

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

THE PUYALLUP TRIBE OF INDIANS, a federally
recognized Indian Tribe,

Petitioner,

v.

PUGET SOUND CLEAN AIR AGENCY; PUGET
SOUND ENERGY, Inc., a Washington Corporation,

Respondents.

NO. _____

THE PUYALLUP TRIBE OF INDIANS’
NOTICE OF APPEAL OF PUGET
SOUND CLEAN AIR AGENCY’S
ORDER ON NOC APPLICATION NO.
11386

I. INTRODUCTION

The Puyallup Tribe of Indians (“Tribe”) is a federally recognized Indian tribe with its Reservation located in Tacoma, Washington. The Tribe’s Reservation shares an airshed with Puget Sound Energy’s (“PSE”) Liquefied Natural Gas facility (the “Project” or “Tacoma LNG”) to which the Puget Sound Clean Air Agency (“PSCAA”) issued an Order of Approval to Construct, Install, or Establish (“Order”) at issue in this appeal on December 10, 2019. Indeed, in addition to other lands located near the Project, the Tribe owns land directly across the Hylebos Waterway from the Project site including marinas that provide access to the Tribal treaty fisheries and restoration sites that provide essential fish habitat.

The Puyallup Tribe and its members are entitled to the quiet enjoyment of their homeland as provided for by the Medicine Creek Treaty and as confirmed by the Puyallup Tribe of Indians

1 Settlement Act of 1989. These rights, including Treaty fishing rights essential to the Tribe's existence
2 and culture would be threatened and violated by the Project as a result of the permit's issuance. The
3 Tribe, and the health of its members, will be disproportionately impacted by the Project's emissions
4 of air pollution (including toxic air pollutants) due to the fact that the Tribe's entire homeland shares
5 an airshed with Project, which will emit harmful pollutants in significant amounts. Further, because
6 the Tribe's entire Reservation is located near and, in places, adjacent to the coast (where sea levels are
7 rising and extreme weather events are becoming more frequent because of climate change), the Tribe
8 is uniquely sensitive to and disproportionately impacted by the consequences of climate change and
9 the greenhouse gas impacts that the instant Project presents.

10 **II. NAME AND ADDRESS OF APPEALING PARTY**

11 Appealing Party: Puyallup Tribe of Indians
12 3009 E. Portland Avenue
13 Tacoma, WA 98038
(253) 573-7000

14 Representatives: Lisa A. Anderson
15 Attorney
16 Law Office of the Puyallup Tribe
17 3009 E. Portland Avenue
18 Tacoma, WA 98038
(253) 573-7852
Lisa.Anderson@puyalluptribe.com

19 Geoff Bridgman
20 Nicholas Thomas
21 Brian Epley
22 Attorneys
23 Ogden Murphy Wallace PLLC
24 901 Fifth Avenue, Suite 3500
25 Seattle, WA 98164
(206) 447-7000
gbridgman@omwlaw.com
nthomas@omwlaw.com
bepley@omwlaw.com

1 **III. PERMITTING ENTITY AND PARTIES TO THE PERMIT**

2 1. Puget Sound Clean Air Agency (PSCAA). PSCAA is named as a party because it is
3 the agency whose decision is being appealed.

4 2. Page one of the Order of Approval identifies the “OWNER” as “Puget Sound Energy.”
5 Thus, Puget Sound Energy (PSE) is named as a party because it is an entity to whom PSCAA’s
6 decision is directed.

7 **IV. THE ORDER APPEALED FROM AND APPLICATION MATERIALS**

8 The Tribe hereby appeals the Order issued by PSCAA to PSE on December 10, 2019, and all
9 related environmental reviews upon which it relies, including but not limited to the SEIS dated March
10 29, 2019 regarding the Puget Sound Energy Tacoma LNG facility. A copy of the Order is attached as
11 **Exhibit A**. The Order states that PSE submitted “an application for a new liquefied natural gas (LNG)
12 facility in the Tacoma Tide Flats.” As framed by the Order, for purposes of WAC 371-08-340(3), the
13 Tribe understands **Exhibits B.1 – B.8** attached to this appeal constitute the “application” for the
14 Order.¹

15
16 **IV. STATEMENT OF GROUNDS FOR APPEAL²**

17 1. PSCAA’s Order is *ultra vires*.

