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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, a Delaware limited liability company, and COWLITZ COUNTY, a political subdivision of the state of Washington,

Petitioners,

and

BNSF RAILWAY COMPANY,

Petitioner-Intervenor,

v.

STATE OF WASHINGTON, SHORELINES HEARINGS BOARD,

Respondents

and

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

Respondent-Intervenors,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

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I. INTRODUCTION

This case involves a decision by the Shorelines Hearings Board affirming the Cowlitz County Hearings Examiner's denial of shoreline permits sought by Millennium Bulk Terminals-Longview LLC. Millennium seeks permits for the construction and operation of a large coal export facility on the Columbia River in Cowlitz County, Washington. Millennium's project, if approved, would be the largest coal export facility in North America. As identified in the unchallenged final environmental impact statement (EIS), the project will result in an increased cancer risk to local residents, a high level of noise impacts to residential areas, an increase in rail and vessel accidents, traffic congestion, and impacts to tribal fishing resources and access to tribal fishing sites, among others. The EIS also found that the project would have disproportionate adverse impacts on the minority and low-income populations in the neighborhoods near the project site. The Hearings Examiner concluded that these significant adverse impacts could not be mitigated, and exercised the substantive authority conferred by the State Environmental Policy Act (SEPA) to deny the permits.

The Hearings Examiner also concluded that the project was inconsistent with the Shoreline Management Act (SMA), particularly the policies applicable to shorelines of statewide significance set forth in

RCW 90.58.020. Because the Board affirmed the Hearings Examiner's denial of the permits based on substantive SEPA, the Board did not reach the issues pertaining to compliance with the SMA.

Millennium, Cowlitz County, and Petitioner-Intervenor BNSF Railway (collectively, Petitioners) argue that the Board applied the wrong scope of review when it limited its review to the record created before the Hearings Examiner. In making this argument, Petitioners confuse the Board's de novo standard of review that applies to review of a shoreline permit with the standard that applies to the exercise of SEPA substantive authority. Under established precedent, the standard that applies to the exercise of SEPA substantive authority is the clearly erroneous standard, and the standard is applied to the record created by the SEPA decision-maker. Because the scope of the Board's review was consistent with precedent, the Court should affirm the Board's decision on this issue.

Petitioners also argue that the Board erred in affirming the Hearings Examiner's consideration of the entire project, rather than limiting its review to Stage 1 of the project. However, Petitioners' argument is contrary to the prohibition against project piecemealing that is central to both the SMA and SEPA. Petitioners make several related contentions based on their piecemealing theory. Because all of Petitioners' arguments related to Stage 1 of the project are contrary to the prohibition

against piecemealing in SEPA and the SMA, the Court should affirm the Board's decision with respect to these issues.

Last, Petitioner-Intervenor BNSF Railway argues that the Hearings Examiner failed to make an independent finding regarding the adequacy of the mitigation of the project's impacts at full buildout. BNSF's argument lacks merit. The unchallenged findings in the EIS, which account for potential mitigation measures in its findings of significant unavoidable adverse impacts, were a sufficient basis for the Hearings Examiner to deny the permits. The Hearings Examiner also considered additional evidence regarding mitigation presented by Petitioners at the hearing. The Hearings Examiner concluded that the project is likely to result in significant adverse environmental impacts identified in the EIS, and that reasonable mitigation measures, including those presented by Petitioners at the hearing, were insufficient to mitigate those impacts. In his decision, the Hearings Examiner made specific findings regarding the inadequacy of the proposed mitigation.

As demonstrated by the record, the Hearings Examiner fully complied with SEPA's requirements for the exercise of substantive SEPA authority. The Board properly upheld the denial of the permits, and the Board's Order should be affirmed in full.

II. COUNTER STATEMENT OF ISSUES

1. Did the Board properly apply the clearly erroneous standard of review, rather than de novo review, to the record created by the Hearings Examiner?

2. Was the record before the Board adequate for review of the Hearings Examiner's exercise of SEPA substantive authority, when all parties moved for summary judgment, none contended the record was inadequate or incomplete, and the Board had before it all information necessary for review?

3. Did the Hearings Examiner and the Board properly consider the impacts of the project at full buildout, or should they have piecemealed the project and limited their review to the impacts at Stage 1?

4. Was the Hearings Examiner's exercise of SEPA substantive authority clearly erroneous, when the Hearings Examiner relied on the significant, adverse, unavoidable, impacts identified in the EIS, no party challenged the EIS, and the impacts identified in the EIS were inconsistent with the County's adopted SEPA policies?

III. COUNTER STATEMENT OF FACTS

A. Millennium's First Attempt to Piecemeal the Project

This case is not the first time that Millennium has attempted to piecemeal its project. In 2010, Millennium sought a shoreline permit to

build a facility in order to export 5 million metric tons of coal each year. AR 0551–53.[1] Cowlitz County issued a Mitigated Determination of Non-Significance (MDNS) under SEPA. Finding that the impacts of the project could be mitigated, the County issued the shoreline permit. *Id.* During the litigation that followed,[2] it was revealed that Millennium's plans were for a much larger facility, and that it intended to seek additional permits to expand the facility as soon as the initial project was approved. *Id.*, AR 0603–06. When Millennium's plans became public, Millennium withdrew its original application and submitted the revised shoreline permit application that is the subject of this appeal. AR 0553.

B. Millennium's Current Application Includes Stage 1 and Stage 2 to Export 44 Million Metric Tons Per Year

Millennium submitted a revised shoreline permit application for a facility that, at full buildout, would be capable of handling 44 million metric tons of coal each year. AR 2063–64. Coal would be brought to the site by train from mines in the Powder River basin in Wyoming and Montana, and the Uinta Basin in Utah and Colorado, stockpiled on site, and then loaded onto ships for transport to Asia, where the coal would be burned to generate electricity. At full buildout, eight trains would enter

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[1] References to the Administrative Record are abbreviated herein as "AR."

[2] Four of the five current Respondent-Intervenors appealed the permit, and Ecology also intervened in the proceeding. AR 0552; *Climate Solutions et al. v. Cowlitz County et al.*, SHB No. 10-023 (case closed March 24, 2011).

and depart from the site each day, each over a mile long, resulting in 16 train trips per day in Cowlitz County and across Washington state. AR 2063–64 Each year, 840 vessels would serve the site, resulting in 1,680 vessel trips up and down the Columbia River per year. *Id.* At full buildout, the vessel traffic associated with the facility would account for approximately one quarter of all vessel traffic on the Columbia River. AR 0677. The project would operate 24 hours a day, seven days a week. AR 2063–64.

