

FILED  
Court of Appeals  
Division II  
State of Washington  
2/28/2019 2:34 PM  
No. 52215-2-II

---

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

---

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC *et al.*

Petitioners,

v.

STATE OF WASHINGTON SHORELINES HEARINGS BOARD *et al.*

Respondents.

---

OPPOSITION BRIEF OF RESPONDENTS WASHINGTON  
ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS, COLUMBIA  
RIVERKEEPER, FRIENDS OF THE COLUMBIA GORGE, AND  
SIERRA CLUB

---

KRISTEN L. BOYLES  
MARISA C. ORDONIA  
JAN E. HASSELMAN  
Earthjustice  
705 Second Avenue, Suite 203  
Seattle, WA 98104-1711  
(206) 343-7340 | Phone  
(206) 343-1526 | Fax  
kboyles@earthjustice.org  
mordonia@earthjustice.org  
jhasselman@earthjustice.org

*Attorneys for Respondents Washington  
Environmental Council, Climate  
Solutions, Columbia Riverkeeper,  
Friends of the Columbia Gorge, and  
Sierra Club*

TABLE OF CONTENTS

INTRODUCTION .....1

COUNTER STATEMENT OF ISSUES .....4

COUNTER STATEMENT OF THE CASE.....5

I. MILLENNIUM COAL EXPORT TERMINAL  
BACKGROUND .....5

    A. Millennium’s First Attempt at Permitting Ended  
    When It Misled the Public and Regulators by  
    Attempting To Segment Its Project.....5

    B. Millennium Withdrew Its Initial Permit Application,  
    Filed a New Application, and Agreed to Full EIS  
    Review. ....7

    C. The Final Environmental Impact Statement Found  
    Nine Areas of Significant Harm That Could Not Be  
    Mitigated. ....8

        1. Increased rail traffic would increase noise  
        levels at certain rail crossings as well as  
        increase average daily noise levels and cause  
        moderate to severe noise impacts to  
        residents of the Highlands neighborhood. .10

        2. Increased rail traffic and diesel particulate  
        matter along the Reynolds Lead, BNSF  
        Spur, and BNSF mainline in Cowlitz County  
        would result in increased cancer risk  
        rates. ....10

        3. Increased rail traffic would result in a  
        substantial increase in vehicle delay at rail  
        crossings in Cowlitz County. ....11

        4. Cumulative impacts would disproportionately  
        fall on minority and low-income  
        populations.....11

5.	Increased vessel activity would increase potential for conflict with Treaty reserved Tribal fishing rights, fishing access, and cause harmful impacts to fish and aquatic habitat.....	12
6.	Increased vessel traffic would increase the likelihood of collisions, groundings, and fires by approximately 2.8 per year. ....	12
7.	Increased rail transport would increase the train accident rate by 22 percent. ....	13
8.	Greenhouse gas emissions would be adverse and significant unless Millennium agreed to 100% mitigation.....	13
D.	The Cowlitz County Hearing Examiner Denied Millennium’s Application for Shoreline Permits...15	
E.	The Shorelines Hearings Board Upheld the Permit Denial Based on Substantive SEPA Standards.....	17
II.	WASHINGTON’S STATE ENVIRONMENTAL POLICY ACT.....	19
III.	WASHINGTON’S SHORELINE MANAGEMENT ACT.....	23
	ARGUMENT.....	25
I.	STANDARD OF REVIEW AND RECORD FOR REVIEW CLAIMS.....	26
II.	THE BOARD CORRECTLY DETERMINED THAT PIECEMEAL REVIEW OF MILLENNIUM’S PROJECT WAS IMPROPER AND INVALID. ....	27
A.	Single Project Piecemealing Is Invalid Under The SMA And SEPA. ....	27

B.	The Undisputed Evidence in the Record Demonstrated that Millennium Was One Project, Not Two Independent Stages. ....	30
C.	The Board Did Not Err in Upholding the Hearing Examiner’s Refusal to Piecemeal Consideration of Millennium’s Single Coal Export Terminal. ....	33
III.	THE HEARING EXAMINER DID NOT ABUSE HIS AUTHORITY IN DENYING MILLENNIUM’S PERMIT APPLICATIONS. ....	37
IV.	THE BOARD DID NOT ERR IN HOLDING THAT THE UNCHALLENGED FEIS COULD NOT BE COLLATERALLY ATTACKED. ....	40
	CONCLUSION.....	41

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bellevue Farm Owners Ass’n v. Washington</i> , 100 Wn. App. 341, 997 P.2d 380 (2000) .....	34
<i>Bhatia v. Washington Dep’t of Ecology</i> SHB No. 95-034 (Jan. 9, 1996).....	34
<i>Buechel v. Dep’t of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	23, 24
<i>Cathcart v. Snohomish Co.</i> , 96 Wn.2d 201, 634 P.2d 853 (1981).....	30
<i>Climate Solutions et al. v. Cowlitz County et al.</i> , No. S10-023 (case closed March 24, 2011).....	5
<i>Cook v. Clallam Cty.</i> , 27 Wn. App. 410, 618 P.2d 1030 (1980).....	23
<i>Cougar Mt. Assocs. v. King Cty.</i> , 111 Wn.2d 742, 765 P.2d 264 (1988).....	37
<i>Donovan v. Sperry Ocean Dock</i> SHB Nos. 10-024 through 10-042 (July 13, 2011).....	28, 29, 35
<i>Donwood v. Spokane Cty.</i> , 90 Wn. App. 389, 957 P.2d 775 (1998).....	23
<i>Guon v. City of Vancouver</i> , 1994 WL 905449, SHB No. 93-53 (March 31, 1994) .....	33
<i>Iddings v. Griffith</i> , 2009 WL 1817902, SHB No. 08-031 (June 22, 2009) .....	29, 35
<i>Jarvis v. Kitsap County</i> , SHB No. 08-001 (April 8, 2008) .....	28

<i>King Cty. v. Wash. State Review Bd. for King Cty.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	20
<i>Leschi v. Highway Comm'n</i> , 84 Wn.2d 271, 804 P.2d 1 (1974).....	19
<i>Lighthouse Resources v. Inslee</i> , No. 18-05005-RJB (W.D. Wash.).....	32
<i>Maranatha Min., Inc. v. Pierce Cty.</i> , 59 Wn. App. 795, 801 P.2d 985 (1990).....	37
<i>Merkel v. Port of Brownsville</i> , 8 Wn. App. 844, 509 P.2d 390 (1973).....	8, 28, 29, 35
<i>Nagatani Bros. v. Skagit Cty. Bd. of Comm'rs</i> , 108 Wn.2d 477, 739 P.2d 696 (1987).....	37, 40
<i>Norway Hill Preservation and Prot. Ass'n v. King Cnty Council</i> , 87 Wn.2d 267, 552 P.2d 674 (1976).....	19
<i>Polygon Corp. v. City of Seattle</i> , 90 Wn.2d 59, 578 P.2d 1309 (1978).....	23, 37
<i>State v. Lake Lawrence Pub. Lands Prot. Ass'n</i> , 92 Wn.2d 656, 601 P.2d 494 (1979).....	23
<i>Sterling v. City of Montesano</i> , SHB No. 06-010 (April 20, 2007).....	30
<i>Victoria Tower P'ship v. City of Seattle</i> , 59 Wn. App. 592, 800 P.2d 380 (1990).....	20, 23, 36
<i>W. Main Assocs. v. City of Bellevue</i> , 106 Wn.2d 47, 720 P.2d 782 (1986).....	22, 23
<b>Statutes</b>	
National Environmental Policy Act 42 U.S.C. § 4321 <i>et seq.</i> .....	15

