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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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NORTHWEST ALLOYS, INC. and MILLENNIUM BULK  
TERMINALS-LONGVIEW, LLC,

*Respondents,*

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL  
RESOURCES, and THE HONORABLE HILARY S. FRANZ, and  
COLUMBIA RIVERKEEPER, WASHINGTON ENVIRONMENTAL  
COUNCIL, and SIERRA CLUB,

*Appellants.*

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**APPELLANTS OPENING BRIEF**

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## INTRODUCTION

As steward, protector, and landlord of state-owned aquatic lands, the Washington State Department of Natural Resources (“DNR”) must manage the aquatic resources and river bed of the Columbia River for the benefit of the public. In honoring this duty, before making a decision on a request from tenant Northwest Alloys for consent to sublease to Millennium Bulk Terminals—Longview, DNR reasonably sought detailed financial and business information about Millennium, its business model, and its proposal to build a massive coal export terminal on the banks of the Columbia River. The Washington legislature gave DNR the obligation to ensure that any proposed lessee or sub-lessee of state-owned aquatic lands was financially sound and would conduct its business in a responsible manner; likewise, DNR had the duty to deny consent to sublease when it was not supplied with adequate information on which to base its assessment.

DNR’s lease with Northwest Alloys provided that before consenting to a sublease, DNR could consider specific factors such as the proposed sub-lessee’s financial condition and business reputation, as well as “such factors as may reasonably bear upon the suitability of the transferee as a tenant of the Property.” That DNR considered these factors—and found Millennium lacking—was detailed in a January 5,

2017 letter from then-Commissioner of Public Lands Peter Goldmark denying Northwest Alloys' request for consent to sublease to Millennium. The Commissioner's letter and the record before DNR highlight the many ways that Millennium is not a suitable subtenant under the terms of the lease—of particular note are DNR's numerous requests for Millennium's financial information and Millennium's steadfast refusal to provide that information. While any responsible landlord would want details about a proposed subtenant's financial capabilities and business plan, Millennium's acknowledged shortcomings—failing to disclose a planned increase in project size and impact, the bankruptcy of a principal project sponsor, changed circumstances in the aluminum business that Millennium serviced at the time, a plunge in the world-wide coal export market—further spurred DNR's requests.

Given these facts, the superior court correctly found that DNR had legitimate concerns about Millennium's financial condition and ability to operate its proposed business. The superior court, however, erroneously concluded that the information DNR requested, such as audited financial statements, was irrelevant and would not contribute to DNR's understanding of Millennium's financial condition. To the contrary, DNR's requests for information were reasonable, as was DNR's decision to deny consent to sublease after Millennium and Northwest Alloys

refused to provide that information. Accordingly, Intervenors Columbia Riverkeeper *et al.* (“Intervenors” or “Riverkeeper”) respectfully ask this Court to reverse and vacate the superior court’s decision that DNR’s denial was arbitrary and capricious.

#### ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

1. Whether the Commissioner’s denial decision was reasonable under the terms of the Lease and the certified record.
  - a. Whether the superior court erred in finding that DNR failed to request information that would address DNR’s concerns regarding the financial viability of Millennium’s proposed coal terminal. CP 17692-93 (Order on the Merits at ¶¶ 11, 12, 13).
  - b. Whether the superior court erred in finding that, as of February 2015, concerns raised in prior negotiations between the parties, including DNR’s concerns related to Millennium’s business reputation and failure to fully disclose the intended size and scope of the project in the initial permitting process, were resolved to DNR’s satisfaction. CP 17690-91, 17693 (Order on the Merits at ¶¶ 8, 14).
  - c. Whether the superior court erred in finding that the Commissioner’s decision to deny Northwest Alloys consent to

sublease to Millennium was arbitrary and capricious. CP 17692-93 (Order on the Merits at ¶ 13, 15).

d. Whether the superior court erred by reversing DNR's denial of consent to sublease to Millennium and ordering DNR to reconsider its denial. CP17693, 17815 (Order on the Merits ¶ 15; January 31, 2018 Order ¶¶ 2-3).

2. Whether the terms of the current Lease allow for the construction of a 44 million-ton-per-year coal export facility.<sup>1</sup>

a. Whether the superior court erred by concluding that the existing terms of the Lease would allow Millennium's proposed coal terminal expansion. CP 17690, 17692 (Order on the Merits at ¶¶ 6, 12).

## STATEMENT OF THE CASE

### FACTUAL BACKGROUND<sup>2</sup>

#### I. DNR'S LEASE WITH NORTHWEST ALLOYS

In June 2008, DNR and Northwest Alloys signed a thirty-year lease of state-owned aquatic lands in Longview, Washington. CP 1873, AR 001528 (Lease). The Lease provides that Northwest Alloys must

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<sup>1</sup> Intervenors incorporate by reference DNR's argument on this issue.

<sup>2</sup> Citations to the clerk's papers are designated "CP" and corresponding designations to the administrative record are designated "AR".

obtain DNR's written consent to sublease the state-owned land. CP 1891-92, AR 001546-47. In determining whether to consent, DNR may consider: (1) the proposed sub-lessee's financial condition, (2) the proposed sub-lessee's business reputation and experience, (3) the nature of the proposed sub-lessee's business, (4) the then-current value of the Property, and (5) such other factors as may reasonably bear upon the suitability of the proposed sub-lessee as a tenant of the Property. *Id.*, Lease Section 9.1 (emphasis added).

Less than two years after entering into the Lease with DNR, Northwest Alloys defaulted on the agreement after its subtenant, Chinook Ventures, caused significant damage to the property. CP 160, AR 000025 (May 6, 2010 Notice to Cure Defaults); *see also* CP 129, AR 000001 (DNR Letter to Chinook Ventures describing violations of Lease). On October 28, 2010, while still in default of the Lease, Northwest Alloys asked DNR for consent to sublease the property to Millennium. *See* CP 240, AR 000098 (October 28, 2010 Letter from Northwest Alloys asking DNR for consent to sublease); CP 280, AR 000132 (November 18, 2010 Email from DNR to counsel for Millennium and Northwest Alloys, noting that "... NW Alloys is currently in default of the lease and DNR has not determined that the proposed cure ... is adequate to resolve the default.").

A. DNR Began Requesting Information from Millennium and Northwest Alloys Less Than One Month After Receiving the Request to Sub-Lease.