Millennium applied to Cowlitz County for a substantial development permit and a conditional use permit under the SMA to construct and operate the project. As identified in Millennium's permit application, Millennium proposes to construct the facility in two stages. AR 0472, 0608. Ostensibly, Millennium was seeking shoreline permits only for Stage 1of the project, although Millennium simultaneously applied to Ecology and the Army Corps of Engineers for water quality permits to construct the entire project and the Cowlitz County Staff Report on the shoreline applications analyzed both stages of the proposal. AR 2079. Millennium also agreed to the preparation of an EIS in which both stages of the project were analyzed. AR 0553.

According to the application, the first stage would involve construction of two docks, one ship loader and related conveyors that

would move coal from stockpile areas to one of the docks, berthing facilities at the other dock, a stockpile area including two stockpile pads, rail car unloading facilities, one operating rail track and up to eight rail storage tracks, as well as dredging approximately 350,000 cubic yards of sediment necessary to accommodate deep draft vessels. AR 0472–74, 0530. The facility would be operable upon completion of Stage 1, at which time the facility would have the capacity to ship 25 million metric tons of coal per year. *Id.* Stage 1 includes construction of most of the infrastructure necessary to export additional volumes of coal, such as the rail tracks, a second dock and berthing facilities, and the dredging necessary to accommodate project vessels at full buildout. AR 0472–74.

The construction of Stage 2 would commence immediately after Stage 1, and includes construction of the incidental infrastructure necessary to ship additional volumes that was not already built in Stage 1, including an additional ship loader, completing preparation of two additional stockpile pads, and additional conveyors. With these incremental additions, the facility's capacity would increase to 44 million metric tons per year. *Id.*; *see also* AR 0011–12.

C. Acting as Co-leads, Ecology and Cowlitz County Issued an EIS that Identified Significant, Unavoidable, Adverse Impacts in Numerous Resource Areas

Cowlitz County invited Ecology to be a co-lead on the project for purposes of compliance with SEPA. AR 0940, 0944. On behalf of the co-leads, Cowlitz County hired a third party consultant to prepare an EIS. *Id.* After nearly four years of intensive study, analysis across multiple disciplines, and extensive public review, the co-leads issued a final EIS that analyzed the project at full buildout in rigorous detail. The co-leads responded to the thousands of comments that were submitted during the EIS process, as the project generated intense public interest. In fact, the draft EIS garnered approximately a quarter million comments, far more than any other EIS known to Ecology. AR 0945. Due to the project's statewide impacts, the co-leads held meetings throughout the state, including Spokane, Longview, Tacoma, Pasco, and Clark County. AR 1071.

The final EIS concluded that the project will cause unavoidable, significant adverse impacts in numerous resource areas. These conclusions in the EIS were made after a thorough analysis of the potential mitigation that might eliminate or minimize these impacts, as summarized below. The EIS was not challenged by any party.

1. Air Quality

The EIS found a significant increase in cancer risk for people living in areas along the rail lines and around the project site in Cowlitz County where diesel emissions primarily from trains would increase. AR 1346. The analysis was based on the assumption that mitigation measures identified in the EIS related to air quality, such as use of best management practices and compliance with permits and other authorizations, would occur. Nonetheless, the study found that residents in some areas in Cowlitz County, including those living in portions of the Highlands neighborhood, would experience an increase in cancer risk rate of up to 30 cancers per million. AR 1338. A greater number of people would experience an increased cancer risk of 10 cancers per million. *Id.* As the EIS explained, this impact could be reduced, but not eliminated, by use of cleaner burning Tier 4 locomotives. However, the EIS found that use of such locomotives was outside the control of Millennium and might not occur for decades because use of older locomotives is currently allowed under federal law.[3] AR 1346. Thus, the EIS concluded that "the increased cancer risk at or above 10 cancers per million . . . would represent an unavoidable and significant adverse impact." *Id.*

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[3] For example, only 6% of the BNSF fleet are Tier 4 locomotives. AR 25.

2. Vehicle Transportation

The EIS found that there would be significant unavoidable adverse impacts to vehicle traffic from the proposed action when the project reaches full operation in 2028. The adverse impacts to vehicle traffic would be due to vehicle delays caused by increased train traffic that would block rail crossings in Cowlitz County. AR 1232. With current track infrastructure, project-related trains would increase traffic delays by over 130 minutes during an average day at six railroad crossings on the spur line. AR 1216. The project would also delay two crossings at peak hours on the main line. Delay of emergency vehicles at railroad crossings would also increase because of project-related trains. AR 1215. The EIS discussed the possible mitigation proposed by Millennium, as well as other mitigation measures, such as rail and road infrastructure improvements. However, the EIS concluded that because "it is unknown when these actions would be permitted and implemented . . . the Proposed Action at full operations in 2028 could result in an unavoidable and significant adverse impact on vehicle transportation." AR 1232.

3. Noise and Vibration

The EIS found that there would be significant unavoidable adverse impacts to residences near four public at-grade crossings along the rail spur in Cowlitz County from train-related horn noise. Approximately 229

residences would be exposed to moderate noise impacts, and approximately 60 residences would be exposed to severe noise impacts, in excess of noise criteria per guidance from the Federal Transportation Administration and Federal Railroad Administration. AR 1306. Millennium volunteered to fund what it calls "quiet crossings," at two of the four at-grade crossings. However, the level of noise reduction from "quiet crossings" is unknown because the trains may still be required to sound their horns. AR 1311. Millennium could coordinate and fund implementation of a federally approved "quiet zone,"[4] to include the at-grade crossings, but this would require a local sponsor and approval by the Federal Railroad Administration. AR 1312. The EIS concluded that, while implementation of approved quiet zones for the at-grade crossings would eliminate noise impacts related to train horns, quiet zones were beyond the control of Millennium and might never be approved or implemented. Thus, the EIS concluded that the noise from the project trains would be an unavoidable and significant adverse environmental impact. AR 1313.

[4] A quiet zone is a public at-grade crossing(s) where additional safety precautions have been constructed, reducing the federal requirement for trains to sound their horns when approaching the crossing(s). A quiet zone is subject to Federal Railroad Administration approval. AR 955.

4. Social and Community Resources

Based on the significant unavoidable adverse impacts to air quality, noise, and traffic delays, the EIS concluded that social and community resources would be significantly adversely impacted. In particular, the EIS found that these impacts would disproportionately affect minority and low-income populations in the neighborhoods near the project site. AR 1068–69.

5. Rail Transportation

At full buildout of the project, 16 trains a day (eight loaded and eight empty) would be added to the state's existing rail traffic. The EIS found that the project trains would contribute to an exceedance in rail capacity that was projected to occur on three segments of the BNSF main line in Washington by 2028. AR 1176. The EIS identified a potential mitigation measure in which Millennium would notify BNSF and Union Pacific about increases in rail traffic, but this proposed mitigation measure would be informational only, and would do nothing to address the capacity problem. AR 1174. The EIS found that BNSF and Union Pacific may or may not be able to make necessary infrastructure or operational changes to address these capacity exceedances, and it was unknown when they might occur. Accordingly, the EIS concluded the project could result in significant unavoidable adverse impacts to rail transportation. AR 1176.

