example) from each signatory that s/he has read and understands the conditions of this Order and the above-referenced permits, plans, documents and approvals. These statements shall be provided to Ecology before construction begins.
14. This Order does not authorize direct, indirect, permanent, or temporary impacts to waters of the state or related aquatic resources, except as specifically provided for in conditions of this Order.
15. Failure of any person or entity to comply with the Order may result in the issuance of civil penalties or other actions, whether administrative or judicial, to enforce the terms of this Order.

B. Notification Requirements

1. The following notifications shall be made via phone or e-mail (e-mail is preferred) to Ecology's Federal Permit Manager. Notifications shall be identified with Order No.13764 and include the Applicants name, project name, project location, project contact and the contact's phone number.
 - a. Immediately following a violation of state water quality standards, spill to waters of the state or when the project is out of compliance with any of this Orders conditions.
 - i. In addition to the phone or e-mail notification, the Applicant shall submit a detailed written report to Ecology's Federal Permit Manager within five (5) days that describes the nature of the event, corrective action taken and/or planned, steps to be taken to prevent a recurrence, results of any samples taken, and any other pertinent information.
 - b. At least ten (10) days prior to all pre-construction meetings
 - c. At least ten (10) days prior to conducting initial in-water work activities for each in-water work window.
 - d. At least seven (7) days prior to the start of over water construction and demolition activities.
 - e. At least seven (7) days within project completion.

C. Timing

1. This Order will expire five (5) years from the date of issuance of the Corps permit. Continuing work subject to this Order, beyond the five-year expiration date, will require the Applicant to request an extension at least 30 days prior to the expiration of this Order.
2. All in-water work shall be completed within August 15 to February 15 of any year, unless otherwise authorized by Ecology.

D. Water Quality Monitoring & Criteria

1. This Order does not authorize the Applicant to exceed applicable state water quality standards as described in WAC 173-201A.
2. For in-water activities within marine waters the temporary area of mixing for turbidity is a 150 foot radius surrounding the in-water activity.
3. For in-water activities within fresh waters (including wetlands) the temporary area of mixing for turbidity established for fresh waters is as follows:
 - a. For waters up to 10 cfs flow at the time of construction, the point of compliance shall be one hundred feet downstream from the activity causing the turbidity exceedance.
 - b. For waters above 10 cfs up to 100 cfs flow at the time of construction, the point of compliance shall be two hundred feet downstream of the activity causing the turbidity exceedance.
 - c. For waters above 100 cfs flow at the time of construction, the point of compliance shall be three hundred feet downstream of the activity causing the turbidity exceedance.
 - d. For projects working within or along lakes, ponds, wetlands, or other nonflowing waters, the point of compliance shall be at a radius of one hundred fifty feet from the activity causing the turbidity exceedance.
4. Visible turbidity anywhere beyond the allowed temporary area of mixing (point of compliance) shall be considered to be an exceedance of the standard.
5. The Applicant shall implement the "Water Quality Protection and Monitoring Plan, Puget Sound Energy Tacoma Liquefied Natural Gas Project" (WQPMP) submitted May 6, 2015, revised September 13, 2016, or as amended by this Order.
6. Ecology's Federal Permit Manager must approve, in writing, any changes or additions to the WQPMP.

7. Monitoring results shall be submitted weekly to Ecology's Federal Permit Manager, per condition A.2.
8. Mitigation and/or additional monitoring may be required if the monitoring results indicate that the water quality standards have not been met.

E. Construction

General Conditions

1. Within the project limits¹ all environmentally sensitive areas including, but not limited to, wetlands, wetland buffers, and mitigation areas shall be fenced with high visibility construction (HVF) prior to commencing construction activities. Construction activities include equipment staging, materials storage, and work vehicle parking. *Note: This condition does not apply to activities such as pre-construction surveying and installing HVF and construction zone signage.*
 - a. All field staff shall be trained to recognize HVF, understand its purpose and properly install it in the appropriate locations.
 - b. HVF shall be maintained until all work is completed for the project.
2. All clearing limits, stockpiles, and staging areas shall clearly be marked prior to commencing construction activities and maintained until all work is completed for each project.
3. No petroleum products, fresh concrete, lime or concrete, chemicals, or other toxic or deleterious materials shall be allowed to enter waters of the state.
4. All construction debris, excess sediment, and other solid waste material shall be properly managed and disposed of in an upland disposal site approved by the appropriate regulatory authority.
5. All in-water and over water BMP's shall be inspected daily to ensure they are functioning as intended. The BMPs shall be modified or enhanced as expeditiously as practicable if a problem is observed.

