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

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, et al.

Petitioners,

v.

STATE OF WASHINGTON SHORELINES HEARINGS BOARD, et al.,

Respondents.

**OPENING BRIEF OF PETITIONER MILLENNIUM
BULK TERMINALS-LONGVIEW, LLC**

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I. INTRODUCTION

This case is about Petitioner Millennium Bulk Terminals-Longview, LLC's ("MBT-Longview") plans to construct a coal export terminal on the Columbia River in Longview, Washington (the "Project"). MBT-Longview applied to Cowlitz County (the "County") for two permits it needed to begin construction. The County issued a staff report (the "Staff Report") recommending approval of the permits. After a three-day hearing, however, a hearing examiner (the "Hearing Examiner") denied the permits after committing several legal errors that derailed his analysis. MBT-Longview appealed to the Shorelines Hearings Board ("SHB" or "Board"), which affirmed the denial and compounded the legal errors committed by the Hearing Examiner. The Court should reverse the Board's decision and remand this case for further proceedings so that MBT-Longview's permit applications can be considered within the proper legal framework.

From the outset, MBT-Longview planned to develop the Project in two separate stages. Stage 1 would be completed first, and would have the capacity to transload 25 million metric tons per year ("MMTPY") of coal delivered by rail onto vessels destined for markets abroad. After completing and operating Stage 1, MBT-Longview planned to consider whether to construct Stage 2, which would expand the Project's capacity to transload up to 44 MMTPY of coal.

Pursuant to the Shoreline Management Act ("SMA") and the Cowlitz County Shoreline Master Plan ("SMP"), MBT-Longview applied

for a Shoreline Substantial Development Permit and a Conditional Use Permit (the “shoreline permits”) necessary for Stage 1 improvements. The County Planning Staff (“County Staff”) considered MBT-Longview’s application for Stage 1 permits in light of the Environmental Impact Statement (“EIS”), public comments, the SMA, and the SMP and recommended approval of the shoreline permits subject to conditions. County Staff then forwarded MBT-Longview’s application to the Hearing Examiner for review.

To avoid concerns about “piecemealing” the Project to avoid full review of the Project’s total potential impacts, MBT-Longview submitted the entirety of the Project for environmental review. The County and the Department of Ecology (“Ecology”) prepared an EIS that assessed impacts and possible mitigation measures for the Project at full build-out (44 MMTPY). The EIS acknowledged that the Project would be developed in two stages but did not separately examine the impacts and mitigation for Stage 1 (25 MMTPY) alone. The EIS concluded that a 44 MMTPY coal export terminal could result in significant adverse impacts to several environmental resource areas, but that those impacts could be mitigated if measures described in the EIS were implemented.

After the EIS was issued but prior to the Hearing Examiner’s review, the County issued MBT-Longview a Critical Areas Permit after determining that the Project’s impacts (at 44 MMTPY) to wetlands, fish, and wildlife habitat and frequently flooded areas would be adequately mitigated. Ecology, however, denied a Clean Water Act Section 401

(“CWA 401”) water quality certification for a 44 MMTPY facility.

Ecology concluded, based on the EIS and Ecology’s State Environmental Policy Act (“SEPA”) policies that the trains and vessels needed to serve a 44 MMTPY facility would have unavoidable, significant adverse impacts.¹

MBT-Longview had asked for the CWA 401 certification for a 44 MMTPY facility, rather than merely for the 25 MMTPY Stage 1 facility.

The Hearing Examiner held a public hearing on MBT-Longview’s application. The distinction between Stages 1 and 2 was a focal point of the hearing. MBT-Longview submitted evidence and testimony explaining the distinction between Stage 1 and Stage 2, the less significant impacts of Stage 1 when compared with Stage 2, and the reasonable mitigation measures for impacts associated with Stage 1. MBT-Longview also explained at the hearing why this information could not be gleaned solely from the EIS, why Ecology’s prior decision on the CWA 401 certification was not applicable to the proposal before the Hearing Examiner, and how Stage 1 of the Project was consistent with the SMA and SMP. Ecology did not participate in the hearing.

Following the hearing, the Hearing Examiner denied MBT-Longview’s application for Stage 1 shoreline permits under SEPA. The Hearing Examiner concluded that he must deny the permits under SEPA because Ecology had denied the CWA 401 certification for a 44 MMTPY

¹ Ecology’s CWA 401 decision is also under review. *See Millennium Bulk Terminals-Longview, LLC v. Wash. State Dep’t of Ecology*, Case No. 18-2-00994-08 (Cowlitz Co. Sup. Ct.).

facility, the EIS concluded that a 44 MMTPY facility would have unavoidable, significant adverse impacts, and MBT-Longview had not offered mitigation measures above and beyond those described in the EIS for a 44 MMTPY facility. The Hearing Examiner declined to consider evidence about the impacts and mitigation specific to Stage 1, finding such evidence “largely irrelevant,” and instead based his decision on Ecology’s and the EIS’s assessment of impacts and mitigation for a 44 MMTPY facility, when the only proposal before him was a 25 MMTPY facility.

The Hearing Examiner also concluded that, because of the unavoidable, significant adverse impacts identified in the EIS and Ecology’s CWA 401 decision for a 44 MMTPY facility, MBT-Longview failed to prove that all requirements of the SMA and SMP had been satisfied. Finally, the Hearing Examiner concluded that a number of unresolved issues prevented MBT-Longview from establishing compliance with the SMA and SMP.

The Hearing Examiner’s rulings were clearly erroneous, and MBT-Longview petitioned the Board for review. The County also petitioned the Board for review. The Board granted intervention to Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club, and Columbia Riverkeeper (collectively, “WEC”), Ecology, and BNSF Railway Company (“BNSF”). Under the SMA, the Board is supposed to decide appeals of local government decisions on shoreline permits de novo. WAC 461-08-500(1). The Board scheduled a

two-week hearing of the case, but then resolved the appeal on summary judgment before conducting the hearing.

MBT-Longview now appeals the Board's Order on Motions, SHB No. 17-017c (Apr. 20, 2018) ("Order"), in which the Board granted summary judgment affirming the Hearing Examiner's denial of MBT-Longview's application for shoreline permits to construct Stage 1 of the Project. The Board concluded that the Hearing Examiner: (1) did not exclude MBT-Longview's evidence about Stage 1 impacts and mitigation, (2) did not err in considering the impacts of a 44 MMTPY facility when evaluating applications for a 25 MMTPY facility, and (3) did not err in denying the permits under SEPA. The Board also concluded that there were no issues of fact precluding summary judgment.

The Board's Order, like the Hearing Examiner's Decision, is fraught with procedural and substantive legal errors that require reversal and remand. First, the Board violated its own rules and precedent in concluding that its scope of review was limited to the record before the Hearing Examiner. The Board then compounded that error by inexplicably deciding the appeal without obtaining a copy of the very record it found should govern its review. The Board instead relied on snippets of that record the parties had filed with their summary judgment briefs. Even worse, having determined that its review was limited to the record before the Hearing Examiner, the Board considered new evidence outside the record submitted by Ecology with its summary judgment briefing.

Next, the Board erred in concluding that the Hearing Examiner properly considered impacts and mitigation related to a much larger Stage 2 facility—which was not before him—in evaluating and denying permits for MBT-Longview’s smaller Stage 1 facility. The Board also misconstrued the Hearing Examiner’s rulings and wrongly concluded that the Hearing Examiner took due account of the evidence about impacts and mitigation specific to a Stage 1 facility. In reality, the Hearing Examiner had concluded he was legally barred from considering that evidence and thus found it “largely irrelevant.”

The Board also committed several legal errors in its SEPA analysis. The record demonstrates that the Hearing Examiner’s findings and conclusions fell far short of the exacting requirements necessary to deny permits under SEPA. The Board also erred in granting summary judgment on that same issue because genuine issues of material fact existed. The Board (and the Hearing Examiner) simply chose to ignore the facts, including, for example, that during Stage 1, only five trains per day and 40 vessels per month would serve the facility, whereas during Stage 2, up to eight trains per day and up to 70 vessels per month would serve the facility. Assuming that the impacts of a 25 MMTPY terminal would be the same as a 44 MMTPY terminal was patently arbitrary. These multiple legal errors require reversal and remand.

II. ASSIGNMENTS OF ERROR

1. The Board erred as a matter of law in concluding that its scope

of review was limited to the record created by the Hearing Examiner. AR² 2073–74 (Order).

2. The Board erred in failing to apply its chosen scope of review by deciding the motions for summary judgment without a copy of the record created by the Hearing Examiner. AR 2059–62 (Order).

3. In ruling on summary judgment, the Board erred in considering and relying upon evidence and argument presented by Ecology for the first time with its reply brief, including new evidence that was not before the Hearing Examiner. AR 2064 (Order).

4. The Board erred in concluding that the Hearing Examiner’s consideration of Stage 2 impacts to deny Stage 1 permits was not clearly erroneous. AR 2079 (Order).

5. The Board erred in concluding that the Hearing Examiner took due account of MBT-Longview’s evidence of Stage 1 impacts and mitigation. AR 2080 (Order).

6. The Board erred in concluding that the Hearing Examiner’s exercise of SEPA substantive authority under RCW 43.21C.060 and WAC 197-11-660 was not clearly erroneous. AR 2080–86 (Order).

7. The Board erred in granting Ecology’s and WEC’s Motions for Summary Judgment on Issue 9 (*see* AR 427) because genuine issues of material fact exist as to the impacts and mitigation of Stage 1. AR 2086 (Order).