18 2. The Order is contrary to law because it is inconsistent with the requirements and intent
19 of state and federal laws designed to protect the environment. Specifically, as detailed below,
20 PSCAA’s Order of Approval relies on environmental analyses that violate the State Environmental

21
22 ¹ The Application submitted to PSCAA was initially deemed incomplete. There may be other documents PSCAA
23 considers to be part of the application and PSCAA may have posted these on its website at:
<https://pscleanair.gov/460/Current-Permitting-Projects> . While it may be most appropriate for PSCAA to provide those
24 documents that it believes constitute the application it received, the Tribe will provide other documents posted on PSCAA’s
25 website if the Board so requests.

26 ² The Tribe alleges that the Order violates its Rights and Entitlements under the Treaty of Medicine Creek. The Tribe does
not raise these issues before the Board because the Tribe believes the Board lacks jurisdiction over these matters. The Tribe
expressly reserves the right to raise such issues in the future in the proper forum and does not waive or otherwise relinquish
any rights by filing this Appeal.

1 Policy Act (“SEPA”). Likewise, the SEIS undergirding PSCAA’s Order relies on environmental
2 analyses that violate the SEPA. In addition, PSCAA’s Order is inconsistent with the requirements of
3 the state and federal Clean Air Acts.

4 3. PSCAA’s granting the Order is inconsistent with Washington’s Administrative
5 Procedure Act for at least the following reasons: the granting of the Order is a misapplication and
6 misinterpretation of the law; and PSCAA’s final agency action is arbitrary and capricious as well as
7 not supported by substantial evidence.

8 **V. STATEMENT OF FACTS**

9 PSCAA’s final agency action (issuance of the Order of Approval) is invalid and contrary to
10 law in at least the following respects ³:

11 Tacoma LNG constitutes a new source of air pollution. The Order was signed by Mr. Ralph
12 Munoz, a PSCAA staff engineer, and by Ms. Carole Cenci, a PSCAA staff compliance manager. The
13 Washington Clean Air Act, however, makes clear that permits for new sources must be issued by
14 PSCAA’s Board; that responsibility has not been and cannot be delegated. Nevertheless, the PSCAA
15 Board took no action to issue this permit.⁴ As such, the Order of Approval was *ultra vires* and invalid.

16 Beyond its *ultra vires* final agency action, PSCAA underestimates Tacoma LNG’s emissions
17 of air pollutants, rendering its conclusions regarding Tacoma LNG’s compliance with the federal and
18 state Clean Air Acts and its Order of Approval erroneous, contrary to law, and otherwise invalid.
19 Further, many of PSCAA’s conclusions regarding Tacoma LNG’s compliance with the federal and
20 state Clean Air Acts lack adequate support, and in other instances PSCAA relies on flawed
21 methodologies and insufficient prophylactic permit conditions. Further, as a result of PSCAA’s errors

22 _____
23 ³ In September 2019, the Tribe submitted detailed comments in response to the PSCAA’s proposed Order of Approval. A
24 copy of the Tribe’s comments is attached hereto as **Exhibit C**. The Order ignores or fails to adequately address the majority
25 of the Tribe’s comments. The Tribe re-alleges and incorporates by reference the contents of **Exhibit C** as though set forth
26 fully herein.

⁴ That the PSCAA Board had no role in the Order of Approval decision was confirmed by PSCAA’s Executive Director,
Mr. Craig Kenworthy, on December 10, 2019, in a formal statement that he released together with PSCAA’s issuance of
the Order of Approval.

