Supreme Court No. 98428-0

Court of Appeals No. 52215-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, and COWLITZ COUNTY

Respondents,

and

BNSF RAILWAY COMPANY

Respondent-Intervenor,

and

STATE OF WASHINGTON SHORELINES HEARINGS BOARD, COWLITZ COUNTY HEARING EXAMINER,

Respondents Below,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, and WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS, FRIENDS OF THE COLUMBIA GORGE, SIERRA CLUB, and COLUMBIA RIVERKEEPER,

Petitioners.

RESPONDENT MILLENNIUM BULK TERMINALS-LONGVIEW, LLC'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Millennium Bulk Terminals-Longview, LLC ("MBT-Longview"), Respondent below, seeks review as outlined below.

II. COURT OF APPEALS DECISION

MBT-Longview seeks review of the Court of Appeals' unpublished decision in *Millennium Bulk Terminals-Longview, LLC v. State of Washington, Department of Ecology*, No. 52215-2-II, 2020 WL 1651475 (March 17, 2020), filed by the Court of Appeals on March 17, 2020. A copy of the decision is included in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Can summary judgment be granted against a non-moving party when it genuinely disputes material factual conclusions drawn from evidence in the record?

2. Whether a decision maker may deny a Shoreline Substantial Development Permit and Conditional Use Permit for the first stage of a development project based on the potential environmental impacts of the second stage of the project, where the second stage was not part of the permit application and, if constructed, would require separate permits and mitigation measures.

IV. STATEMENT OF THE CASE

A. MBT-Longview's Proposed Project.

MBT-Longview seeks to construct and operate a coal export terminal at the site of the former Reynolds aluminum smelter located adjacent to the Columbia River in Longview, Washington (the "Project"). AR 1687. The Project will receive trains and unload, stockpile, and load coal by conveyor onto ships for export. AR 1727.

MBT-Longview designed the Project to be constructed in two, independent stages. *Id*. In Stage 1, MBT-Longview would construct improvements to support a coal export terminal with a throughput capacity of 25 million metric tons per year ("MMTPY") of coal. *Id*. The Stage 1 improvements include two docks (Dock 2 and Dock 3), one shiploader and related conveyors on Dock 2, berthing facilities on Dock 3, a stockpile area including two stockpile pads, railcar unloading facilities, one operating rail track, up to eight rail storage tracks for train parking, and associated facilities and infrastructure. *Id.* Stage 1 is operational on its own.

In Stage 2—which represents the Project at full build-out—MBT-Longview would construct a shiploader on Dock 3 and two additional stockpile pads with the associated coal-handling equipment. AR 1728. The construction of these Stage 2 improvements would increase the throughput capacity of the Project to 44 MMTPY of coal. *Id.* In addition to the physical improvements made in Stage 2, the main operational difference between Stage 1 and Stage 2 is an increase in the number of trains and vessels serving the Project. AR 717; AR 714. In Stage 2, the number of trains serving the terminal would increase

from five trains per day to eight trains per day and increase the number of vessels from 40 vessels per month to 70 vessels per month. *Id.*

B. Environmental Review of the Project.

MBT-Longview submitted the entire Project for environmental review under the State Environmental Policy Act ("SEPA"). AR 511. Acting as co-lead agencies, Cowlitz County (the "County") and the Department of Ecology ("Ecology") jointly evaluated the potential environmental impacts of the Project at full build-out (Stages 1 and 2 combined) and issued a single final environmental impact statement ("EIS") for the Project. AR 488.

The EIS acknowledged that the Project would be developed in two stages, but it did not separately evaluate the potential impacts of the smaller, Stage 1 facility. AR 511; AR 515–16. The EIS concluded that the 44 MMTPY facility could have significant adverse impacts on nine environmental resource areas, but all such impacts could be avoided or reduced through mitigation measures identified in the EIS. AR 518; AR 988–1002.

C. County Review of MBT-Longview's Stage 1 Permits.

In February 2012, MBT-Longview filed an application with the County for permits to construct Stage 1 of the Project, including a Shoreline Substantial Development Permit for construction of Stage 1 improvements and a Shoreline Conditional Use Permit for dredging associated with the new docks (the "Shoreline Permits"). AR 608. MBT-Longview's application for the Shoreline Permits was expressly limited to the construction of improvements necessary for a 25 MMTPY facility. AR 710; AR 472.

In 2017, the County recommended approval of MBT-Longview's application for Stage 1 permits with 36 conditions to mitigate for impacts related to Stage 1. AR 707–08. The County staff report acknowledged that MBT-Longview would need to submit a second Shoreline Substantial Development Permit for expansion of the facility under Stage 2. AR 710. The County's recommendation and MBT-Longview's application were then forwarded to a Hearing Examiner for review, as required by the Cowlitz County Code. AR 2066. Beginning on November 2, 2017, the Hearing Examiner held a three-day public hearing on MBT-Longview's application for Stage 1. AR 17; AR 710; AR 1929; AR 1934–35.

During the hearing, MBT-Longview and the County explained that MBT-Longview was only seeking shoreline permits for Stage 1 of the Project. AR 1929; AR 1934–35. Because the Project EIS did not separately analyze the impacts and mitigation for Stage 1, MBT-Longview presented evidence about the impacts of Stage 1. That evidence demonstrated that the impacts of the smaller facility built in Stage 1 would be less than the impacts of full build-out of the Project at Stage 2 as described in the EIS. *See* AR 1729. MBT-Longview and other participants also presented evidence of the Stage 1 impacts on, and reasonable mitigation for, the nine resource areas identified in the EIS. *See* discussion *infra*.

On November 14, 2017, the Hearing Examiner issued a written decision denying MBT-Longview's application for the Shoreline Permits. AR 8–74. The Hearing Examiner's decision identified nine unavoidable, significant adverse environmental impacts from the EIS. AR 21–38. The

Hearing Examiner also found that the net greenhouse gas emissions associated with the Project were an additional unavoidable, significant adverse environmental impact. AR 38–40. The Hearing Examiner determined that, because the adequacy of the EIS had not been appealed, more specific evidence presented at the hearing about Stage 1 was "largely irrelevant to the issue of whether the ten unavoidable, significant adverse impacts identified in the FEIS can be reasonably mitigated." AR 56.

The Hearing Examiner denied the permits in part using substantive authority under SEPA, concluding that MBT-Longview had "failed to reasonably mitigate the ten, unavoidable, significant adverse impacts identified in the EIS." AR 9–10. The Hearing Examiner did not consider the impacts and mitigation related to the application for Stage 1 permits before him. Instead, the Hearing Examiner denied permits for Stage 1 based entirely on impacts and mitigation for Stage 2, which was not before him.