² Citations to the Board’s Administrative Record are designated “AR.”

8. The Board erred in granting Ecology's and WEC's Motions for Summary Judgment on Issue 8 (*see* AR 426), because the Board agreed with MBT-Longview in holding that it could challenge the Hearing Examiner's sole reliance on the EIS, but then the Board inexplicably entered judgment for Ecology and WEC on that issue. AR 2075-78 (Order).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the Board's scope of review of a denial of the shoreline permits *de novo* under WAC 461-08-500(1)? (Assignment of Error ("AOE") 1).

2. Did the Board err as a matter of law by deciding the summary judgment motions without reviewing the record before the Hearing Examiner? (AOE 2).

3. Did the Board act arbitrarily and capriciously by deciding the summary judgment motions without reviewing the record before the Hearing Examiner? (AOE 2).

4. Did the Board err as a matter of law by considering and relying on evidence submitted for the first time on reply by one party in resolving issues on summary judgment, including new evidence that was not presented to the Hearing Examiner? (AOE 3).

5. Did the Board misconstrue the Hearing Examiner's treatment of MBT-Longview's evidence when it found he considered such evidence but merely gave it little weight, when in fact the Hearing Examiner stated such evidence was "largely irrelevant"? (AOE 5).

6. Did the Hearing Examiner act clearly erroneously when he rejected as “largely irrelevant” evidence of Stage 1 impacts? (AOE 4).

7. Can a decision-maker deny permits under SEPA based on impacts of a proposal not before him? (AOE 4).

8. Was the Hearing Examiner required to make specific, independent findings about what Stage 1 impacts would be? (AOE 6).

9. Was the Hearing Examiner required to make a specific finding about whether reasonable measures existed to mitigate impacts of Stage 1? (AOE 6).

10. Did the Hearing Examiner act clearly erroneously when he evaluated the mitigation of impacts of both Stage 1 and Stage 2, when the only application before him was for Stage 1? (AOE 6).

11. Do genuine issues of material fact exist regarding impacts of and mitigation for a project where the nonmoving party presented evidence that impacts of the project could be mitigated? (AOE 7).

12. Is summary judgment regarding whether the Hearing Examiner lawfully exercised SEPA substantive authority appropriate where genuine issues of material fact exist regarding the impacts of a project and mitigation of such impacts? (AOE 7).

13. Is the Board’s grant of summary judgment to Ecology and WEC on Issue 8 inconsistent with its holding that the Hearing Examiner’s use of the EIS can be challenged? (AOE 8).

IV. STATEMENT OF THE CASE

A. MBT-Longview's proposed facility.

MBT-Longview seeks to construct and operate a coal export terminal at the site of the former Reynolds aluminum smelter located adjacent to the Columbia River in Longview, Washington. AR 1687. The Project will receive trains and unload, stockpile, and load coal by conveyor onto ships for export. AR 1727. MBT-Longview selected the site for the Project because it is already an industrialized site that has both rail and marine access. AR 436–37.

Development of the Project will proceed in two independent stages. AR 1727. Under Stage 1, MBT-Longview will construct improvements necessary for a coal export terminal with a throughput of 25 MMTPY of coal. AR 1727. The Stage 1 improvements include two docks (Dock 2 and Dock 3), one shiploader and related conveyors on Dock 2, berthing facilities on Dock 3, a stockpile area including two stockpile pads, railcar unloading facilities, one operating rail track, up to eight rail storage tracks for train parking, and associated facilities and infrastructure. *Id.*

In Stage 2—which represents the Project at full build-out—the throughput of the Project would increase to 44 MMTPY of coal through the construction of a shiploader on Dock 3 and two additional stockpile pads with the associated coal handling equipment. AR 1728. The main difference between Stage 1 and Stage 2 is an increase in the number of trains and vessels serving the Project. AR 717; AR 714. In Stage 2, the

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

Although development of the Project is phased into two separate stages, MBT-Longview submitted the entire Project for environmental review under SEPA. AR 511 (“Proposed Action” in EIS is 44 MMTPY terminal). Acting as co-lead agencies, the County and Ecology jointly evaluated the potential environmental impacts of the Project at full build-out (Stages 1 and 2 combined) in a single final EIS, as required by SEPA. AR 488. The EIS acknowledged that the Project would be developed in two stages, but it did not separately evaluate the potential impacts of the smaller, Stage 1 facility. AR 511; AR 515–16.

The EIS concluded that there were nine environmental resource areas upon which a 44 MMTPY facility could have significant adverse impacts. AR 518. However, the EIS identified potential mitigation for the impacts to each of those resource areas. *Id.*; AR 988–1002. The EIS concluded that, although the impacts to these resource areas could not be completely eliminated through mitigation measures, such impacts could be avoided or reduced if the proposed mitigation measures were implemented. AR 518.

The EIS also analyzed the Project for consistency with the SMA and the SMP. AR 524. The EIS concluded that the Project would be consistent with the objective of the urban shoreline designation, is a permitted use for an urban shoreline pursuant to the Cowlitz SMP, and is a

water-dependent and preferred use under the SMA. *Id.* The adequacy of the EIS was not appealed. AR 1951.

B. MBT-Longview applied for shoreline permits necessary to build Stage 1 improvements.

In February 2012,³ MBT-Longview filed an application with the County for shoreline permits necessary for constructing Stage 1 of the Project, including a Shoreline Substantial Development Permit for construction of Stage 1 improvements and a Shoreline Conditional Use Permit for dredging associated with the new docks. AR 608. MBT-Longview's application for the shoreline permits was expressly limited to the construction of improvements necessary for a 25 MTPY facility. AR 710; AR 472.

C. County Staff recommended approval of MBT-Longview's Stage 1 shoreline permits.

County Staff began its review of the application in 2017, issued a notice of application, and accepted public comments. AR 707–88; AR 1930; AR 707. County Staff acknowledged that MBT-Longview did not apply for the permits necessary to construct and operate Stage 2, but it would be required to do so should it desire to increase throughput or expand the facility. AR 710. County Staff issued the Staff Report concluding that Stage 1 would be consistent with the SMA and the SMP if 36 mitigation conditions identified in the Staff Report were implemented.

³ MBT-Longview later amended the application in 2016 to update the wetland mitigation plan. *See* AR 466–90.

AR 707 at 83–88. The Staff Report discusses a range of mitigation measures, including for each of the nine environmental resource areas identified in the EIS as potentially being significantly impacted by a 44 MMTPY facility. AR 760–82. County Staff’s recommendation and MBT-Longview’s application were then forwarded to the Hearing Examiner for review, as required by the Cowlitz County Code. AR 2066.

D. The Hearing Examiner conducted a public hearing on the permit applications for Stage 1 shoreline permits.

The Hearing Examiner conducted a public hearing on MBT-Longview’s application over the course of three days in November 2017. AR 17. WEC participated in the hearing, AR 16–17, Ecology did not, AR 16–21.

1. MBT-Longview and the County submitted evidence regarding the impacts of, and mitigation for, Stage 1 improvements.

At the hearing, both MBT-Longview and County Staff explained that the only permit application before the Hearing Examiner was for shoreline permits necessary to develop and operate Stage 1 of the Project. AR 1929; AR 1934–35. MBT-Longview presented evidence that the impacts of Stage 1 would be less than the Stage 2 impacts described in the EIS. *See* AR 1729. MBT-Longview and other participants also presented evidence of both the Stage 1 impacts on, and reasonable mitigation for, the nine resource areas identified in the EIS. *See* discussion *infra*. WEC submitted a brief, a copy of Ecology’s CWA 401 decision, and copies of

decisions and comments by the Washington Department of Natural Resources, all of which focus on Stage 2 impacts. *See* AR 69.

a. Noise Impacts

The EIS identified noise impacts and vibration associated with rail traffic to and from the Project as a potential impact requiring mitigation. AR 999. The EIS acknowledged that implementation of Quiet Zones would mitigate noise impacts of the Project at full build-out. AR 1312. The Staff Report adopted the same mitigation recommendation for train noise that was made in the EIS. AR 777; AR 787. BNSF testified that it will cooperate with communities to obtain Quiet Zone designations to reduce noise and that there is no foreseeable increase in rail traffic, noise, or vibration related to the Project. AR 1847–48. MBT-Longview stated that it would work with the community and pay for any Quiet Zone improvements. AR 1897.

b. Rail Transportation and Safety

The EIS also identified rail transportation and safety as resources that could be adversely impacted. AR 997–98. Specifically, the EIS determined that Project-related trains at full build-out would exceed the rail line capacity and could increase the potential for train accidents. *Id.* The EIS stated that impacts to rail transportation and safety could be mitigated through rail infrastructure improvements. *Id.* BNSF testified that it has adequate capacity to accommodate rail traffic in Washington and that it continually evaluates and accounts for capacity needs. AR 1843. BNSF also testified that the Project would not cause capacity

constraints on BNSF's system, because it invests in infrastructure to ensure capacity across its network. AR 1845. BNSF presented evidence that it prioritizes safety of its railways and has an inspection program that exceeds Federal Railroad Administration requirements. AR 1852. MBT-Longview presented evidence that train impacts during Stage 1 would be less than during Stage 2. AR 1839–41.