On November 18, 2010, DNR requested business, financial, and environmental information from Millennium and Northwest Alloys, noting that they were “required to provide adequate information to DNR to determine the suitability of the proposed sub-lessee” under Section 9 of the Lease. CP 280, AR 000132. Northwest Alloys’ default and its failure to assure its past tenant’s compliance with the Lease raised the stakes for DNR, and the agency sought detailed information from the companies. *See id.* (November 18, 2010 Email from DNR to counsel for Northwest Alloys and Millennium stating that “DNR is concerned about whether NW Alloys should continue as a lessee of the site” given Northwest Alloys’ failure to ensure Chinook Ventures’ compliance with the Lease, and noting that DNR had not received much information regarding Millennium, the proposed sub-lessee). DNR’s initial request sought details on:

1. The financial condition of Millennium Bulk Logistics, Inc., including the extent of its assets, to help DNR determine whether it has the financial wherewithal to comply with the terms of the lease--especially in terms of abiding by requirements related to authorized improvements.
2. The business reputation and experience of Millennium Bulk Logistics, Inc., and if this Incorporation has been

formed just to operate this site, the business reputation of any of its affiliates, owners, or partners. DNR would like to understand the history of this company and any of its individual owners in terms of the conduct of their business(es) and whether they have any history of causing environmental damage or failing to comply with applicable law and regulatory requirements. As a steward of state-owned aquatic lands and responsible for this site, DNR would like to understand that the new proposed sub-lessee will be able to perform its obligations under the lease that relate to site stewardship and otherwise. Please inform us of each of the owners of the Incorporation and their experience with site uses such as the one proposed for the sublease.

3. Any information that you can provide that will inform us of site operating protocols that will protect state-owned aquatic lands from the release of hazardous substances and that will provide environmental protection. If Millennium or any of its partners has experience with the types of systems that would be put in use at the Longview site, please describe what controls are in place to prevent harm to the aquatic environment in which the facility would exist, and how upland operations may affect state-owned aquatic lands.

CP 280, AR 000132; *see also* CP 1891, AR 001546 (Lease Section 9.1).

B. Millennium's Initial Responses to DNR Were Inadequate.

Millennium sent a series of letters in response to DNR's requests, but failed to answer all questions or provide all documentation. *See* CP 290, AR 000140 (Nov. 22, 2010 Letter describing letter of credit and Ambre Energy assets, but providing no financial documents); CP 299, AR 000148 (Plan of Operation and Maintenance); CP 313, AR 000161 (Operational Protocols); CP 319, AR 000166 (Conveyer Drawings); CP

325, AR 000171 (outlining assets devoted to project, but no documentation or details on the extent of Millennium's assets).

On November 29, 2010, DNR sent a letter clarifying its request, and noting that the information initially provided was insufficient and not adequately responsive. CP 331-33, AR 000176-78 ("Not all of the information DNR requested on November 18, 2010 has been provided at this time, which DNR will need to receive in order to evaluate the proposed new sub-lessee"). Because Millennium provided no evidence of its own assets, DNR asked to be provided with "evidence of assets sufficient to secure performance of all lease obligations, including those measures required to cure the existing default." CP 332, AR 000177. In fact, the limited information given to DNR indicated that Millennium had no assets of its own other than what it would purchase from Chinook Ventures, and that Millennium intended to "rely on the assets of Ambre Energy for its performance of lease obligations." *Id.* DNR also asked for a copy of the proposed letter of credit that Millennium described but did not provide with its November 22, 2010 response letter, and for documentation confirming Millennium's representation that Ambre Energy would guarantee Millennium's performance under the sublease. *Id.*

To judge Millennium's ability to safeguard aquatic resources, DNR asked for additional information relevant to Millennium's ability and experience in operating a coal handling facility in compliance with applicable laws and regulations. *Id.* DNR's requests highlighted its concerns over Millennium's lack of experience in operating such a facility; they specifically focused on the potential harm that coal dust and coal spills might have on state-owned aquatic lands. *Id.* DNR asked for information regarding Ambre Energy's other coal handling facilities and its history of compliance with laws and regulations at those sites. *Id.* DNR also reiterated its request for evidence of insurance, permits, and proposed plans of operation in order to properly evaluate proposed rights of entry for sampling and dredging. *Id.*

Millennium sent DNR a response letter on December 2, 2010 that exemplified its view that it was unreasonable for DNR to consider financial and business reputation information prior to consenting to sublease, despite the clear terms of the Lease to the contrary. CP 336-341, AR 000180-185 (Millennium Response Letter). Millennium's counsel stated, "I think the thought that Millennium has to demonstrate financial capability to DNR is misplaced" because Northwest Alloys remained the tenant under the Lease. CP 337, AR 000181. Millennium again provided no evidence of its own assets, but represented that Northwest Alloys was

financially capable, and that Ambre Energy would guarantee Millennium's performance under the Lease. *Id.* Millennium disagreed that the business reputation information requested by DNR regarding compliance with applicable laws and regulations at other Ambre Energy coal sites was relevant and provided only scant annual reports for one site. CP 338, AR 000182.

II. COMMUNITY AND CONSERVATION GROUPS URGED DNR TO DENY CONSENT UNDER THE TERMS OF THE LEASE.

On November 12, 2010, Washington Environmental Council, Sierra Club, Columbia Riverkeeper, and Climate Solutions sent Commissioner Goldmark a letter requesting that he deny the aquatic sublease because Millennium's proposed plan to export millions of tons of coal to overseas markets was inconsistent with Washington's commitment to combat climate change. CP 244-250, AR 000101-107 (WEC *et al.* Letter to Commissioner Goldmark).<sup>3</sup> The letter noted that DNR could not simply "rubber-stamp a sublease transfer," and that Section 9.1 of the Lease allowed DNR to consider various factors in deciding whether to consent to sublease, including the "nature of the proposed transferee's business." CP 246, AR 000103. The groups also pointed out that DNR

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<sup>3</sup> Hillary Franz took office as Commissioner of Public Lands on January 11, 2017.

had authority to cancel or renegotiate the terms of the Lease based on Northwest Alloys' default. CP 247, AR 000104. The letter was not a secret missive to the Commissioner; it was emailed to at least 27 people at state, local, and federal agencies involved in the permitting process for the proposed coal export terminal. CP 248-250, AR 000105-107.