D. Procedural Background.

In December 2017, MBT-Longview and the County filed petitions with the Shorelines Hearings Board ("Board") seeking review of the Hearing Examiner's decision. AR 1–6. The Board granted intervention to Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club, Columbia Riverkeeper (collectively, "WEC"), Ecology, and BNSF Railway Company, and consolidated the two petitions. AR 423–32.

On April 20, 2018, the Board issued an order denying MBT-Longview's motion for partial summary judgment on purely legal issues and granting Ecology's and WEC's motion for summary judgment on several legal

and factual issues, and it affirmed the Hearing Examiner's denial of the Shoreline Permits. AR 2058–94 at 88. The Board held that the Hearing Examiner did not err in considering the impacts of a 44 MMTPY facility in evaluating the permits for a 25 MMTPY facility, AR 2079, that the Hearing Examiner complied with all of the requirements to deny the permits under SEPA, and that no material issues of fact precluded entry of summary judgment. AR 2080–86.

MBT-Longview and the County appealed the Board's order to the Cowlitz County Superior Court. CP 1–58, 62–108. After the cases were consolidated in the trial court, the Court of Appeals accepted direct review. CP 220–23.

The Court of Appeals affirmed the Board's decision denying the Shoreline Permits. Slip Op. at 22. The Court acknowledged that MBT-Longview presented evidence that Stage 1 would not result in the adverse impacts identified in the EIS and the impacts could be mitigated. Slip Op. at 15. The Court concluded that Ecology did not dispute that evidence, but the parties "simply dispute the conclusions that can be drawn from such undisputed evidence." *Id.* The Court held that, as a result, the Board did not err in concluding that no genuine issues of material fact exist with regard to the impacts and mitigation of Stage 1 improvements. *Id.*

The Court of Appeals also rejected MBT-Longview's argument that it was improper for the Hearing Examiner to deny Stage 1 permits based on potential impacts from Stages 1 and 2 combined. The Court found that the two stages of the Project are "interrelated and interdependent," and that restricting

the Hearing Examiner's review to Stage 1 "would effectively allow Millennium to nullify SEPA substantive authority as applied to its project through the [Shoreline Management Act]" and would "permit a collateral attack on the EIS." Slip Op. at 16. The Court further determined that completion of Stage 1 would have a coercive effect on any subsequent permitting for Stage 2 because "Stage 1 involves the construction of a large coal export terminal, and Stage 2 involves far less construction but allows the terminal to vastly increase the amount of coal it processes." Slip Op. at 17.

The Court of Appeals further held that the Hearing Examiner properly exercised his authority under SEPA to deny the permits. Slip Op. at 19. The Court held that the requirements for exercising SEPA substantive authority under RCW 43.21C.060 were met because the Hearing Examiner relied on impacts identified in an EIS and "discussed why the proposed mitigation measures were insufficient to mitigate the impacts." Slip Op. at 20.

V. ARGUMENT IN FAVOR OF REVIEW

The Court should grant review under RAP 13.4 because the Court of Appeals' ruling distorts several legal standards that apply to state permitting processes and will cause confusion for permit applicants and decision makers alike. To begin with, the Court of Appeals affirmed entry of summary judgment despite finding that the parties disputed the factual conclusions that can be drawn from the evidence in the record. That ruling conflicts with black letter standards for summary judgment under CR 56 established by this Court. *See* RAP 13.4(b)(1). The Court of Appeals' misuse of summary judgment has the potential to mislead litigants, lower

courts and other tribunals, and therefore involves an issue of substantial public importance. *See* RAP 13.4(b)(4).

This case also involves an issue of substantial public importance to public and private developers in Washington who apply for land use permits, as well as to the decision makers who must review and decide those permit applications. *See id.* The Court of Appeals held that a decision maker can deny a permit for one phase of a phased development project on the basis of potential impacts of another, future phase not under review. That novel holding redefined the concept of "piecemealing" a development project under the Shoreline Management Act in a way that could be used to prevent any phased development project in Washington's shorelines.

A. The Court of Appeals Misapplied the Summary Judgment Standard.

In affirming the entry of summary judgment in face of acknowledged disputes about conclusions that can be drawn from evidence in the record, the Court of Appeals misapplied the summary judgment standard.

"The fundamental premise of summary judgment is that it is appropriate only when there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Ehrhart v. King Cty.*, ___ Wn.2d ___, ___ P.3d ___, 2020 WL 1649891, at *9 (Wash. Apr. 2, 2020) (internal quotation marks omitted). All facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists "if, after weighing the

evidence, reasonable minds could reach different factual conclusions about an issue that is material to the disputed claim." *Jones v. Wash. Dep't of Health*, 170 Wn.2d 338, 352, 242 P.3d 825 (2010) (emphasis added).

The question before the Court of Appeals was whether the Board properly dismissed MBT-Longview's appeal by granting Ecology's motion for summary judgment. Slip Op. at 2. MBT-Longview had appealed, among other issues, the Hearing Examiner's use of substantive authority under SEPA to deny the Shoreline Permits. *Id.* at 3. SEPA sets a high bar to deny a permit; the decision maker "must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact." RCW 43.21C.060; *see Cougar Mountain Assocs. v. King Cty.*, 111 Wn.2d 742, 755, 765 P.2d 264 (1988). Thus, summary judgment could be entered for Ecology only if there was no genuine dispute that environmental impacts "would result" from Stage 1 and that reasonable mitigation measures "are insufficient to mitigate" those impacts. RCW 43.21C.060.

The Court of Appeals expressly recognized that MBT-Longview presented evidence that "impacts from Stage 1 would not result in the adverse impacts identified in the EIS" and evidence "regarding whether its proposed measures would mitigate the identified impacts" of Stage 1. Slip Op. at 15. The Court of Appeals further acknowledged that the parties disputed "the conclusions that can be drawn" from that evidence. *Id.* Thus, after weighing the evidence and arguments before it, the Court of Appeals

concluded that the parties reached different factual conclusions about issues that are material to the disputed claims. Nevertheless, the Court of Appeals inexplicably affirmed entry of summary judgment against MBT-Longview.

By acknowledging disputes about the factual conclusions that could be drawn from the evidence, the Court of Appeals could not conclude as a matter of law, viewing that evidence in the light most favorable to MBT-Longview, that unavoidable impacts *would* result from Stage 1 and potential mitigation measures *are* inadequate. Instead, because the Court of Appeals concluded that the parties disputed "the conclusions that can be drawn" from the evidence, Slip Op. at 15, the Court of Appeals should have denied summary judgment and ordered a de novo hearing before the Board. *See* WAC 461-08-500(1).