State Environmental Policy Act

RCW 43.21C.010.....19, 29  
RCW 43.21C.020(3).....19  
RCW 43.21C.031(1).....20  
RCW 43.21C.060.....21, 22, 23, 31

Shoreline Management Act

RCW 90.58.020 .....24, 27  
RCW 90.58.100(5).....25  
RCW 90.58.140 .....31

**Regulations**

WAC 173-27-040(b).....25  
WAC 173-27-150.....25  
WAC 197-11-030.....19, 22  
WAC 197-11-060(3)(b) .....29  
WAC 197-11-330.....20  
WAC 197-11-660.....22  
WAC 197-11-704(2)(a) .....31  
WAC 197-44-400.....20, 36

## INTRODUCTION

Millennium Bulk Terminals-Longview sought permits from Cowlitz County under the Shoreline Management Act (“SMA”) to build a project of unprecedented size, impact, and controversy—a massive coal export terminal on the banks of the Columbia River, capable of handling up to 44 million metric tons of coal a year, operating 24 hours per day, seven days per week, for 30 years. Cowlitz County and the Washington Department of Ecology, as co-leads under the State Environmental Policy Act (“SEPA”), issued a Final Environmental Impact Statement (“FEIS”) in April 2017 that found nine areas of significant, adverse, and unavoidable harm caused by the proposed coal terminal. The range and extent of harmful impacts was staggering: for Cowlitz County and the state as a whole, Millennium would cause clogged streets, unhealthy air, overburdened rail lines, harm to the Columbia River ecosystem, and reduced Tribal fishing. No one, including Millennium, challenged or appealed the FEIS’s conclusions or analysis.

Undaunted, Millennium began the shorelines permitting process in Cowlitz County. After the three-day hearing, however, the Cowlitz County Hearing Examiner denied Millennium’s shorelines permit application under substantive SEPA standards and the requirements of the SMA and the Cowlitz County Shorelines Management Master Program.

The Shorelines Hearings Board (“SHB” or “Board”)) upheld this permit denial. AR 2058-92, SHB Order (April 20, 2018).

In this Court, Millennium essentially presents a single argument, although the company couches it in several ways: after proposing a single project for a 44 million metric ton coal export terminal to be constructed in two stages, after a lengthy and detailed FEIS reviewed the impacts of the entire project, after relying on the alleged economic benefits of the project at full build-out, and after seeking other federal permits and state approvals for the project as a whole, Millennium insists that it should be allowed to ignore the total impacts of the project and instead be judged only on impacts from the first of two related stages of construction.

Millennium’s argument makes a mockery of SEPA and SMA review and would allow proponents of projects with significant, harmful, unavoidable impacts to divide the permits sought for a single project into consecutive stages—each to be, in Millennium’s view, re-analyzed for smaller (or different) impacts, harms, and mitigation despite the overarching EIS process that went before. Whether considered under SEPA or the SMA, the type of piecemeal review advocated by Millennium is precisely what those statutes command decision makers to avoid.

Millennium also challenges the status and use of the FEIS. The FEIS reviewed and analyzed the direct, indirect, and cumulative impacts

that would be caused by the entire project. The FEIS concluded that for nine separate types of significant risks and harms, no mitigation was possible. No one appealed the FEIS. While the lack of an appeal does not mean that parties agree with every aspect of the FEIS's analysis, for the purposes of the Hearing Examiner's decision, the findings and conclusions in the FEIS are unchallenged, and there can be no error in reliance on them. Before the Hearing Examiner, Millennium's experts critiqued the FEIS's conclusions and analysis, despite Millennium's contention that it was not challenging the FEIS itself. The Board's Order prohibited this kind of collateral attack and should be upheld.

Simply put, there is no factual or legal dispute that the substantive SEPA requirements for permit denial were met: (1) Cowlitz County had SEPA policies incorporated into its county code to protect the environment and public health; (2) the FEIS found that the project would result in significant, adverse impacts and those findings are unchallenged; and (3) the FEIS acknowledged that reasonable measures could not mitigate nine of those impacts and no additional possible, reasonable mitigation measures for other aspects of the entire project were proposed by Millennium during the hearing.

Respondents Washington Environmental Council, Climate Solutions, Columbia Riverkeeper, Friends of the Columbia Gorge, and

Sierra Club (collectively “WEC”) join the Washington Department of Ecology in respectfully asking the Court to uphold the decision of the Board and the Cowlitz County Hearing Examiner.

#### COUNTER STATEMENT OF ISSUES

1. Whether the Board properly applied the clearly erroneous standard of review to the record created by the Hearing Examiner, where only the substantive SEPA denial, and not the underlying FEIS, had been challenged?

2. Whether the record before the Board was adequate for review of the Hearing Examiner’s exercise of SEPA substantive authority, where 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. Whether the Hearing Examiner and the Board properly considered the impacts of the full project, as analyzed in the FEIS, instead of allowing piecemealed consideration of the project’s Stage 1 impacts?

4. Whether the Board erred, under a clearly erroneous or de novo standard of review, in upholding the Hearings Examiner’s decision that (1) made a detailed record of the Cowlitz County SEPA policies protecting the environment, shorelines, and public health; (2) concluded, based on the significant, adverse, unavoidable impacts identified in the

unchallenged FEIS, that the project caused significant environmental impacts that could not be adequately mitigated; and (3) explained his reasoning in a lengthy opinion?

## COUNTER STATEMENT OF THE CASE

### I. MILLENNIUM COAL EXPORT TERMINAL BACKGROUND

#### A. Millennium's First Attempt at Permitting Ended When It Misled the Public and Regulators by Attempting To Segment Its Project.

On September 20, 2010, Millennium filed an application with Cowlitz County for a Shoreline Substantial Development Permit (“SSDP”) to build a 5-million-ton/year coal export terminal in Longview, Washington, at a site owned by Northwest Alloys, a subsidiary of Alcoa. Cowlitz County issued a Mitigated Determination of Non-Significance (and later a Modified Mitigated Determination of Non-Significance) under SEPA, finding no significant impacts from the proposal that could not be adequately mitigated. Relying on this threshold determination, Cowlitz County granted Millennium a shoreline permit. Four conservation groups (including four of the five Respondents) challenged both the SEPA Modified Mitigated Determination of Non-Significance and the SSDP before the Shorelines Hearings Board; the Washington Department of Ecology joined that appeal. *Climate Solutions et al. v. Cowlitz County et al.*, No. S10-023 (case closed March 24, 2011).

During the discovery process, Millennium released a copy of an internal memo that outlined Millennium's intent to circumvent full review under SEPA. Administrative Record ("AR") 603-06, October 28, 2010 Internal Millennium Memorandum.<sup>1</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." *Id.* Despite this knowledge of SEPA's requirements, Millennium planned to expand its proposed export coal terminal to at least 20 million tons of coal per year after it received approval based on a five-million-ton per year proposal. 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. Millennium's plans made both national and local news. *See* William Yardley, *In Northwest, a Clash over a Coal Operation*, New York Times, Feb. 14, 2011; Eric Olsen, *Millennium Bulk Terminals files paperwork with county for \$600 million coal terminal*, The Daily News, Feb. 23, 2012.<sup>2</sup>

---

<sup>1</sup> Citations to documents in the Administrative Record will be identified by AR numbers followed by document title. Pin cites in frequently cited documents will refer to the documents' internal pagination.