Commissioner Goldmark responded to the group's letter on December 16, 2010, assuring the groups that DNR "recognize[d] that climate change and the use of coal in the global environment are important issues to the people of Washington State." CP 457-467, AR 000369-376 (DNR Letters to Washington Environmental Council, Sierra Club, Climate Solutions, Columbia Riverkeeper). The Commissioner acknowledged the "significant nature of the default" on the Lease which "involve[d] the regulatory jurisdiction of multiple federal and state agencies." *Id.* In considering whether to consent to sublease, the Commissioner said that DNR was proceeding carefully, examining its options, and intended to make a "decision that best serves the people of Washington." *Id.*

A. Litigation Brought by Intervenors and the Department of Ecology Revealed Millennium's Undisclosed Plans

On February 11, 2011, the Department of Ecology sent DNR a copy of an internal Millennium memo that outlined Millennium's intent to deceive state and local regulatory agencies in order to circumvent proper

review under the State Environmental Policy Act (“SEPA”). CP 492-96, AR 000393-97 (October 28, 2010 Internal Millennium Memo).<sup>4</sup> The memo demonstrated that Millennium understood that SEPA “require[d] that development proposals which are related to each other so closely to be in effect a single course of action must be analyzed in the same environmental document.” CP 493, AR 000394. Despite this knowledge of SEPA’s requirements, Millennium secretly planned to expand its proposed export coal terminal by at least 20 million tons of coal per year after it received approval based on the five-million-ton per year proposal submitted for SEPA review. CP 494-95, AR 000395-96. To avoid being “perceived as having deceived the agencies,” the memo recommended waiting at least two months after the grant of permits before approaching the agencies about Millennium’s expansion plans. CP 495, AR 000396. Once exposed, Millennium’s deception made both national and local news. *See, e.g.*, CP 498-500, AR 000398-400 (February 15, 2011 New York Times article); CP 516-17, AR 000413-14 (March 10, 2011 article in The Longview Daily News).

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<sup>4</sup> These documents were disclosed during discovery in the challenge to Millennium’s 2010 shorelines permit brought by the Washington Department of Ecology and conservation groups (including Intervenors). *See* CP 475, AR 000381 (Ecology’s Motion to Intervene in appeal); CP 516, AR 000413 (March 10, 2011 news article discussing appeal).

On March 7, 2011, DNR responded to Northwest Alloys' request for information regarding DNR's timeframe for a decision on whether to consent to sublease. CP 505-514, AR 000403-412; *see also* CP 485-88, AR 000388-391 (February 2, 2011 Letter from Northwest Alloys to DNR). DNR noted that the scope and nature of Millennium's proposed project had continually changed, and highlighted the news coverage of Millennium's plan to mislead state agencies. CP 505-06, AR 000403-04. DNR stated that "[w]ith these various changes in the description of the nature of the sublease proposal, it should be no surprise that DNR has not acted on NW Alloys' request for consent." CP 505, AR 000403. DNR asked for clarification of Millennium's plans and timeline. CP 506, AR 000404 ("confirm whether or not NW Alloys and Millennium intend to broaden the scope of the proposal to encompass a more significant use of state-owned aquatic lands"). DNR explained that:

DNR is concerned with understanding the intent of NW Alloys and/or Millennium with respect to the scope of the proposal. Inconsistencies make evaluating your proposal difficult and potentially signals that DNR will need to actively monitor the proposed sub-lessee's operations to confirm ongoing compliance with the limited scope of any approved improvements. In order for DNR to be confident that your request is reasonable in the context of DNR's responsibilities for managing state-owned aquatic lands, a clear and accurate description of your proposal – that is consistent with representations being made to other permitting agencies about its scope – is essential.

CP 506, AR 000404.

On March 16, 2011, Washington Environmental Council, Sierra Club, Columbia Riverkeeper, and Climate Solutions sent Commissioner Goldmark a letter highlighting the news coverage on how “Millennium’s environmental review has been marred by misrepresentations and a lack of material disclosure”; the letter attached relevant documents that the organizations had obtained during their appeal of Millennium’s shorelines permit and SEPA determination from Cowlitz County. CP 519-540, AR 000415-36 (WEC *et al.* Second Letter to Commissioner Goldmark). The organizations summarized some of Millennium’s misrepresentations:

- Millennium’s SEPA application stated that no other current plans were associated with the site, and a Millennium project manager signed the statement as being “true and complete to the best of my knowledge.” CP 520, AR 000416. The memo outlining Millennium’s significant expansion plans was sent to its parent company’s board of directors that same month. *Id.*
- Millennium’s representations to its investors indicated that it would ultimately aim to build a facility that would handle 60 million tons of coal per year—twelve times the amount accounted for in its permit. CP 521, CP 536; AR 000417, AR 000432.
- A July 19, 2010 email from Vice President of Ambre Energy, Millennium’s parent company at the time, suggested that expansion could be completed “without having to complete a full EIS,” and advises that future expansion plans not be discussed with outside parties. CP 521, CP 540; AR 000417, AR 000436.
- A November 5, 2010 email from project manager Lyle Hobbs recommends not discussing plans to build a new ship berth because

“[t]he community is small, and the risk to the current permit path is too large.” CP 521, CP 539; AR 000417, AR 000435.

The organizations urged the Commissioner to weigh Millennium’s deceitful business practices and misrepresentations when determining whether to deny consent to sublease, and they emphasized that the Commissioner could properly consider Millennium’s “business reputation” under the terms of the Lease. CP 519-523, AR 000415-19. The ability of DNR to act on Millennium’s sub-lease request passed, however, as Millennium withdrew its original permit application. CP 636, AR 000450. Approximately a year later, Millennium restarted the permitting process, this time submitting a revised application for a coal export terminal of 44 million tons per year. CP 6123, AR 005713.

B. While Millennium Stonewalled DNR’s Efforts To Obtain Financial Statements, Community and Environmental Groups Provided DNR with Relevant Information.

DNR and Northwest Alloys continued to discuss curing Northwest Alloys’ default on the Lease, as well as the conditions necessary for DNR to grant consent to sublease to Millennium after Millennium submitted its revised application. *See, e.g.*, CP 1074, AR 000860 (Feb. 9, 2012 Letter from DNR to Northwest Alloys, “DNR remains concerned that Northwest Alloys continues to undertake unauthorized activities of the same nature that lead to defaults identified in the May 6, 2010 notice.”); CP 1086, AR

000868 (DNR proposed monthly meetings with Northwest Alloys); CP 1258, AR 001002 (May 30, 2013 Letter from DNR discussing concerns about Millennium and expressing willingness to discuss lease amendments). During these ongoing discussions, DNR again requested Millennium's financial statements pursuant to the terms of the Lease, CP 1539, AR 001240 (Feb. 3, 2016 Letter from DNR), which Millennium again refused to provide, CP 1561, AR 001257 (March 9, 2016 Letter from Millennium to DNR stating that the Washington Administrative Code does not describe a process for DNR to seek Millennium's financial statements).