Summary judgment is a tool for resolving cases that do not require fact-finding. The Court of Appeals' ruling conflicts with the standards for summary judgment and opens the door for improper and premature resolution of cases that require a trial or hearing to resolve questions of fact. This Court should accept review of this case and clarify that, under these circumstances, summary judgment is not appropriate.

B. The Court of Appeals Redefined the Concept of "Piecemealing" in a Manner that Could Prevent Phased Development Projects in Washington.

The Court should also accept review to clarify the parameters of the prohibition against "piecemeal" development under the Shoreline Management Act ("SMA"). The Court of Appeals held that it was permissible for the Hearing Examiner to deny the Shoreline Permits for

Stage 1 based on the potential environmental impacts of Stage 2. The Court of Appeals concluded that considering an application for Stage 1 alone would result in improper "piecemealing" of the Project under the SMA. The Court of Appeals' decision is an unprecedented expansion of the rule against "piecemeal" shoreline development that could prevent public and private development projects from being undertaken in phases.

Until now, the SMA's prohibition against piecemeal development under RCW 90.58.020[1] has never required developers of multi-phase projects to obtain shoreline permits for all phases of the project at once. *See Walker v. Point Ruston LLC,* SHB Nos. 09-013, 09-016, 2010 WL 235153, at *13 (Jan. 19, 2010) ("[T]he Board has held in past decisions that phasing of Projects under more than one shoreline permit is permissible."); *Iddings v. Griffith*, SHB No. 08-031, 2009 WL 1817902, at *12 (June 22, 2009) ("Simply applying for one permit rather than all the permits ultimately required for a proposed development is not necessarily a piecemealing violation [under the SMA]."); *Scheyer v. Dep't of Ecology*, SHB No. 98-66, 1999 WL 418004, at *5 (June 16, 1999) ("It is not necessary that one apply for all shoreline permits that may ultimately be required for a proposed development.").

[1] RCW 90.58.020 provides, in relevant part, that because "the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation," there is "a clear and urgent demand for a planned, rational, and concerted effort . . . to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."

Case law holds that improper "piecemealing" under the SMA occurs only in two limited circumstances not present here. The first is where a project is segmented to avoid shoreline review, such as by excluding a portion of the project occurring on the uplands from the portion occurring on the shoreline. *See Merkel v. Port of Brownsville*, 8 Wn. App. 844, 851–52, 509 P.2d 390 (1973) (when developing a marina, it was improper for the port to exclude the associated clearing of trees on the uplands from SMA review); *cf. Scheyer*, 1999 WL 418004, at *5 (rejecting argument that approval of a shoreline variance for construction of a residence was improper piecemeal development under the SMA upon finding that "any impacts associated with a residence will be addressed through the review of a building permit"); *King v. Port of Vancouver*, SHB No. 97-17, 1997 WL 804291 (Nov. 20, 1997) (affirming the phased development and permitting of a project upon finding that any further development on the port property would be subjected to appropriate review and consideration to protect the environment).

The second circumstance is where permitting one phase would coerce the issuance of permits for a subsequent phase because the phases are interdependent. *Compare Bhatia v. Dep't of Ecology*, SHB No. 95-34, 1996 WL 538822, at *14 (Jan. 9, 1996) (permitting the construction of a house on an eroding shoreline would likely coerce future permitting for a bulkhead necessary to save the house from falling into the water), *with Jarvis v. Kitsap Cty.*, SHB No. 08-001, 2008 WL 11462915, at *6 (Apr. 8, 2008) (permitting construction of a dock separately from the construction

of mooring buoy was not improper piecemealing because the dock "can function independent of any future" buoy installation or upland improvements).

In *Bhatia*, the Board held that Mr. Bhatia had inappropriately piecemealed a residential development project when he failed to apply for approvals of the residence and its "attendant parts" at the same time. 1996 WL 538822, at *16. The Board found that the "various pieces of Mr. Bhatia's proposal," including a home, septic system, road, retaining wall, and a bulkhead, "are all part of an integrated, larger project, the parts of which depend on each other for their justification or implementation." *Id*. at *13. As such, the house along with the "integrated and non-severable parts of the total development" should have been the subject of a single permit application. *Id*. at *16.

In contrast, in *Jarvis*, the Board rejected the argument that a county's approval of a permit for construction of a pier was improperly piecemealed because it did not include consideration of three mooring buoys that were part of the overall project plan. 2008 WL 11462915, at *3. The Board explained that the project proponent "may later apply for a separate permit for the buoys, but there is no application pending at the present time." *Id.* The Board held that there was no improper piecemealing under the SMA, finding that "[e]nvironmental review of any later buoy proposal has not been foreclosed, or in any way predetermined, by the County's review of the community dock," and that the "community dock can function independent of any future mooring buoy installation." *Id.* at *6. The Board

distinguished the case from *Bhatia*, where the "various pieces of a proposal to build a residence on a beach were so interdependent as to require review of the entire proposal at the same time." *Id.*

The Court of Appeals' ruling goes far beyond those precedents. There is no dispute that Stage 1 of the Project can operate independently and without development of Stage 2. Stage 1 is thus like the dock in *Jarvis* that could operate independently from the associated mooring buoys, and it is unlike the access road and septic system in *Bhatia* that were non-severable from the residence they supported. MBT-Longview has also acknowledged all along that constructing Stage 2 would require separate shoreline permits—a fact expressly acknowledged by the Court of Appeals. *See* Slip Op. at 4. SMA review of Stage 2 would occur at that time; SMA review would not be avoided altogether as in *Merkel.* Any future review of Stage 2 permits would require an evaluation of cumulative effects of Stages 1 and 2 and mitigation for any impacts. Thus, permitting Stage 1 alone in no way "dilute[s] the SMA review process," as the Court of Appeals reasoned. Slip Op. at 16.

The Court of Appeals also determined that permitting Stage 1 would coerce permitting for Stage 2 because "Stage 1 involves the construction of a coal export terminal" whereas Stage 2 "involves far less construction but allows the terminal to vastly increase the amount of coal it processes." Slip Op. at 17. But there is no coercive effect here like there was in *Bhatia*, where sunk costs to construct a road, septic system and other attendant parts of a residence coerced the permitting for the residence itself, and where a

subsequent permit would likely have been required to save the residence from destruction due to slope erosion. 1996 WL 538822, at *13–16. The Court of Appeals' novel justification could be applied against any phased development project because, under that reasoning, every phase would be coercive of the next.

Take, for example, the development of a multi-phase wind energy facility along the Columbia River designed to proceed in two phases. The first phase would construct 50 turbines, an operations and management building, and transmission lines. The second phase would add an additional 25 turbines, which would increase the generating capacity of the overall project. Each phase of the facility requires shoreline permits. Construction of the second phase, however, depends on the developer obtaining sufficient investors and financing.