<sup>2</sup> *See* <http://www.nytimes.com/2011/02/15/us/15coal.html> (last visited

B. Millennium Withdrew Its Initial Permit Application, Filed a New Application, and Agreed to Full EIS Review.

When its misrepresentations became public, Millennium withdrew its original permit application, submitted a revised application to Cowlitz County for a coal export terminal of 44 million metric tons per year, AR 608, Millennium Cowlitz County Application (Feb. 22, 2012) at 1, and agreed to review of the project, both Stages 1 and 2, through an Environmental Impact Statement. This second try for Millennium presented a proposal for a single coal export terminal with a total throughput capacity at full build-out of 44 million metric tons per year of coal. AR 8-74, Findings of Fact, Conclusions of Law and Decision Denying Permits (Nov. 14, 2017) at 4-5 (“Shoreline Permit Denial”). Millennium proposed to construct the terminal in two related stages. Stage 1 would involve construction of two new docks (Docks 1 and 2), one shiploader and related conveyors on Dock 2, berthing facilities on Dock 3, a stockpile area including two stockpile pads, railcar unloading facilities, one operating rail track, up to eight rail storage tracks for train parking, project area ground improvements, associated facilities and infrastructure, and necessary dredging for the two docks. *Id.* at 5. Stage 2

---

Feb. 25, 2019); [http://tdn.com/news/local/millennium-bulk-terminals-files-paperwork-with-county-for-million-coal/article\\_c90b544c-5dbd-11e1-9fae-0019bb2963f4.html](http://tdn.com/news/local/millennium-bulk-terminals-files-paperwork-with-county-for-million-coal/article_c90b544c-5dbd-11e1-9fae-0019bb2963f4.html) (last visited Feb. 25, 2019).

would rely on the docks, ground improvements, rail tracks, and facilities built in Stage 1, adding an additional shiploader, two additional stockpile pads, conveyors, and other equipment necessary to increase the amount of coal exported to 44 million metric tons per year. AR 610-48, Millennium 2016 JARPA at 8-9 (outlining planned construction activity in Stages 1 and 2). Both stages were part of the same single overall project.

C. The Final Environmental Impact Statement Found Nine Areas of Significant Harm That Could Not Be Mitigated.

Cowlitz County and Ecology, as co-leads under SEPA, released a draft EIS in April 2016 and the FEIS on April 28, 2017. As required by SEPA and the SMA, the EIS reviewed the harms and impacts that would be caused by the project as a whole, that is, both Stages 1 and 2. *See Merkel v. Port of Brownsville*, 8 Wn. App. 844, 509 P.2d 390 (1973) (discussing prevention of piecemeal development under both SEPA and SMA). The public process surrounding the environmental review resulted in several public hearings and hundreds of thousands of public comments submitted at various stages. As it was intended, the SEPA public process engaged the community and the region, bringing forward the risks, harms, and benefits of the project and analyzing the direct, indirect, and cumulative impacts that would be caused by the project in a full and transparent manner.

The Millennium FEIS found a wide range of serious concerns associated with the Millennium export terminal proposal, including significant adverse impacts on Tribal treaty-protected fishing access, impacts on Tribal fishing harvest due to adverse effects on fish and aquatic habitat, increased and serious delays at railroad crossings, increased risk of train accidents, increased risk of vessel collision or allusion, moderate to severe increased noise, and greenhouse gas emissions of up to 55 million metric tons per year. These were significant, cumulative impacts that the community has strenuously opposed.

Importantly for the Hearing Examiner's decision, the FEIS found many impacts significant, adverse, and unavoidable, that is, they could not be mitigated. FEIS at S-41.<sup>3</sup> The impacts occurred in nine areas: air quality, vehicle traffic, vessel traffic, rail capacity, rail safety, noise pollution, social and community resources, cultural resources, and tribal resources. FEIS at S-41 to S-43; *see also* FEIS Table S-2. The environmental and human health impacts are summarized below and in Ecology's concurrently filed opposition brief.

---

<sup>3</sup> The FEIS is thousands of pages long in its entirety. Ecology submitted selected pages from the FEIS as a summary judgment exhibit, *see* AR 935-1378; the entire FEIS can be found at <http://millenniumbulkeiswa.gov/sepa-eis.html> (last visited Feb. 25, 2019).

1. *Increased rail traffic would increase noise levels at certain rail crossings as well as increase average daily noise levels and cause moderate to severe noise impacts to residents of the Highlands neighborhood.*

The Millennium terminal would generate up to 16 trips by loaded and unloaded trains along rail corridors in Washington, Oregon, Idaho, Montana, and Wyoming each day. In the Longview community alone, train-related noise impacts would be significant and unavoidable to residences near four at-grade railroad crossings. Train-related noise included operational noise as well as locomotive horns sounded for safety reasons. Noise impacts would be particularly acute in the Highland neighborhood, causing a disproportionately high adverse impacts on a minority, low-income population. FEIS at S-41. The FEIS also concluded that, if the Federal Railroad Administration did not approve a Quiet Zone near the terminal, “the impacts would be unavoidable and significant.” FEIS at S-34-35; 5.5-32 to 5.5-33.

2. *Increased rail traffic and diesel particulate matter along the Reynolds Lead, BNSF Spur, and BNSF mainline in Cowlitz County would result in increased cancer risk rates.*

The FEIS found that increased diesel particulate matter would result in increased cancer risk rates. FEIS at S-14. The modeled cancer risk rate found an increase for a majority of the Highlands neighborhood of between 3 and 10 percent. FEIS at S-41, 5.6-20; FEIS at Figure 5.6-3.

The FEIS concluded that these impacts “would constitute a disproportionately high and adverse effect on minority and low-income populations and would be unavoidable and significant.” FEIS at S-14. The FEIS further concluded that, “[b]ased on an inhalation-only health risk assessment, coal export terminal operations and Proposed Action-related trains would increase the cancer risk associated with diesel particulate matter emissions.” *Id.* at S-35.

3. *Increased rail traffic would result in a substantial increase in vehicle delay at rail crossings in Cowlitz County.*

With the current track status on the Reynolds Lead and BNSF Railway spur, by 2028, the FEIS predicted Millennium coal trains would increase the total gate downtime by over 130 minutes during an average day at six specific crossings. FEIS at S-33; 5.3-30. Even with potential track upgrades, the FEIS identifies continued delay at four crossings, particularly during peak traffic hours. These delays would affect emergency vehicles at at-grade crossings as well. FEIS at 5.3-29. The FEIS found that traffic impacts caused by Millennium would be significant and unavoidable. FEIS at 5.3-45 to 5.3-46.

4. *Cumulative impacts would disproportionately fall on minority and low-income populations.*

Due to the cumulative impacts of the significant and non-mitigable impacts to air quality, noise, and traffic delays, the FEIS found that social

and community resources would be significantly adversely impacted and minority and low-income populations near the Millennium site would be disproportionately harmed. FEIS at 3.2-25 to 3.2-26.

5. *Increased vessel activity would increase potential for conflict with Treaty reserved Tribal fishing rights, fishing access, and cause harmful impacts to fish and aquatic habitat.*

Millennium would add approximately 1,680 transits per year of Panamax-class marine vessels through the Columbia River estuary. These vessels would travel through areas adjacent to and within the usual and accustomed Tribal fishing areas. Fishing access at both designated and unmapped Tribal fishing access areas would be restricted. FEIS at S-17; 3.5-13 to 15. The FEIS found that the project's interference with Tribal fisheries harvest would be a significant adverse impact. FEIS 3.5-20 (describing problems of access and "difficult to quantify" reductions in harvestable fish resources due to behavioral and habitat impacts). No mitigation measure could be implemented to eliminate these impacts.

6. *Increased vessel traffic would increase the likelihood of collisions, groundings, and fires by approximately 2.8 per year.*

The FEIS found that Millennium would have significant adverse effects on vessel transportation that could not be mitigated. Millennium would add 1,680 ship transits per year to the Columbia River. FEIS at 5.4-40. Added to the current 4,440 ship transits, Millennium would be

responsible for over one quarter of the traffic on the Columbia River. This increased vessel traffic would increase the frequency of collisions, groundings, and fires by approximately 2.8 incidents per year. FEIS at 5.4-41. No mitigation measures were proposed to eliminate the possibility of an incident or its resulting harm. FEIS at 5.4-48.

7. *Increased rail transport would increase the train accident rate by 22 percent.*

The FEIS found that Millennium-caused trains would increase the train accident rate by 22 percent in Cowlitz County and Washington. FEIS at S-31, 5.2-8 (presenting a baseline of 4.30 average accidents per year and a project-related average of 5.25 accidents per year).