c. Vehicle Transportation

The EIS also identified vehicle transportation as a resource area that could be adversely affected by the Project at full build-out if not mitigated by road and rail improvements. AR 998. As noted above, BNSF testified that it would make improvements to its rail system as necessary. AR 1843; AR 1845. BNSF also testified that trains related to the Project would not cause unique crossing delays or undue impacts on first responders. AR 1849. MBT-Longview submitted evidence that vehicle transportation impacts during Stage 1 would be less than during Stage 2. *See* AR 1839–41.

d. Air Quality

Evidence was also presented regarding impacts on air quality. The EIS determined that the Project at full build-out could have adverse impacts on air quality, but those impacts could be mitigated through low-emission train locomotives, known as “Tier 4” locomotives. AR 983. BNSF testified that the Environmental Protection Agency (“EPA”) strictly regulates air quality emissions of locomotives, and BNSF has the newest and cleanest freight trains in North America. AR 1838. BNSF further

testified that EPA regulations are “systematically decreasing emissions from all types of vehicles, including locomotives.” AR 1845–47. BNSF testified that it currently has 275 Tier 4 locomotives and 275 “Tier 4 credit” locomotives, and that almost 40 percent of its fleet of locomotives has been replaced in the last 10 years. AR 1857. BNSF also presented evidence that over 98 percent of BNSF trains are equipped with an Automatic Emission Shutdown System, which automatically shuts down locomotives not in use, thereby decreasing emissions during operation. AR 1846. MBT-Longview also submitted evidence that it would adopt an anti-idling policy at the facility. AR 1897.

e. Social and Community Resources

The EIS determined that the Project at full build-out could have noise, traffic, and air quality impacts that would disproportionately affect minority and low-income populations. AR 983. Evidence was submitted regarding mitigation of these potential impacts, including mitigation measures referenced in the EIS. *See* AR 988–89. Additionally, MBT-Longview and others submitted evidence that that impacts to noise, traffic, and air quality could be mitigated and would be less during Stage 1 than during Stage 2. *See, e.g., supra* pp. 14–15 (discussing testimony regarding mitigation for traffic, noise, and health impacts).

f. Tribal Resources

Parties also presented evidence about mitigation of potential impacts to tribal resources such as fish and wildlife. The EIS determined that the Project could affect tribal resources through the restriction of

access to tribal fishing areas by Project-related trains. AR 990. BNSF presented evidence that it recognizes treaty rights of tribes and their members to access traditional hunting, fishing, and gathering sites and that BNSF has created an access program for tribal members seeking access to these sites. AR 1852.

The EIS identified Project construction activities, such as dredging, pile driving, and marine construction work, as actions that “could cause” or “could affect” aquatic habitat and fish and “could delay” tribal access to these resources. AR 1132–38. However, the EIS concluded that the Project would have “no unavoidable and significant adverse impacts on fish” based on compliance with laws applicable to the work being performed and the implementation of the mitigation measures identified in the EIS. AR 1152. The EIS also identified multiple measures to mitigate impacts on tribal access to resources. AR 1108–10. Indeed, prior to the hearing, the County had considered and addressed fish impacts when it issued the Critical Areas Permit determining that such impacts were adequately mitigated by the conditions included in that permit. AR 1909–13. Neither Ecology nor WEC appealed the Critical Areas Permit. AR 15.

g. Vessel Transportation

The EIS determined that the operation of the Project at full build-out could increase the likelihood of a vessel incident, but that “the likelihood of a serious [Project]-related vessel incident occurring is very low.” AR 985. The EIS stated that an operational oil spill at the dock

would most likely occur during bunkering (i.e., refueling) at Docks 2 and 3. AR 975. The Staff Report adopted a condition to prohibit vessel fueling at those docks, as well as a condition requiring MBT-Longview to attend Lower Columbia River Harbor Safety Committee meetings. AR 785 (Condition Nos. 20 and 21). MBT-Longview testified that it had no plans to allow bunkering at the docks, that it will have cleanup and control measures in place to address spills, and that it is a member of the Marine Fire and Safety Association, the umbrella organization that responds to oil spills on the river. AR 1896; AR 1900. MBT-Longview also explained that the U.S. Coast Guard and other agencies “impose extensive regulations on shipping operations, and state and federal laws that impose responsibility and liability on shipping operators and cargo owners.” AR 1896. MBT-Longview submitted evidence that vessel traffic impacts during Stage 1 would be less than during Stage 2 due to the fact that fewer vessels will be serving the facility under Stage 1. AR 1729. The Staff Report included a condition that would require MBT-Longview to create a containment and cleanup plan to limit the exposure of spilled coal into the aquatic environment. AR 784 (Condition No. 12).

h. Cultural Resources

Both the County and MBT-Longview presented possible mitigation for the impacts to cultural resources related to the Project. The EIS determined that demolition of the Reynolds metals plant—a historic district—could be adversely affected by the Project. AR 983. The EIS acknowledged, however, that a Memorandum of Agreement (“MOA”)

was under negotiation that could resolve the impact to this cultural resource. *Id.* The Staff Report also noted that an MOA was currently being negotiated and would be included as a condition of the U.S. Army Corps of Engineers' ("Corps") Record of Decision, in compliance with Section 106 of the National Historic Preservation Act. AR 765. The Staff Report stated that the MOA was expected to include stipulations regarding inadvertent discovery of archaeological resources and monitoring of ground-disturbing activities by a qualified professional archaeologist. *Id.* The Staff Report concluded, based on the expected terms of the MOA and the requirements of the Corps, that additional mitigation is not required. *Id.*

i. Greenhouse Gases

The EIS concluded that greenhouse gas ("GHG") emissions associated with the Project would have no unavoidable and significant adverse environmental impacts. AR 1001. The EIS concluded that implementation of mitigation measures would reduce impacts of GHGs at full build-out and there would be "no unavoidable and significant adverse impacts from greenhouse gas emissions." AR 1766. At the hearing, MBT-Longview also presented expert testimony regarding GHG impacts for Stage 1 and how they could be mitigated. AR 1916–20; AR 1944.

E. The Hearing Examiner denied MBT-Longview's application for Stage 1 shoreline permits.

The Hearing Examiner issued a written decision on November 14, 2017 (the "Decision"), denying MBT-Longview's application for shoreline permits to develop Stage 1 under SEPA substantive authority.

AR 8–74, at 9–10. The Hearing Examiner concluded that he “must” deny the permits for Stage 1, because MBT-Longview had “failed to reasonably mitigate the ten, unavoidable, significant adverse impacts identified in the EIS.” AR 10. Inexplicably, the Hearing Examiner did not analyze the impacts of Stage 1 but relied entirely on Ecology’s CWA 401 decision and the EIS’s assessment of impacts for Stage 2, which was a facility nearly twice the throughput of the Stage 1 facility. AR 9. Nowhere in his 67-page Decision did the Hearing Examiner evaluate the impacts of the 25 MTPY proposal before him. AR 8–74.

Rather than considering the evidence presented and analyzing the proposal set forth in MBT-Longview’s applications against the SMA and Cowlitz SMP criteria, the Hearing Examiner authored 18 pages of “Findings Related to SEPA,” none of which identify impacts unique to Stage 1. AR 21–40. Importantly, the Hearing Examiner did not address whether the impacts attributable to Stage 1 can be reasonably mitigated. *Id.* In fact, the Hearing Examiner concluded that MBT-Longview’s evidence about mitigating Stage 1 impacts was irrelevant:

The Applicant has presented the testimony of several experts. . . . this testimony is *largely irrelevant* to the issue of whether the ten unavoidable, significant adverse environmental impacts identified in the FEIS can be reasonably mitigated.

AR 56 (emphasis added). The Hearing Examiner also concluded that, because of the unavoidable, significant adverse impacts identified in the EIS, MBT-Longview had failed to prove that the requirements of the SMA

and County SMP had been satisfied and that unresolved issues further prevented MBT-Longview from doing so. AR 10.

F. MBT-Longview and the County appealed to the Board.

On December 5, 2017, MBT-Longview filed a petition for review of the Decision with the Board. AR 1–6. The County also petitioned for review. AR 77–82. The Board granted intervention to BNSF, Ecology, and WEC and consolidated the two petitions. AR 423–32. The Board identified the following nine issues in its Prehearing Order:

1. Did the Cowlitz Hearing Examiner unlawfully or fail to apply, or misinterpret the County’s Shoreline Master Program (SMP) and the Shoreline Management Act (SMA)?
2. Did the Cowlitz Hearing Examiner misinterpret, misapply or fail to apply the State Environmental Policy Act (SEPA) or County SEPA regulations and other regulations?
3. Did the Cowlitz Hearing Examiner fail to analyze the Project as presented in the applications and in light of substantial evidence and the County SMP?
4. Did the Cowlitz Hearing Examiner commit an error by imposing preconditions from other permits and approvals outside of his scope of authority provided for in the SMA, and that would be separately addressed in pending or subsequent reviews?
5. Did the Hearing Examiner commit an error by interjecting areas of further environmental study and imposing additional mitigation discussion despite the lapse of jurisdiction for appeal of SEPA adequacy?
6. Is the Project consistent with the state SMA?
7. Is the Project consistent with the Cowlitz SMP?

8. Whether Millennium and Cowlitz County are barred from challenging the Final [EIS] findings and conclusions regarding the ten areas of significant, adverse, unmitigated impacts cited in the Hearing Examiner decision?
9. Did the Hearing Examiner lawfully exercise substantive authority under SEPA, RCW 43.21C.060 and WAC 197-11-660(1), to deny the shoreline permit?

...

AR 426–27. The Board scheduled a two-week hearing for March 19–30, 2018. AR 425.