Under the Court of Appeals' decision, the developer of the wind facility would be required to obtain shoreline permits for both phases of the project at the same time. Otherwise, the developer would violate the Court of Appeals' novel prohibition against piecemeal development, despite the fact that neither phase would avoid review under the SMA if permitted separately, and despite the fact that the first phase of the facility could independently function without any future expansion.

The Court of Appeals' decision is a dramatic and unprecedented expansion of the law against "piecemeal" development. The Court of Appeals' ruling creates risk for developers of phased projects who may now believe they must apply for shoreline permits for all phases at once or run

afoul of the rule against "piecemealing" a project. The Court should review this issue to provide clarity for developers and local decision makers seeking shoreline permits for multi-phased development projects.

VI. CONCLUSION

The decision below conflicts with Court precedent regarding the summary judgment rule and involves issues of substantial public importance that stand to affect developers and permitting authorities throughout Washington. Accordingly, Petitioners respectfully request that the Court grant discretionary review pursuant to RAP 13.4(b)(1) and (b)(4).

Respectfully submitted this 16th day of April, 2020.

K&L GATES LLP

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DECLARATION OF SERVICE

Laura White declares as follows:

1. I am over the age of 18 and am competent to testify herein.

2. I am a practice assistant at the law firm of K&L Gates LLP.

3. On April 16, 2020, I caused the foregoing document to be filed electronically with the court and also to be served on the parties below through the Washington State Appellate Courts' eFiling Portal:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of April, 2020, at Seattle, Washington.

/s/ Laura White
Laura White, Legal Secretary

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

March 17, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, and COWLITZ COUNTY Respondents, and BNSF RAILWAY COMPANY, Respondent-Intervenor, STATE OF WASHINGTON, SHORELINES HEARINGS BOARD, COWLITZ COUNTY HEARINGS EXAMINER, Respondents Below, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS, FRIENDS OF THE COLUMBIA GORGE, SIERRA CLUB, and COLUMBIA RIVERKEEPER, Petitioners.	No. 52215-2-II UNPUBLISHED OPINION

MELNICK, J. — Millennium Bulk Terminals-Longview (Millennium) sought to build the largest coal export terminal in North America, to be located in Longview. Millennium planned to build the facility in two stages, Stage 1 and Stage 2. An environmental impact statement (EIS) under the State Environmental Policy Act (SEPA), chapter 43.21C RCW, analyzed the impacts of the facility based on the completion of Stage 2. As necessary for the project, Millennium applied

to Cowlitz County for a substantial development permit and a conditional use permit. The permit application only sought permits necessary to build Stage 1 of the project.

The County recommended approval of the permit application. However, after a hearing, the Cowlitz County Hearing Examiner denied Millennium's permit application. Millennium and the County then petitioned the Shorelines Hearings Board (the Board) for review of the Hearing Examiner's decision. The Department of Ecology (DOE) and numerous environmental groups[1] (collectively, WEC) intervened as respondents. BNSF Railway Company (BNSF) intervened as a petitioner.

Before conducting a hearing, the Board granted DOE's and WEC's motions for summary judgment. The Board's ruling affirmed the Hearing Examiner's denial of Millennium's permit application based on the Hearing Examiner's exercise of SEPA substantive authority. Millennium then sought judicial review of the Board's decision, and we accepted direct review.

Millennium[2] argues that the Board erred when it limited the scope of its review to the record created before the Hearing Examiner, an error which was compounded by the fact that the Board never obtained the full record before the Hearing Examiner and then did in fact accept extra-record evidence from DOE. Millennium next contends that the Board erred when it concluded that the Hearing Examiner properly considered impacts from the whole project, when it only sought permits for Stage 1. Similarly, Millennium argues that the Board erred when it concluded that the Hearing Examiner took due account of the impacts and mitigation related to Stage 1.

[1] Washington Environmental Council (WEC), Climate Solutions, Friends of the Columbia Gorge, Sierra Club, and Columbia Riverkeeper.

[2] We often refer to Millennium and BNSF collectively as Millennium. In addition, we refer to DOE and WEC collectively as DOE.

Finally, Millennium contends that the Board erred in affirming the Hearing Examiner's exercise of SEPA substantive authority to deny its permit application.

We affirm the Board's decision.

FACTS

I. ENVIRONMENTAL IMPACT STATEMENT

Millennium sought to build a coal export terminal in Longview, which would receive coal by train from various states. The trains would then be unloaded, stockpiled, and loaded by conveyors to ships which would transport the coal to Asia.

Because significant adverse impacts on the environment would likely result from the facility, SEPA required the preparation of an EIS. Cowlitz County and DOE served as co-lead agencies responsible for the EIS.

The EIS recognized that Millennium would construct the facility in two stages. At the completion of Stage 1, the terminal would have an annual throughput capacity of approximately 25 million metric tons of coal per year. At the completion of Stage 2, often termed "full build-out," the terminal would receive and send out approximately eight trains per day, load approximately 70 ships per month, and "have a maximum annual throughput capacity of up to 44 million metric tons of coal per year." Admin. Record (AR) at 511, 515.

The EIS analyzed the significant adverse impacts and proposed mitigation measures based on the facility at full build-out. The EIS discussed how

> [i]f the proposed mitigation measures [identified in the EIS] were implemented, they would reduce but not completely eliminate significant adverse environmental impacts resulting from construction and operation of the [facility]. Unavoidable and significant adverse environmental impacts could remain for nine environmental resource areas: social and community resources; cultural resources; tribal resources; rail transportation; rail safety; vehicle transportation; vessel transportation; noise and vibration; and air quality.

AR at 518. The EIS then analyzed those nine impact areas, and potential mitigations measures, in greater detail.

The EIS also contained a lifecycle assessment of estimated net greenhouse gas (GHG) emissions. While the EIS did not list GHG emissions among the project's significant adverse impacts, it assumed that Millennium would offset 100 percent of GHG emissions. Thus, the EIS determined that "[w]ith implementation of proposed mitigation, there would be no unavoidable and significant adverse environmental impacts from [GHG] emissions." AR at 981.

II. SHORELINE PERMITS

In 2016, Millennium applied to Cowlitz County for a substantial development permit and a conditional use permit as required under the Shoreline Management Act of 1971 (SMA). In its permit application, Millennium noted that it would construct the facility in two stages, which would require separate permit applications.

Millennium's permit application only sought permits for Stage 1. Stage 1 consisted of the construction of two docks, one shiploader, conveyors, two stockpile pads, train unloading facilities, one rail track, and up to eight rail storage tracks. Stage 1 also included substantial dredging of the Columbia River. At the completion of Stage 1, the facility would have the capacity to ship 25 million metric tons of coal per year.