8. *Greenhouse gas emissions would be adverse and significant unless Millennium agreed to 100% mitigation.*

Millennium's project conflicted with Washington's goal to reduce its greenhouse gas emissions. The FEIS concluded that the greenhouse gas emission impact of exporting 44 million metric tons of coal per year varies significantly based on different assumptions but suggested that under the "preferred scenario," the impact would be just under 2 million tons of CO<sub>2</sub> equivalent annually. This amount was significant (equivalent to adding 425,000 cars to the road annually) and far above the thresholds of what was acceptable as the state committed to reducing carbon pollution. Under some scenarios, emissions could be as high as 55 million

metric tons of CO<sub>2e</sub> each year, substantially higher than Washington state's entire greenhouse gas footprint from all sources. FEIS at 5.8-19, Table 5.8-10, *see also* FEIS Vol. III(c) Greenhouse Gas Emissions, Table 69 (April 2017) (estimating the Upper Bound of Average Annual Emissions to be 55.92 million metric tons of CO<sub>2e</sub>).

The FEIS proposed 100% mitigation for greenhouse gas impacts; this 100% mitigation requirement prevented greenhouse gas emissions from joining the list of nine “adverse, unmitigatable” impacts. However, at the hearing, Millennium disavowed the 100% mitigation proposal, instead committing to only one half of one percent of the mitigation set out in the FEIS. Shoreline Permit Denial at 32. Without full mitigation, the project's significant greenhouse gas emissions became another unmitigated significant adverse impact. “The FEIS concludes that if the net GHG emissions are not fully mitigated they become a tenth unavoidable, significant adverse impact.” Shoreline Permit Denial at 3.<sup>4</sup>

---

<sup>4</sup> The FEIS also found that Millennium would cause significant, adverse, and unavoidable impacts to rail transportation, with rail lines exceeding capacity by 2028, FEIS at 5.1-24, and to the Reynolds Metals Reduction Plant Historic District, FEIS at 3.4-20.

D. The Cowlitz County Hearing Examiner Denied Millennium’s Application for Shoreline Permits.

After the FEIS’s review of the entire project, Millennium applied for a Shoreline Substantial Development Permit (“SSDP”) and Shoreline Conditional Use Permit (“SCUP”) from Cowlitz County but only for the first of two construction stages. The reason for this application partitioning was not immediately clear; Millennium had long maintained that a smaller terminal would not be economically viable.<sup>5</sup>

In Cowlitz County, as per County rules, the Hearing Examiner held a three-day hearing in Longview, Washington on Millennium’s shoreline application, taking testimony from the County and Millennium, as well as public testimony from supporters and opponents of the coal export terminal. During the hearing, the Hearing Examiner gave Millennium the “opportunity to offer evidence of possible, reasonable mitigation” for its impacts. Shoreline Permit Denial at 3.

The County Planning Department staff testified first and presented a County Staff Report, AR 1464-1542, recommending approval of the

---

<sup>5</sup> Millennium “has determined an economically viable coal export terminal must have a throughput capacity of 40 to 50 million metric tons per year (MMTPY) of coal...” Millennium Bulk Terminals-Longview, Draft NEPA EIS (Sept. 2016) at 3.1, *available at* [http://www.millenniumbulkeiswa.gov/assets/chapter\\_3\\_alternatives.pdf](http://www.millenniumbulkeiswa.gov/assets/chapter_3_alternatives.pdf) (last visited Feb. 25, 2019).

shoreline permits. The County's Staff Report repeatedly ignored the FEIS findings and offered unsupported conclusions that the project would cause no adverse harm. For example, the Staff Report claimed that "construction activities would not have disproportionately high and adverse effects on minority and low-income populations." County Staff Report at 55. Such conclusion was flatly at odds with the findings of the FEIS, which explicitly stated at S-41, "the Proposed Action would have a disproportionately high and adverse effect on minority and low-income populations." The County Staff Report observed that "the Project is not expected to interfere with water dependent uses in this area of the river," yet the FEIS documented significant, unmitigatable adverse impacts from increased shipping accidents and interference with Tribal fishing. FEIS at S-42-43. Similarly, the Staff Report made the extraordinary claim that the "adverse environmental impacts of the proposed redevelopment are met or exceeded by the benefits provided through mitigation." County Staff Report at 20; *id.* at 32 ("operations will therefore have no significant adverse effect on the quality of life of county residents."). But the FEIS said exactly the opposite and found extensive harm to the environment and human health that could not be mitigated.

Expert and fact witnesses testified for Millennium, several hundred individuals presented public testimony for and against the project, and

attorneys for the parties gave closing oral arguments. The Hearing Examiner and the parties questioned the role of the FEIS and its findings and conclusions several times at the hearing, with counsel for Millennium asserting “[t]he EIS is not on trial...there has been no appeal to the accuracy of the environmental impact statement itself...” AR 1443-49, Transcript of Proceedings at 64-65; AR 1565-1622, Millennium Shoreline Hearing Pre-Hearing Memo at 11 (“The FEIS was not appealed and such appeals are now barred. The EIS adequacy is not an issue before the Examiner.”).

On November 14, 2017, the Hearing Examiner issued a lengthy and detailed decision denying Millennium’s shoreline application. Relying on the FEIS and the additional testimony and evidence presented by Millennium, the Hearing Examiner denied the shoreline permit application under the SMA and substantive SEPA authority.

E. The Shorelines Hearings Board Upheld the Permit Denial Based on Substantive SEPA Standards.

Millennium appealed the Hearing Examiner’s decision to the Shorelines Hearings Board, as did Cowlitz County; the Board consolidated the appeals. The Washington Department of Ecology entered the case to defend the Hearing Examiner’s decision; BNSF Railway intervened as a plaintiff; and Washington Environmental Council, Climate Solutions,

Columbia Riverkeeper, Friends of the Columbia Gorge, and Sierra Club intervened as defendants.

On appeal, Millennium's staged strategy became clear. Millennium's argument centered on its request for a Stage 1 permit only, and the Hearing Examiner's alleged error in using the FEIS – a comprehensive document that cost millions of dollars and thousands of hours to produce – because it covered (as required) the entire proposed project. It was unfair, Millennium argued, for a Stage 1 application to be judged by a project's full impacts. Instead, Millennium felt that the Hearing Examiner should have essentially redone the environmental analysis for the piecemealed permit application.

The Board did not play Millennium's game. On cross-motions for summary judgment, the Board ruled in favor of Ecology and WEC on three issues, holding that the FEIS's determination of impacts, harms, and significance could not be challenged in these proceedings (SHB Issue 8); the Hearing Examiner's consideration of the project as a whole, as opposed to Stage 1 construction only, was not clearly erroneous (SHB Issue 3); and the Hearing Examiner's use of the substantive SEPA standard to deny project permits was not clearly erroneous (SHB Issues 2 and 9). AR 2058-92, SHB Order. The Board did not reach the remaining issues.

Millennium, BNSF, and Cowlitz County appealed the Board's decision; this Court granted motions for discretionary review on October 12, 2018.

## II. WASHINGTON'S STATE ENVIRONMENTAL POLICY ACT

SEPA is Washington's core environmental policy and review statute and broadly serves two purposes: first, to ensure that government decision-makers are fully apprised of the environmental consequences of their actions and, second, to encourage public participation in the consideration of environmental impacts. *Norway Hill Preservation and Prot. Ass'n v. King Cnty Council*, 87 Wn.2d 267, 279, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001); WAC 197-11-030(f). In adopting SEPA, the Legislature declared the protection of the environment to be a fundamental state priority. RCW 43.21C.010. SEPA states that "[t]he legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." RCW 43.21C.020(3). This policy statement "indicates the basic importance of environmental concerns to the people of the state." *Leschi v. Highway Comm'n*, 84 Wn.2d 271, 279-80, 804 P.2d 1 (1974).

A detailed EIS is required on “proposals for ... major actions having a probable significant, adverse environmental impact.” RCW 43.21C.031(1); WAC 197-11-330. The Washington Supreme Court has emphasized that adverse environmental impacts need not be inevitable to require an EIS; rather, “an EIS should be prepared when significant adverse impacts on the environment are ‘probable.’” *King Cty. v. Wash. State Review Bd. for King Cty.*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993) (citing RCW 43.21C.031).