Equipment & Maintenance

6. Staging areas will be located a minimum of 50 feet and, where practical, 200 feet, from waters of the state including wetlands. If a staging area must be located within 50 feet of waters of the state, the Applicant shall provide a written explanation and obtain approval

¹ Project limits include mitigation sites, staging areas, borrow sources, and other sites developed or used to support project construction.

from Ecology's Federal Permit Manager before placing the staging area in the setback area.

7. All equipment being used below the ordinary high water mark shall utilize bio-degradable hydraulic fluid.
8. Equipment used for this project shall be free of external petroleum-based products while used around the waters of the state, including wetlands. Accumulation of soils or debris shall be removed from the drive mechanisms (wheels, tires, tracks, etc.) and the undercarriage of equipment prior to its use around waters of the state, including wetlands.
9. Fuel hoses, oil drums, oil or fuel transfer valves and fittings, etc., shall be checked regularly for drips or leaks, and shall be maintained and stored properly to prevent spills into state waters.
10. Wash water containing oils, grease, or other hazardous materials resulting from wash down of equipment or working areas shall not be discharged into state waters. The Applicant shall set up a designated area for washing down equipment.
11. A separate area shall be set aside, which does not have any possibility of draining to surface waters, for the wash-out of concrete delivery trucks, pumping equipment, and tools.

Construction and Demolition

12. No structural material may enter waters of the state during demolition activities.
13. When asphalt or other decking is removed, the contractor shall prevent asphalt grit or other debris on the pier from entering the water. Prior to demolition, the contractor shall remove as much of the surface asphalt grit and debris as possible. Floating platforms, suspended tarps, or other means should be deployed under and around the structure to capture grit and debris.
14. All forms for concrete shall be completely sealed to prevent the possibility of fresh concrete entering waters of the state.
15. All concrete shall be completely cured prior to coming into contact with water.
16. Concrete process water shall not enter waters of the state. Any concrete process/contact water discharged from a confined area with curing concrete shall be routed to upland areas to be treated and disposed of appropriately with no possible entry to state waters.

17. All saw cut water and debris generated from saw cutting activities that occur above water shall be contained and disposed of appropriately with no possible entry to waters of the state.

Creosote Pile Removal

18. The Applicant shall consider the best tidal conditions for piling removal that may result in the least amount of disturbance to in place sediment. If piling removal results in exceedance of turbidity at the compliance boundary, reconsider the timing of removal to a more restricted time frame, for example, the lowest practical tide condition or around slack water.
19. A sediment curtain shall be used at all times during pile pulling. The curtain shall not be allowed to rest on the sea floor.
20. In addition to the sediment curtain all work should be confined to within a floating containment boom with absorbent pads to capture floating surface debris and any creosote sheen.
 - a. The boom shall be located at a sufficient distance from all sides of the structure or piling that are being removed to ensure that contaminated materials are captured.
 - b. Extracted piles shall be transferred to the containment basin without leaving the boomed area to prevent loss of treated wood chemicals (e.g., creosote) and debris to the water column and sediments.
 - c. The boom shall stay in its original location until any sheen present from removed piling has been absorbed by the boom or removed utilizing absorbent material.
21. A small boat should be available at all times during active construction to manage the boom and curtain and captured debris. If used, anchors must be removed once the project is complete.
22. Any shavings, sawdust, woody debris (splintered wood, fragments, loose piling) on the water or sediment surface must be retrieved and placed in the containment area. Likewise any pile-associated sediment and adhered organisms must be collected daily, contained on site, and ultimately disposed at an approved upland disposal site along with the extracted piling and decking.
23. Remove piling slowly and “wake up” the piling by vibrating it to break the skin friction bond between the piling and sediment. This will minimize turbidity in the water column as well as possibly breaking off the piling.
24. Treated wood piling shall not be broken off intentionally by twisting, bending or other deformation.