Stage 2 included the construction of an additional shiploader, two stockpile pads, and conveyors. At the completion of Stage 2, the facility would have the capacity to ship 44 million metric tons of coal per year.

The County issued a staff report recommending approval of Millennium's permit application with 36 conditions. The staff report recognized that Millennium's permit application only sought a permit for Stage 1 and that Millennium would have to submit a second permit

application prior to any construction related to Stage 2. The staff report noted that "construction of Stage 2 would occur beginning at the completion of Stage 1." AR at 710. Although the staff report recognized that Millennium only sought permits for Stage 1, it analyzed the project's impacts at full build-out.

As required under Cowlitz County Code 19.20.050(A)(1), the staff report and Millennium's permit application were transmitted to the Cowlitz County Hearing Examiner for review.

III. HEARING EXAMINER

The Hearing Examiner held a three-day hearing.[3] The County, Millennium, WEC, and other interested parties participated in the hearing; DOE did not. The parties submitted prehearing memoranda and exhibits, and presented testimony and argument. Near the outset of the hearing, Millennium confirmed that its permit application covered only Stage 1.

During the hearing, the Hearing Examiner gave Millennium and the County "the opportunity to propose reasonable mitigation" in addition to the mitigation measures discussed in the EIS. AR at 10. Millennium submitted an exhibit that summarized questions the Hearing Examiner posed. It largely related to mitigation measures and responded to the Hearing Examiner's questions on that subject.

It appears the Hearing Examiner thought that a great deal of Millennium's expert evidence conflicted with the EIS. The Hearing Examiner stated:

> [Millennium] has presented the testimony of several experts whose opinions are in conflict with the []EIS but, in the absence of any appeal [of the EIS], this testimony is largely irrelevant to the issue of whether the ten unavoidable, significant adverse environmental impacts identified in the []EIS can be reasonably mitigated.

[3] The record before us does not contain the transcript of the entire proceedings before the Hearing Examiner. There are only excerpts.

> The conditions proposed in the Staff Report do not reasonably mitigate these impacts. At the conclusion of the hearing the County chose not to propose any new conditions, and [Millennium's] position is nearly identical to the County's. As a result, neither the County nor [Millennium] propose reasonable mitigation for any of the unavoidable, significant adverse environmental impacts identified in the []EIS.

AR at 56-57.

The Hearing Examiner's ruling documented findings related to SEPA. The ruling discussed the EIS's findings regarding adverse impacts, and the Hearing Examiner found that the project would result in adverse impacts. Regarding GHGs, the Hearing Examiner recognized that the EIS operated on the assumption that Millennium would mitigate 100 percent of the GHG emissions associated with the project. During the hearing, however, Millennium stated that it would not mitigate 100 percent of the GHG emissions but would instead only mitigate about 0.5 percent of the GHG emissions. Thus, although the EIS only identified nine significant adverse impacts, the Hearing Examiner found, with the addition of GHG emissions, that the project had 10 significant adverse impacts associated with it.

The Hearing Examiner's ruling then summarized Millennium's proposed mitigation:

- The parties' proposed mitigation for noise impacts is insufficient to ensure that Quiet Zones will be implemented.
- The parties do not propose any mitigation for the increased risk of cancer. Their only suggestion is that eventually the BNSF will upgrade to Tier 4 status, but currently only 6% of the BNSF fleet meets this standard. The remainder of the fleet will not be completely upgraded for more than 20 years.
- The parties' proposed conditions to mitigate traffic impacts do not ensure that the necessary track improvements will be made . . . .
- The parties do not propose any conditions addressing the impacts to the Reynolds Historic District.
- The parties' proposed conditions fail to ensure rail capacity or rail safety.
- The parties do not propose any conditions to ensure vessel safety and appropriate responsibility for any vessel accident.

- The Mitigation Plan . . . will address some tribal concerns but not all of them. The parties do not propose any additional conditions to address additional tribal impacts.
- The County proposes no [GHG] mitigation, while [Millennium] proposes less than 1% of that required under the EIS.

AR at 57-58.

The ruling also identified local SEPA policies adopted in the Cowlitz County Code and discussed how the project's failure to mitigate the significant adverse impacts "conflicts with virtually every one of the County's environmental policies." AR at 59. Accordingly, the Hearing Examiner exercised SEPA substantive authority and denied Millennium's permit application.

The Hearing Examiner also denied Millennium's permit application on the basis that Millennium failed to satisfy the requirements of the SMA and the Cowlitz County Shoreline Management Plan.

The Hearing Examiner's decision listed the evidence that had been submitted to it.

IV. SHORELINES HEARINGS BOARD

Millennium and Cowlitz County each filed petitions with the Board requesting review of the Hearing Examiner's decision. The Board consolidated them. DOE, WEC, and BNSF intervened. The Board scheduled a hearing in March 2018 and ordered that discovery be completed by February 2018.

The parties agreed that the appeal presented nine legal issues. The issues relevant to the Hearing Examiner's exercise of SEPA substantive authority included:

> 2. Did the Cowlitz Hearing Examiner misinterpret, misapply or fail to apply the [SEPA] or County SEPA regulations and other regulations?
>
> 3. Did the Cowlitz Hearing Examiner fail to analyze the Project as presented in the applications and in light of substantial evidence and the County SMP?
>
> . . . .

> 8. Whether Millennium and Cowlitz County are barred from challenging the [EIS's] findings and conclusions regarding the ten areas of significant, adverse, unmitigated impacts cited in the Hearing Examiner decision?
> 9. Did the Hearing Examiner lawfully exercise substantive authority under the SEPA . . . to deny the shoreline permit?

AR at 426-27.

Various parties then moved for summary judgment on some or all issues. DOE and WEC moved for summary judgment on all issues. In its reply brief in support of its motion, DOE offered a portion of a draft EIS prepared by the United States Army Corps of Engineers under the National Environmental Policy Act.[4]

The Board granted DOE's and WEC's motions and denied all the other summary judgment motions. Because the Board affirmed the Hearing Examiner's exercise of SEPA substantive authority to deny Millennium's permit application, it ruled that it did not need to reach the remaining legal issues.

In the background section of its order, the Board cited to the United States Army Corps of Engineers' draft EIS for the proposition that "in order for a coal export terminal to be economically viable, [Millennium] needed [to have] a throughput capacity of 40 to 50 [million metric tons of coal per year]." AR at 2064.

