

# SEPA AND PORT LEASING

## LIFE AFTER *COLUMBIA RIVERKEEPER ET. AL. VS. PORT OF VANCOUVER USA*

### A Panel Discussion:

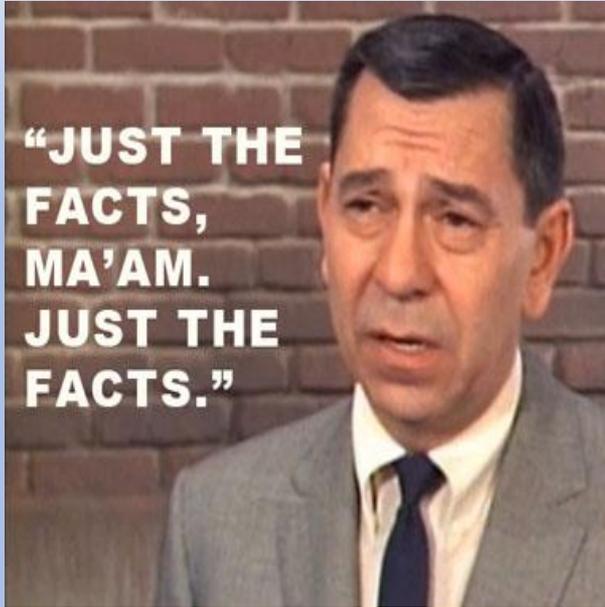
- Lisa Lowe, attorney
- Frank Chmelik, attorney
- Jon Sitkin, attorney
- Scott Keller, ED Port of Benton – not an attorney

# OVERVIEW

- On March 17, 2017, the Washington Supreme Court announced its decision in *Columbia Riverkeeper et. al. v. Port of Vancouver USA*, et. ux.
  - What are SEPA implications for port district leases?
  - What can or should ports do to address this decision?

*392 P.2d 1025 (2017)*

# JUST THE FACTS



- Port of Vancouver considers a land lease for the development of an oil export terminal
- Lease provides that tenant must receive all necessary permits before beginning development
- Port does not conduct a SEPA process before making the leasing decision
- Because it is an energy facility there must necessarily be a decision by the Washington State Energy Facility Site Evaluation Council
  - EFSEC conducts SEPA by law
- But the Court went beyond that to comment on ports generally

# A 5-4 COURT DECISION

- Majority opinion (as explained below)
  - EFSEC by law must conduct the SEPA so the Port of Vancouver did not have to conduct SEPA;  
and
  - SEPA applies to Port leasing decisions;  
and
  - The Port of Vancouver lease as drafted did not “limit reasonable alternatives” and therefore complied with SEPA

- Dissenting Opinion
  - The Port “limited reasonable alternatives” by signing a “binding commercial lease”
  - Lease language of agreeing to “work diligently and in good faith” to achieve a described project limited any other reasonable alternative
  - The “use provision” in the lease limiting the lease to a particular use limited any other reasonable alternative
  - The lease violates the SEPA purpose of “environmentally informed decision making” because the Port had not conducted SEPA before the lease decision

# WHAT IS SEPA?

Washington State Environmental Policy Act (SEPA)

- SEPA overlays and supplements all other laws
- SEPA is the State's most fundamental environmental policy statement
- SEPA applies to decisions by every state and local agency within Washington State, including ports
- SEPA is a process that provides for the identification of possible environmental impacts that may result from governmental action prior to the action being taken

# WHAT IS THE TIMING OF SEPA REVIEW?

- Earliest possible point in the planning and decision-making process
- When the principle features of a proposal and its environmental impacts can be reasonably identified. WAC 197-11-055(2)(a)
- “Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.” WAC 197-11-055(2)(a)(ii)

# WHO CONDUCTS THE SEPA REVIEW?

- The lead agency
- One agency is usually identified as the “lead agency” for a specific proposal
  - The lead agency for most private projects will be the city or county where the project is located
  - For public projects, the lead agency will be the agency proposing the project

# ARE LEASING DECISIONS SUBJECT TO SEPA?

- Yes, said the Supreme Court citing WAC 197-11-070(b), because a port is a “government agency,” “taking an action” that is “limiting the choice of reasonable alternatives.”
- Except, when a lease results in no change in use (WAC 197-11-800(5)(c):  
*“Leasing...or otherwise authorizing the use of real property when the property use will remain essentially the same as the existing use for the term of the agreement, or when the use under the lease, easement or other authorization is otherwise exempted by this chapter.”*

# PORT LEASING PRACTICES PRE-RIVERKEEPER CASE

- Most ports had standard lease language which required the tenant to obtain “all necessary permits” before beginning construction:

*LESSEE WILL OBTAIN PERMITS: Lessee agrees to obtain and comply with all necessary permits for any leasehold improvement. If Lessee fails to obtain and comply with such permits, then Lessee accepts full responsibility for any and all costs incurred by Lessor, including actual attorneys' fees. In this way, Lessee agrees to be solely responsible for all damages, costs and expenses incurred as a result of Lessee's failure to fully comply with any necessary permit process and requirements.*

- Ports relied upon the permit granting government (city or county) to conduct the appropriate SEPA review
- No specific reference to SEPA

# WHAT THE COURT HELD

- Port of Vancouver USA did not limit their choice of “reasonable alternatives” because:
  - Condition precedent – required tenant to obtain all “necessary, licenses, permits and approvals”
  - If the condition precedent was not satisfied then either party could terminate the lease
  - Port retained the right to approve plans and specifications

# WHAT THE COURT REASONED

- These retained powers, according to the Court:  
“plainly preserves the Port’s ability to shape the final project in response to environmental review, for example by adopting additional mitigation measures, heightened insurance requirements, or modifying project specifications. This preserves reasonable alternatives.”

# OK, SO NOW WHAT - FOR PORT LEASES WHERE THERE IS NEW DEVELOPMENT OR A CHANGE IN USE?

- Condition precedent – obtain all “necessary, licenses, permits and approvals”
- If the condition precedent is not satisfied then either party may terminate the lease
- Port retains right to approve plans and specifications

# BUT THEN, WHAT ABOUT...

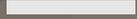
- Retained Right to Change the Project or Impose Additional Conditions?
  - Will the marketplace accept this?
  - Do you include in all “new use” leases or just the ones that may be controversial?
  - Will such a condition affect the price?
  - Who will/should bear the business risk?
  - Should a port imposed change yield a right of the tenant to terminate?
  - Should a port imposed change yield a price adjustment?

# ARE THERE OTHER ALTERNATIVES?

- Sale of the property?
- Memorandum of Understanding with a lease to follow?
  - Will potential tenants agree to this uncertainty?
- Port conducted SEPA?
  - Will there be enough information at the lease stage?
  - Will the other governments object?
- How does the Port get enough knowledge?

# BEST PRACTICES RECOMMENDATIONS

- Condition precedent – obtain all “necessary, licenses, permits and approvals” if the condition precedent is not satisfied then either party may terminate the lease
- Port retains right to approve plans and specifications
- Staff actually reviews environmental determination and has commission take action
  - Some form of a carve back for environmental review
  - Economic impact or termination
- Just sell the property
  - But this may require SEPA



QUESTIONS?