While Millennium withheld details regarding its financial condition from DNR, Intervenors and others brought to DNR's attention publicly available information regarding the financial situation and business reputation of Millennium and its parent corporations, the nature of Millennium's business as a proposed coal handling facility, and the difficulties facing the coal market in general. *See, e.g.*, CP 546, CP 647, CP 1206, CP 1240, CP 1411, CP 1476, CP 1491, CP 1502, CP 1532, CP 1592, CP 1634, CP 1636, CP 1651, CP 1657, CP 1748, CP 1770, CP 1798; AR 000440, AR 000457, AR 000965, AR 000989, AR 001131, AR 001188, AR 001200, AR 001207, AR 001234, AR 001287, AR 001324,

AR 001325, AR 001334, AR 001338, AR 001422, AR 001438, AR 001463.

For example, Intervenors copied DNR on a November 9, 2015 email sent to the U.S. Army Corps of Engineers and the Department of Ecology regarding Northwest Alloys' permit application for dredging at the Longview site, purportedly needed to import alumina ore for Alcoa's smelter in Wenatchee.<sup>5</sup> CP 1476-77, AR 001188-89. Intervenors noted that Alcoa had announced plans to shut down its two remaining aluminum smelters in Washington State, including the Wenatchee site, and submitted that maintenance dredging was no longer necessary. CP 1477, AR 001189. This news prompted DNR to inquire about the intended use of the Longview site. CP 1479, AR 001190 (Dec. 14, 2015 Letter from DNR to Alcoa, noting Alcoa's consistent representations that the main purpose of the Longview site was to support operation of the Wenatchee smelter); CP 1539, AR 001240 (Feb. 3, 2016 Letter from DNR to Northwest Alloys, stating "Alcoa's recent decision to shutter its Wenatchee Works operation raises questions regarding the nature of Millennium's business as it relates to use of the existing dock on the property leased from the state.").

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<sup>5</sup> Northwest Alloys is a subsidiary of Alcoa, Inc. CP 3682, AR 3293.

While DNR proceeded with its own investigation and other individuals and advocacy groups offered their viewpoints on Millennium's proposed project, Intervenors continued to provide DNR with information. *See, e.g.*, CP 1532, AR 001234 (January 2016 Memo to DNR); CP 1502, AR 001207 (2016 Climate Solutions Letter to DNR). Intervenors offered analysis of the Lease and its terms, and argued that every factor that DNR could consider in determining whether to grant or withhold its consent supported denial of the sublease request. *Id.* The groups emphasized the dismal market for U.S. coal exports, noting the falling prices for coal that were attributed to lessened demand in Asia and robust supplies coming from Australia, Indonesia, and Russia. CP 1504-05, AR 001209-10; CP 1534, AR 001236. *See also* CP 14032, AR 013599 (Nov. 2014 Report by Institute for Energy Economics and Financial Analysis, "No Need for New U.S. Coal Ports: Data Shows Oversupply in Capacity"); CP 14039, AR 013605 (Nov. 2014 Wall Street Journal Article, "Hedge Funds Bet on Coal-Mining Failures").

The groups also pointed out that both of Millennium's co-owners, Arch Coal and Lighthouse Resources,<sup>6</sup> were in dire financial straits; in

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<sup>6</sup> In 2015, Ambre Energy became Lighthouse Resources. CP 14057, AR 013619; *see also* CP 14048, AR 013612 (Dec. 18, 2014 Sightline Daily article, "What Ambre Says About Its Financial Collapse").

fact, Arch Coal had recently filed for Chapter 11 bankruptcy protection. CP 1502-06, AR 001207-11; CP 1533-34, AR 001235-36. *See also* CP 14043, AR 013608 (Dec. 2014 Bloomberg article, “Investors flee Arch Coal debt, driving down its bond prices”); CP 14136-14200, CP 14208-14222, AR 013694-013757, AR 013763-013777 (Jan. 2016 Arch Coal bankruptcy filings). Upon learning this news, DNR requested more information regarding Millennium’s financial condition. CP 1539, AR 001240 (Feb. 3, 2016 Letter from DNR to Northwest Alloys, “Based on Arch Coal’s ownership interest in Millennium, the bankruptcy filing raises questions regarding the financial condition of Millennium that DNR needs to have answered before it completes review of your request for its consent for a sublease.”); CP 1741, AR 001418 (June 24, 2016 Letter from DNR to Alcoa, expressing concerns about Millennium’s obligations to Northwest Alloys following Arch Coal’s sale of its membership interest in Millennium, and asking for a copy of Northwest Alloys’ ground lease with Millennium).

The Intervenors’ January 2016 Memo to DNR also pointed to Millennium’s deception of state agencies in the SEPA process, and the fact that neither Millennium nor Lighthouse Resources had any experience “building, owning, or operating a major piece of fossil fuel infrastructure.” CP 1535, AR 001237. As to the nature of Millennium’s business as a

proposed coal handling facility, the groups again highlighted the abysmal coal market. CP 1504-06, CP 1536, AR 1209-11, AR 001238. The January 2016 Memo also refuted Millennium's claim that the sublease was necessary to move other bulk products, particularly alumina for Alcoa's Wenatchee smelter, since Alcoa shuttered the Wenatchee smelter in late 2015. CP 1536, AR 001238.

Counsel for Intervenors sent a follow-up email on March 31, 2016, after reviewing DNR's correspondence with Millennium and Alcoa, obtained through public records requests. CP 1634, AR 001324. Intervenors again asked that the consent to sublease be denied, or that the discussion be deferred until Millennium had a viable plan for a coal terminal. *Id.* Review of this correspondence also revealed that Millennium had refused to provide DNR with audited financial statements as requested, and that "rather than providing a response, Millennium presumptuously stated that it has been operating at the site without incident for some time, and that is all the information DNR needs." *Id.* Of course, the Lease allowed DNR to examine Millennium's financial condition and business plan, and Intervenors argued that Millennium was not entitled to a sublease decision until it has provided the requested information. *Id.*

In a May 27, 2016 email to DNR, counsel for Intervenors alerted DNR to the fact that Arch Coal sold its 38 percent stake in Millennium’s proposed coal export terminal for nothing more than a release of its financial obligations to Millennium. CP 1651, AR 001334. The email emphasized that the proposed coal export terminal remained a bad investment, and again urged DNR to deny consent to sublease. *Id.*<sup>7</sup>

III. DNR DENIED CONSENT TO SUBLEASE AFTER MILLENNIUM REPEATEDLY REFUSED TO PROVIDE FINANCIAL STATEMENTS AND OTHER INFORMATION AND DECIDING THAT MILLENNIUM WAS NOT A SUITABLE SUBTENANT.