Indeed, the purpose of SEPA is not to generate the information for its own sake. Rather, the purpose of SEPA is to inform an underlying substantive decision; that is, whether or not to grant the underlying permit or authorization to take action that potentially affects the environment. WAC 197-44-400. “The primary function of an EIS is to identify adverse impacts to enable the decision-maker to ascertain whether they require either mitigation or denial of the proposal.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990). Accordingly, the information developed under SEPA on direct, indirect, and cumulative impacts of a proposal must inform the ultimate permitting decision.

In addition to its procedural elements, SEPA contains substantive authority. The Washington Legislature gave state and local decision-makers the affirmative authority to condition or deny projects where

environmental impacts are serious, cannot be mitigated, or collide with local rules or policies. This authority, like all government authority, is not boundless: the denial of a project must be made on the basis of policies adopted by the relevant government body in light of significant adverse impacts that cannot be reasonably mitigated.

On this point, SEPA is explicit. It provides *additional* substantive authority for government agencies to condition or even deny proposed actions—even where they meet all other requirements of the law—based on their environmental impacts. RCW 43.21C.060. As one treatise pointed out, when this premise was challenged by project proponents early in SEPA’s history, “the courts consistently and emphatically responded that even if the action previously had been ministerial, it became *environmentally discretionary* with the enactment of SEPA.” Richard Settle, *SEPA: A Legal and Policy Analysis* (Dec. 2014) at §18.01[2] (emphasis added).

SEPA’s applicable text is clear:

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, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, that such conditions or denials shall be based 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, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. ... In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.

RCW 43.21C.060 (emphasis added); *see also* WAC 197-11-030(1) (“The policies and goals set forth in SEPA are supplementary to existing agency authority.”). This authority is amplified in Ecology’s SEPA regulations, which lay out additional procedures and requirements for conditioning or denial pursuant to SEPA’s substantive authority. WAC 197-11-660. For example, in order to deny a proposal under SEPA, an agency must find that “reasonable mitigation measures are insufficient to mitigate the identified impact.” WAC 197-11-660(f)(ii).

Courts have repeatedly recognized that this denial authority exists, even where projects otherwise comply with all relevant applicable codes. The Washington Supreme Court explicitly affirmed that “under the State Environmental Policy Act of 1971 a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance.” *W. Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). An appellate court similarly affirmed

that “counties therefore have authority under SEPA to condition or deny a land use action based on adverse environmental impacts even where the proposal complies with local zoning and building codes.” *Donwood v. Spokane Cty.*, 90 Wn. App. 389, 398, 957 P.2d 775 (1998). Decision-makers have denied permits under this authority in a number of contexts.<sup>6</sup>

In sum, SEPA authorized the Cowlitz County Hearing Examiner, as the final decision maker for Cowlitz County at that time, to deny applications for shoreline permits based on the findings of non-mitigable significant adverse impacts in the FEIS. RCW 43.21C.060.

### III. WASHINGTON’S SHORELINE MANAGEMENT ACT

The Washington Legislature enacted the SMA to protect Washington’s fragile shorelines from the mounting pressure of development and to ensure coordination in their management. *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). The

---

<sup>6</sup> *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69-70, 578 P.2d 1309 (1978) (upholding denial of high-rise project based on aesthetic, property values, and noise impacts); *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. at 602 (upholding denial of 16-floor tower and mitigation to 8-floors); *State v. Lake Lawrence Pub. Lands Prot. Ass’n*, 92 Wn.2d 656, 659, 601 P.2d 494 (1979) (upholding denial of development of 14-acre parcel because of effects on bald eagles); *Cook v. Clallam Cty.*, 27 Wn. App. 410, 414, 618 P.2d 1030 (1980) (upholding permit denial of commercial development in rural area); *W. Main Assocs.*, 49 Wn. App. at 521-23 (upholding denial of permits based on historic/cultural impacts, view impacts, shadow impacts, traffic impacts, and air impacts).

Legislature found that Washington’s shorelines are among the state’s most valuable and fragile natural resources, noting that “there is great concern throughout the state relating to their utilization, protection, restoration, and preservation.” RCW 90.58.020. Courts interpret the SMA broadly to protect the state’s shorelines as fully as possible. *Buechel*, 125 Wn.2d at 203. “All development on the shorelines of this state...must conform to the [Shoreline Act].” *Id.*

The SMA assigns priority protections for shorelands and shorelines, making protection of statewide interest (as opposed to local interest) of paramount importance. The law also assigns preference for protection of the natural character of shorelines, long-term over short-term benefit, and the protection of shoreline resources and ecology. RCW 90.58.020(1)-(4). Uses are preferred that are consistent with control of pollution and prevention of damage to the natural environment, or where the use is dependent upon use of the shoreline. RCW 90.58.020. In limited instances where alteration is allowed, it should, for industrial uses of the shoreline, be where the development is “particularly dependent on location on or use of the shoreline.” *Id.*

Local governments may grant permits to build on a shoreline of statewide significance *only* if the proposal meets both SMA requirements and applicable local requirements. RCW 90.58.140(1). Developments

that require a SSDP, RCW 90.58.140(1) and (2) and WAC 173-27-150, must be evaluated for consistency with: “(a) the policies and procedures of the [shorelines] act; (b) the provisions of this regulation [i.e., WAC 173-27-150]; and (c) the applicable master program adopted or approved for the area...” WAC 173-27-150(1); *see also* CCC 19.20.020.<sup>7</sup> Local governments may allow deviations from some County Program requirements through conditional use permits. RCW 90.58.140(10); WAC 173-27-040(b). Conditional use permits are only allowed, however, under extraordinary circumstances and if the public suffers no substantial detrimental effect. RCW 90.58.100(5).

#### ARGUMENT

For years, Millennium has pursued permits necessary to build a coal export terminal capable of handling up to 44 million metric tons per year. Stage 1 and Stage 2 are simply two development phases of a single coal export terminal project. Millennium itself describes the fully built-out coal terminal as one project, Millennium Pre-Hearing Memorandum at 4; Millennium sought a federal permit from the Army Corps and a § 401 water quality certification from the Washington Department of Ecology for a full 44 million metric ton per year terminal, 2016 JARPA at 7; and

---

<sup>7</sup> Cowlitz County implements the SMA through its Shorelines Management Master Program for Cowlitz County (1977), AR 831-61.

the FEIS reviewed the project's impacts at full build-out, FEIS at S-8.

Treating the project as two independent actions now would undermine the very foundations of full and transparent SEPA review.

Millennium and BNSF challenge the Board's decision upholding the Hearing Examiner's denial of shoreline permits for claimed procedural errors, Millennium Br. at 25-32; BNSF Br. at 6-7; for failing to piecemeal consideration of project impacts, Millennium Br. at 32-49; BNSF Br. at 8-18); and for holding that the unchallenged FEIS could not be collaterally attacked through this proceeding, Millennium Br. at 50.<sup>8</sup> None of these arguments are correct or persuasive. No matter how many different ways Petitioners phrase their claims, the Board correctly denied Millennium's attempt at improper project segmentation, and properly upheld the Hearing Examiner's permit denial under SEPA. This Court should affirm.

I. STANDARD OF REVIEW AND RECORD FOR REVIEW CLAIMS

WEC incorporates by reference the arguments presented by Respondent Ecology on the Standard and Scope of Review (Argument, Section A) and the Record for Review (Argument, Section C).

---

<sup>8</sup> Cowlitz County simply adopts Millennium's presentation in total.