25. Piling shall not be shaken, hosed-off, stripped or scraped off, left hanging to drip or any other action intended to clean or remove adhering material from the piling.
26. Upon removal from the substrate and water column, the piling shall be moved expeditiously into the containment area for processing and disposal at an approved off-site, upland facility.
27. Containment areas on barges, piers and upland areas shall have continuous sidewalls and controls as necessary (e.g., straw bales, oil absorbent boom, ecology blocks, durable plastic sheeting or lining, covers, etc.) to contain all sediment, wood-treating compounds, organisms and debris, and to prevent re-entry of these materials into the aquatic environment.
28. Multiple attempts to remove a pile shall be made before resorting to cutting.
29. Piles that cannot be fully extracted shall be cut off three feet below the mudline, capped and the hole filled with clean sediment that matches the native material
30. No grubbing for broken piling is allowed.
31. Hand excavation of sediment (with divers in subtidal areas) is approved if needed to gain access for cutting equipment. Hydraulic jetting devices shall not be used to move sediment away from piling.
32. Water left in the containment on the barge shall not be discharged into waters of the state.
33. Barges shall not be allowed to ground-out during in-water construction and shall be swept, as necessary, and kept free of material that could be blown into water.

Piling Installation

34. A sediment curtain shall be used at all times during pile placement. The curtain shall not be allowed to rest on the sea floor.
35. Sound attenuation methods are required for the driving or proofing of steel piles with an impact hammer below the ordinary high water line. Installation of a bubble curtain around the pile during all driving or proofing operations to ensure proper sound attenuation. The bubble curtain must distribute air bubbles around 100 percent of the perimeter of the piling over the full length of the pile in the water column.
36. Wood, concrete, steel or plastic piling may be installed using vibratory methods and/or an impact hammer. Vibratory methods are preferred.
37. Hydraulic jetting devices shall not be used to place piling.

Pipeline Installation

38. The applicant shall implement "Puget Sound Energy, Inc., General Frac-Out Plan" submitted on September 15, 2016 during HDD operations.
39. A trench breaker plan shall be submitted to Ecology's Federal Permit Manager for review and comment prior to starting construction of the pipeline.
40. Trench breakers shall be installed to limit the potential transport and/or migration of existing contaminated groundwater during construction of the pipeline.
41. An as-built of the pipeline shall be submitted to Ecology's Federal Permit Manager within 30 days of completing the pipeline construction.

F. Emergency/Contingency Measures

1. The Applicant shall develop and implement a spill prevention and containment plan for this project and shall have spill cleanup material available on site at all times during construction.
2. Work that is out of compliance with the provisions of this Order, conditions causing distressed or dying fish, discharges of oil, fuel, or chemicals into state waters or onto land with a potential for entry into state waters, is prohibited. If such work, conditions, or discharges occur, notify the Ecology Federal Permit Manager per condition B.1.a. and immediately take the following actions:
 - a. Cease operations at the location of the non-compliance.
 - b. Assess the cause of the water quality problem and take appropriate measures to correct the problem and/or prevent further environmental damage.
 - c. In the event of a discharge of oil, fuel, or chemicals into state waters, or onto land with a potential for entry into state waters, containment and cleanup efforts shall begin immediately and be completed as soon as possible, taking precedence over normal work. Cleanup shall include proper disposal of any spilled material and used cleanup materials.
 - d. Immediately notify Ecology's Regional Spill Response Office at 360-407-6300 and the Washington State Department of Fish & Wildlife the nature and details of the problem, any actions taken to correct the problem, and any proposed changes in operation to prevent further problems.
 - e. Immediately notify the National Response Center at 1-800-424-8802, for actual spills to water only.
3. Notify Ecology's Southwest Regional Spill Response Office immediately if chemical containers (e.g. drums) are discovered on-site or any conditions present indicating disposal or burial of chemicals on-site that may impact surface water or ground water.