In the January 5, 2017 letter decision, Commissioner Goldmark denied Northwest Alloys’ request for consent to sublease state-owned aquatic lands to Millennium. CP 1850-52, AR 001509-11. The Commissioner found that Northwest Alloys had failed “to provide requested information regarding the financial condition and business of Millennium as well as other factors that bear on the suitability of Millennium as a subtenant.” *Id.*

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<sup>7</sup> The email also discussed the draft environmental impact statement (“DEIS”) for the proposed coal export terminal that was released by Cowlitz County and Ecology on April 29, 2016. CP 8929, AR 008500. The DEIS found significant and harmful impacts to the environment from the project, including public health concerns, unavoidable greenhouse gas emissions, and negative impacts on fish and water quality. CP 9003-06, AR 008574-77.

The Denial Letter explained that, “[b]ecause Northwest Alloys has not provided [Millennium’s] financial statements after repeated requests, DNR has determined that denial of Northwest Alloys’ request for DNR’s consent to sublease is appropriate.” *Id.* The Commissioner found that DNR’s requests were reasonable, especially in light of historically poor market conditions for coal, Millennium’s unclear commitments to Northwest Alloys under their ground lease, and the bankruptcy of one of Millennium’s co-owners. *Id.* The letter also noted that Millennium failed to fulfill DNR’s request for a copy of its ground lease with Northwest Alloys to clarify Millennium’s obligations to Northwest Alloys, which was of particular concern after Arch Coal’s bankruptcy and the idling of Alcoa’s Wenatchee aluminum smelter. CP 1851, AR 001510; *see also* CP 1741, AR 001418 (June 24, 2016 DNR Request for Ground Lease and Financial Information).

The Commissioner also determined that DNR’s requests for information were reasonable because Northwest Alloys’ prior sublease tenant, Chinook Ventures, had defaulted on its obligations and caused significant damage to the site; Millennium lacked expertise in operating a large-scale coal export project; and Millennium had a troubling history of misleading the public about its intentions and the project’s size. CP 1851-52, AR 001510-11.

## PROCEEDINGS BELOW

On February 2, 2017, Northwest Alloys and Millennium filed a notice of appeal of the Commissioner's decision, under RCW 79.02.030, in Cowlitz County Superior Court.<sup>8</sup> CP 1. Riverkeeper moved to intervene as respondents on March 8, 2017. CP 62. Northwest Alloys and Millennium opposed Riverkeeper's intervention, CP 14296, and, following a March 15, 2017 hearing on the motion, the Court ordered supplemental briefing regarding the scope of review under RCW 79.02.030. *See* CP 14376. Following a second hearing, the Court granted Riverkeeper's motion to intervene. CP 14465.

On October 27, 2017, the Cowlitz County Superior Court heard argument from the parties and, in an oral ruling, found that DNR's denial of Northwest Alloys' consent to sublease was arbitrary and capricious. CP 17687-695. The Court entered a written order on November 29, 2017. *Id.* The Court's written order states that "DNR's reasons for denial of the sublease as stated in the January 5, 2017 letter are not supported by the

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<sup>8</sup> RCW 79.02.030 provides an appeal process for any person whose property rights or interests will be affected by a Commissioner's decision regarding the sale or lease of public lands. Under this unique appeals process, the superior court reviews the Commissioner's decision *de novo* based upon the pleadings and DNR's certified administrative record. *Id.*

facts” and found that DNR’s denial of consent to sublease was arbitrary and capricious. CP 17693 (Order on the Merits at ¶ 15).

The superior court found that “The primary landlord certainly has the right to know how a subtenant’s business is going to operate. [Millennium’s] proposal was such that DNR was allowed to ask that question. DNR did not.” CP 17692 at ¶ 11. The court also concluded that “the record shows that DNR did not ask the key question related to financial viability of the coal terminal operation. Nobody ever asked, ‘How are you going to make this thing work financially? How is this going to pencil out?’ That never happened.” *Id.* at ¶ 12.

The superior court’s Order on the Merits did not address remedy and held that question open for further proceedings. CP 17693 at ¶ 16. Following additional briefing and argument, the superior court entered an Order on January 31, 2018, directing DNR to reconsider its denial of the consent to sublease. CP 17814.

The parties appealed both the November 30, 2017 Order on the Merits and the subsequent January 31, 2018 Order to this Court. CP 17818-51. After considering the appealability of these orders, this Court determined that they were appealable as a matter of right, and accepted review on March 20, 2018. *Northwest Alloys, Inc., et al. v. State of Wash.*

*Dep't of Nat. Res., et al.*, Case No. 51677-2-II, Letter Ruling by  
Commissioner Schmidt (Mar. 20, 2018).

#### STANDARD OF REVIEW

An appellate court sits in the same position as the superior court when reviewing an administrative decision and applies the appropriate standard of review directly to the administrative record. *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 617–18, 987 P.2d 103 (1999). Under RCW 79.02.030, courts review a decision by the Commissioner of Public Lands *de novo* based on the pleadings and the underlying record as certified by DNR. The record, by definition, contains the information that was before DNR when it made the sublease decision. *See, e.g., Tucker v. Dep't of Ret. Sys.*, 127 Wn. App. 700, 705, 113 P.3d 4 (2005) (“The party challenging an agency’s action must prove the decision’s invalidity; our review is limited to the record before the agency.”).

Intervenors agree with DNR that *de novo* review in this case requires deference to the agency, and that this Court’s review of DNR’s decision should be under the arbitrary and capricious standard. *See* DNR’s Opening Brief, Section V. Standard of Review; *see also Haynes v. Seattle Sch. Dist. No. 1*, 111 Wn.2d 250, 254, 758 P.2d 7 (1988), *cert. denied*, 489 U.S. 1015, 109 S. Ct. 1129, 103 L. Ed. 2d 191 (1989) (de

novo review of agency decision ordinarily limited to whether agency acted arbitrarily, capriciously, or contrary to law).

In the superior court proceedings, Intervenors argued that DNR’s decision was reasonable under both a deferential standard and under a “reasonable person” standard. CP 15617. Northwest Alloys and Millennium argued that DNR was owed no deference, and that an objective reasonable person standard of review applied. CP 15552. Here, Intervenors incorporate by reference DNR’s argument under an arbitrary and capricious standard of review, and argue that DNR’s decision was also reasonable under a “reasonable person” standard that accounts for DNR’s position as steward of state-owned aquatic lands. *See Ernst Home Ctr., Inc.*, 80 Wn. App. 473, 486, 910 P.2d 486 (1996) (“where a lease prohibits a landlord from “unreasonably” withholding consent to an assignment by the tenant, the court should evaluate whether a reasonably prudent person in the landlord's position would have refused to consent”) (emphasis added).