6. Rail Safety

The EIS found that Millennium-related trains would increase the train accident rate by 22% within Washington State. AR 1184. Similar to the problem of capacity exceedances, the EIS identified a potential mitigation measure in which Millennium would notify BNSF and Union Pacific about upcoming increases in rail operations. AR 1185. However, this notification did not commit BNSF or Union Pacific to make any changes that would reduce accident rates. Similar to impacts to rail transportation, because any mitigation to address rail safety, such as infrastructure improvements, would be beyond the control of Millennium and could not be guaranteed, the EIS concluded that the project could result in unavoidable significant adverse impacts on rail safety. AR 1186.

7. Vessel Transportation

The EIS found that the project could have significant adverse effects on vessel transportation that could not be mitigated. Millennium would add 1,680 ship transits to the current 4,440 ship transits on the Columbia River per year, for a total of 6,120 at full buildout. AR 1272. Thus, the project would contribute over a quarter of the vessel traffic in the Columbia River. Based on modeling, the EIS found that the increased traffic would increase the frequency of incidents, such as collisions, allisions, groundings, and fires by approximately 2.8 incidents per year.

AR 1273. The EIS concluded that, while the likelihood of a serious Millennium-related vessel incident was low, the consequences could be severe, depending on the nature and location of the incident, the weather conditions, and whether any oil was discharged. The EIS concluded that there were no mitigation measures that could completely eliminate the possibility of an incident or the resulting impacts. AR 1280.

8. Cultural Resources

The site of the proposed facility was for many years occupied by the Reynolds Aluminum plant, a designated historic district. Construction of the project would demolish 30 of the 39 identified resources that contribute to the historical significance of the Reynolds Metals Reduction Plant Historic District. AR 1089. As a result, the EIS concluded the project would result in a significant, adverse, unavoidable impact to cultural resources. The EIS acknowledged that, in a separate federal process, an agreement was being negotiated to address this impact between the Corps, Cowlitz County, the Washington Department of Archaeologic and Historic Preservation, the City of Longview, the Bonneville Power Administration, the National Park Service, potentially affected Native American tribes, and Millennium. The EIS also acknowledged that, if those efforts continued and were successful, the agreement could resolve the impact in compliance with section 106 of the

National Historic Preservation Act of 1966. AR 1091. However, there is no indication when or whether the agreement would ever be signed. Without an agreement in place, the EIS determined that the impacts to the historic district were unavoidable and significant adverse impacts. *Id.*

9. Tribal Resources

The EIS found that construction and operation of the Millennium coal export terminal could result in unavoidable indirect impacts on tribal resources, such as restricted access to tribal fishing areas and reduction of the number of fish available for harvest by Native American tribes. AR 1092. The EIS found that construction activities such as building new docks, river bottom dredging, and pile driving would cause physical and behavioral responses in fish that could result in injury, and would affect aquatic habitat. AR 1105–06. Eulachon, a species of significance as a tribal cultural resource, would potentially be impacted by the initial and maintenance sediment dredging. AR 1102, 1125–26, 1133–34. In addition, the EIS found that there would be impacts resulting from operation of the facility. Fugitive coal dust and potential spills would increase suspended solids in the Columbia River. AR 1107. The EIS found that while some of these impacts could be reduced, they could not be entirely mitigated and could alter fish behavior and affect the number of fish available for tribal harvest. AR 1111.

Further, the EIS found that the increase in project trains travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American tribes would restrict access to 20 tribal fishing access sites set aside by the U.S. Congress above Bonneville Dam in the Columbia River. AR 1097–06. There are additional access sites that are not mapped that would also be impacted. As with impacts to rail safety and rail transportation, the EIS concluded that improving rail infrastructure for access to tribal fishing areas along the Columbia River was outside the control of Millennium. Thus, the EIS concluded that operation of the project at full buildout could result in unavoidable adverse impacts to tribal resources.[5] AR 1111.

D. The Cowlitz County Hearings Examiner Exercised Substantive SEPA Authority and Denied the Permits Based on the Unchallenged Findings in the EIS and the Testimony Presented by Petitioners at the Hearing

The Cowlitz County Hearings Examiner held a three day open public hearing on Millennium's permit application during which the Hearings Examiner allowed Millennium and the County the opportunity to present reasonable mitigation measures to address the findings of the EIS.[6] Petitioners presented witness testimony including representatives from

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[5] The EIS did not make a determination of significance for impacts to tribal resources because it was beyond the scope of the EIS to determine treaty reserved rights. AR 1111.

[6] Ecology was not a party to the proceeding before the Hearings Examiner.

Millennium, BNSF, and the Longview/Kelso Building Trades Association. AR 0019. Petitioners also presented testimony from Millennium's environmental consultant and various experts on the topics of air quality, coal dust, and greenhouse gas emissions. AR 0019–20. Petitioners also entered numerous exhibits into the record, including pre-filed testimony of multiple witnesses, and a number of reports addressing the project's impacts and mitigation. AR 0142–44.

After consideration of the evidence presented, the Hearings Examiner found that Millennium failed to propose reasonable mitigation that would sufficiently address the impacts identified in the EIS.[7] AR 0021–40, 0047–59. In addition to the nine areas of significant adverse unavoidable impacts identified in the EIS, the Hearing Examiner also found that greenhouse gas emissions from the project would create a tenth significant adverse unavoidable impact that could not reasonably be mitigated. AR 0038–40. The Hearing Examiner's finding was based on Millennium's hearing testimony that it would mitigate only one-half of 1% of the greenhouse gas emissions calculated in the EIS. *Id.* The Hearings Examiner made specific findings as to the inadequacy of the proposed mitigation.

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[7] During the hearing, Millennium repeatedly represented that it was not challenging the EIS, although most of the evidence it presented contradicted the EIS's findings. AR 0056, 2077.

- 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 fleet 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 to the Reynolds Lead.

- 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 approved as part of the Critical Areas Permit, 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 Greenhouse Gas mitigation, while the Applicant proposes less than 1% of that required under the FEIS.

AR 0057–58. The Hearings Examiner then concluded that the impacts were inconsistent with "virtually every one" of Cowlitz County's adopted SEPA policies. AR 0058–59.

The Hearings Examiner also concluded that the project was inconsistent with the SMA. AR 0040–42. Specifically, he concluded that the project's environmental impacts were inconsistent with the policies applicable to shorelines of statewide significance set forth in RCW 90.58.020. For example, he found that the project's noise impacts, increased cancer risk rate, traffic impacts, and disproportionate impact on minority and low income neighborhoods, precluded any conclusion that the project results in long term over short term benefit. *Id.* The Hearings Examiner also found that the project's impacts on statewide rail safety and rail capacity precluded any conclusion that it protects statewide over local interests, as required by RCW 90.58.020(1). AR 0041.