On January 17, 2018, MBT-Longview filed a motion for summary judgment on Issues 1 through 4, raising purely legal issues and seeking remand of the Decision on the basis that the Hearing Examiner erred by (1) rejecting MBT-Longview’s request for shoreline permits for Stage 1 of the Project based on impacts from Stages 1 and 2 combined, (2) failing to review the permit applications for consistency with the SMA and SMP, (3) misapplying SEPA, and (4) concluding that the shoreline permits could be denied because other authorizations and permits for the Project were outstanding. AR 433–51. Ecology and WEC both filed oppositions to MBT-Longview’s motion. AR 1548–60; AR 1634–53.

Ecology and WEC subsequently filed their own motions for summary judgment on all issues, arguing that SEPA did not require the Hearing Examiner to consider any of the evidence submitted by MTB-Longview regarding the impacts or mitigation measures for Stage 1 facilities and operations and correctly concluded that the Project was inconsistent with the SMA and SMP. AR 541–80; AR 789–829. MBT-

Longview opposed the motions on the basis that Ecology and WEC were not entitled to a judgment as a matter of law on those issues, genuine issues of material fact existed regarding compliance with SEPA, the SMA, and SMP, and a hearing was required to resolve those factual issues. AR 1679–1717.

G. The Board entered summary judgment for Ecology and WEC and affirmed denial of the shoreline permits under SEPA.

Before the March hearing could be held, the Board issued a letter notifying the parties that it would be resolving the case on summary judgment. AR 2050–51. On April 20, 2018, the Board issued its Order denying MBT-Longview’s motion for summary judgment and granting Ecology’s and WEC’s Motions for Summary Judgment on Issues 2, 3, 8, and 9 and affirmed the Hearing Examiner’s denial of the shoreline permits. AR 2058–94 at 88.

The Board held that the Hearing Examiner did not err in considering the impacts of a 44 MMTPY facility in evaluating the permits for a 25 MMTPY facility, AR 2079, and the Hearing Examiner did not reject MBT-Longview’s evidence about Stage 1 impacts and mitigation, AR 2080. The Board also held that, although the “the FEIS’s determination of adverse environmental impacts associated with the Project and their significance cannot be challenged in this proceeding ... the Hearing Examiner’s use of the FEIS can be challenged in addressing whether the exercise of SEPA substantive authority was clearly erroneous.” AR 2078. Finally, the Board held that the Hearing Examiner

complied with all of the requirements to deny the permits under SEPA and that no material issues of fact precluded entry of summary judgment on that issue. AR 2080–86.

MBT-Longview and the County appealed the Order to the Cowlitz County Superior Court. CP 1–58, 62–108. After the cases were consolidated below, this Court accepted direct review. CP 220–23.

V. STANDARD OF REVIEW

This appeal is brought pursuant to the Administrative Procedure Act (“APA”). RCW 34.05.510. Because this case involves challenges to the Board’s rulings on summary judgment, the APA standards of review are considered together with a summary judgment standard of review.

Kettle Range Conservation Grp. v. Dep’t of Nat. Res., 120 Wn. App. 434, 456, 85 P.3d 894 (2003).

A. This Court reviews the Board’s summary judgment rulings de novo.

This Court reviews the Board’s summary judgment rulings de novo, engaging in the same inquiry as the Board. *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). The Court must view the facts and all reasonable inferences in the light most favorable to the nonmoving party. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment can only be granted if there are no genuine issues of material fact, and if the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment is only

appropriate if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437.

B. The Board’s other rulings are reviewed under the APA standards.

This Court reviews the Board’s other rulings using the standards in the APA. Under the APA, the Court may grant relief from a Board’s ruling if it determines, among other things, that the ruling is based on an erroneous interpretation or application of the law or is arbitrary and capricious. RCW 34.05.570(3). The Court reviews the Board’s factual findings for substantial evidence, which is “evidence in sufficient quantity to persuade a fair-minded person of the truth of the declared premises.” *de Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248, 276, 391 P.3d 458 (2016). The Court reviews the Board’s conclusions of law de novo. *Id.* at 277. “A decision is arbitrary and capricious if it is willful and unreasoning action in disregard of facts and circumstances.” *Id.* (internal quotation marks omitted).

VI. ARGUMENT

A. The Board committed several procedural errors that require reversal and remand for a full hearing.

As a threshold matter, the Board committed three procedural errors that require this Court to reverse the Board’s Order and remand the petition to the Board for reconsideration and a full hearing.

1. The Board erred in holding that its scope of review was limited to the record created by the Hearing Examiner.

First, the Board’s conclusion that its scope of review was “limited

to the record created” by the Hearing Examiner conflicts with its own rules and precedent. AR 2074. Citing no direct legal authority, the Board concluded:

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 the hearing.

Order at 16–17. This was legal error.

The Board’s rules provide that the standard and scope of its review is “de novo unless otherwise required by law.” WAC 461-08-500(1). As the Board correctly acknowledged in its Order, AR 2073, SEPA does not prescribe the scope of review in an appeal under SEPA. Nor did the Board identify any other “law” that required it to apply a different scope of review. Thus, under the plain terms of WAC 461-08-500(1), the Board was required to apply a de novo scope of review but failed to do so. The Board simply concocted a different scope of review for this case in derogation of its own rules.

Other Board rules also support application of a de novo scope of review in SEPA challenges. For example, under WAC 461-08-505(2), the Board is instructed to admit “[e]vidence that is material and relevant” to determining whether a shoreline permit decision is consistent with the requirements of SEPA “whether or not such evidence had been submitted to the local government unit.” This rule specifically envisions that the

Board will consider additional evidence in reviewing SEPA challenges like the one before it in this case.

The Board's decision to limit its review in this case to the record created by the Hearing Examiner also runs counter to well-established Board precedent. The Board has long recognized that its scope of review in such cases is not limited to the record created at the local government level. For example, in *Luce v. City of Snoqualmie*, 2001 WL 1090674, at *8, SHB No. 00-034, Final Findings of Fact, Conclusions of Law & Order (Jan. 1, 2001), the Board rejected the argument that the application of a clearly erroneous standard of review required it to limit its review to the record created before the administrative agency. *Id.* (“[T]he clearly erroneous standard as exercised by the board does not preclude consideration of extra-record testimony.”).

There, the Board explained that its *scope of review*, meaning the breadth of the evidence reviewed by the Board, is de novo in both SMA and SEPA challenges. *Id.* This is true, the Board explained, even where the standard of review, meaning the burden of persuasion carried, is a clearly erroneous standard. *Id.* Citing WAC 461-08-505(2) and prior Board precedent, the Board explained that the scope of the Board's review in SEPA appeals is de novo and is not confined to the record made before the local government. *Id.* (citing *Citizen for Sensible Growth v. City of Leavenworth*, SHB No. 98-24 (1998) (holding that scope of review is de novo and is not confined to the record made before the local government; that was so even though the standard of review was clearly erroneous),

and *Save Our Industrial Land v. City of Seattle*, SHB No. 95-41 (1996) (SEPA appeal is not limited to the administrative record before the agency)). Since *Luce*, the Board has consistently held that the application of the clearly erroneous standard of review under SEPA does not affect its de novo scope of review. See *Oppenheimer v. City of Seattle*, 2007 WL 780320, at *4 n.8, SHB No. 06-026, Findings of Fact, Conclusions of Law, & Order (March 9, 2007).

Here, the Board did not explain its abrupt departure from its own rules and longstanding precedent, seeking refuge instead in *Cook v. Clallam County*, 27 Wn. App. 410, 618 P.2d 1030 (1980). But that case is irrelevant because it was not before the Board and thus was not subject to the Board's rules regarding scope of review (i.e., WAC 461-08-500 or WAC 461-08-505(2)). The Board seems to place relevance in the fact that this case involves an "unchallenged" EIS. See AR 2074. That makes no sense because the Board specifically held that "the Hearing Examiner's use of the FEIS can be challenged in addressing whether the exercise of SEPA substantive authority was clearly erroneous." AR 2078. The Board should therefore have considered that decision on a de novo record.

Although there are no Washington cases interpreting or applying WAC 461-08-500(1) or WAC 461-08-505(2), case law nonetheless supports the application of a de novo scope of review in Board cases. For example, in *Kitsap County v. Department of Natural Resources*, 99 Wn.2d 386, 392, 662 P.2d 381 (1983), the Washington Supreme Court explained that the "SMA established the SHB as a quasi-judicial administrative body

with specialized skills in hearing shoreline cases.” Conducting its cases as contested cases under the APA, the Court explained, the “SHB hearing is a *de novo* review of the local governmental determination.” *Id.* In this way, the Court elaborated, the “Legislature has substituted SHB review of local government determinations under the SMA for direct superior court review by writ of certiorari.” *Id.* As a result, the SHB’s review of the local government decision is not limited to the record created before the local government. *Id.*

So too in *San Juan County v. Department of Natural Resources*, 28 Wn. App. 796, 798–99, 626 P.2d 995 (1981), the Court of Appeals rejected the argument that the Board’s review was limited to the record of proceedings before the local government. The court concluded that RCW 90.58.180(3), which governs the SHB’s review of permit decisions, requires a broader scope of review because it directs the SHB to review such decisions under the provisions of the APA pertaining to adjudicative proceedings. *Id.*

Here, there was no legal basis for the Board to limit the scope of its review to the record created before the Hearing Examiner. The Board should have exercised the role the Legislature gave to it and conducted a *de novo* review.