#### SUMMARY OF ARGUMENT

DNR reasonably denied Northwest Alloys’ consent to sublease state-owned aquatic lands to Millennium based on the record before the agency; the superior court erred in reversing DNR’s decision. In denying Northwest Alloys’ request for consent to sublease to Millennium, the

Commissioner made specific findings of fact that flowed from the agreed upon factors set forth in the Lease: (1) Millennium failed to provide requested financial statements; (2) Millennium failed to provide a copy of the ground lease with Northwest Alloys to clarify Millennium's financial and other obligations to Northwest Alloys; (3) there were historically poor market conditions for the coal industry; (4) Northwest Alloys' allowed a prior sub-lessee to cause significant damage to the site resulting in default of the Lease; (5) Millennium lacked expertise operating a coal export project; and (6) Millennium had a troubling history of misrepresenting its plans and the project's size. CP 1850-52, AR 001509-11.

The record confirms that Millennium and Northwest Alloys failed to fulfill DNR's clear and reasonable requests for Millennium's financial statements, as allowed for by the terms of the Lease; this failure alone supports a reasonable denial of consent.

But that was not the only information DNR lacked. Because Millennium relied on the financial strength of its parent companies and Northwest Alloys to demonstrate its ability to perform under the Lease, the January 2016 bankruptcy filing of Arch Coal—Millennium's primary backer—led DNR to request additional information about Millennium's assets. For Northwest Alloys' part, the default and damage caused by Northwest Alloys' prior sub-lessee fueled DNR's concerns, as well as the

2015 shuttering of Alcoa's Wenatchee aluminum smelter—the destination of alumina ore imported by Northwest Alloys. DNR had more than an obligation to ensure that history would not repeat itself; DNR's stewardship of public resources demanded that it request and consider all pertinent information, which it did.

And it is no secret that throughout the sublease review process, DNR met with and received information from Intervenors and other community and conservation groups. These meetings were proper, and in fact, provided DNR with details about the proposed project that Millennium refused to supply. DNR also reviewed the historically poor market conditions for the coal industry and coal exports in particular. And finally, the fact that Millennium lacked expertise and experience operating such a project prompted DNR's requests for evidence of Millennium's ability to perform under the Lease—requests that went largely unanswered.

In short, DNR acted reasonably; indeed, any reasonably prudent landlord would have denied consent to sublease based on the record before DNR, and this Court should reverse the superior court's decision.

## ARGUMENT

### I. THIS COURT MUST CONSIDER DNR'S POSITION AS STEWARD OF STATE-OWNED AQUATIC LANDS IN DETERMINING WHETHER DENIAL OF CONSENT TO SUBLEASE WAS REASONABLE.

The application of the “reasonable person” test in this case requires the Court to determine whether a reasonable person in DNR’s position as steward of the state’s aquatic lands, based on the evidence in the record, would have denied consent to sublease. *See Ernst Home Ctr., Inc.*, 80 Wn. App. at 486. Washington law is clear that a landlord’s position is relevant in determining the reasonableness of denying consent to sublease, and this Court must consider DNR’s statutory mandate when reviewing the record and DNR’s decision. *See, e.g., Ernst Home Ctr., Inc.*, 80 Wn. App. at 486 (“...where a lease prohibits a landlord from ‘unreasonably’ withholding consent to an assignment by the tenant, the court should evaluate whether a reasonably prudent person *in the landlord’s position* would have refused consent”) (emphasis added). Here, where the landlord is a state agency, the Court must review reasonableness of its decisions based on the duties and mandates of the agency.<sup>9</sup>

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<sup>9</sup> As this Court reviews DNR’s decision de novo, the Court need not defer to the superior court’s findings; moreover, the Court can review the entire record before DNR to draw its own decision on reasonableness.

The Washington Legislature gave DNR broad authority to manage state aquatic lands for the benefit of the public:

The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department of natural resources the responsibility to manage these lands for the benefit of the public.

RCW 79.105.010. To manage state-owned aquatic lands and provide a balance of public benefits for all citizens of the state, DNR must consider:

“(1) Encouraging direct public use and access; (2) fostering water-dependent uses; (3) Ensuring environmental protection; (4) Utilizing renewable resources.” RCW 79.105.030; *see also* RCW 79.105.210, Aquatic Lands—Preservation and Enhancement of Water-Dependent Uses—Leasing Authority (DNR shall manage to preserve and enhance water-dependent uses, with priority given to uses which enhance renewable resources, waterborne commerce, and the navigational and biological capacity of the waters, and to statewide interests as distinguished from local interests; DNR shall consider “natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use.”).

As DNR explains on its website:

DNR is steward of 2.6 million acres of state-owned aquatic lands. On behalf of the people of Washington, we manage the resources attached to or embedded in aquatic lands (ex. seaweed, shellfish, sand, minerals and oil), as well as the man-made structures in the water and air space above these lands.

Through the state constitution and legislature, DNR must ensure a balance of benefits for the citizens of Washington from the use of aquatic lands. These benefits include:

- Commerce and navigation
- Public use and access
- Use of renewable resources
- Protection of the environment (the health of these aquatic lands)
- Generate an economic return to citizens (when appropriate)

Aquatics: Leasing and Land Transactions, <http://www.dnr.wa.gov/programs-and-services/aquatics/leasing-and-land-transactions> (last visited June 25, 2018). In short, any decision by DNR with respect to aquatic lands must comply with its overarching stewardship, protection, and public benefit mandates. *See Pope Resources, LP v. Wash. State Dep't of Nat. Res.*, \_\_\_ Wn.2d \_\_\_, 418 P.3d 90, 95 (2018) (“DNR executes its leasing authority with a view toward the State’s duty to protect the public trust.”). It is through this particular lens of reasonableness that the Court should review the record and DNR’s decision. *See Ernst Home Ctr., Inc.*, 80 Wn. App. at 486; *see also Aviation W. Corp. v. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 427, 980 P.2d 701 (1999) (“The court must

scrutinize the record to determine if the result was reached through a process of reason, not whether the result was itself reasonable in the judgment of the court.” (quoting *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992)) (emphasis in original).

