

Oral Ruling

Port of Kalama v. Washington Shorelines Hearing Board, et al.

May 8, 2018



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

PORT OF KALAMA,)
Petitioner,) Cause No. 17-2-01269-08
v.)
WASHINGTON SHORELINES HEARING)
BOARD, et al.,)
Respondents.)

ORAL RULING
The Honorable Stephen M. Warning Presiding
May 8, 2018

TRANSCRIBED BY: Marjorie Jackson, LLC

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A P P E A R A N C E S (continued)

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1 May 8, 2018
2 (10:35:00)
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5 THE COURT: All right. Well, let me start, I guess, with
6 something of a non sequitur. Whatever else can be said
7 about the political conversation over the last couple years,
8 apparently many of us have come to the conclusion it means
9 that what have for a long time been common notions of
10 civility have gone by the board, and everybody is just
11 entitled to act like a jackass. But I -- it's strange. We
12 see it in jury selection all the time.
13 These are important issues that people feel strongly
14 about. Thank you, everyone, for behaving appropriately. I
15 guess that's something I didn't think I had to say all the
16 time five years ago, but just -- we have gotten to the point
17 where I need to acknowledge it, so thank you.
18 I can't imagine a more difficult subject area to address
19 in the context of an environmental impact statement than
20 greenhouse gases, because it's not like the whitetail deer
21 on Cottonwood Island. The trying to decide where the
22 sideboards are is, well, nigh impossible, I think.
23 Certainly difficult. And we can't lose sight of the fact
24 that SEPA recognizes a cost-benefit analysis to this whole
25 process. You know, at some point, how far down the rabbit

1 hole do you go? How much money do you spend at the bottom
2 of that rabbit hole? And that's why we have this rule of
3 reason, which is kind of a common standard for the courts in
4 many areas: What's reasonable? In the context of every man
5 or every woman, what's reasonable?

6 Here, unfortunately, this whole thing is complicated by
7 what I have to say is just absurd guidance from the
8 Department of Ecology. I forget the terms the Shorelines
9 Hearing Board used for it, but they were fairly polite in
10 how they described it. And that just makes it more
11 difficult for everybody involved in the process.

12 But there -- I agree with the notion that that guidance
13 would be, I think, best described as formulaic. And the use
14 of that guidance in the EIS does run directly contrary to
15 RCW 72.35.020 and the mandates that have been given to us
16 there by the legislative and executive branch. It talks
17 about overall reductions in greenhouse gases issued by this
18 state. It puts some sideboards on it, and the sideboards
19 are the boundary lines of the State of Washington.

20 So I would agree with the Shorelines Hearing Board to the
21 extent that there is no issue of material fact as to the
22 adequacy of the discussion of the impacts of greenhouse gas
23 from this facility in the context of -- I think it's the
24 Klickitat case that talks about the discussion has to be
25 based on all policy available. We have got specific

1 that's: Where do we go from here? And you have to go back
2 and look at what were really two different process.

3 So, first, on the vacature of the permits issue, the
4 permits went through their entire process. For me, and
5 given what I do and where my arena is, they essentially went
6 through the trial. All factual issues were discussed and
7 the permits were granted. They have already decided the
8 whitetail deer issue, all those other issues. Because of
9 that and even though I think it does create some issues of
10 just what the process is, I'm really loathe to order a whole
11 lot of additional time or expense to parties unless it's
12 really appropriate.

13 The only issue that's going to change when we go back to
14 those permitting agencies is the difference between the
15 current EIS and the future one. So I'm not going to vacate
16 the permits. The permitting agencies need to review that
17 new EIS, but that's the extent of the future review there.
18 We're not starting over at "all issues on the table" because
19 they have had what, in essence, is a trial. We're only
20 reviewing the one fact on the ground that will have changed,
21 and that's what the EIS says.

22 We're in a different situation with the Shorelines
23 Hearing Board and the issue of res judicata or issue
24 preclusion. The Shorelines Hearing Board never got to their
25 trial. There was a summary judgment motion that said:

1 statutory policy that has to be included in that discussion.
2 So I would sustain the Shorelines Hearing Board to that
3 extent.