E. The Board Reviewed the Hearings Examiner's Exercise of Substantive SEPA Authority and Affirmed Denial of the Permits

Millennium appealed the Hearings Examiner's decision to the Shorelines Hearings Board. Ecology, BNSF, Cowlitz County, and Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club, and Columbia Riverkeeper (collectively "WEC") intervened in the Board proceeding. Ecology, WEC, and Millennium filed cross-motions for summary judgment. Millennium's main contention was that the Hearings Examiner should have limited his review to only those impacts that Millennium alleged were attributable to

Stage 1 of the project, and that the Hearings Examiner's decision was erroneous because he had based his decision on the project's impacts at full buildout. AR 2074. Millennium also argued that the Hearings Examiner failed to meet the requirements for exercising substantive SEPA authority because he failed to consider the mitigation measures that were presented at the hearing and included in the County's staff report.[8]

The Board affirmed the Hearings Examiner's denial of the permits based on substantive SEPA. The Board did not reach the question of the project's consistency with the SMA. AR 2087. Relying on precedent, the Board reviewed the Hearings Examiner's exercise of SEPA substantive authority on the record before the Hearings Examiner. AR 2073. The Board found that the Hearings Examiner recognized that Millennium was applying for Stage 1 only, and that he gave due consideration to the (scant) evidence presented regarding Stage 1 impacts and mitigation. AR 2079–80. However, the Board rejected Millennium's argument that the Hearings Examiner was precluded from considering the impacts of the project as a whole. *Id.* As the Board observed, the EIS analyzed the project at full buildout and the County relied on its evaluation of the project at full

[8] Millennium also argued to the Board that the Hearings Examiner was required to determine compliance with the SMA prior to making a decision based on the exercise of substantive SEPA. AR 2083–85. The Board rejected this contention and Millennium has since abandoned this argument.

buildout. "The staff report quoted at length from sections of the FEIS's analysis of Project impacts at full operations and recommended permit conditions drawn from the FEIS applicable to both Stage 1 and Stage 2." *Id.* In light of these findings, the Board concluded that the Hearings Examiner's decision was not clearly erroneous when the Hearings Examiner considered the project as a whole. AR 2080.

The Board also rejected Millennium's contention that there were facts in dispute regarding mitigation of the project's impacts. Instead, the Board found that "the Hearing Examiner found that the conditions proposed in the Staff Report did not reasonably mitigate the identified impacts," and that "[t]he Hearing Examiner identified specific shortcomings he found in the proposed mitigation."[9] AR 2086.

Based on these findings, the Board concluded that the Hearings Examiner met the requirements in RCW 43.21C.060 and WAC 197-11-660(1)(f) in determining that (1) the project is likely to result in significant adverse environmental impacts identified in the EIS and (2) reasonable mitigation measures are insufficient to mitigate those impacts. AR 2086–88. The Board further determined that the Hearings

[9] At the end of the hearing, the Hearings Examiner asked the County if it had any changes to the permit conditions in the staff report. It had none. AR 0020.

Examiner properly cited the County's SEPA policies as a basis for the denial as required by WAC 197-11-660(1)(b). *Id.*

Millennium and the County filed petitions for review of the Board's decision in Cowlitz County Superior Court. BNSF joined in Millennium's Petition. After obtaining a Certificate of Appealability from the Board, Ecology and WEC sought and obtained discretionary review by this Court.

IV. ARGUMENT

A. Standard And Scope Of Review

This Court reviews the Board's decision under the Washington Administrative Procedure Act (APA). *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep't of Ecology,* 146 Wn.2d 778, 789–90, 51 P.3d 744 (2002); *see also* RCW 34.05.570(3). The Court's review of the facts is confined to the record before the Board. RCW 34.05.558. The burden of demonstrating the invalidity of the Board's decision is on Petitioners, as the parties asserting invalidity. RCW 34.05.570(1)(a).

The Court may grant relief if it determines that the Board has "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Where statutory construction is necessary, a court will interpret statutes de novo. *Pub. Util. Dist. No. 1,* 146 Wn.2d at 790. However, if an ambiguous statute falls within the agency's expertise, the agency's interpretation of the

statute is "accorded great weight, provided it does not conflict with the statute." *Id.* The Court may grant relief if the Board's Order is "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). The substantial evidence test is "highly deferential." *ARCO Prods. Co. v. Wash. Utilities and Transp. Comm'n,* 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

Because the original administrative decision was on summary judgment, the reviewing court overlays the APA standard of review with the summary judgment standard. *Verizon Nw. Inc. v. Wash. Emp't Sec. Dep't*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

The Board correctly determined that Petitioners did not meet their burden of proving that the decision of the Hearings Examiner was clearly erroneous under SEPA. The Board correctly interpreted the governing law, did not act arbitrarily and capriciously, and should be affirmed. RCW 34.05.570(3)(d), (i).

B. SEPA Grants Decision-Makers the Authority to Deny a Permit Based on Significant Adverse Impacts Disclosed in an EIS that Cannot Reasonably be Mitigated

SEPA is not merely procedural, but also includes a substantive component. *See generally*, Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 18.01 (2014). RCW 43.21C.060 provides the relevant authority:

> The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies . . . . *Any governmental action may be conditioned or denied pursuant to this chapter* . . . .

(Emphasis added.) As Professor Settle states in his authoritative treatise, this authority to condition or deny permits under SEPA has existed since its enactment:

> There never has been serious doubt that SEPA authorizes agencies to base the substance of their decisions on environmental criteria and information.

Settle, *supra* § 18.01[2] at 18-6.

The authority to condition or deny permits pursuant to SEPA has been repeatedly confirmed by courts over many decades in a variety of settings. *E.g., Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978); *Dep't of Natural Res. v. Thurston Cty.*, 92 Wn.2d 656, 601 P.2d 494 (1979); *Brinnon Grp. v. Jefferson Cty.*, 159 Wn. App. 446, 245 P. 3d 789 (2011); *Adams v. Thurston Cty.*, 70 Wn. App. 471, 855 P.2d 284

(1993); *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 800 P.2d 380 (1990); *West Main Assoc. v. City of Bellevue*, 49 Wn. App. 513, 742 P.2d 1266 (1987). Moreover, the scope of SEPA substantive authority is "supplementary" to all other existing authorizations. RCW 43.21C.060. Thus, an agency may deny a permit under SEPA even if all other criteria for the permit are met. *Polygon*, 90 Wn.2d at 63–64 (citation omitted).

C. The Board Properly Limited its Review to the Record Created Before the Hearings Examiner

This case is not the typical Board case in which a SEPA determination is challenged in conjunction with a shoreline permit appeal. In such cases, the Board's review is de novo. Here, Petitioners challenge the denial of the shoreline permits without challenging the EIS. Based on the fact that there was an open record hearing below, and following case law, the Board properly limited its scope of review to the record created before the Hearings Examiner. Under these circumstances, where the EIS has not been challenged and where the Hearings Examiner's exercise of substantive SEPA is being appealed, the Board properly limited its review to the record. There is no evidence that the Board had insufficient information to review the decision of the Hearings Examiner. Petitioners' arguments to the contrary must be rejected.