II. DNR ACTED AS A REASONABLY PRUDENT LANDLORD IN DENYING CONSENT TO SUBLEASE BASED ON THE RECORD BEFORE IT.

A. The Record Supports the Commissioner’s Denial of Consent to Sublease Pursuant to the Terms of the Lease.

Section 9.1 of the Lease lists the factors that DNR and Northwest Alloys agreed DNR could consider in determining whether to withhold consent to sublease, including a catch-all provision that gives DNR great discretion to ask for and consider a broad scope of information. AR 001546. Parties to a lease “are free to negotiate the standard by which a landlord’s failure to consent to an assignment will be considered.” *Ernst Home Ctr., Inc. v. Sato*, 80 Wn. App. 473, 484, 910 P.2d 486 (1996). The Lease allows DNR to consider: (1) Millennium’s financial condition, (2) Millennium’s business reputation and experience, (3) the nature of Millennium’s business, (4) the then-current value of the Property, and (5) such other factors as may reasonably bear upon the suitability of Millennium as a tenant of the Property. CP 1891, AR 001546.

Before the superior court, Northwest Alloys and Millennium attempted to frame this as a simple sublease decision, but the record is replete with evidence that would cause any reasonably prudent landlord to conclude that Millennium was an unsuitable subtenant based on Millennium's withholding of vital information and significant misrepresentations. *See 224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 721, 281 P.3d 693 (2012) ("The reasonableness of a refusal of consent to an assignment is to be measured objectively by the action which would be taken by a reasonably prudent person in like circumstances.") (citing *Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 296-97, 391 P.2d 713 (1964)); *Ernst Home Ctr., Inc.*, 80 Wn. App. at 482)). Additionally, the factors that DNR could consider under the terms of the Lease weighed heavily against granting consent to sublease to Millennium. DNR's denial was reasonable, and this Court should reverse the superior court's decision.

1. *DNR's denial of consent was reasonable when Millennium repeatedly refused to provide DNR with financial information.*

From the outset, Millennium disregarded the clear terms of the Lease and argued that "the thought that Millennium has to demonstrate financial capability to DNR is misplaced." CP 337, AR 000181 (Dec. 2, 2010 Letter from Millennium to DNR). The record shows that DNR made

multiple requests over several years for Millennium's financial information, as DNR was entitled to do under the Lease. *See, e.g.*, CP 280, AR 000132 (November 18, 2010 Email from DNR to counsel for Northwest Alloys and Millennium requesting information regarding the financial condition of Millennium, including the extent of its assets): *see also* CP 1850, AR 001509 ("On February 3, 2016, and again on June 24, 2016, DNR requested financial statements for Millennium.... Northwest Alloys did not provide any financial statements for Millennium following DNR's February 3, 2016 request.").

The record also shows that Northwest Alloys and Millennium repeatedly refused to fulfill DNR's requests, though the stated reasons for withholding Millennium's financial information varied over time. CP 337, AR 000181 (in December 2010, Millennium asserted that it did not have to demonstrate financial capability to DNR and that Millennium's financial condition was irrelevant because Northwest Alloys remained liable under the lease); CP 1561, AR 001257 (in March 2016, Millennium refused to provide audited financial statements, stating that the Washington Administrative Code did not describe a process for DNR to seek such information); *see also* CP 15569-570, Appellants' Opening Brief at 36-37 (Millennium "withheld the audit financial statements that DNR had requested, on the basis that they were confidential business

information”) (citing CP 1598, AR 001291); CP 15570 (when DNR again requested audited financial statements in June of 2016, Millennium “did not respond to the request, as it had become clear that submitting the information would have been futile”); *id.* at n.7 (arguing that Lease does not require Millennium “to provide any particular type of information” to DNR).

There is no evidence in the record showing that Millennium provided requested financial information regarding its assets and liabilities prior to receiving the Commissioner’s January 5, 2017 Denial Letter. Indeed, Millennium and Northwest Alloys admit that they “chose not to respond” to DNR’s later requests because they had “had enough.” CP 15559. Unlike the facts in *Ernst*, where the landlord specifically did not consider the proposed subtenant’s financial status in denying consent, and further testified that he would deny consent even with “glowing reports about the financial success” of the proposed subtenant, *Ernst Home Ctr., Inc.*, 80 Wn. App. at 490, DNR repeatedly requested and was repeatedly denied financial information that would allow it to make an informed decision on whether to consent to sublease. *See* CP 1850, CP 280, CP 1561; AR 001509, AR 000132, AR 001257.

In addition to refusing to provide financial statements, Millennium also failed to provide DNR with a copy of its ground lease with Northwest

Alloys. CP 1851, AR 001510; *see also* CP 1741-42, AR 001418-19.

DNR was particularly concerned about Millennium's obligations to Northwest Alloys after Arch Coal, one of Millennium's parent companies, filed for bankruptcy and the bankruptcy filings suggested that Millennium's financial condition could be negatively affected by its obligations to Northwest Alloys. *Id.* DNR's request for a copy of the ground lease, like its requests for audited financial statements, was reasonable as it would provide evidence that directly addressed DNR's concerns regarding Millennium's obligations and its financial condition. A reasonably prudent landlord would not grant consent to sublease when the lessee and proposed sub-lessee refused to provide information that is both readily obtainable and necessary to make an informed decision.

In their superior court reply brief, Northwest Alloys and Millennium asserted for the first time that audited financial statements would not aide DNR in understanding the company's financial condition because DNR already knew that Millennium had no assets of its own. CP 15732. The superior court erroneously adopted this reasoning in finding that DNR acted arbitrarily and capriciously:

Everybody knew that [Millennium] was a single purpose startup entity, bleeding cash with no source of revenue, and it was reliant on essentially weekly infusions of cash from its owner. DNR had the ability to request information regarding finances but the financial statement of

[Millennium] as requested really does not contribute towards that understanding....The primary landlord certainly has the right to know how a subtenant's business is going to operate. [Millennium's] proposal was such that DNR was allowed to ask that question. DNR did not.

CP 17692 (Order on the Merits at ¶ 11). The superior court erred in finding that DNR was required to say certain magic words—and that the agency failed to do so—when the record clearly shows that DNR made repeated requests for any information that Northwest Alloys or Millennium could provide to shed light on Millennium's financial condition. CP 1741-42, CP 280; AR 001418-19, AR 000132.

Because Millennium and Northwest Alloys made it impossible for DNR to properly assess Millennium's financial condition as allowed for by the terms of the Lease, the Commissioner's denial of consent to sublease was reasonable.