4 It gets more complicated from there, and I try for a
5 variety of reasons to keep my rulings, especially in these
6 sort of areas, as simple as possible. So there is a
7 discussion at footnote 3 that we have referenced multiple
8 times about just what that analysis is supposed to look
9 like. There certainly can be an argument made that that is
10 a significant usurpation of policy by the Shorelines Hearing
11 Board. But I don't have to decide that today because, if
12 you look at what their decision was, everything in that
13 footnote is strictly dicta. It is utterly unnecessary to
14 their decision as to whether or not the discussion of
15 greenhouse gases was adequate. And having found that,
16 because of reliance on the DOE dicta -- or guidance, the
17 discussion was not adequate. They don't need to, and in my
18 view, should not have gone farther than that to create what
19 really are significant policy decisions. Whether or not
20 those policy decisions are really within their remit, I
21 don't have to determine, though.

22 That takes me to the next -- I guess the final issue.
23 It's two issues that are similar but, in my analysis -- and
24 this is part of why I kept asking that question about
25 adequacy of the discussion versus ANSI determination, and

1 Here's one issue that blows the thing up. And they made a
2 decision on that one issue. So I am not making any finding
3 of res judicata or issue preclusion in terms of the
4 proceedings before the Shorelines Hearing Board because we
5 have not yet had that full trial before the finder of fact
6 in front of the Shorelines Hearing Board.

7 So any questions on the ruling, Counsel? I hope that's
8 been sufficiently clear.

9 I am going to be out of town for the next couple of weeks
10 and then a couple of weeks in June where I am utterly
11 unavailable.

12 MS. LEVERETTE: Can I ask a quick question?

13 THE COURT: Yes, ma'am.

14 MS. LEVERETTE: Part of what Northwest Innovation Works
15 is struggling with in the remand is the content of
16 footnote 3 because we will be before that board again with
17 the new analysis.

18 THE COURT: Mm-hmm.

19 MS. LEVERETTE: And so any direction from the Court as to
20 what in that footnote goes beyond -- is more of a policy
21 statement than the law or any insight into what analysis is
22 probably part of the new analysis.

23 THE COURT: For me to do that, I would be doing exactly
24 what I faulted the Shorelines Hearing Board for doing. I
25 think I've got to leave my statement at its dicta, and it

1 certainly was a broad new pronouncement. Beyond that, I
2 think I've got to leave it to them.

3 So what I'm going to ask you -- if we can't get an agreed
4 order entered, please contact my judicial assistant,
5 Michelle Honey. She's got my schedule, but, unfortunately,
6 May and June, there's a lot of time when I will mercifully
7 be outside of Wi-Fi.

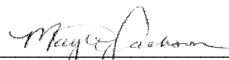
8 (Conclusion of oral ruling.)
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1 CERTIFICATE
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3 STATE OF WASHINGTON)
4)
5 COUNTY OF SNOHOMISH)
6

7 I, the undersigned, do hereby certify under penalty
8 of perjury that the foregoing court proceedings were
9 transcribed under my direction as a certified transcriptionist;
10 and that the transcript is true and accurate to the best of my
11 knowledge and ability, including any changes made by the trial
12 judge reviewing the transcript; that I received the audio
13 and/or video files in the court format; that I am not a
14 relative or employee of any attorney or counsel employed by the
15 parties hereto, nor financially interested in its outcome.
16
17