2. The Board compounded that error by failing to apply its selected scope of review.

After wrongly concluding that the Board must limit its review to the record before the Hearing Examiner, the Board inexplicably issued

dispositive rulings without ever bothering to obtain a copy of that record for review. This too is reversible error.

Under the clearly erroneous standard of review, the reviewing body “examine[s] the entire record and all the evidence.” *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *see also Ancheta v. Daly*, 77 Wn.2d 255, 259–60, 461 P.2d 531 (1969) (“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed.” (internal quotation marks omitted) (emphasis added)). As the Washington Supreme Court has recognized, “[t]he ‘clearly erroneous’ standard provides a broader review than the ‘arbitrary or capricious’ standard because it mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision.” *Swift v. Island Cty.*, 87 Wn.2d 348, 357, 552 P.2d 175 (1976) (internal quotation marks omitted).

As a result, when a reviewing body does not have the complete record of the administrative decision it is reviewing, it cannot render a determination regarding whether that decision was clearly erroneous. *See Tunget v. Emp’t Sec. Dep’t*, 78 Wn.2d 954, 957–58, 481 P.2d 436 (1971) (“The incomplete record is insufficient to permit a determination that the trial court acted either correctly or incorrectly in holding the administrative decision was clearly erroneous in view of the [e]ntire record.” (internal quotation marks omitted)).

Here, it is undisputed that the Board did not have the complete record created by the Hearing Examiner. *See* AR 1–1094 (Board’s Administrative Record does not contain copy of Hearing Examiner’s record); AR 2059–61 (Hearing Examiner’s record not listed in documents considered by Board). The Board had only portions of that record submitted with the parties’ summary judgment briefs. *See, e.g.*, AR 2059–61; AR 1928–45. But without having and reviewing the entire record and all the evidence before the Hearing Examiner, the Board could not issue a determination about whether the Hearing Examiner’s decisions were clearly erroneous. Accordingly, even if the Court accepts the Board’s novel scope of review, it still must remand for the Board to actually obtain the very record the Board itself found should govern its review.

3. The Board wrongly accepted new extra-record evidence submitted by Ecology.

After wrongly concluding that the scope of its review was limited to the record created before the Hearing Examiner and then failing to actually obtain or review that record, the Board further compounded those errors by inexplicably accepting new evidence submitted by Ecology that was never presented to the Hearing Examiner. The Board’s decision cites to pages from the federal draft EIS prepared by the Corps under the National Environmental Policy Act. *See* AR 2064 (citing Exhibit A to the Second Wolfman Declaration, which introduced this evidence, AR 2040 at 41). That evidence was not submitted to the Hearing Examiner. *See* AR

65–74 (list of evidence received by Hearing Examiner).⁴ Ecology submitted this evidence to the Board with its reply brief in support of its motion for summary judgment.⁵ AR 2012 at 24. The Board thus considered new evidence proffered by one party after holding that no new evidence could be considered. The Board simply ignored its own holding.

B. The Board erred in concluding that the Hearing Examiner properly considered Stage 2 impacts to deny Stage 1 permits.

The Board erred in concluding that as a matter of law, the Hearing Examiner’s “consideration of the Project as a whole was not clearly erroneous” and granting summary judgment on that issue. AR 2079. The Board cites no statute, rule, or case to support this legal conclusion. Instead, the Board’s only basis for its conclusion is the fact that County Staff partially relied on the EIS, which analyzed the terminal at full build-out, in its Staff Report. AR 2079–80. The Board’s conclusion cannot withstand scrutiny.

It is self-evident that a government body reviewing an application for a shoreline permit under the SMA must base its decision on the

⁴ Ecology also submitted other evidence not before the Hearing Examiner with its motion for summary judgment. *See* AR 862 at 64 (January 23, 2018 memorandum prepared *after* the Hearing Examiner issued the Decision in November 2017); AR 931 at 32; AR 1380 (Exhibit B is a “Draft Health Impact Assessment” dated December 2017).

⁵ Considering this evidence was doubly wrong because Ecology submitted it with its reply brief, and MBT-Longview thus had no opportunity to respond to it. *See White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991) (nothing in CR 56 “permits the party seeking summary judgment to raise issues at any time other than its motion and opening memorandum”).

proposal described in the application before it. This obvious point is borne out by the procedures in the Cowlitz County Code for shoreline permits. Under the code, “All applications for a permit required under the [SMA] . . . shall be submitted to the Department of Building and Planning. Upon receipt of the permit application, the Director shall determine whether the information submitted meets the requirements of WAC 173-27-180...” CCC 19.20.020.

WAC 173-27-180, in turn, describes the application requirements for a substantial development or conditional use permit and requires a “general description of the proposed project that includes the proposed use or uses and the activities necessary to accomplish the project.” RCW 90.58.140, which requires permits for a “substantial development” on shorelines of the state, also speaks in terms of the proposed “development,” which is defined in the SMA as:

[A] use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level[.]

RCW 90.58.030(3)(a).

Once the County receives an application for a Shoreline Substantial Development Permit, the Director “may refer the permit application for a review by departmental staff...” CCC 19.20.040. After staff review and public notice, “The Director . . . shall transmit the permit

application and all pertinent review comments, findings and recommendations to the Cowlitz County Hearing Examiner for action.” CCC 19.20.050. “For applications involving shoreline substantial development permits, conditional use permits, and variance permits, the Hearing Examiner shall hold a public hearing prior to taking action.” *Id.* Thus, the plain language of the SMA and the Cowlitz County Code demonstrate that the Hearing Examiner’s evaluation and “action” is based on the permit application submitted to the County—not on potential future proposals for which permit applications have not yet been submitted.

Although SEPA requires the County to consider an EIS associated with the proposed shoreline development, the scope of the analysis in an EIS does not serve to expand the Hearing Examiner’s evaluation of the application before him. The role that an EIS plays in an agency’s evaluation of a permit application is informational: “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); WAC 197-11-400(2) (“An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation, that would avoid or minimize adverse impacts or enhance environmental quality.”). Indeed, an EIS is only one source of information a decision-maker must consider. *See* WAC 197-11-400(4) (the EIS “shall be used by agency officials in conjunction with other relevant materials and

considerations to plan actions and make decisions”); WAC 197-11-448(1) (“SEPA does not require that an EIS be an agency’s only decision making document.”); *see also Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 313, 197 P.3d 1153 (2008) (“FEIS’s [sic] are critical evaluative tools for decision makers, but nothing in SEPA requires decision makers to rely solely on the information in the FEIS when making decisions.”).

Moreover, the preparation of an EIS for a multi-phase development does not mandate that a developer submit all phases for permitting at the same time. *See, e.g., Marvin & Kay Guon v. City of Vancouver*, 1994 WL 905449, at *6, SHB No. 93-95, Final Findings of Fact, Conclusions of Law & Order (March 31, 1994) (after SEPA review of master plan for multi-phase shoreline development project was completed, it was appropriate for city to approve permit for only one phase of development). Thus, the fact that the EIS considered the impacts of the Project at full build-out does not mean that the Hearing Examiner was required to expand his review of MBT-Longview’s application for Stage 1 shoreline permits to consider impacts of Stage 2, a potential future proposal that was not before him.

It is undisputed that MBT-Longview only submitted an application to the County for shoreline permits for Stage 1 improvements. This fact was acknowledged in the Staff Report, AR 710, and communicated several times to the Hearing Examiner, AR 462–463; AR 1929; AR 1934–35. It is also undisputed that, if MBT-Longview wants to construct

Stage 2 in the future, it will have to seek additional shoreline permits for Stage 2 improvements. This point was clearly stated in both the permit application, AR 472, and the County Staff Report, AR 710, 713, 714, 716.

Indeed, the Hearing Examiner himself expressly acknowledged in his decision that MBT-Longview was seeking shoreline permits “to construct Stage 1 improvements for a coal export facility.” AR 11. Nevertheless, the Hearing Examiner evaluated and acted on MBT-Longview’s application for Stage 1 permits based on impacts identified in the EIS, which evaluated only the potential *combined* impacts of Stages 1 and 2. *See* AR 9–11 (“The FEIS concludes that the Project has nine unavoidable, significant adverse impacts... As the unchallenged FEIS concludes that the Project has many unavoidable, significant adverse impacts, and as the parties have failed to provide reasonable mitigation, the Shoreline Permits must be denied.”); AR 511 (EIS defines “Proposed Action” as a 44 MMTPY facility). This was error because the “Project” analyzed in the EIS was not the same project for which MBT-Longview sought shoreline permits.

The Hearing Examiner made no findings about the impacts specific to the Stage 1 facility and instead evaluated MBT-Longview’s proposal for Stage 1 improvements based on Stage 2 impacts. This was in disregard of the facts and clearly erroneous, and the Board erred in holding otherwise. *See, e.g., Overlake Fund v. Shorelines Hearings Bd.*, 90 Wn. App. 746, 764, 954 P.2d 304 (1998) (decision based on

considerations not before the decision-maker rendered the decision arbitrary and capricious).

C. The Board erred in concluding that the Hearing Examiner took due account of MBT-Longview's evidence of Stage 1 impacts and mitigation.

The Board also erred in concluding that the Hearing Examiner actually considered MBT-Longview's evidence about Stage 1 impacts and mitigation. Before the Hearing Examiner, MBT-Longview submitted evidence and testimony regarding the impacts of a 25 MMTPY facility and measures that would mitigate those impacts. The Hearing Examiner, however, concluded that he could not consider this evidence because it conflicted with the unchallenged EIS:

[N]either [MBT-Longview] or [sic] any other party has appealed the FEIS and its findings and conclusions are unchallenged for the purpose of this hearing. [MBT-Longview] has presented the testimony of several experts whose opinions are in conflict with the FEIS but, in the absence of any appeal, this testimony is largely irrelevant to the issue of whether the ten unavoidable, significant adverse impacts identified in the FEIS can be reasonably mitigated.