1 in assessing Tacoma LNG’s air emissions, Tacoma LNG has improperly and unlawfully evaded major
2 source review under Title V of the Clean Air Act. Further, PSCAA erroneously determined that key
3 standards of performance for new sources of air emissions were inapplicable, or that Tacoma LNG
4 was exempt from them. PSCAA also erred in failing to require that Tacoma LNG comply with the
5 NESHAP rules on Marine Vessel Loading Operations. PSCAA also erred in failing to require PSE to
6 submit a risk management plan and other hazard management plans as required under 40 C.F.R. Part
7 68. PSCAA also erroneously concluded that, without “[n]ew legislation,” it was unable to look at
8 cumulative impacts (in the form of air pollution or otherwise) in discharging its duties under state and
9 federal laws designed to protect the environment.

10 Additionally, the right to equal protection of laws is guaranteed by the Fourteenth Amendment
11 of the United States Constitution and by the privileges and immunities clause of article I, section 12
12 of the Washington Constitution. PSCAA, and its Order of Approval, unfairly targets and threatens the
13 Tribe by allowing a new source of toxic air pollution – as well as the siting of a facility holding over
14 8 million gallons of explosive material – to operate immediately adjacent to the Tribe’s Reservation
15 and well-within the Tribe’s historical homeland. PSCAA’s action wholly failed to account for the fact
16 that impacts from the construction and operation of the Project will impact tribal members, minority
17 and low-income populations by causing disproportionately high and adverse effects. Indeed, no
18 meaningful environmental justice analysis was performed with regard to the siting of the facility, and
19 PSCAA failed to require a Health Impact Assessment to ascertain the health impacts of this new source
20 of toxic air pollution before it erroneously issued the Order of Approval. PSCAA’s decision in this
21 regard is arbitrary, violates Title VI of the Civil Rights Act, and violates the Tribe’s right to the equal
22 protection of the laws. Moreover, construction and operation of the facility is likely to result in
23 unavoidable direct and indirect impacts on tribal resources.

24 Furthermore, the SEIS undergirding the Order of Approval purports to evaluate the lifecycle
25 GHG emissions from the project and concludes that the project will have insignificant GHG emissions.
26 The SEIS relies on flawed data, utilizes flawed analytical frameworks, provides a biased and outcome-

1 driven analysis, and reaches incorrect conclusions regarding the lifecycle Greenhouse Gas emissions
2 from the Project. A legally adequate (and unbiased) SEIS would have revealed that the project has
3 very consequential GHG emissions that warrant denial or mitigation under the law.

4 According to PSCAA, its Order of Approval was also supported by a final environmental
5 impact statement (“FEIS”), prepared by the City of Tacoma, that addressed other environmental,
6 safety, and health issues besides GHG emissions. That FEIS also includes faulty data, assumptions,
7 analyses and conclusions, and emanates from procedures and actions that were contrary to SEPA.
8 PSCAA should have found that the air quality and safety impacts of the project were significant and
9 required either denial or additional mitigation after, at the very least, a supplemental environmental
10 impact statement – addressing the full range of impacts under the most recent facility design and in
11 light of what is now known about the facilities planned operations and end uses – was completed.

12 The Order was not supported by a supplemental environmental impact statement (beyond the
13 March 29, 2019 SEIS concerning lifecycle GHG emissions), even though the project has changed
14 significantly in a way that would result in new adverse environmental impacts. For example, the
15 revised project contemplates much higher rates of marine fueling for which there is no infrastructure
16 and no permits, which would result in significant impacts in the marine waters adjacent the project,
17 and which create enhanced safety issues in and around the Blair Waterway. These impacts have never
18 been examined. Similarly, the Tribe has learned that PSE now intends for LNG produced at the facility
19 to be transported from the facility by train. Not only does this pose additional (and grave) health and
20 safety risks, it will result in further deterioration of the airshed’s air quality, because of the increase in
21 the number of diesel-powered trains going and leaving from the facility and because of the releases
22 that will occur during the filling of rail tank cars. These impacts have never been examined.

23 VI. RELIEF REQUESTED

24 PSCAA’s Order, and its shortcomings identified herein, have a direct impact on the Tribe, its
25 properties, its members, and obligations owed it both by the United States and by the State of
26 Washington. The Tribe prays for the following relief cumulatively and alternatively:

1 A. That the Board immediately stay the effectiveness of the Order pending a final decision
2 by the Board. The Tribe reserves the right to seek such a stay by motion.