1. The Board relied on precedent in making its decision to limit its review of the Hearings Examiner's exercise of substantive SEPA to the record created before the Hearings Examiner

Petitioners contend that the Board improperly limited its review of the Hearings Examiner's exercise of substantive SEPA to the record before the Hearings Examiner. Petitioners' argument is not well-taken. It is well-established that the review of an agency's exercise of substantive SEPA authority is under the clearly erroneous standard. *Cougar Mountain Assoc. v. King Cty.*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988). Under the clearly erroneous standard of review, the court "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 Assoc.*, 111 Wn.2d at 747 (quoting *Polygon Corp. v. Seattle,* 90 Wn.2d 59, 69, 578 P.2d 1309 (1978)). *See also Norway Hill Preserv. & Protec. Ass'n v. King Cty.,* 87 Wn.2d 267, 552 P.2d 674 (1976). After first observing that "SEPA does not prescribe the scope or standard of review on appeal," the Board explained its decision to limit its review to the record before the Hearings Examiner:

> 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 FEIS 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.

AR 2073–74 (citations and footnotes omitted). The Board also relied on *Cook v. Clallam Cty.,* 27 Wn. App. 410, 618 P.2d 1030 (1980). In *Cook,* the Court of Appeals held that the trial court erred in conducting a trial in a challenge to a denial of a building permit based on the findings of an unchallenged EIS. *Id.* at 413. After identifying that the proper issue before the superior court was "whether the environmental documents prepared pursuant to SEPA identify 'specific adverse environmental impacts,'" the court then stated that "[t]he environmental documents, not new testimony presented on appeal, were the proper evidence to use in evaluating the Board's decision." *Id.* (citation omitted). Thus, the court held that an appeal from a decision-maker's substantive SEPA decision is reviewed on the record created before the decision-maker.

In this case, where there was a local hearing before the Cowlitz County Hearings Examiner, the record created at that hearing is the proper record for the Board's review of the Hearings Examiner's exercise of substantive SEPA. Thus, the Board distinguished its ruling from prior Board decisions involving SEPA challenges in which there had been no open record hearing at the local level. AR 2074 n.2.

Further, in each of those cases distinguished by the Board, the SEPA document itself was challenged. These cases stand in sharp contrast to this case, where the EIS has not been appealed and Petitioners claim they are not challenging the EIS. Petitioners cite to no case in which the Board utilized a de novo scope of review where the underlying SEPA document was not being challenged. In the Board cases cited by Petitioners, the SEPA document itself was appealed.[10] Similarly, the court cases relied on by Petitioners involved a challenge to the adequacy of an EIS or a DNS. Opening Brief of Petitioner Millennium Bulk Terminals-Longview, LLC (Pet. Brief) at 28–29 (citing *Kitsap Cty. v. Dep't of Nat. Res.,* 99 Wn.2d 386, 662 P.2d 381 (1983)(challenging adequacy of an EIS); *San Juan Cty. v. Dep't of Nat. Res.,* 28 Wn. App. 796, 626 P.2d 995 (1981)(challenging adequacy of a DNS).

Whether the SEPA document is being challenged makes all the difference to the scope of review. As explained by the Board, "EIS adequacy refers to the legal sufficiency of the environmental data contained in the impact statement . . . " AR 2077. In cases where the

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[10] Millennium's Brief at 27–28 (citing *Luce v. City of Snoqualmie,* No. 00-034, 2001 WL 1090674 (Wash. Jan. 1, 2001) (challenge to a Determination of Non-Significance (DNS); *Save Our Industrial Land v. City of Seattle,* No. 95-41, 1996 WL 660477 (Wash. Oct. 24, 1996) (challenge to an EIS); *Oppenheimer v. City of Seattle*, No. 06-026, 2007 WL 780320 (Wash. Mar. 9, 2007) (challenge to a Mitigated Determination of Non-Significance (MDNS)). *See also* Opening Brief of Petitioner-Intervenor BNSF Railway Company at 6 (citing *Citizens for Sensible Growth v. City of Leavenworth*, No. 98-24, 1998 WL 937222 (Wash. Oct. 15, 1998))(challenge to a DNS).

adequacy of the EIS is being challenged, evidence may be presented regarding the project's impacts and the Board must consider that evidence de novo in order to determine whether the EIS's assessment of the project's impacts is adequate. Here, however, the adequacy of the EIS was not challenged. Where the EIS is not challenged, and where the exercise of SEPA substantive authority is reviewed under the clearly erroneous standard, the scope of review is limited to the record created by the SEPA decision-maker, as demonstrated by *Cook*.[11] Thus, the Board properly limited its review of the exercise of substantive SEPA authority by the Hearings Examiner to the record created by the Hearings Examiner.

2. The record before the Board was adequate for review of the Hearings Examiner's exercise of substantive SEPA authority because all parties moved for summary judgment, Petitioners did not contend the record was incomplete, and the Board had all the information necessary for its review

Millennium asserts that the Board erred by failing to obtain a complete copy of the record created before the Hearings Examiner. Pet. Brief at 29–31. Yet, Millennium never raised this as an issue before the Board, when the Board could rectify it. The fact that Millennium filed its

[11] Limiting the scope of review did not preclude Petitioners from challenging the exercise of substantive SEPA authority by the Hearings Examiner. "[T]he Hearing Examiner's use of the FEIS can be challenged in addressing whether the exercise of substantive SEPA authority was clearly erroneous." AR 2078. However, Millennium misconstrues this as an opportunity to challenge the EIS. Pet. Brief at 39.

own motion demonstrates there was sufficient information for summary disposition. Further, Millennium does not identify any missing information critical to the Board's review. Millennium's argument should be rejected on these bases alone.

The record before the Board was extensive. It included Millennium's 2016 permit application; significant portions of the 12,000 page EIS;[12] the draft Health Impacts Analysis jointly prepared by the County and the Washington Department of Health; the 82-page County staff report (with proposed mitigation measures); Millennium's Prehearing Brief filed with the Hearings Examiner; two extensive written submissions from BNSF's General Permitting Manager (with exhibits); excerpts from the transcript of the open record hearing; excerpts from the reports prepared by Petitioners' experts regarding coal dust, greenhouse gas emissions, and the cancer risk from diesel emissions; a study of the economic benefits of the project; the Critical Areas permit issued by the County for the project; Millennium's written responses to the questions asked by the Hearings Examiner; two declarations submitted by the County Planning Director; Ecology's decision denying the Section 401

[12] The portions of the EIS submitted into the record before the Board were voluminous, and included the introduction, the summary, and the individual chapters addressing the project action, permits, social and community resources, cultural resources, tribal resources, fish, rail transportation, rail safety, vehicle transportation, vessel transportation, noise and vibration, air quality, and coal dust. AR 0934–1378.

water quality certification; and more. The record before the Board was more than sufficient for the Board to review the Hearings Examiner decision. Millennium apparently agreed, as it never contended that the record was incomplete when it filed its own summary judgment motion. Nor was Millennium precluded from submitting substantial parts of the record to the Board, and could have submitted the entire record if it chose to do so.