AR 56. The Hearing Examiner concluded that because the adequacy of the EIS had not been appealed, the EIS was the only possible source of information for determining whether the impacts of Stage 1 can be reasonably mitigated. In other words, the Hearing Examiner concluded (wrongly) that he was legally barred from considering any evidence outside the EIS. As MBT-Longview explained to the Board, under WAC 197-11-400(4), the Hearing Examiner was required to consider the EIS

and any “other relevant materials” in making the permitting decision. *See Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 313. The Hearing Examiner’s conclusion that evidence outside the EIS was “largely irrelevant” to determining if reasonable mitigation existed for the impacts identified in the EIS was therefore erroneous.

The Board, however, misconstrued the Hearing Examiner’s decision and concluded the Hearing Examiner actually did consider evidence about Stage 1 impacts and mitigation but merely gave it little weight. AR 2080. That holding cannot be squared with the Hearing Examiner’s analysis and his conclusion that such evidence was “largely *irrelevant*” because the EIS had not been appealed. AR 56 (emphasis added). Attributing little weight to evidence does not render that evidence irrelevant; evidence is still relevant even if it is given little weight. *See ER 401*.

The Board misses the point in reasoning that MBT-Longview “cites to no evidence excluded by the Hearing Examiner,” and does not “claim it was precluded from presenting testimony at the public hearing.” AR 2080. The issue is that the Hearing Examiner, operating under a misunderstanding of the law about the effect of an unappealed EIS, wrongly concluded that he could not rely on the evidence submitted by MBT-Longview outside the EIS in determining whether reasonable mitigation measures existed for the impacts identified in the EIS. Thus, contrary to the Board’s conclusion, the Hearing Examiner did not merely give this evidence little weight, he concluded that because the adequacy of

the EIS had not been appealed, he was legally barred from considering it. The Board itself recognized that the Hearing Examiner's conclusion on this point was incorrect. In addressing the parties' arguments about the effect of an unchallenged EIS on the exercise of substantive SEPA authority, the Board ruled that while "the FEIS's determination of adverse environmental impacts associated with the Project and their significance cannot be challenged in this proceeding ... the Hearing Examiner's *use of the FEIS can be challenged* in addressing whether the exercise of SEPA substantive authority was clearly erroneous." AR 2078 (emphasis added). That correct ruling conflicts with the premise of the Board's incorrect finding that the Hearing Examiner actually did consider such evidence.

D. The Board erred in affirming the Hearing Examiner's exercise of substantive SEPA authority to deny the permits.

The Hearing Examiner denied MBT-Longview's shoreline permits using SEPA substantive authority. The Board affirmed the Hearing Examiner's denial under SEPA, concluding that he complied with the procedural requirements for exercising substantive SEPA authority and that no genuine issues of material fact precluded summary judgment. The Board erred on both counts.

1. The Hearing Examiner's denial of the permits under SEPA substantive authority was clearly erroneous.

The Board erred in concluding that the Hearing Examiner's denial of MBT-Longview's permits under SEPA complied with the requirements of RCW 43.21C.060. SEPA is both a procedural and a substantive environmental law. *See* RCW 43.21C.075(1). SEPA's procedural

provisions include threshold determinations (whether an EIS is required) and preparation of a “detailed statement” (in the form of an EIS) of the impacts of a proposal, reasonable alternatives to a proposal, and possible mitigation measures to avoid, minimize, or compensate (that is, to “mitigate”) for impacts. *See* RCW 43.21C.030(2)(c). An EIS is informational in nature and does not represent an approval or denial of the proposed action. *See Save Our Rural Env’t v. Snohomish Cty.*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983) (“SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision makers. It was not designed to usurp local decisionmaking or to dictate a particular result.” (internal citation omitted)); *Stempel v. Dep’t of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973) (“SEPA does not demand any particular substantive result in governmental decision making.”).

The substantive aspect of SEPA, on the other hand, authorizes decision-makers to condition or deny proposals based on the potential environmental impacts identified in the SEPA review documents, subject to certain strict requirements described in RCW 43.21C.060. That provision provides, in relevant part:

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... Such

action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished. 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). Thus, under the plain language of the statute, to deny a permit under SEPA, the decision-maker must find that (1) the proposal would result in significant adverse environmental impacts identified in an EIS, and (2) reasonable mitigation measures are insufficient to mitigate the identified impacts.

RCW 43.21C.060 imposes stricter requirements for exercising SEPA authority to deny a permit than it does for merely conditioning a permit. For example, conditioning a permit under SEPA only requires that the decision-maker select mitigation measures that are aimed to address the “specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter.” RCW 43.21C.060.

Denials under SEPA, however, require more. The decision-maker must make specific, independent findings based on evidence in the record. In particular, the decision-maker must find that potential impacts identified in the EIS will actually result from the proposed action. *See*

Nagatani Bros., Inc. v. Skagit Cty. Bd. of Comm'rs, 108 Wn.2d 477, 482, 739 P.2d 696 (1987) (governmental action may be denied under SEPA “only on the basis of specific, proven significant environmental impacts”). Additionally, the decision-maker must also make a finding that those identified impacts cannot reasonably be mitigated.

The legislative history of RCW 43.21C.060 confirms this key distinction between SEPA denials and conditions. In the early 1980s, the legislature’s Commission on Environmental Policy (the “Commission”) undertook a comprehensive review of SEPA to identify needed improvements. *See* Washington State Legislature, Ten Years’ Experience with SEPA, Final Report of the Commission on Environmental Policy on the State Environmental Policy Act of 1971 (June 1983) (“SEPA Report”). RCW 43.21C.060 was among the provisions evaluated and subsequently amended by the legislature in 1983 and has not been amended since. The Commission explained that the 1983 amendment:

makes clear that agencies may condition proposals to mitigate specific adverse impacts which are identified in the environmental documents prepared under SEPA, ***but may only deny a proposal if these impacts are significant and if they cannot be sufficiently mitigated.*** This determination will be made by the governmental agency. The ***existing law does not distinguish between conditions and denials or require an agency to make any findings in denying a proposal***[.]

SEPA Report at 40 (emphasis added). In other words, if a decision-maker wants to condition a proposal under SEPA substantive authority, the decision-maker may do so based on the potential adverse impacts

identified in the EIS. However, if the decision-maker wants to deny a proposal under SEPA, the decision-maker must make concrete findings that the potential significant adverse impacts identified in the EIS are actually significant and cannot be reasonably mitigated. This is done by considering the EIS and other relevant evidence. WAC 197-11-400(4); WAC 197-11-448(1).

The Washington Supreme Court has cautioned about the necessity for imposing such exacting requirements on a decision-maker denying a proposal under SEPA:

SEPA seeks to achieve balance, restraint and control rather than to preclude all development whatsoever. Its scheme cuts both ways as an instrument of control placed in the hands of government, but not an unbridled control that can ignore due process and fair treatment of landowners.

Cougar Mountain Assocs. v. King Cty., 111 Wn.2d 742, 753–54, 765 P.2d 264 (1988). As explained further below, the Hearing Examiner failed to comply with the strict requirements for exercising SEPA authority to deny the shoreline permits.

a. The Hearing Examiner failed to make findings that Stage 1 improvements would result in significant adverse impacts.

First, the record demonstrates that the Hearing Examiner failed to make the impact findings necessary to deny the permits under SEPA. Under RCW 43.21C.060, in order to deny MBT-Longview's application for Stage 1 permits, the Hearing Examiner had to find that issuing the Stage 1 permits would result in the potential significant impacts identified

in the EIS. While the Hearing Examiner includes several pages of “Findings Related to SEPA” in his decision, AR 21–40, these findings are insufficient to support denial of the Stage 1 permits under SEPA because they do not specifically relate to the impacts of a 25 MMTPY facility. As explained above, the Hearing Examiner erroneously concluded that he could not consider MBT-Longview’s evidence about what impacts would result from development of Stage 1. As a result, the Hearing Examiner based his findings about Stage 1 impacts solely on the EIS, which only evaluated the potential impacts of the larger, 44 MMTPY Stage 2 facility. The Hearing Examiner made no findings about impacts specific to the permit application before him, and he deemed evidence presented about the application before him “largely irrelevant.” RCW 43.21C.060 does not authorize a decision-maker to deny a proposal based on impacts of *other* potential proposals. Instead, it requires a specific finding that the proposed action would result in significant adverse environmental impacts. The Hearing Examiner’s findings fall short of this requirement. This failure alone warrants reversal.

b. The Hearing Examiner also failed to make the required findings regarding mitigation.

The record also demonstrates that the Hearing Examiner erred in denying the Stage 1 permits under SEPA because he failed to make specific findings that that reasonable mitigation measures do not exist to mitigate the impacts of Stage 1. The Board concluded that the Hearing Examiner complied with this requirement because he found that the

mitigation measures proposed in the Staff Report and by MBT-Longview did not reasonably mitigate the identified impacts. AR 2086. Those findings, however, are legally insufficient.