2. *DNR properly considered Millennium's business reputation and experience in its denial.*

A reasonably prudent landlord would not grant consent to sublease to a company with a history of deceptive business practices, especially when that company's intended use of the site has been purposefully unclear. In the Denial Letter, the Commissioner noted that Millennium's duplicity in the permit application process—generously described as a “significant error”—was a factor that required DNR to vet thoroughly both

Millennium's plans for the site and its financial condition. CP 1852, AR 001511. Millennium's misrepresentations to DNR and other local and state agencies regarding its plans for the site are well-documented in the record. CP 493-96, CP 498-500, CP 516-17, CP 519-540; AR 000394-97, AR 000398-400, AR 000413-14, AR 000415-36.

In addition to Millennium misleading DNR and other local and state agencies about the intended size and scope of its coal export project, *see id.*, neither Millennium nor Northwest Alloys notified DNR about the idling of the Wenatchee Works smelter despite Northwest Alloys' consistent representations that the sublease was necessary to support operation of that smelter, *see* CP 1479, CP 1539; AR 001190, AR 001240. Given this course of events, along with Millennium's unwavering resolve to conceal its financial documents, DNR was rightly concerned about whether Millennium would be an appropriate and viable subtenant.

Despite finding that Millennium's deception in the earlier permitting process was a "pretty significant self-inflicted wound," the superior court erroneously concluded that DNR could not "resurrect [a] historical permitting issue as a concern" in its January 2017 denial. CP 17691, 17693 (Order on the Merits at ¶¶ 10, 14). Even if DNR's concerns about Millennium's misrepresentations were allayed for a time in February 2015, *see* CP 17690-91 (Order on the Merits at ¶ 8), that history

remained part of the context in which DNR ultimately made its decision. This context included Millennium withholding legally required information about its business plans in the 2010 permitting process, then refusing to supply financial and other business documents for its current proposal, and further neglecting to notify DNR that operations at the alumina smelter it supplied were indefinitely suspended. That DNR was concerned about everything else it might not know due to Millennium's recalcitrance was both justified and clearly documented in the record even after February 2015.

Furthermore, DNR was rightly cautious in assessing Millennium's plans based on the nature of Millennium's business as a proposed coal handling facility. The record demonstrates that DNR's concerns about poor market conditions for coal were well-founded at the time DNR made its decision. *See, e.g.*, CP 1851, CP 1592, CP 14061; AR 001510, AR 001287, AR 013622. Shortly before the Commissioner issued the denial, a November 2016 report produced by the U.S. Energy Information Administration (EIA) documented the drop in U.S. coal production in 2015. CP 14061, AR 013622. Moreover, in December 2016, the EIA released its Short-Term Energy Outlook, which forecasted historically low U.S. coal production. CP 17582, AR 013807 (projecting that 2016 would end in 15 percent decline in annual coal production to its lowest level

since 1978 and that 2017 would not bring a significant rebound). Indeed, the record shows that, in 2016, Arch Coal withdrew its plan for Otter Creek Mine in Montana, which would have been the largest coal strip mine in the country and the primary source of coal for Millennium's export plans. CP 1592, CP 14202; AR 001287, AR 013758. Northwest Alloys and Millennium did not produce information necessary to alleviate DNR's concerns about Millennium's suitability as a subtenant, particularly given Millennium's fraught history and the difficult economic circumstances faced by coal operations. Accordingly, DNR's denial of consent was reasonable.

B. DNR Properly Denied Consent Based On Millennium's Unsuitability as a Sub-tenant Despite Northwest Alloys' Continued Liability Under the Lease.

While failing to provide a consistent and reasonable explanation for withholding financial information, Millennium deflected questions regarding its own financial situation and instead focused on the capabilities of its parent companies and Northwest Alloys. *See* CP 336-341, AR 000180-185. Millennium argued that its financial condition was irrelevant because Northwest Alloys remained liable under the lease. CP 337, AR 000181. But in entering into the Lease, DNR and Northwest Alloys specifically provided factors DNR may reasonably consider in determining whether to withhold consent to sublease, which include a

broad catch-all factor, and Washington courts may not disregard contract language that the parties have chosen. *See Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Northwest Alloys may wish that it had negotiated different terms, but it cannot now change the agreed-upon factors or redefine reasonableness in a manner that is contrary to the plain language of the Lease.

Additionally, as DNR's brief discusses in further detail, the Commissioner found that Northwest Alloys allowed its previous subtenant to cause significant damage to the site, resulting in the Northwest Alloys' default. CP 1851, AR 001510. Given the recent default, and the years-long process of curing the default, DNR was explicit in its concerns that Millennium itself be able to perform. *See, e.g.*, CP 280, CP 1539, CP 1741; AR 000132, AR 001240, AR 001418. Indeed, given DNR's concerns "about whether NW Alloys should continue as a lessee of the site" after Northwest Alloys failed to ensure Chinook Ventures' compliance with the Lease, CP 280, AR 000132, DNR was reasonably wary of Millennium's overreliance on Northwest Alloys' continued liability under the Lease.

Northwest Alloys is bound by the terms of the Lease it voluntarily entered into, and it cannot now argue that Millennium's financial condition and other agreed-upon factors are irrelevant simply because

Northwest Alloys may remain liable as a tenant. DNR's decision was reasonable.

### CONCLUSION

DNR measured the suitability of Millennium as a sub-tenant against the factors outlined in the Lease, found that the evidence weighed against granting consent to sublease, and denied consent. The record clearly shows that Millennium and Northwest Alloys failed to fulfill DNR's clear and reasonable requests for information, as allowed for by the terms of the Lease, and this failure alone supports a reasonable denial of consent. Moreover, the record shows that every other factor in the Lease weighed against granting consent to sublease. In particular, the bankruptcy of Arch Coal, the closing of the Wenatchee alumina smelter, the failure of Northwest Alloys and Millennium to provide DNR with a copy of their ground lease, and Millennium's prior misrepresentations in the permitting process all support DNR's denial of consent to sublease.

For the foregoing reasons, and for the reasons given in DNR's brief, Intervenor respectfully request that this Court reverse the superior court and reinstate DNR's denial of consent to Northwest Alloy's proposed sublease to Millennium.

Respectfully submitted this 6th day of July, 2018.

*s/Marisa C. Ordonia*

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DECLARATION OF SERVICE

Aanal Patel declares as follows:

1. I am over the age of 18 and am competent to testify herein.
2. I am a Litigation Assistant at Earthjustice.
3. On July 6<sup>th</sup>, 2018, I caused the foregoing document to be filed

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*/s/Aanal Patel*

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Aanal Patel

# EARTHJUSTICE

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## Transmittal Information

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