YOUR RIGHT TO APPEAL

You have a right to appeal this Order to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do all of the following within 30 days of the date of receipt of this Order:

- File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

ADDRESS AND LOCATION INFORMATION

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	Department of Ecology Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
Pollution Control Hearings Board 1111 Israel RD SW STE 301 Tumwater, WA 98501	Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903

CONTACT INFORMATION

Please direct all questions about this Order to:

Kerry Carroll, Federal Permit Manager
Department of Ecology
P.O. Box 47600
Olympia, WA 98503-7600
360-407-7503
kerry.carroll@ecy.wa.gov

MORE INFORMATION

- **Pollution Control Hearings Board Website**
www.eho.wa.gov/Boards_PCHB.aspx
- **Chapter 43.21B RCW - Environmental and Land Use Hearings Office – Pollution Control Hearings Board**
<http://apps.leg.wa.gov/RCW/default.aspx?cite=43.21B>
- **Chapter 371-08 WAC – Practice And Procedure**
<http://apps.leg.wa.gov/WAC/default.aspx?cite=371-08>
- **Chapter 34.05 RCW – Administrative Procedure Act**
<http://apps.leg.wa.gov/RCW/default.aspx?cite=34.05>
- **Chapter 90.48 RCW – Water Pollution Control**
<http://apps.leg.wa.gov/RCW/default.aspx?cite=90.48>
- **Chapter 173.204 Washington Administrative Code (WAC) Sediment Management Standards**
<http://www.ecy.wa.gov/biblio/wac173204.html>
- **Chapter 173-200 WAC Water Quality Standards for Ground Waters of the State of Washington**
<http://www.ecy.wa.gov/biblio/wac173200.html>
- **Chapter 173-201A WAC Water Quality Standards for Surface Waters of the State of Washington**
<http://www.ecy.wa.gov/biblio/wac173201A.html>

SIGNATURE

Dated this 16th day of September, 2016 at the Department of Ecology, Lacey Washington



Brenden McFarland, Section Manager
Environmental Review and Transportation
Shorelands and Environmental Assistance Program

Attachment A
Statement of Understanding
Water Quality Certification Conditions

Tacoma LNG Project
Puget Sound Energy, Inc. and Port of Tacoma
Section 401 Water Quality Certification Order No. 13764
and
Corps Reference No. NWS-2014-128-WRD

I, _____, state that I will be involved as an agent or contractor for Puget Sound Energy, Inc. and Port of Tacoma in the site preparation and/or construction of the Tacoma LNG located at 901 and 1001 Alexander Avenue East and 3533 E 11th Street, Pierce County, Washington. I further state that I have read and understand the relevant conditions of Washington Department of Ecology Section 401 Water Quality Certification Order No. 13764 and the applicable permits and approvals referenced therein which pertain to the project-related work for which I am responsible.

Signature

Date

Title

Phone

Company



**EXHIBIT
D**

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

November 21, 2018

Carole Cenci, Compliance Manager
Puget Sound Clean Air Agency
1904 Third Avenue, Suite 105
Seattle, WA 98101

RE: Comments on Draft Supplemental Environmental Impact Statement for
Puget Sound Energy - Tacoma Liquefied Natural Gas Project

Dear Carole Cenci:

Thank you for the opportunity to comment on the Draft Supplemental Environmental Impact Statement (SEIS) for the Puget Sound Energy Tacoma Liquefied Natural Gas Project. We appreciate that the analysis includes a greenhouse gas (GHG) life cycle analysis related to the proposal. The state of the science underlying life cycle analysis has advanced in recent years and continues to progress.

Regarding the GHG analysis, Ecology offers several comments:

- Our technical experts note that marine emission comparisons in the analysis should be to diesel, not Marine Diesel Oil (MDO), as heavier fuels are being phased out in nearshore operations. Also, because this project would require a large amount of electricity and create new demand, the analysis would be more accurate if it used current marginal power emission factors.
- In the evaluation of emissions from peak shavings, we don't understand how peak shaving could result in a net emissions decrease because energy is needed to liquefy the natural gas. This should be clarified in the Final SEIS. Additionally, the LNG converted back into natural gas for peak shaving should be evaluated against natural gas thermal combustion or power generation rather than petroleum, because Washington does not have significant petroleum based power generation.
- The analysis assumes that 100% Canadian natural gas would be used. If correct, this could cause fuel shuffling that results in an increased use of non-Canadian natural gas for other projects.