As noted above, denial of a permit under SEPA requires a finding that the significant adverse environmental impacts of the proposed action *cannot* be reasonably mitigated. The statute thus demands a finding about the *unavailability* of reasonable mitigation measures, not about whether the applicant's proposed mitigation measures are sufficient. As the Supreme Court has held, to deny a proposal under SEPA, the decision-maker must find that the impacts are unavoidable, not merely whether any proposed measures would be sufficient. *See Cougar Mountain Assocs.*, 111 Wn.2d at 755 (to deny a proposal under SEPA, the decision-maker must "specifically set forth reasonable mitigation measures to counteract [the identified] impacts, or, if such measures do not exist, ... specifically state why the impacts are unavoidable and development should not be allowed"). Thus, even if MBT-Longview's proposed mitigation was insufficient to mitigate the impacts, the Hearing Examiner could only deny the permits if he found that such impacts cannot, under any circumstance, be mitigated. *See Marantha Mining, Inc. v. Pierce Cty.*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) ("The law does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible.").

Here, the Hearing Examiner only evaluated the County's and MBT-Longview's proposed mitigation measures, rather than determining

whether reasonable mitigation was possible:

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

AR 57. The Hearing Examiner failed to consider whether other reasonable mitigation measures were available to mitigate the identified environmental impacts of Stage 1, and deemed evidence of such mitigation measures "largely irrelevant." Indeed, other mitigation measures were available; the EIS specifically spelled some of them out. For instance, with respect to noise impacts, the Hearing Examiner acknowledged that the EIS identified the installation of Quiet Zones as a mitigation measure that "would eliminate the Project's noise impacts," but noted that neither the County nor MBT-Longview proposed the installation of Quiet Zones as a condition of permit approval, AR 22–23. The Hearing Examiner then concluded that "[t]he parties' proposed mitigation for noise impacts is insufficient to ensure that Quiet Zones will be implemented" as a basis for denying the permits. AR 57. That conclusion, however, fails to explain why the mitigation measures identified in the EIS—i.e., the installation of Quiet Zones—would not offset the identified impacts.

The Hearing Examiner erred in dismissing the mitigation measures identified in the EIS without explaining *why* imposing those measures as

conditions on the proposal would not have minimized the impacts of the project. *See Cougar Mtn. Assocs.*, 111 Wn.2d at 754 (although the county identified the impacts that would result from the proposed subdivision, “it failed to state why the mitigation measures included in the EIS were insufficient to offset these impacts”). The Board erred by affirming the Hearing Examiner’s deficient analysis.

2. Genuine issues of material fact remain regarding the impacts of, and mitigation for, Stage 1.

Apart from the legal errors in the Board’s analysis of Issues 2 and 9, the Board’s grant of summary judgment on those issues was erroneous because genuine issues of material fact existed regarding the impacts of, and mitigation for, Stage 1.

As the Board recognized in its Order, “[t]he summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution, and neither party contests the facts relevant to the legal determination.” AR 2072. As the moving parties, Ecology and WEC were required to demonstrate that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The Board was required to view all facts and inferences in favor of MBT-Longview and the County, as the nonmoving parties. *Id.* The Board recited the summary judgment standard but never actually applied it.

The issue before the Board was whether factual disputes remained regarding whether the Hearing Examiner’s denial of the shoreline permits

was proper under SEPA. As described above, exercising SEPA authority to deny a permit requires a decision-maker to make specific findings about the impacts of a proposal and whether reasonable mitigation measures exist to mitigate those impacts. MBT-Longview raised genuine issues of fact regarding both of those findings before the Board that precluded the Board from granting summary judgment.

First, MBT-Longview put forth substantial evidence creating issues of fact about whether Stage 1 improvements would result in significant adverse environmental impacts identified in the EIS. For example, MBT-Longview cited to evidence that the impacts identified in the EIS would not result from the construction of Stage 1 alone. *See* AR 1846–47 (BNSF testified that the “EIS inaccurately assumes that BNSF locomotives at Millennium would continuously run. That is simply not true. The truth is that over 98 percent of [BNSF’s] locomotives are equipped with an Automatic Emissions Shutdown System, which automatically shuts down a locomotive when it is not in use. This reduces idling emissions.”); AR 1925–26 (expert report submitted to Hearing Examiner explaining that the cancer risks calculated in the EIS were based on “overstated exposure assumptions and a conservative estimate of the cancer potency of diesel exhaust” and concluding that the “[c]ancer risks for diesel emissions estimated to be present are not significant.”). MBT-Longview also presented evidence to the Board that impacts to rail safety and transportation would not be significant. *See* AR 1843–44 (BNSF

testimony that it has capacity to serve Washington and continues to invest in infrastructure to meet capacity demands).

Second, MBT-Longview presented evidence to the Board that raised factual issues regarding the mitigation measures available for Stage 1 impacts. MBT-Longview presented the Board with portions of the EIS that stated that impacts related to noise impacts and social and community resources could be mitigated. AR 1742. MBT-Longview also presented evidence from BNSF that impacts to air quality, rail capacity, and rail safety would be mitigatable. For example, BNSF's anti-idling policy and equipment would mitigate impacts from locomotive emissions, and BNSF's practice of adapting the capacity of its lines would mitigate safety and capacity concerns. AR 1846–47; AR 1856–58; AR 1839–41; AR 1843–45. MBT-Longview also presented evidence that impacts to cultural resources could be mitigated. *See* AR 1742 (EIS concludes that the MOA under negotiation may resolve impacts to demolition of Reynolds plant).

The Board did not address any of this evidence but merely made the conclusory statement that it “will not substitute its judgment for that of the hearing examiner” and that it was “not left with a definite a firm conviction that a mistake was made.” AR 2086–87. Viewing the evidence in the light most favorable to MBT-Longview, MBT-Longview raised genuine disputes of material fact about the extent of Stage 1 impacts and whether such impacts could reasonably be mitigated. Granting summary judgment to Ecology and WEC was therefore improper.

E. The Board erred in granting Ecology and WEC summary judgment on Issue 8.

Ecology and WEC moved for summary judgment on Issue 8, seeking a ruling that MBT-Longview and the County were barred from collaterally attacking the EIS or presenting new information to counter the findings in the EIS. MBT-Longview was not challenging the adequacy of the EIS, but rather was arguing that the Hearing Examiner’s sole reliance on the EIS to the exclusion of all other evidence was improper. AR 1968–1970. The Board concluded that “the Hearing Examiner’s use of the FEIS can be challenged in addressing whether the exercise of SEPA substantive authority was clearly erroneous.” AR 2078 (emphasis added). The Board thus rejected Ecology and WEC’s arguments but inexplicably granted Ecology’s and WEC’s Motions for Summary Judgment on Issue 8. The Board’s judgment is thus inconsistent with its ruling on that issue and should be reversed.

VII. CONCLUSION

For the reasons set forth above, the Court should reverse the Board’s order dismissing MBT-Longview’s petition and remand the case to the Board for a full hearing.

Respectfully submitted this 28th day of December 2018.

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Attorneys for Petitioner Millennium Bulk Terminals-Longview, LLC

APPENDIX

DECISION OF THE COWLITZ COUNTY HEARING EXAMINER,
NOVEMBER 14, 2017

1 BEFORE THE COWLITZ COUNTY HEARINGS EXAMINER

2 IN RE THE MATTER OF MILLENNIUM) File No. 12-04-0375
3 BULK TERMINALS - LONGVIEW,) SHORELINE PERMIT APPLICATION
4 LLC COAL EXPORT FACILITY) NO. 17-0992
5 APPLICANT:)
6 MILLENNIUM BULK TERMINALS -) FINDINGS OF FACT, CONCLUSIONS
7 LONGVIEW, LLC) OF LAW AND DECISION DENYING
8 PERMITS

9 APPLICANT: Millennium Bulk Terminals - Longview, LLC ("Applicant")

10 REPRESENTATIVE: Jon K. Sitkin
11 Chmelik Sitkin & Davis, P.S.
12 1500 Railroad Avenue
13 Bellevue, Washington 98225

14 Craig S. Trueblood
15 K&L Gates, LLP
16 925 4th Avenue, Suite 2900
17 Seattle, Washington 98104

18 COUNTY STAFF: Elaine Placido, Director of Community Development
19 Ron Melin, Senior Environmental Planner
20 207 4th Avenue N.
21 Kelso, Washington 98626

22 REPRESENTATIVE: Douglas Jensen
23 Cowlitz County Prosecutor's Office
24 First Floor, 312 S.W. 1st Avenue
25 Kelso, Washington 98626

INTERESTED PARTIES: Columbia Riverkeeper, Friends of the Columbia Gorge,
Climate Solutions, Sierra Club, Washington Environmental
Council, Greenpeace USA, Association of Northwest Steelheaders,
Northern Plains Resource Council, Oregon Physicians for Social
Responsibility, Washington Physicians for Social Responsibility,
and Western Organization of Resource and Councils (collectively
"Riverkeeper")

*Findings of Fact, Conclusions
of Law and Decision Denying
Permits - 1*

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Phone: 360-748-3386

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APP002

1 REPRESENTATIVE: Kristen Boyles
2 Earthjustice
3 705 Second Avenue, Suite 203
4 Seattle, Washington 98104

5 SUMMARY OF REQUEST: The Applicant seeks a Shoreline Substantial Development Permit
6 and a Shoreline Conditional Use Permit to construct Stage 1 improvements for a coal export
7 facility near Longview and along the Columbia River, an urban shoreline of statewide
8 significance.