The Board concluded that it was bound to the record created before the Hearing Examiner. The Board stated:

> To properly employ the clearly erroneous standard of review to the exercise of SEPA substantive authority, where there has been an open record hearing below and there is an unchallenged []EIS which identifies significant adverse unmitigated environmental impacts, the Board concludes that the appropriate scope of review is limited to the record created during that hearing.

[4] It appears that the portion of the draft EIS had not been submitted to the Hearing Examiner.

AR at 2073-74.

Millennium and Cowlitz County petitioned the superior court for review of the Board's decision. The court consolidated the petitions. DOE then petitioned for direct review, which we granted.

ANALYSIS

I. MOOTNESS

We ordered the parties to provide supplemental briefing on whether our decision in *Northwest Alloys, Inc. v. Department of Natural Resources*, 10 Wn. App. 2d 169, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d 1019 (2020), renders the current appeal moot.

Millennium argues that the appeal is not moot because the shoreline permits at issue in this case do not depend on it obtaining permission to sublease aquatic lands from the Department of Natural Resources, which was at issue in *Northwest Alloys*. We agree.

"A case is moot if a court can no longer provide effective relief." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010). "When an appeal is moot, it should be dismissed." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1994). "'The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.'" *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006) (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984)). "'As long as the

parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012)).

Millennium's permit application does not rely on it being the sublessee of the aquatic lands at issue *Northwest Alloys*. Therefore, if we reversed and remanded to the Board, and the Board subsequently granted Millennium's permit application, then Millennium could obtain meaningful relief. Millennium could obtain the shoreline permits for which it applied. Accordingly, we conclude that this case is not moot.

II. LEGAL PRINCIPLES

A. Standards of Review

The parties agree that the Board reviews an administrative body's exercise of SEPA substantive authority to deny a shoreline permit application under the "clearly erroneous" standard. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988); *Citizens for Sensible Growth v. City of Leavenworth*, No. 98-24 (Wash. Shorelines Hr'gs Bd. Oct. 15, 1998). "Under the clearly erroneous standard of review, the [Board] 'does not substitute its judgment for that of the administrative body and may find the decision clearly erroneous only when it is left with the definite and firm conviction that a mistake has been committed.'" *Cougar Mountain Assocs.*, 111 Wn.2d at 747 (internal quotation marks omitted) (quoting *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978)).

We review orders from the Board under the Washington Administrative Procedure Act (APA). RCW 34.05.518; *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002). Judicial review is limited to the record before the Board.

RCW 34.05.558. Under the APA, we may grant relief from the Board's ruling if we determine, among other issues, that the ruling is based on an erroneous interpretation or application of the law or is arbitrary and capricious. RCW 34.05.570(3).

However, when an agency's ruling is made on summary judgment, we review those decisions de novo, making the same inquiry as the Board. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). At summary judgment, we "must view the facts and reasonable inferences in the light most favorable to the non-moving party." *Eastlake Cmty. Council v. City of Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132 (1992). "Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012). If no material facts are in dispute, and if the Board properly granted summary judgment, the Board's ruling could not be clearly erroneous.

B. The SMA and SEPA

With some exceptions, none of which is applicable here, the SMA applies to the "shorelines" of the state. RCW 90.58.030(2)(e), .140. The SMA requires local governments to develop and enforce a shoreline management plan (SMP). RCW 90.58.080. An SMP is a comprehensive use plan, "constitut[ing] use regulations for the various shorelines of the state." RCW 90.58.100(1). Development on shorelines must be consistent with the policies and purpose of the SMA as adopted in the applicable SMP or they "shall not be undertaken." RCW 90.58.140(1). "[S]ubstantial development shall not be undertaken on shorelines of the state without first obtaining a permit." RCW 90.58.140(2). The SMA and Cowlitz County Code authorize the County to issue or deny substantial development permits and conditional use permits. RCW 90.58.050, .140; chapter 19.20 CCC.

SEPA requires an EIS on "proposals for . . . major actions having a probable significant, adverse environmental impact." RCW 43.21C.031(1); *see* WAC 197-11-330. "The primary function of an EIS is to identify adverse impacts to enable the decisionmaker to ascertain whether they require either mitigation or denial of the proposal." *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990). "SEPA requires only that governmental bodies evaluate the pertinent environmental policies; it does not require that the result be certain or predictable." *W. Main Assocs. v. City of Bellevue*, 49 Wn. App. 513, 526, 742 P.2d 1266 (1987).

Proposed land use actions with significant environmental impacts are "subject to review for both substantive and procedural compliance with SEPA." *Kiewit Constr. Grp., Inc. v. Clark County*, 83 Wn. App. 133, 138-39, 920 P.2d 1207 (1996). "Substantive review considers the merits of the proposal, while procedural review involves the EIS process, including the adequacy of the EIS." *Kiewit Const. Grp.*, 83 Wn. App. at 139. "EIS adequacy refers to the legal sufficiency of the environmental data contained in the impact statement." *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 633. "Whether an EIS is adequate is a question of law."[5] *Klickitat County Citizens Against Imported Waste*, 122 Wn.2d at 632.

SEPA's substantive authority allows decision-makers to condition or deny government action based on an EIS, assuming certain conditions are satisfied. RCW 43.21C.060; *Polygon Corp.*, 90 Wn.2d at 64 ("SEPA confers substantive authority to the deciding agency to act on the basis of the impacts disclosed."). SEPA substantive authority is "not a substitute for local zoning ordinances, but 'overlays local ordinances and must be enforced even where a particular use is allowed by local law or policy.'" *W. Main Assocs.*, 49 Wn. App. at 525 (quoting *Cook v. Clallam County*, 27 Wn. App. 410, 415, 618 P.2d 1030 (1980)). Thus, SEPA's substantive authority allows

[5] Here, no party challenged the adequacy of the EIS.

a decision-maker to deny a project "because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance." *W. Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

In order to deny a proposal through SEPA substantive authority, a decision-maker must (1) find that the proposal would result in significant adverse impacts identified in the relevant environmental document, (2) find that reasonable mitigation measures are insufficient to mitigate the identified impacts, and (3) cite the relevant agency SEPA policy that is the basis for its denial and discuss why the project is inconsistent with that policy.[6] RCW 43.21C.060; WAC 197-11-660(1)(a)-(b), (f).

"Piecemealing is the practice of conducting environmental review only on current segments of public works projects and postponing environmental review of later segments until construction begins." *Concerned Taxpayers Opposed to the Modified Mid-South Sequim Bypass v. Dep't of Transp.*, 90 Wn. App. 225, 231 n.2, 951 P.2d 812 (1998).

SEPA regulations disallow piecemeal environmental review, requiring that parts of proposals which "are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document." WAC 197-11-060(3)(b). Piecemealing "is disfavored because the later environmental review often seems merely a formality, as the construction of the later segments of the project has already been mandated by the earlier construction." *Concerned Taxpayers*, 90 Wn. App. at 231 n.2.