18 IN WITNESS WHEREOF, I have hereunto set my hand
19 this 15th day of May, 2018.

20
21 
22 _____
23 Marjorie Jackson, CET
24
25



<p style="text-align: center;">A</p> <p>ability 10:11 absurd 5:7 accurate 10:10 acknowledge 4:17 act 4:11 additional 7:11 address 4:18 adequacy 5:22 6:25 adequate 6:15,17 agencies 7:14,16 ago 4:16 agree 5:12,20 agreed 9:3 al 1:8 AMANDA 2:10 analysis 4:24 6:8,23 8:17,21,22 and/or 10:13 ANNE 3:4 ANSI 6:25 apparently 4:8 appropriate 7:12 appropriately 4:14 area 4:18 areas 5:4 6:6 arena 7:5 argument 6:9 asking 6:24 assistant 9:4 attorney 10:14 Attorneys 3:11 Atty 2:18 audio 10:12 available 5:25 Avenue 2:6,13,19 3:12</p> <hr/> <p style="text-align: center;">B</p> <p>back 7:1,13 based 5:25 Behalf 2:3,9,16 3:3 3:9 behaving 4:14 best 5:13 10:10</p>	<p>beyond 8:20 9:1 blows 8:1 board 1:8 4:10 5:9 5:20 6:2,11 7:23 7:24 8:4,6,16,24 bottom 5:1 boundary 5:19 branch 5:16 broad 9:1</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 10:1,1 case 5:24 Cause 1:5 certainly 4:23 6:9 9:1 certified 10:9 certify 10:7 CET 10:23 change 7:13 changed 7:20 changes 10:11 Civil 2:18 civility 4:10 clear 8:8 Columbia 2:9 come 4:8 common 4:9 5:3 complicated 5:6 6:4 conclusion 4:8 9:8 contact 9:4 content 8:15 context 4:19 5:4,23 continued 3:1 contrary 5:14 conversation 4:7 cost-benefit 4:24 Cottonwood 4:21 counsel 8:7 10:14 County 1:2 2:16,18 10:5 couple 4:7 8:9,10 court 1:1 4:5 8:13 8:18,19,23 10:8 10:13</p>	<p>courts 5:3 cowlitz 1:2 2:16,18 create 6:18 7:9 current 7:15</p> <hr/> <p style="text-align: center;">D</p> <p>day 10:19 decide 4:21 6:11 decided 7:7 decision 6:12,14 8:2 decisions 6:19,20 deer 4:20 7:8 Department 3:9 5:8 DERR 2:4 described 5:10,13 determination 6:25 determine 6:21 dicta 6:13,16 8:25 difference 7:14 different 7:2,22 difficult 4:18,23 5:11 direction 8:19 10:9 directly 5:14 discussed 7:6 discussion 5:22,24 6:1,7,14,17,25 Division 2:18 DOE 6:16 doing 8:23,24 DOUGLAS 2:17</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:1,1 3:1,1 10:1,1 Earthjustice 2:12 Ecology 3:9 5:8 EIS 5:14 7:15,17,21 EMILY 3:10 employed 10:14 employee 10:14 EMRY 2:17 entered 9:4 entire 7:4 entitled 4:11</p>	<p>environmental 4:19 especially 6:5 essence 7:19 essentially 7:5 et 1:8 everybody 4:10 5:11 exactly 8:23 executive 5:16 expense 7:11 extent 5:21 6:3 7:17</p> <hr/> <p style="text-align: center;">F</p> <p>F 10:1 facility 5:23 fact 4:23 5:21 7:20 8:5 factual 7:6 fairly 5:9 far 4:25 farther 6:18 faulted 8:24 feel 4:13 Feldman 2:5 files 10:13 final 6:22 financially 10:15 finder 8:5 finding 8:2 first 7:3 five 4:16 footnote 6:7,13 8:16,20 foregoing 10:8 forget 5:8 format 10:13 formulaic 5:13 found 6:15 front 8:6 full 8:5 future 7:15,17</p> <hr/> <p style="text-align: center;">G</p> <p>gas 5:22</p>	<p>gases 4:20 5:17 6:15 given 5:15 7:5 go 5:1 7:1,1,13 goes 8:20 going 7:13,15 8:9 9:3 GOODIN 2:10 gotten 4:16 granted 7:7 greenhouse 4:20 5:17,22 6:15 ground 7:20 guess 4:5,15 6:22 guidance 5:7,12,14 6:16</p> <hr/> <p style="text-align: center;">H</p> <p>hand 10:18 Hearing 1:7 5:9,20 6:2,10 7:23,24 8:4 8:6,24 hereto 10:15 hereunto 10:18 hole 5:1,2 Honey 9:5 Honorable 1:12 hope 8:7 Hughes 3:11</p> <hr/> <p style="text-align: center;">I</p> <p>imagine 4:18 impact 4:19 impacts 5:22 important 4:13 impossible 4:22 included 6:1 including 10:11 Innovation 3:3 8:14 insight 8:21 interested 10:15 involved 5:11 Island 4:21 issue 5:21 6:22 7:3 7:8,13,23,23 8:1,2</p>
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