Further, the cases that Millennium relies on to advance its argument are distinguishable on numerous grounds. Pet. Brief at 30 (citing *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 579 P.2d 1309 (1978); *Ancheta v. Daly*, 77 Wn.2d 255, 461 P.2d 531 (1969); *Swift v. Island Cty.*, 87 Wn.2d 348, 552 P.2d 175 (1976); *Tungent v. Emp't Sec. Dep't*, 78 Wn.2d 954, 481 P.2d 436 (1971)). First, none of these cases involved Board review of a local decision; instead, they occurred in the context of the court's appellate review. Additionally, *Tungent* and *Ancheta* involved the transmittal of the agency administrative record to the court, as required in cases of judicial review of an agency action brought under the state APA. *See, e.g.,* RCW 34.05.566(1)[13] ("within thirty days after service of the petition for review . . . the agency shall transmit to the court . . . a

[13] *Tungent* and *Archeta* were decided prior to the current version of the APA, when the APA was codified at RCW 34.04.

certified copy of the agency record for judicial review of the agency action.") These cases are inapposite, as the Board's review of a local decision is not subject to these judicial review provisions of the APA. None of the cases cited stand for the proposition that the Board was required to obtain the entire record before the Hearings Examiner.

Last, Millennium argues that the Board erroneously accepted evidence from Ecology in the form of a brief excerpt from the environmental analysis conducted by the Army Corps of Engineers for the project indicating that the viability of the project depended on the export of over 40 million tons of coal per year. AR 2045–46. Millennium could have moved the Board to strike this submission, but elected not to do so. Further, it is not evident that the Board relied on this information in reaching its conclusions or that it prejudiced Millennium. If anything, it was harmless error.

In sum, Petitioners fail to prove that the scope of the Board's review of the Hearings Examiner's decision was inappropriate. Millennium also fails to factually and legally support its allegation that the record before the Board was incomplete. Petitioners' arguments that the Board committed procedural errors justifying a remand should be rejected.

D. The Board's Affirmation of the Hearings Examiner's Decision Was Lawful and Appropriate Where the Hearings Examiner Correctly Considered the Project at Full Buildout Rather than Limiting His Analysis to Stage 1

Petitioners never appealed the EIS, yet they continue to assert arguments that amount to a collateral attack on the EIS. First, Petitioners argue that the Hearings Examiner was precluded from relying on the EIS where the EIS analyzed the project at full buildout. This argument is contrary to the prohibition against piecemealing in SEPA and the SMA. Second, Petitioners make the related argument that that the Hearings Examiner failed to consider their evidence purporting to address Stage 1 impacts and mitigation. However, this allegation is unsupported by the record. Third, Petitioners argue that there are facts in dispute regarding the project's impacts and mitigation that preclude summary judgment. Where the EIS has not been challenged, there can be no dispute. As much as Petitioners want to revisit the EIS findings, they are barred from doing so.

1. The Board did not err in upholding the Hearings Examiner's decision to consider the project at full buildout

Petitioners assert that the Hearing Examiner erred by considering the full impacts of the entire project, when Millennium only applied for shoreline permits for Stage 1 of the project. This argument elevates form over substance, and is emblematic of Millennium's attempts to short-

circuit (for the second time) a robust and comprehensive environmental review and permitting process for its project. The SMA and SEPA require consideration of the project's full impacts during permitting because that is necessary to give effect to the mandates and purposes of those laws. Due to the unprecedented size and scale of the project, these considerations are of particular importance in this case.

The SMA was enacted to prevent "the inherent harm in an uncoordinated and piecemeal" development of the state's shorelines. RCW 90.58.020. The SEPA rules state that "[p]roposals or parts of proposals that 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). Thus, both the SMA and SEPA prohibit "uncoordinated and piecemeal" development. RCW 90.58.020; WAC 197-11-060(3)(b); *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 850–51, 509 P.2d 390 (1973); *Batchelder v. City of Seattle*, 77 Wn. App. 154, 160, 890 P.2d 25 (1995); *Indian Trail Property Owner's Assoc. v. City of Spokane*, 76 Wn. App. 430, 443, 886 P.2d 209 (1994). As the Board has previously observed, "the piecemeal consideration of environmental impacts from broader development plans, is one which strikes at the very core of both the State Environmental Policy Act and the

Shorelines Management Act." *Appletree Cove Prot. Fund v. Kitsap Cty.*, No. 93-055, 1994 WL 905514, at CL IV (Wash. Oct. 6, 1994).

A proposal violates the prohibition against piecemealing when the phases of a project are "interrelated and interdependent." *Merkel*, 8 Wn. App. at 847. The rule against piecemealing is driven by concerns that segmentation of a project can preclude consideration of the full environmental impacts of the entire proposal. *East Cty. Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 441, 105 P.3d 94 (2005); *Indian Trail.,* 76 Wn. App. at 443. Moreover, as permits for individual segments are approved, they exert a "coercive effect" on the consideration of future segments, leading to incremental degradation of the environment and uncoordinated development. *Merkel*, 8 Wn. App. at 851. 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 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).

In this case, approval of Stage 1 will coerce approval of Stage 2, because otherwise the facility would be oversized for its throughput. For example, the eight rail storage tracks proposed in Stage 1 will support the eight trains a day that will bring coal to the site at full buildout. Similarly,

Dock 3 proposed in Stage 1 will support coal loading for two vessels per day that would occur at full buildout. Further, the dredging sought at Stage 1 will accommodate docking vessels at the two new docks required to increase the facility's output. Thus, almost the entire infrastructure necessary to achieve the project's full capacity will be built during Stage 1, as confirmed by Millennium. "The main difference between Stage 1 and Stage 2 is an increase in the number of trains and vessels serving the project." Pet. Brief at 10. Further, the proposed construction schedule for Stage 1 is from year 2018 to year 2021 and Stage 2 is scheduled for completion during the years 2022–2024. This is a continuous sequence with an artificially imposed and contrived "phasing" in name only.