Carole Cenci, Compliance Manager

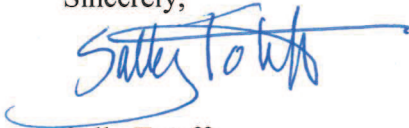
November 21, 2018

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- If analyses in the Final SEIS lead to consideration of mitigation, technical expertise from Ecology is available to assist with calculations, determinations, and mitigation. Specifically, we could assist with the design of mitigation strategies that would result in emission reductions that are:
 - real, specific, identifiable, and quantifiable;
 - permanent;
 - verifiable; and
 - additional to existing law, rule, or supplementary requirements.
- Mitigation projects occurring within Washington are typically more easily tracked and accounted for, and support more accurate state GHG inventories. In-state actions would provide the added benefit of helping Washington reach its GHG reduction targets.

Again, thank you for the opportunity to comment. Please do not hesitate to contact Ben Blank at Ben.Blank@ecy.wa.gov or me at Sally.Toteff@ecy.wa.gov if you have questions about our comments.

Sincerely,



Sally Toteff
Southwest and Olympic Regional Director

(MLD:201805572)

cc: Ben Blank, Climate Policy Section Manager
Neil Caudill, Senior Carbon Reduction Planner
Betsy Wheelock, Project Manager, PSCAA



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Counsel for Environmental Protection
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

November 21, 2018

Email: publiccomment@psc Clean Air Agency

Puget Sound Clean Air Agency
ATTN: Public Comment on DSEIS, PSE LNG Project
1904 Third Avenue, Suite 105
Seattle, WA 98101

Re: Comment on Draft SEIS

Thank you for this opportunity to comment on the Draft Supplemental Environmental Impact Statement for the proposed Tacoma Liquefied Natural Gas Project. I offer two categories of comment: substantive and procedural.

Substantively, the Attorney General's Office's Counsel for Environmental Protection Unit agrees with and incorporates here the comments submitted by the Washington State Department of Ecology.

In addition, we encourage the Agency to revise the draft SEIS to fully respond to other commenters' concerns about the calculations of the short- and long-term global warming potential value of methane. The draft SEIS should ensure that it applies the most current, valid, peer-reviewed assessment of the global warming potential of emissions related to this project. Similarly, the draft SEIS assumes that all gas associated with the Project will come from Canada, and bases its calculations on that assumption. It is not clear why that assumption should be expected to hold true for the 40-year lifespan of the Project, especially as United States natural gas production has increased substantially in recent years. Consequently, the SEIS should be revised to anticipate and adequately review the possibility of a change in the source and makeup of that gas over the facility's 40-year lifespan.

Procedurally, the SEIS should be significantly revised to accurately identify the actual circumstances and current status of the construction and permitting process on the site. As currently drafted, the SEIS evaluates a No-Action Alternative that can only be described as fictional. In so doing, the draft SEIS raises questions about whether the Agency's SEPA process allowed the kind of "snowballing effect" that the Washington Supreme Court warned about in *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664

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(1993) (concluding that the appropriate time to prepare an EIS is when “the responsible agency determines that significant adverse environmental impacts are probable following the government action”).

As you are aware, the Project began construction in 2016. A PSCAA inspector visited the project site on March 15, 2017, and observed activity indicating that the facility should have, before that activity, submitted a Notice of Construction application and received an Order of Approval. PSCAA issued a Notice of Violation on that basis on April 12, 2017. Although the project developer then submitted a Notice of Construction application, construction has continued at the site. PSCAA has apparently taken no further action investigating or enforcing the Notice of Violation, beyond accepting the NOC application and undertaking this SEPA process.

The Draft SEIS, however, does not appear to acknowledge that construction of any type has occurred on the Proposed Action. In fact, it appears to assume that construction, and therefore impacts of construction, are still contingent on the selection of an alternative. That of course is not the case, and therefore the Draft SEIS’s description of the Proposed Action and No Action Alternative fail to comport with the actual status of the project site. In short, the No Action Alternative as described in the Draft SEIS is no longer an available alternative.