II. THE BOARD CORRECTLY DETERMINED THAT  
PIECEMEAL REVIEW OF MILLENNIUM’S PROJECT WAS  
IMPROPER AND INVALID.

Millennium’s primary argument raises several issues that are all different ways of making the same point. Millennium contends that the Board erred by upholding the Hearing Examiner’s decision that used the impacts and analysis in the FEIS even though Millennium limited its shoreline permit application to Stage 1 only. *See* Millennium Br. at 32-44; BNSF Br. at 8-15. This argument – that the Hearing Examiner was required to ignore the full impacts of the proposed coal terminal and disregard the findings of significant and unmitigable harm found by the FEIS simply because Millennium chose to present its permit request in two successive stages – violates both SEPA and the SMA as improper piecemealing of a single project and should be rejected. Millennium cannot take a single project and divide it into segments for the purposes of SEPA and SMA authorization.

A. Single Project Piecemealing Is Invalid Under The SMA  
And SEPA.

In order to protect the “most valuable and fragile” of Washington’s natural resources, the Washington Legislature enacted the SMA to prevent “the inherent harm in an uncoordinated and piecemeal development” of the state’s shorelines. RCW 90.58.020. Any project significantly affecting the environment and shorelines of the state must be reviewed

comprehensively to ensure that all environmental aspects of the project are fully considered. *Merkel v. Port of Brownsville*, 8 Wn. App. at 847. For decades, the courts and the Board have held that project proponents may not segment or piecemeal their proposals and seek permits for each segment as if they were independent projects:

There is nothing in the record before us to indicate that the contemplated construction has ever been anything but one project. The question, therefore, is whether the Port may take a single project and divide it into segments for the purposes of SEPA and SMA approval. The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compel us to answer in the negative.

*Merkel*, 8 Wn. App. at 850-51; *Jarvis v. Kitsap County*, Order on Partial Summary Judgment at 10, SHB No. 08-001 (April 8, 2008) (“Phased review is also not allowed where it would segment and avoid present consideration of proposals and the impacts that are required to be evaluated in a single environmental document.”).

A proposal is illegally piecemealed into smaller segments when the segments are “interrelated and interdependent” upon one another. *See Merkel*, 8 Wn. App. at 847; *Donovan v. Sperry Ocean Dock*, Findings of Fact, Conclusions of Law, and Order at 34, SHB Nos. 10-024 through 10-042 (July 13, 2011). If a single project like the Millennium coal export terminal could be permitted in successive stages, the full environmental impacts of the entire project would never be disclosed or considered.

Similarly, if the approval of one portion of a project will steamroll a favorable decision on a later portion of the project, that is further reason for disallowing a piecemeal approach under SMA. *Merkel*, 8 Wn. App. at 851; *Donovan v. Sperry Ocean Dock*, Findings of Fact at 34.

SEPA also forbids project segmentation, as one of SEPA's primary purposes is "to promote efforts which will prevent or eliminate damage to the environment and biosphere," an inspiring goal that can only be achieved through full review. RCW 43.21C.010. SEPA regulations command 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). Proposals are closely related if they are interdependent parts of a large proposal and depend on the larger proposal as their justification or for their implementation. WAC 197-11-060(3)(b)(ii). This Court must judge whether a project is being segmented to avoid full review. *See Iddings v. Griffith*, 2009 WL 905449 \*27, SHB No. 08-031 (June 22, 2009) ("Under the SMA, the Board focuses on whether the project has been segmented to avoid shoreline review and whether the approval of one aspect of the proposal will coerce an approval of a later stage of the development.").<sup>9</sup>

---

<sup>9</sup> In fact, because the FEIS already evaluated the cumulative effects and consequences of the final project, a piecemeal approach is inappropriate.

B. The Undisputed Evidence in the Record Demonstrated that Millennium Was One Project, Not Two Independent Stages.

The record demonstrates that Millennium has consistently presented its proposed coal export terminal as a single project, to be developed in two construction stages. The 2016 JARPA describes the purpose and the objectives of the single “proposal” as being “to (1) make use of existing rail infrastructure (freight corridors) and an efficient, direct shipping route to Asia; and (2) reuse and redevelop an existing industrial terminal into an American Pacific Coast export terminal in Cowlitz County capable of exporting up to 44 mmt [million metric tons per year] of coal to meet international demand.” 2016 JARPA at 9. The FEIS reviewed the entire project and the impacts that it would cause at full build-out. FEIS at S-4 to S-11. Millennium’s project as a whole, not its two construction stages, triggered SEPA and SMA obligations. The pertinent statutes and regulations use the terms “proposal,” RCW 43.21C.060, “development,” RCW 90.58.140, and “action,” WAC 197-

---

*Cf. Cathcart v. Snohomish Co.*, 96 Wn.2d 201, 634 P.2d 853 (1981) (holding piecemeal EIS review permissible only if consequences of ultimate development cannot be initially assessed); *Sterling v. City of Montesano*, Order of Dismissal at 12, SHB No. 06-010 (April 20, 2007) (“piecemeal environmental review is permissible only in circumstances where the first phase of a project is independent of the second, and if the consequences of the ultimate development cannot be initially assessed”).

11-704(2)(a). Individual construction steps, divided out for no good reason, do not fall under these definitions.

It is also clear that Stage 1 and Stage 2 of the project are dependent on each other. Stage 1 builds the basics of a coal export terminal—a rail bed with arrival and departure tracks and eight rail storage tracks, two coal stockpile pads and associated facilities for those pads, two shipping docks with conveyors and other equipment for coal ship loading, and upland facilities including roadways, service buildings, water management facilities, utility infrastructure, and other ancillary facilities. 2016 JARPA at 8. This construction would get the coal terminal up and running with a maximum capacity of 25 million metric tons per year. Stage 2 expands the coal export terminal by adding a shiploader and constructing two more coal stockpile pads with associated coal handling equipment. *Id.* The Stage 2 additions increase the throughput capacity of the terminal, but in no way represent a separate project. Stages 1 and 2 would be permitted under a single authorization from the Army Corps, as the new docks (Docks 2 and 3) and dredging for access, berthing, and turning is necessary for both construction stages. *Id.* at 7.<sup>10</sup>

---

<sup>10</sup> The County Staff Report also analyzed aspects of the coal port at full build-out. *See, e.g.*, Staff Report at 22, 30 (full build out vessel traffic impacts); at 17 (full build out noise impacts); at 46 (economic benefits).

Moreover, Millennium and the County continued to rely on the economic benefits of the project at full build-out—that is, upon construction of both Stages 1 and 2. Millennium Pre-Hearing Memorandum at 17 (touting 30-year present value of tax revenues and predicting commencement of operations in 2015 with “gradual ramp up” to full 44 million metric tons per year in 2018, only three years later); AR 1660-64, Economic and Fiscal Impacts of Millennium Bulk Terminals Longview at v; County Staff Report at 28, 32, 46.<sup>11</sup> Millennium obtained a Critical Areas Permit from Cowlitz County for 44 million metric tons per year, not simply Stage 1. Millennium Br. at 2; *see also* Conceptual Mitigation Plan (May 25, 2017) at 48-49 (purpose of project is to build 44 million metric ton per year terminal; as the “required through put” is 44 million metric tons per year, no alternatives with fewer wetlands impacts

---

<sup>11</sup> Millennium and its parent company Lighthouse Resources are concurrently prosecuting a federal case that raises constitutional claims against Ecology’s separate denial of a water quality certificate for the project. *See Lighthouse Resources v. Inslee*, No. 18-05005-RJB (W.D. Wash.). Expert reports submitted in that litigation by Millennium, Lighthouse, and BNSF all use full terminal build-out of 44 million metric tons per year as the standard for judging economic impacts. *See, e.g.*, Dkt. 191-1, Responsive Expert Report of Dr. William Huneke (Nov. 26, 2018) at ¶ 50 (calculating expected revenue to BNSF at full coal terminal operation); Dkt. 188-3, Expert Report of Dr. Mark A. Berkman (Nov. 26, 2018) at ¶ 25 (calculating economic consequences if terminal not built, using full build-out scenarios).

fit requirement).<sup>12</sup> In short, Millennium’s coal export terminal is one project; the Hearing Examiner correctly reviewed the significant, unavoidable harms and benefits from the project at full build-out in his permitting decision; and the Board correctly upheld that decision on summary judgment.