Petitioners' insistence that the project must be reviewed in stages is also belied by the fact that both stages of Millennium's proposal are parts of a single, integrated plan of development. The EIS reviewed them as such (without objection by Millennium), and Millennium seeks to permit them under a single authorization from the Corps of Engineers and Ecology's section 401 water quality certification. Even the staff report prepared by the County and submitted to the Hearing Examiner analyzes the entire project for compliance with the SMA, and does not distinguish between the two stages except for a few passing references to the fact that

"[s]hip loading facilities for Stages 1 and 2 will be permitted under separate shoreline substantial development permits." AR 1471, 1514, 1530 n.2. The County staff report assumed full buildout in analyzing the proposal against the local SMP policies and goals, the criteria for shorelines of statewide significance, and the shoreline permit criteria. For example, the County considered the vessel traffic at full buildout in evaluating the project's impacts on recreational use of the Columbia River. AR 1485, 1493. The County considered the rail traffic at full buildout in evaluating the project's noise impacts. AR 1480. The County also relied on the economic benefits of the project at full buildout. AR 1509. Thus, the County reviewed the project as involving both stages. Nowhere in the staff report is there any justification or analysis supporting the segmentation of the project.

Millennium relies on a Board case, *Guon v. City of Vancouver, Guon*, No. 93-53, 1994 WL 905449 (Wash. Mar. 31, 1994), to support its piecemeal theory. In *Guon*, the Board authorized a permit for one project that was part of an overall master plan. The case is distinguishable from the present facts, because it involved a master plan with discrete and independent projects. *Goun* at *3, 5. Further, Petitioners' argument that piecemealing is appropriate here, where the entire project has been subject to SEPA review, defeats the whole point of SEPA review. The disclosure

of the full impacts of a project would be meaningless if a permitting authority could not consider those impacts either during permit review or in exercising its substantive SEPA authority. If a permittee could segment a project to avoid the consequences of an EIS that included findings of significant adverse impacts, there would be little point to requiring an EIS. Where segmentation serves only to thwart full environmental review, it is improper. *Indian Trail*, 76 Wn. App. at 443. For all of these reasons, Petitioners' arguments that the Board erred in affirming the Hearings Examiner's consideration of the project at full buildout, should be rejected.

2. The Board did not err in concluding that the Hearings Examiner considered Petitioners' evidence regarding Stage 1 impacts and mitigation because the record indicates the Hearings Examiner duly considered Petitioners' evidence in light of the unchallenged EIS

Petitioners' argument that the Hearing Examiner should have limited his analysis to Stage 1 impacts relies on the assumption that the project can be lawfully piecemealed. As discussed above, it cannot. Further, there is no merit to Petitioners' claims that the Hearings Examiner disregarded their evidence that purported to address Stage 1 impacts. The evidence presented by the Petitioners was, in large part, a critique of the EIS and not specific to Stage 1 at all. AR 0021–40, 0056–57. Rather than offering meaningful mitigation, Petitioners insisted that the project would

not have impacts. For example, BNSF testified that "as to rail traffic and noise impacts, there is no foreseeable increase in rail traffic, noise, or vibration related to the project." AR 1692. Regarding rail transportation, rail safety and vehicle delays, BNSF testified that "[p]roject-related trains will not cause unique crossing delays and there would not be any undue impact on first responders." *Id.* The Hearings Examiner properly refused to credit this testimony because it conflicted with the unchallenged EIS. AR 132.

In those areas where mitigation measures were proposed, they were given due consideration by the Hearings Examiner. In a detailed discussion of each of the resource areas impacted, the Hearings Examiner made specific findings as to the adequacy of the mitigation presented. AR 0021–40, 0097-116. For example, regarding increased cancer risk, the Hearings Examiner acknowledged BNSF's testimony that 6% of its fleet are Tier 4 locomotives, and that the replacement of its fleet will occur by 2040. AR 0100–01. The Hearings Examiner also noted BNSF's position that it would be unlawful to impose a condition requiring the use of Tier 4 locomotives. *Id.* There is no merit to Petitioners' claim that the Hearings Examiner did not consider Petitioners' testimony.

Last, BNSF argues that the Hearings Examiner took an inconsistent position with respect to the inviolability of the EIS, because

he cited greenhouse gas emissions as a tenth significant adverse impact. The Hearings Examiner made this determination based on Millennium's testimony that it would only commit to one-half of 1% of the mitigation relied on in the EIS. AR 0022, 0038–40. The Hearings Examiner's conclusion regarding greenhouse gas emissions is wholly consistent with the EIS, because but for the mitigation identified in the EIS, the greenhouse gas emissions would be a significant and unavoidable adverse impact. AR 38 ("The FEIS concludes that unless the net [greenhouse gas emissions]...is fully mitigated, these emissions will have an unavoidable, significant adverse environmental impact"). Additionally, for the exercise of substantive SEPA authority, the impacts do not have to be characterized as significant in the EIS so long as they are identified in the EIS, and the Hearings Examiner explains why the impacts justify permit denial. *West Main Assoc.*, 49 Wn. App. at 523.

The evidence in the record is more than sufficient to support the Board's affirmation of the Hearings Examiner decision, where the Hearings Examiner gave due consideration to Petitioners' testimony regarding the project's impacts and mitigation, and the findings of the unchallenged EIS clearly support his decision.

3. There are no genuine issues of material fact regarding the project's impacts and mitigation where the findings of the EIS cannot be challenged

Millennium asserts that summary judgment was inappropriate because there are issues of material fact regarding Stage 1 impacts and mitigation. This assertion is belied by the fact that the parties, including Millennium, filed cross motions for summary judgment on this issue at the Board. AR 0017–18, 433–51. By filing its motion, Millennium has essentially conceded there are no issues of material fact. *Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 261, 325 P.3d 237 (2014) citing *Tiger Oil Corp. v. Dep't of Licensing,* 88 Wn.App. 925, 930, 946 P.2d 1235 (1997). Millennium's argument also fails because it is contrary to the prohibition against piecemealing. Perhaps because of this fatal flaw, BNSF expands on this argument and alleges that issues of fact exist relative to mitigation for the entire project. Opening Brief of Petitioner-Intervenor BNSF Railway Company (BNSF Brief) at 16–18. BNSF's argument should be rejected as a collateral attack on the EIS.

BNSF's theory is based on its erroneous assertion that the EIS is not determinative of the project's impacts, and that reasonable mitigation measures exist to address those impacts. According to BNSF, the Hearings Examiner failed to establish that the project would likely result in the significant adverse impacts identified in the EIS. BNSF Brief at 9–11. The

record does not support BNSF's position. For example, in finding that the project would have significant unavoidable adverse impacts, the EIS considered the possible actions that BNSF might take to mitigate the project's impacts, such as infrastructure improvements. The EIS also considered that BNSF trains will operate in compliance with the all legal requirements (such as the use of anti-idling technology), and it considered the possibility that the Federal Railroad Administration could approve a quiet zone to reduce noise impacts. AR 1002, 1067–69. The Hearings Examiner also considered the mitigation measures proposed by Petitioners at the hearing, which were "nearly identical" to those presented in the County's staff report, and which did not address all of the identified impacts. AR 0021–40, 0056–57. The Hearings Examiner considered the measures but determined that they "do not reasonably mitigate the impacts," in large part because they failed to ensure that the impacts will be mitigated. *Id.* SEPA requires mitigation measures to be capable of being accomplished. RCW 43.21C.060, WAC 197-11-660(1)(c); *see also Anderson v. Pierce*, 86 Wn. App. 290, 301, 936 P.2d 432 (1997).