A few specific examples:

- The Draft SEIS’s summary of the No Action Alternative states that “the existing land uses would continue at the proposed Tacoma LNG Facility site,” p. 1-2. It is not clear that this could be the case; if so, substantial demolition and removal activity would be required. The Draft SEIS should include an accurate description of the No Action Alternative, or clearly indicate where the No Action Alternative diverges from the actual status of the project site.
- The Draft SEIS section on construction emissions is based on construction activities as defined in the September 30, 2015 Final Environmental Impact Statement (FEIS) (section 2.3 of the FEIS). Did PSCAA determine whether construction activities as actually conducted to date are substantially identical to those defined in the FEIS? If so, the SEIS should so indicate; if not, the SEIS should make such a determination.
- Section 3 of the Draft SEIS, “Description of the No Action Alternative,” contains a number of statements that do not comport with the present status of the project site. For instance, on page 3-1, the draft states that “under the No Action Alternative, the Proposed Action would not be implemented.” Because construction has advanced, those aspects of the Proposed Action would be, and in fact have been, implemented.
- The Draft SEIS discusses construction impacts on pp. 4-6 – 4-7, but fails to indicate that more than two years of the “four-year period” of construction have already occurred. The

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November 21, 2018

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Draft SEIS does not indicate whether the statements of GHG emissions on pp. 4-7 and 4-8 are based on construction as projected before the project began, or based on activities that have already occurred.

- In addition, the Draft SEIS asserts that “There are no construction impacts associated with the No Action Alternative.” p. 4-9. This is plainly incorrect. Because construction impacts have already occurred, an alternative involving removal of the project would have further impacts associated with either demolition or repurposing of the already-built facilities.

Taken together, these shortcomings render the Draft SEIS’s consideration of a No-Action alternative insufficient, and raises the concern that the SEPA process that produced it was insufficient to avoid the “snowballing effect” discussed above. We encourage the Agency to address those concerns prior to issuance of the final SEIS and issuing an Order of Approval.

Sincerely,

A handwritten signature in blue ink, appearing to read "William R. Sherman", is written over a light blue rectangular background.

William R. Sherman

Counsel for Environmental Protection Unit

The key inputs that affect this study are the energy consumed by the Tacoma LNG project and the displacement of fuels with LNG. The inputs for the project were provided by PSE. The assumption on fuel displacement is that every gallon of LNG displaces an activity associated with its end use. So, a TOTE marine vessel operates on LNG instead of MGO. The displaced fuel is based on the energy economy ratio in Table 2.4. The range of GHG emissions associated with the Tacoma LNG were examined via the scenarios shown in Table 2.4.

Table 2.4. Parameters for Sensitivity Analysis

Scenario Parameter	Baseline	Lower	Upper
a. Tacoma LNG	PSE data for LNG facility operation	Use waste gas for pretreatment and LPG sales	PSE data for LNG facility operation
b. Loss Factor	PSE estimates for fugitive emissions from LNG transfers		
c. Natural Gas Upstream	BC Gas from GHGenius	British Columbia Gas inventory sensitivity analysis	U.S. GREET
d. Electricity Mix	Washington State	Tacoma Power	eGRID NWPP Region sensitivity analysis
e. Energy economy ratio	1.0 for marine 0.90 for trucking 1.0 for NG peak shaving	1.015 for marine 0.90 for trucking 1.0 for NG	1.0 for marine 0.90 for trucking 1.0 for NG
f. Methane Emissions	5.3 g CH ₄ /kWh slip 95% boil off capture	5.3 g CH ₄ /kWh slip 100% boil off capture	6.9 g CH ₄ /kWh slip 0% boil off capture
g. Economic effects	Assume 1:1 displacement of end use for each application. Price induced effects are assumed to be minor.		

2.4 Assumptions and Data Sources

Calculations of life cycle GHG emissions are based on the energy inputs and emissions factors and assumptions for each step in the fuel production process. The assumptions used to develop direct emissions from fuel production, and inputs to GREET modeling tools for the upstream and downstream emissions in the life cycle are described below. Since many of the data sources apply to both Tacoma LNG as well as displaced emissions, the data are organized by category rather than a linear path along the fuel life cycle.

2.4.1 Natural Gas Upstream

Natural gas provides a feedstock for the Tacoma LNG Facility. It is also an input to power generation and crude oil refining. The production of natural gas includes extraction at a gas well, processing to separate natural gas liquids, and transport to the Tacoma LNG Facility or other users of natural gas. The Tacoma LNG Facility will have a capacity to produce an average of 500,000 gallons per day of LNG.