C. The Board Did Not Err in Upholding the Hearing Examiner’s Refusal to Piecemeal Consideration of Millennium’s Single Coal Export Terminal.

While Millennium asserts (at 32) that it is “self-evident” that the Hearing Examiner had to review the application submitted on Stage 1 only, it is equally (if not more) self-evident that Millennium cannot game the system to piecemeal approval of its project. *See* SHB Order at 22-23.

Millennium’s view of SEPA would mean that a full and comprehensive FEIS could be essentially meaningless if a project proponent simply sought permits for the project in successive stages. *Guon v. City of Vancouver*, 1994 WL 905449, SHB No. 93-53 (March 31, 1994), does not support such a concept. In *Guon*, the Board upheld permitting for one project where there was an overarching master plan for shoreline development. The facts here do not involve a master plan with separate independent projects; the proposed project is a single coal export

---

<sup>12</sup> AR 65, listing Millennium Hearing Examiner Exh. C-10, *available at* <http://www.co.cowlitz.wa.us/DocumentCenter/View/13342>.

terminal. Instead, as in *Bhatia v. Washington Dep't of Ecology*, Findings of Fact, Conclusions of Law, and Order at 34, SHB No. 95-034 (Jan. 9, 1996), the Board found that a project that involved a various stages for contiguous lots should have been reviewed through a single SMA permit, vacating the permit “because of the violation of the SMA’s strong proscription against piecemeal development.”

Similarly, in *Bellevue Farm Owners Ass’n v. Washington*, 100 Wn. App. 341, 997 P.2d 380 (2000), the appellate court held that a SEPA determination of non-significance did not divest the Board of the authority to review and deny a project under environmental considerations in the county Shorelines Master Program. The appellate court reiterated that a local government may condition or deny a proposal based on adverse environmental impacts under SEPA even if the project complies with local zoning and building codes, while holding that SEPA supplemental authority did not eclipse the SMA. *Id.* at 354-55.

Additionally, approval of Stage 1 without consideration of the impacts caused by Stage 2 would increase the likelihood of coercing a favorable decision on permits required to implement Stage 2. Stage 1 constructs a large coal export terminal, and Stage 2 increases the amount of coal that same terminal can handle. Accordingly, approval of Stage 1 as an independent and separate project would necessarily streamroll

approval of Stage 2, as the second stage would add to existing harms but be seen as merely an extension of an existing project. *Merkel*, 8 Wn. App. at 851; *Donovan v. Sperry Ocean Dock*, Findings of Fact at 34. This is precisely the piecemeal approach banned by the SMA and SEPA.<sup>13</sup>

Finally, there is nothing uncertain about the final project here. Millennium seeks to limit consideration of an already finalized, unchallenged, and comprehensive FEIS. Allowing such an interpretation would flip the purpose of an EIS on its head. In most situations, a project proponent seeks to limit the evaluation of scope of SEPA review at the beginning of the process. *See, e.g., Merkel*, 8 Wn. App. at 847; *Bhatia*, Findings of Fact at 37. This case is different from situations where courts reject piecemealing claims because impacts of an entire project are unknown or vague. Here, the FEIS is already completed on the project proposed by Millennium as a whole. To argue now, as Millennium does, that it is “entitled to a review of the permit application it submitted,” Millennium Br. at 32, turns the SEPA review process into a game, where

---

<sup>13</sup> BNSF’s challenge to the Hearing Examiner’s mitigation findings presents the same piecemealing argument in different clothes. BNSF Br. at 12-15. The FEIS considered mitigation for project impacts as a whole, and neither the Board nor the Hearing Examiner erred by failing to essentially re-do the mitigation requirements “where the project has been segmented to avoid shoreline review.” *Iddings v. Griffith*, 2009 WL 1817902 at \*27.

Millennium gets to duck consideration of all the impacts it would cause by breaking the project in smaller sections for permitting.

Such an interpretation would render SEPA and its accompanying EISs a nullity: an agency or municipality could conduct an adequate EIS that accords due weight to the full effects of a single project, but at the stage where such information would be used—to grant or deny a permit—the Hearing Examiner would be barred from relying upon it. Not only is such an approach counterfactual to the situations in which piecemeal approaches to the SMA are allowed (where a future project has uncertainty and environmental assessments are dubious), but it also disregards the entire purpose of conducting comprehensive environmental reviews. The purpose of SEPA is not to generate the information for its own sake. Rather, the purpose of SEPA is to inform an underlying substantive decision; e.g., whether or not to grant the underlying permit or authorization to take action that potentially affects the environment. WAC 197-44-400. “The primary function of an EIS is to identify adverse impacts to enable the decision-maker to ascertain whether they require either mitigation or denial of the proposal.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990). Millennium’s arguments cut the heart out of SEPA review and should be rejected.

III. THE HEARING EXAMINER DID NOT ABUSE HIS AUTHORITY IN DENYING MILLENNIUM'S PERMIT APPLICATIONS.

Millennium does not dispute that SEPA granted the Cowlitz County Hearing Examiner discretion to deny a project under SEPA's substantive authority, even where the project might otherwise comply with all relevant applicable codes. *See, e.g., Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978). In order to invoke its substantive SEPA denial authority, a decision maker must (1) make a record that identifies the SEPA policy or policies upon which the decision is based;<sup>14</sup> (2) conclude, based on an EIS, that there are significant environmental impacts which cannot be adequately mitigated; and (3) explain its reasoning. *Maranatha Min., Inc. v. Pierce Cty.*, 59 Wn. App. 795, 803, 801 P.2d 985 (1990); *see also Cougar Mt. Assocs. v. King Cty.*, 111 Wn.2d 742, 753, 765 P.2d 264 (1988); *Nagatani Bros. v. Skagit Cty. Bd. of Comm'rs*, 108 Wn.2d 477, 482, 739 P.2d 696 (1987).

Here, the Hearing Examiner's lengthy opinion, following three days of expert witnesses, fact witnesses, and public testimony, complied with all requirements to issue a substantive SEPA denial and was based on

---

<sup>14</sup> The Cowlitz County Board of Commissioners amended portions of the County Code in February 2018 and deleted many of the County's SEPA policies. SHB Order at 13, n.1.

uncontroverted law and undisputed facts: (1) Cowlitz County had SEPA policies incorporated into its code to protect the environment and public health, Shoreline Permit Denial at 52-53, 56; (2) the FEIS found that the project would result in nine significant, adverse impacts and those findings were undisputed, *id.* at 14-33; and (3) the FEIS acknowledged that reasonable measures could not mitigate those impacts and no additional possible, reasonable mitigation measures were proposed by Millennium during the hearing, *id.* at 49-51. The Court should affirm the Board's order upholding the substantive SEPA denial. SHB Order at 23-29.<sup>15</sup>

Millennium first suggests that the Hearing Examiner dismissed Millennium's mitigation evidence, citing to a portion of the Hearing Examiner decision which characterizes Millennium's testimony as "largely irrelevant." Millennium Br. at 37. Millennium's argument does not stand up to scrutiny. The Hearing Examiner did not ignore Millennium's mitigation testimony because Millennium's experts barely offered any, focusing instead on critiquing the FEIS. *See* Shoreline Permit Denial at 13 (listing Millennium witnesses); *id.* at 16, 20, 22, 24, 28, 32, 41, 43, 50 (referencing Millennium witnesses or statements pertaining to

---

<sup>15</sup> The Board reviewed the Hearing Examiner's exercise of SEPA substantive authority under the clearly erroneous standard, SHB Order at 29, but even with *de novo* review as a matter of law, the Hearing Examiner's decision easily passes muster.

mitigation). It was the evidence challenging the FEIS that the Hearing Examiner refused to follow, and that was not an error. *Id.* at 49-52.