3 B. That the Board declare the Order is *ultra vires* and remand to PSCAA for action by the
4 PSCAA's Board.

5 C. That the Board revoke the Order and remand with instructions to PSCAA to prepare a
6 complete and unbiased SEIS that properly evaluates lifecycle Greenhouse Gas emissions.

7 D. That the Board revoke the Order and remand with instructions that the project undergo
8 a proper permitting review, including major source review under Title V of the Clean Air Act.

9 E. That the Board impose additional conditions on the Order sufficient to ensure
10 compliance with the State and Federal Clean Air Acts.

11 F. That the Board revoke the order and remand to PSCAA with instructions to perform a
12 permitting analysis in light of what is now known regarding Tacoma LNG's design, planned
13 operations and end uses.

14 G. That the Board revoke the order and remand with instructions to prepare an SEIS
15 addressing the full range of environmental impacts in light of what is now known regarding Tacoma
16 LNG's design, planned operations and end uses.

17 H. That the Board revoke the order and remand with instruction to perform a Health
18 Impact Assessment.

19 I. For such other relief as is required to ensure compliance with SEPA.

20 J. For such other relief as is required to comply with the state and federal Clean Air Acts.

21 ///

22 ///

23 ///

24 ///

25 ///


26 ///

1 Dated this 19th day of December, 2019

2 PUYALLUP TRIBE OF INDIANS

3 By 
4 Lisa A.H. Anderson, WSBA No. 27877
5 Law Office, Puyallup Indian Tribe.

6
7 OGDEN MURPHY WALLACE, P.L.L.C.

8 By 
9 Geoff J.M. Bridgman, WSBA No. 25242
10 Nicholas G. Thomas, WSBA No. 42154
11 Brian S. Epley, WSBA No. 48412

12 Attorneys for Petitioner
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I, Brie Carranza, declare that I am employed by the law firm of Ogden Murphy Wallace PLLC, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date listed below, I caused a true and correct copy of the foregoing document entitled *THE PUYALLUP TRIBE OF INDIANS' APPEAL OF PUGET SOUND CLEAN AIR AGENCY'S ORDER ON NOC APPLICATION NO. 11386* to be served on counsel listed below in the manner indicated.

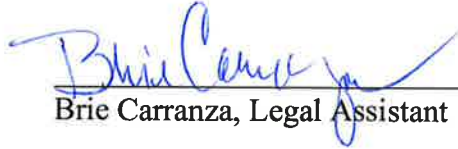
<p><i>Pollution Control Hearings Board</i></p> <p>Pollution Control Hearings Board 1111 Israel Road SW, Suite 301 Tumwater, WA 98501</p>	<p><input checked="" type="checkbox"/> Via Legal Messengers <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-mail</p>
<p><i>Respondent, Puget Sound Energy</i></p> <p>Steven Secrist Registered Agent Puget Sound Energy 10855 NE 4th Street Bellevue, WA 98004</p>	<p><input checked="" type="checkbox"/> Via Legal Messengers <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-mail</p>
<p><i>Respondent, Puget Sound Energy</i></p> <p>Steven Secrist Registered Agent Puget Sound Energy 355 – 110th Avenue NE, Est 11 Bellevue, WA 98004</p>	<p><input checked="" type="checkbox"/> Via Legal Messengers <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-mail</p>
<p><i>Puget Sound Clean Air Agency</i></p> <p>Craig T. Kenworthy Executive Director Puget Sound Clean Air Agency 1904 Third Avenue Suite 105 Seattle, WA 98101</p>	<p><input checked="" type="checkbox"/> Via Legal Messengers <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-mail</p>

Co-Counsel for the Puyallup Tribe of Indians

Lisa A. Anderson, WSBA #27877
Law Office, Puyallup Indian Tribe
3009 East Portland Avenue
Tacoma, WA 98404

- Via Legal Messengers
- Via First Class Mail
- Via Facsimile
- Via E-mail

DATED THIS 19th day of December, 2019.


Brie Carranza, Legal Assistant