[6] Cowlitz County Code contained appropriate SEPA policies on which the Hearing Examiner based its decision. Former CCC 19.11.110(B) (2017). Because Millennium does not challenge this aspect of the Hearing Examiner's decision to exercise SEPA substantive authority, those policies and the Hearing Examiner's examination of them are not discussed in detail.

The SMA also disallows piecemeal environmental review. The SMA seeks "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. Piecemeal development creates the danger that the review and public scrutiny of connected developments will be diluted and less effective in "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life." RCW 90.58.020; *see Jarvis v. Kitsap County*, No. 08-001, at 11 (Wash. Shorelines Hr'gs Bd. Apr. 8, 2008).

Whether a contemplated development is being presented for review in an impermissible piecemeal fashion depends on the particular facts presented. For purposes of SEPA and SMA review, the Board's test for impermissible piecemealing, is whether "a proposal is really a single project that has been divided into segments that are interrelated and interdependent." *Jarvis*, No. 08-001, at 11 (citing *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 847, 509 P.2d 390 (1973)).

III. EXERCISE OF SEPA SUBSTANTIVE AUTHORITY

A. No Genuine Issues of Material Fact Exist

Millennium argues that genuine issues of material fact remain regarding "whether Stage 1 improvements would result in significant adverse environmental impacts identified in the EIS" and whether mitigation measures would offset those impacts. Br. of Millennium at 48.

We disagree because Millennium's argument largely relies on piecemealing Stage 1 impacts from Stage 2 impacts. *E.g.*, Br. of Millennium at 48 ("[Millennium] cited to evidence that the impacts identified in the EIS would not result from the construction of Stage 1 alone."). Millennium's attempt to piecemeal the project is addressed and rejected below.

As discussed above, in order to deny Millennium's proposal via SEPA substantive authority, the Hearing Examiner was required to: (1) find that Millennium's proposal would result in significant adverse impacts identified in the EIS, (2) find that reasonable mitigation measures were insufficient to mitigate the identified impacts, and (3) cite the Cowlitz County SEPA policy that was the basis for its denial and discuss why Millennium's project was inconsistent with that policy. RCW 43.21C.060; WAC 197-11-660(1)(a)-(b), (f). The Board then reviewed the Hearing Examiner's decision to determine whether that decision was "clearly erroneous." *Cougar Mountain Assocs.*, 111 Wn.2d at 747; *Citizens for Sensible Growth*, No. 98-24.

Millennium presented evidence that impacts from Stage 1 would not result in the adverse impacts identified in the EIS. Millennium also presented evidence regarding whether its proposed measures would mitigate the identified impacts. DOE does not dispute any of Millennium's proffered evidence. Rather, the parties simply dispute the conclusions that can be drawn from such undisputed evidence. Therefore, the Board did not err in concluding that no genuine issues of material fact exist.

Finally, although Millennium contends that genuine issues of material fact exist because it intended to present extra-record evidence regarding the effects of mitigation at the hearing before the Board, it failed to state what evidence it intended to present and never made an offer of proof. Thus, we reject Millennium's bald assertion that genuine issues of material fact exist simply because of evidence it intended to present but never did.

B. The Board Properly Applied the Law

1. Viewing Stage 2 Impacts

Millennium argues that the Board erred when it concluded that "the Hearing Examiner's 'consideration of the Project as a whole was not clearly erroneous.'" Br. of Millennium at 32

(quoting AR at 2079). Millennium contends that "[i]t is self-evident that a government body reviewing an application for a shoreline permit under the SMA must base its decision on the proposal described in the application before it." Br. of Millennium at 32-33. Because Millennium's argument is based on an impermissible attempt to piecemeal its project under the SMA, we disagree.

The record shows that Stage 1 and Stage 2 are interrelated and interdependent. *Jarvis*, No. 08-001, at 11. Without objection, Millennium obtained an EIS analyzing the impacts from the coal export facility at full build-out. Thus, it did not impermissibly piecemeal in the preparation of the EIS. It also did not appeal the adequacy of that EIS.

However, regarding the shoreline permits under the SMA, the staff report analyzed Millennium's entire project for compliance with the County SMP. And only after the Hearing Examiner denied its permit application did Millennium contend that analyzing Stage 2 impacts to deny its permit application for Stage 1 was impermissible.

We reject Millennium's attempt to unlawfully piecemeal its project to avoid review under the SMA and SEPA substantive authority. Accepting Millennium's argument that the Hearing Examiner could not consider Stage 2 impacts would effectively allow Millennium to nullify SEPA substantive authority as applied to its project through the SMA. As noted above, SEPA substantive authority overlays local government policies; here, the SMA through the Cowlitz County Code. Accepting Millennium's argument would dilute the SMA review process and public scrutiny of Millennium's Stage 1 permit application, in contravention of the purposes that the SMA seeks to achieve. RCW 90.58.020. In addition, it would permit a collateral attack on the EIS.

Completion of Stage 1 would then have a coercive effect on the completion of Stage 2. Stage 1 involves the construction of a large coal export terminal, and Stage 2 involves far less construction but allows the terminal to vastly increase the amount of coal it processes. This is precisely the type of piecemealing that the legislature was concerned about. RCW 90.58.020; *Concerned Taxpayers*, 90 Wn. App. at 231 n.2; *see also Merkel*, 8 Wn. App. at 850-51.

2. Alleged Refusal to Consider Stage 1 Evidence

Millennium argues that the Board erred when it said that the Hearing Examiner looked at Stage 1 impacts and mitigation but simply gave them little weight. According to Millennium, the Hearing Examiner did not consider its evidence because it wrongly concluded that it could not consider its evidence. We disagree.

An EIS "shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions." WAC 197-11-400(4).

In its ruling, the Hearing Examiner stated:

> [Millennium] has presented the testimony of several experts whose opinions are in conflict with the []EIS but, in the absence of any appeal, this testimony is *largely irrelevant* to the issue of whether the ten unavoidable, significant adverse environmental impacts identified in the []EIS can be reasonably mitigated.

AR at 56 (emphasis added).

Millennium's reliance on the Hearing Examiner's use of the phrase "largely irrelevant" is misplaced. Millennium argues that the Hearing Examiner did not consider any of its evidence because it termed that evidence "largely irrelevant." However, a swath of evidence can be "largely irrelevant" even if individual pieces of evidence are relevant.