The Hearing Examiner understood that substantive SEPA denial was discretionary. Shoreline Permit Denial at 51 (“Cowlitz County recognizes its right to condition or deny permits....”). The Hearing Examiner ultimately found that the shoreline permits “must be denied,” not because there was no choice, but because the evidence of Millennium’s significant and unavoidable harms was so compelling. *Id.* at 56 (“The Project, as conditioned, fails to reasonably mitigate the ten unavoidable, significant adverse environmental impacts identified in the FEIS. As a result of the Project’s failure to mitigate the unavoidable, significant adverse environmental impact identified in the FEIS, the Project has not satisfied the environmental standards found in CCC 19.11.110(b)(1), or in CCC 19.11.110(b)(2).”).<sup>16</sup> The Hearing Examiner did not conclude that SEPA imposed a mandatory duty to deny; he

---

<sup>16</sup> BNSF claims that the Hearing Examiner erred by including greenhouse gas emissions as the tenth significant and unavoidable impact caused by the project because the FEIS found mitigation possible for greenhouse gas impacts. BNSF Br. at 11. As Millennium explicitly renounced any intention to commit to the proposed greenhouse gas mitigation, the Hearing Examiner’s inclusion of this tenth impact was entirely correct and demonstrates his understanding of his role in issuing a substantive SEPA denial. *See* Shoreline Permit Denial at 50-51 (“The County proposed no Greenhouse Gas mitigation, while the Applicant proposes less than 1% of that required under the FEIS.”).

reviewed the evidence and exercised the discretion delegated to him by the County at that time.

Millennium's citation (at 42) to *Nagatani Brothers* shows how far the company is willing to stretch the case law in an attempt to sway this Court. *See also* BNSF Br. at 18. Millennium claims that "specific, proven significant environmental impacts" are missing here, even though the Washington Supreme Court in *Nagatani Brothers* explicitly stated that "[t]o deny an application on environmental grounds the significant adverse impacts are to be identified in a final or supplemental EIS." 108 Wn.2d at 482 (emphasis added). In that case, the final EIS failed to identify any adverse impacts; here, the "specific, proven significant environmental impacts" in the FEIS are nine significant adverse impacts that could not be mitigated, and additional adverse impacts where mitigation was possible.<sup>17</sup>

IV. THE BOARD DID NOT ERR IN HOLDING THAT THE UNCHALLENGED FEIS COULD NOT BE COLLATERALLY ATTACKED.

As neither Millennium nor BNSF challenged the adequacy of the FEIS in this case or earlier, the Board concluded that "the FEIS's determination of adverse environmental impacts associated with the Project and their significance cannot be challenged in this proceeding."

---

<sup>17</sup> *But see* note 16 *supra*. Identification of possible mitigation measures does not ensure those measures will actually be taken.

SHB Order at 21. Millennium makes a half-hearted attempt to appeal this ruling, arguing that it did not challenge the adequacy of the FEIS, but instead the Hearing Examiner's reliance on it. Millennium Br. at 50. Nothing in Millennium's argument undercuts the Board's common-sense decision that Millennium could not collaterally attack the adequacy of the FEIS in this appeal where it had not challenged the adequacy of the FEIS at the first opportunity as SEPA requires. The Court should uphold that Board on Issue 8. Millennium chose not to challenge the FEIS. In making that strategic choice, Millennium gave up the ability to question the FEIS's findings on impacts and mitigation. As discussed above, the Board allowed Millennium to challenge how the Hearing Examiner used the FEIS in making the SEPA denial – a challenge that the Board rejected.

#### CONCLUSION

For the reasons discussed above and in Ecology's Response Brief, WEC respectfully asks the Court to deny Millennium's appeal and affirm the Board's ruling on summary judgment upholding the denial of Millennium's shoreline permits under the substantive SEPA standard.

Respectfully submitted this 28th day of February, 2019.

*s/ Kristen L. Boyles*

---

KRISTEN L. BOYLES  
MARISA C. ORDONIA  
JAN E. HASSELMAN

Earthjustice  
705 Second Avenue, Suite 203  
Seattle, WA 98104-1711  
(206) 343-7340 | Phone  
(206) 343-1526 | Fax  
kboyles@earthjustice.org  
mordonia@earthjustice.org  
jhasselman@earthjustice.org

*Attorneys for Respondents Washington  
Environmental Council, Climate  
Solutions, Columbia Riverkeeper,  
Friends of the Columbia Gorge, and  
Sierra Club*

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on February 28, 2019, I caused the foregoing document to be filed electronically with the court and also to be served on the parties below through the Washington State Appellate Courts' eFiling Portal:

Craig S. Trueblood,  
J. Timothy Hobbs  
Gabrielle E. Thompson  
K&L Gates LLP  
925 Fourth Ave., Suite 2900  
Seattle, WA 98104-1158  
craig.trueblood@klgates.com  
tim.hobbs@klgates.com  
gabrielle.thompson@klgates.com

Bart J. Freedman  
Endre M. Szalay  
Francesca M. Eick  
K&L Gates LLP  
925 Fourth Ave., Suite 2900  
Seattle, WA 98104-1158  
jim.lynch@klgates.com  
bart.freedman@klgates.com  
endre.szalay@klgates.com

Jonathan Sitkin  
Chmelik Sitkin & Davis  
1500 Railroad Avenue  
Bellingham WA 98225  
jsitkin@chmelik.com

Lisa Petersen  
Assistant Attorney General  
1125 Washington Street S.E.  
P.O. Box 40100  
Olympia, WA 98504-0100  
LisaP1@ATG.WA.GOV

Thomas Young  
Sonia Wolfman  
Assistant Attorney General  
Ecology Division  
P.O. Box 40117  
Olympia, WA 98504-0117  
TomY@ATG.WA.GOV  
SoniaW@ATG.WA.GOV

Douglas Jensen  
Chief Civil Deputy  
Cowlitz County Prosecuting  
Attorney  
Hall of Justice  
312 SW 1st Avenue  
Kelso, WA 986 26  
jensend@co.cowlitz.wa.us

Dated this 28th day of February, 2019 at Seattle, Washington.

s/ Diana Brechtel  
Diana Brechtel

# EARTHJUSTICE

February 28, 2019 - 2:34 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52215-2  
**Appellate Court Case Title:** Millennium Bulk Terminals-Longview, LLC, et al, Respondents v. Dept.of Ecology, et al, Appellants  
**Superior Court Case Number:** 18-2-00571-1

### The following documents have been uploaded:

- 522152\_Briefs\_20190228142613D2382698\_6383.pdf  
This File Contains:  
Briefs - Respondent Intervenor  
*The Original File Name was Respondent - Intervenor Opposition Brief.pdf*

### A copy of the uploaded files will be sent to:

- ECYOlyEF@atg.wa.gov
- Lisap1@atg.wa.gov
- ankur.tohan@klgates.com
- bart.freedman@klgates.com
- craig.trueblood@klgates.com
- endre.szalay@klgates.com
- ethan.morss@klgates.com
- gabrielle.thompson@klgates.com
- jensend@co.cowlitz.wa.us
- jhasselman@earthjustice.org
- jim.lynch@klgates.com
- joan.hadley@klgates.com
- jsitkin@chmelik.com
- kbarnhill@chmelik.com
- lalseaef@atg.wa.gov
- laura.white@klgates.com
- mary.klemz@klgates.com
- mordonia@earthjustice.org
- mscheibmeir@localaccess.com
- soniaw@atg.wa.gov
- tim.hobbs@klgates.com
- tomy@atg.wa.gov

### Comments:

OPPOSITION BRIEF OF RESPONDENTS WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS, COLUMBIA RIVERKEEPER, FRIENDS OF THE COLUMBIA GORGE, AND SIERRA CLUB

---

Sender Name: Diana Brechtel - Email: dbrechtel@earthjustice.org

**Filing on Behalf of:** Kristen L. Boyles - Email: kboyles@earthjustice.org (Alternate Email: chendrickson@earthjustice.org)

Address:

705 Second Avenue

Suite 203

Seattle, WA, 98104

Phone: (206) 343-7340 EXT 1039

**Note: The Filing Id is 20190228142613D2382698**