The facts of this case stand in sharp contrast to the *Nagatani* case that BNSF relies on. BNSF Brief at 18 (citing *Nagatani Bros., Inc. v. Skagit Cty. Bd. Of Com'rs*, 108 Wn.2d 477, 739 P.2d 696 (1987)). In *Nagatani*, the Skagit County Board of Commissioners denied a

preliminary plat application based on the recommendations of the planning commission without any public hearing. The court found that the denial of the plat was not supported by the record, where the staff recommendation failed to identify environmental concerns and where the EIS failed to identify any adverse impacts. *Id.* at 482. *Nagatani* has no relevance here.

Moreover, as explained in Section IV(D)(2) above, the bulk of Petitioners' testimony was focused on disputing the EIS findings regarding the project's impacts. As properly recognized by the Hearings Examiner, BNSF cannot use its testimony at the open record hearing to challenge the findings of the EIS. Where the EIS has not been challenged, its findings are verities for purposes of review of the exercise of substantive SEPA authority by the Hearings Examiner. *West Main Assoc.*, 49 Wn. App. 513; *Polygon Corp.*, 90 Wn.2d 59. Because the conclusions in the EIS are binding, Petitioners cannot now challenge its findings or present new information to rebut those findings. Petitioners' assertion that there are genuine issues of material fact is nothing more than a masked attempt to collaterally attack the EIS and should be rejected as such.

E. The Board's Affirmation of the Hearings Examiner Decision Was Lawful and Appropriate Where the Hearings Examiner Met the Procedural Requirements for the Exercise of Substantive SEPA to Deny the Permits

It is too late for Petitioners to challenge the EIS. However, Petitioners can challenge the Hearings Examiner's exercise of substantive SEPA by presenting evidence that the Hearings Examiner failed to meet the requirements for doing so. As explained by the Board, a decision-maker must specify (1) the unacceptable adverse environmental impacts identified in an EIS; (2) whether any reasonable mitigation measures exist to sufficiently mitigate the identified impacts; and (3) the policies under which such impacts are unacceptable. AR 0024–25, 0027–28; *see also* RCW 43.21C.060; WAC 197-11-660 (1); *West Main Assoc.*, 49 Wn. App. at 520; Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 18.01 at 18.27 (2014). These questions must be considered in light of SEPA's recognition of a fundamental and inalienable right to a healthful environment and "in light of the public policy expressed in SEPA of maintenance, enhancement and restoration of the environment." *Polygon,* 90 Wn.2d at 70; *see also* RCW 43.21C.010, .020. As described below, the record clearly indicates that the Hearing Examiner complied with these requirements.

In his thorough and well-reasoned 57-page decision, the Hearing Examiner identified the significant adverse unavoidable impacts from the EIS that he was relying on to deny the permits. The Hearings Examiner discussed these impacts at great length, and explained why they warranted denial of the permits. AR 0021–40, 0047–59. The conclusions of the Hearings Examiner are drawn from the findings in the EIS that the project would cause significant unavoidable adverse impacts in the areas of air quality, vehicle traffic, vessel traffic, rail capacity, rail safety, noise pollution, social and community resources, cultural resources, tribal resources, and unmitigated greenhouse gas emissions. In finding that "[t]he proposal would likely result in significant adverse environmental impacts identified in a final environmental impact statement," the Hearings Examiner met the requirement of WAC 197-11-660(1)(f)(ii). *West Main Assoc.*, 49 Wn. App. at 522 (project denial upheld where city council identified the adverse environmental impacts disclosed in the project EIS as the basis for its denial).

The Hearings Examiner gave the same detailed consideration to the question of whether reasonable mitigation measures exist to mitigate the impacts. As recognized by the Hearings Examiner, the EIS concludes that the proposed mitigation is insufficient. Nonetheless, the Hearings Examiner provided Petitioners with additional opportunity to propose

mitigation. As discussed in Sections III (D) and (E) above, the Hearings Examiner gave due consideration to the mitigation measures recommended in the County staff report, the mitigation measures presented by Petitioners (which largely repeated the County's), and the mitigation measures in the EIS. The Hearings Examiner then provided specific reasons why the mitigation was inadequate to address the impacts. AR 0021–59. In doing so, the Hearings Examiner made the requisite finding that "reasonable mitigation measures are insufficient to mitigate the identified impact[s]." WAC 197-11-660(1)(f)(ii).

Last, the denial of a proposal must be predicated "upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency" or appropriate legislative body. RCW 43.21C.060;
WAC 197-11-660 (1)(a). The County's SEPA policies are codified in the Cowlitz County Code (CCC) at CCC 19.11.110.[14] The County's SEPA policies recognize "that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility

[14] These provisions in the County code have since been amended to severely restrict the County's ability to deny a project based on substantive SEPA.
See *https://destinyhosted.com/cowlidocs/2018/BOCC/20180213_641/9249_19%2011_SEPA_EnvironmentalPolicy_tracks_BOCC.pdf;* *http://www.co.cowlitz.wa.us/DocumentCenter/View/14093.*

to contribute to the preservation and enhancement of the environment." AR 0059, citing former CCC 19.11.110(b)(2). Accordingly, the County is directed to "use all practical means" to fulfill its responsibility as a trustee for the environment for each successive generation; assure a safe, healthful, productive, and aesthetically and culturally pleasing surroundings for the County's citizens; attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; preserve important historic, cultural, and natural aspects of our national heritage; achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. AR 0058, citing former CCC 19.11.110(b)(1). The Hearings Examiner reviewed the project in light of these policies and concluded that the failure to reasonably mitigate the project's significant adverse impacts were inconsistent with nearly all of them. AR 0058–59.

The Hearings Examiner's compliance with the requirements for exercising substantive SEPA is well-documented in the record. Accordingly, the Board properly concluded that the Hearings Examiner "fully complied" with SEPA's procedural requirements in exercising

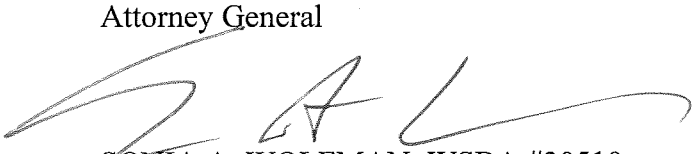
SEPA substantive authority to deny the permits. AR 2085. Because Petitioners cannot prove that the Board's conclusion was clearly erroneous, their appeals should be dismissed.

V. CONCLUSION

For the reasons stated above, the Board's decision should be affirmed in full.

RESPECTFULLY SUBMITTED this 28th day of February 2019.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on February 28, 2019, I caused to be served the Department of Ecology's Response Brief in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

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