Millennium's true argument seems to dispute the characterization of its evidence. The record shows that the Hearing Examiner heard three days of testimony where Millennium presented expert witnesses and exhibits, and was afforded the opportunity to propose reasonable

mitigation measures. Additionally, Millennium submitted an exhibit that summarized questions the Hearing Examiner posed and its responses, largely related to mitigation measures. Thus, Millennium has not shown that the Hearing Examiner precluded it from presenting any evidence or that the Hearing Examiner viewed as irrelevant any reasonable mitigation measures presented by Millennium. Accordingly, we reject Millennium's argument.[7]

3. The Exercise of SEPA Substantive Authority Was Not Clearly Erroneous

Millennium argues that the Hearing Examiner's denial of its permit application under SEPA substantive authority was clearly erroneous. Millennium contends that the Hearing Examiner failed to make the specific findings as to both significant adverse impacts and mitigation. We disagree.

As noted above, in order to deny Millennium's proposal under SEPA substantive authority, the Hearing Examiner had to find that "(1) The proposal would result in significant adverse impacts identified in a final or supplemental [EIS] . . . (2) reasonable mitigation measures [were] insufficient to mitigate the identified impact," and (3) cite the SEPA policy contained in the Cowlitz County Code that was the basis for its denial and discuss why the project was inconsistent with that policy. RCW 43.21C.060; WAC 197-11-660(1)(a)-(b), (f).

[7] For similar reasons, we reject Millennium's argument that the Board erred in granting DOE summary judgment on issue 8. According to Millennium, the Board agreed with it on the law but "inexplicably granted [DOE's] and WEC's Motions for Summary Judgment on Issue 8." Br. of Pet. Millennium at 50. However, Millennium's challenge is simply another way for it to argue about the characterization of its evidence. Millennium agrees that the Board's order correctly stated the law. Millennium therefore agrees that it cannot challenge the EIS's determination of environmental impacts or their significance but can challenge the Hearing Examiner's use of the EIS in its exercise of SEPA substantive authority. Thus, Millennium's true argument is that the evidence it provided fell in the latter category and was permissible evidence that the Hearing Examiner erroneously disregarded. For these reasons, we reject Millennium's argument.

Regarding impacts, the EIS determined that even if Millennium implemented the identified mitigation measures, "[u]navoidable and significant adverse environmental impacts could remain for nine environmental resource areas." AR at 518. After a three-day hearing, the Hearing Examiner found that, based on the EIS and the evidence presented at the hearing, ten significant adverse impacts would result from Millennium's proposed terminal.

The EIS contained a lifecycle assessment of estimated net GHG emissions. Although the EIS determined that GHG emissions would not be a significant adverse impact, it reached that determination on the assumption that Millennium would offset 100 percent of GHG emissions. However, at the hearing, Millennium clarified its position that it would only offset 0.5 percent of the GHGs. As a result, the Hearing Examiner found that GHG emissions constituted a tenth significant adverse impact.

The Hearing Examiner's finding regarding GHG emissions was not clearly erroneous. Impacts need not be "labeled 'significant' in order for [an agency] to rely on them in making a decision." *W. Main Assocs.*, 49 Wn. App. at 523. Instead, the EIS must simply identify the impacts, and the agency must "set forth its reasons for concluding that these impacts warrant[] denial of the . . . application." *W. Main Assocs.*, 49 Wn. App. at 523. Here, the EIS identified impacts from GHG emissions, and the Hearing Examiner set forth reasons why GHG emissions constituted a tenth significant adverse impact.

Because the EIS identified significant adverse impacts, and the Hearing Examiner relied on those impacts, we agree with the Board that the Hearing Examiner complied with the first prong of SEPA substantive authority.

Regarding mitigation, the Hearing Examiner discussed in detail proposed mitigation measures and discussed why the proposed mitigation measures were insufficient to mitigate the impacts. The Hearing Examiner specifically listed the deficiencies in the proposed mitigation. For example, the Hearing Examiner stated that "[t]he parties' proposed mitigation for noise impacts is insufficient to ensure that Quiet Zones will be implemented." AR at 57.

As a result, the Hearing Examiner concluded that "neither the County nor [Millennium] propose reasonable mitigation for any of the unavoidable, significant adverse environmental impacts identified in the []EIS." AR at 57. Therefore, we agree with the Board that the Hearing Examiner complied with the second prong of SEPA substantive authority.

Finally, the Hearing Examiner cited SEPA policies contained in the Cowlitz County Code and discussed how the impacts from the project conflicted with "virtually every one of [those] policies." AR at 59. We agree with the Board that the Hearing Examiner complied with the third prong of SEPA substantive authority.

Based on all of the above, we agree with the Board that the Hearing Examiner's exercise of SEPA substantive authority was not clearly erroneous.

IV. OTHER ALLEGED ERRORS

Millennium argues that the Board committed numerous other errors. It contends that the Board impermissibly limited the scope of its review to the record before the Hearing Examiner, limited its review yet never obtained a copy of that record, and failed to comply with its own ruling because it accepted new evidence from DOE. We reject Millennium's arguments.

If no genuine issues of material fact exist, the Board may employ the summary judgment procedure. *Eastlake Cmty. Council*, 64 Wn. App. at 276. No party argues that the Board cannot grant summary judgment. Here, the Board set an adjudicatory hearing where it would have heard

evidence; however, before conducting the hearing, the Board ruled on summary judgment. We look to the record before the Board. RCW 34.05.558.

First, Millennium did not submit other materials beyond the record before the Hearing Examiner to the Board, but it could have. With its summary judgment motion, Millennium could have presented any admissible evidence it chose. Millennium has not shown that it submitted any evidence that the Board rejected. Therefore, Millennium's argument that the Board erred by not hearing evidence beyond that provided to the Hearing Examiner is without merit. Millennium chose what materials it submitted to the Board.[8]

Second, Millennium could have submitted to the Board the entire Hearing Examiner record. Millennium chose not to. We conclude that the Board's decision, granting summary judgment in favor of DOE based on the portions of the record that the parties submitted during summary judgment, was neither an erroneous interpretation or application of the law nor was it arbitrary and capricious. RCW 34.05.570(3).

Finally, we reject Millennium's argument that it failed to abide by its own ruling. We recognize that in DOE's reply brief in support of its motion for summary judgment before the Board, the agency offered evidence not presented to the Hearing Examiner. We also recognize that the Board's decision cited that document. However, at summary judgment, DOE was free to submit any evidence it chose to support its motion. If Millennium opposed that evidence, it should have objected to it or moved to strike it. Millennium chose not to do so.

[8] If this matter had proceeded to a hearing and not been decided on summary judgment, then Millennium's argument that it had been precluded from presenting additional evidence may have more merit.

We affirm the Board's decision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, C.J.

Sutton, J.

K&L GATES LLC

April 16, 2020 - 3:28 PM

Filing Petition for Review

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