9 LOCATION OF PROPOSAL: The Project is located at 4029 Industrial Way, Longview,
10 Washington, within the Northwest and Northeast Quarters of Sections 35 and 36, Township 8
11 North, Range 3 West, W.M., and the Southwest and Southeast Quarters of Sections 25 and 26,
12 Township 8 North, Range 3 West, W.M., at approximately Columbia River Mile 63, within
13 Parcel Nos. 619530400, 61950, 61953, WDNR Aquatic Lands Lease No. 20-B09222, and BPA
14 Parcels 61954 and 6195303.

15 PROJECT DESCRIPTION: See below

16 SUMMARY OF DECISION:

17 1. In advance of this hearing Cowlitz County (the "County") and the Department of
18 Ecology ("Ecology"), as co-lead agencies, issued a Final Environmental Impact Statement (the
19 "FEIS") to inform this decision making process. The FEIS concludes that the Project has nine
20 unavoidable, significant adverse impacts. Importantly, neither the Applicant or any other party
21 has appealed the FEIS. For the purpose of this hearing its findings and conclusions are
22 unchallenged.

23 By Decision dated September 26, 2017, Ecology denied the Applicant a Section 401
24 Water Quality Certification, in part, under its substantive SEPA authority, concluding that the
25 Project had nine unavoidable significant environmental impacts as identified in the FEIS, and
that these impacts could not be reasonably mitigated. I concur with Ecology that the Project has
unavoidable, significant environmental impacts that cannot be reasonably mitigated, and
therefore deny the Applicant's requested Shoreline Substantial Development Permit and
Shoreline Conditional Use Permit under Cowlitz County's substantive SEPA authority.

*Findings of Fact, Conclusions
of Law and Decision Denying
Permits - 2*

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APP003

1 Although I reach the same conclusion as Ecology I do so through a different analysis.
2 Ecology reached its Decision by examining the FEIS and concluding that the listed unavoidable
3 and significant adverse impacts could not be mitigated. I question whether this approach
4 provided the Applicant with an opportunity to offer evidence of possible, reasonable mitigation.
5 Therefore, in this hearing the County and the Applicant have been given the opportunity to
6 propose reasonable mitigation. Nonetheless, by the conclusion of the hearing the parties had
7 failed to do so. As the unchallenged FEIS concludes that the Project has many unavoidable,
8 significant adverse impacts, and as the parties have failed to provide reasonable mitigation, the
9 Shoreline Permits must be denied.

10 In its Decision Ecology did not address the impacts from Greenhouse Gas (GHG)
11 emissions. This was due to the belief that the Applicant was proposing to mitigate 100% of net
12 GHG emissions. During the hearing the Applicant clarified that it is not proposing to mitigate
13 the Project's net GHG impacts as calculated in the FEIS. The FEIS concludes that if the net
14 GHG emissions are not fully mitigated they become a tenth unavoidable, significant adverse
15 impact.

16 In summary, I conclude that the Applicant has failed to reasonably mitigate the ten
17 unavoidable, significant adverse impacts identified in the FEIS, and the Shoreline Permits must
18 be denied under substantive SEPA authority.

19 2. The Applicant has the burden of proving that all of the requirements of the State
20 Shoreline Management Act (SMA) and the County's Shoreline Master Program (SMP) have
21 been satisfied. As a result of the unavoidable, significant adverse impacts identified in the FEIS,
22 the Applicant has failed to meet this burden.

23 3. There remain a number of unresolved issues which further prevent the Applicant
24 from meeting its burden of proving that the requirements of SMA and SMP have been met.

25 These include:

*Findings of Fact, Conclusions
of Law and Decision Denying
Permits - 3*

COWLITZ COUNTY HEARING EXAMINER
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1 The Project requires dredging to accommodate berthing of fully loaded Panamax-class ships,
2 resulting in dredging and disposal of up to 350,000 cubic yards of material from State-owned
3 aquatic lands.

4 The Project would be constructed in two stages over several years:

5 Stage 1 of the Project would consist of facilities necessary to unload coal from
6 trains, stockpile the coal onsite, and load coal into oceangoing vessels at Dock 2.
7 Two docks (Dock 2 and Dock 3) would be constructed along with one ship loader
8 and related conveyors on Dock 2, with berthing facilities only at Dock 3.
9 Onshore a stockpile area including two stockpile pads, railcar unloading facilities,
10 one operating rail track, up to eight rail storage tracks for train parking,
11 miscellaneous ground improvements, and associated facilities and infrastructure
12 would be built. Upon completion of Stage 1 the Project would have capacity for
13 handling 25 Million Metric Tons Per Year (MMTPY) of coal.

14 Stage 2 of the Project would consist of installation of ship loading and associated
15 equipment on Dock 3, two additional coal stockpile pads and necessary conveyors
16 and facilities for conveyance of coal from the collective coal pads to the two
17 docks. Construction of Stage 2 would be expected to commence once Stage 1 had
18 been completed, within approximately 3 to 5 years. Stage 2 would increase
19 export capacity to 44 MMTPY.

20 The Applicant is leasing 540 acres from the landowner, Northwest Alloys. Northwest
21 Alloys also has an existing Aquatics Lands Lease No. 20-B09222 from the Washington
22 Department of Natural Resources (DNR) through January 2038 for the adjacent tidelands where
23 the Project's docks are to be located. The 190-acre Project site has been separated from the
24 Applicant's remaining leased area through boundary line adjustment. The remaining land within
25 the Applicant's leased area is intended for other uses, including the continued operation of a bulk
product terminal at the existing Dock 1,

A more complete description of the Project can be found in the County Staff Report (the
"Staff Report") at pages 4-13, incorporated herein by reference.

1 Coal would be delivered to the Project site by rail. The Project anticipates receipt of coal
2 from two separate sources:

3 1. The primary source of coal would be the Powder River Basin in Montana and
4 Wyoming. Coal coming from this source would be delivered by dedicated "unit trains"
5 operating on BNSF lines. The coal trains would move west to Huntley, Montana then across
6 northern Idaho to Sandpoint, Idaho. From Sandpoint, trains would cross into Washington State
7 and travel through Spokane. Trains would then travel south to Pasco and then west along the
8 Washington side of the Columbia Gorge in close proximity to the Columbia River. The trains
9 would then travel through Vancouver and turn north, following the Interstate 5 corridor and the
10 Columbia River until reaching the Longview/Kelso area. Once unloaded at the Project site the
11 empty trains would continue north on the main BNSF line paralleling Interstate 5 and through
12 Olympia, Lacey, Tacoma and Auburn before turning east and travelling over the Cascade
13 Mountains at Stampede Pass. Return trains would then turn south through Yakima and return to
14 Pasco. From Pasco empty trains would follow the same route as loaded trains and travel through
15 Spokane and back to the Powder River Basin.

17 2. The secondary source of coal would come from the Uinta Basin in Utah and
18 Colorado as well as from the Powder River Basin. Coal from this area would be delivered on
19 Union Pacific (UP) unit trains. These trains would travel through Pocatello and Boise, Idaho and
20 then along the Oregon side of the Columbia Gorge to Portland. North of Portland UP trains
21 would operate on BNSF tracks, crossing the Columbia River into Vancouver and continuing on
22 the same main BNSF track used by the BNSF coal trains. Empty UP trains would return on the
23 same route as they came.
24
25

1 Coal from either source would be delivered by dedicated trains or "unit" trains consisting
2 of 4 locomotives and 125 coal cars with an approximate length of 1 1/3 miles. The Project
3 would result in 8 loaded unit trains and 8 empty unit trains per day, or 16 total unit trains per day.
4 Coal would be delivered 365 days per year resulting in over 23,000 locomotive trips annually (4
5 locomotives x 16 trains x 365 = 23,360 annual locomotive trips).

6 All coal trains would arrive at Longview/Kelso at the "Longview Junction Yard". Trains
7 would be diverted off of the BNSF main line and onto the "BNSF Spur". The BNSF Spur travels
8 across the Cowlitz River and into the Longview industrial area. Coal trains would then continue
9 on a second spur known as the "Reynolds Lead" through Longview until reaching the Project
10 site.
11

12 Coal would be unloaded and sent by conveyor to large storage pads. Additional
13 conveyance systems would convey the coal to the docks for loading onto ocean-going vessels for
14 shipment to Pacific markets. Coal would be loaded onto vessels in the "Handymax" and
15 "Panamax" sizes. These are deep draft vessels having capacities of up to 100,000 tons. The
16 Project anticipates loading 70 vessels per month, or 840 vessels per year. This equates to 1,680
17 vessel "transits" of the Columbia River annually.

18 Construction of the Project would result in the permanent loss of 24.10 acres of wetlands.
19 In addition, construction and operations would have shoreline, overwater, underwater, and
20 dredging impacts affecting aquatic resources. To mitigate these impacts, the Applicant
21 submitted a Conceptual Mitigation Plan (the "Mitigation Plan") which evaluates fish and wildlife
22 habitat impacts, discusses onsite construction impacts and minimization measures, and proposes
23 fish and wildlife habitat mitigation. The Mitigation Plan proposes to create an off-channel
24

1 slough feature as aquatic mitigation and also proposes off-site wetlands mitigation. The FEIS
2 concludes that as a result of the Mitigation Plan, there will be no adverse impacts to wetlands.
3 On July 19, 2017, the County approved a Critical Areas Permit No. 17-06-3166 requiring
4 compliance with the Mitigation Plan. The Critical Areas Permit was not appealed.

5 Acting as co-lead agencies, on April 29, 2016, the County and Ecology published a Draft
6 Environmental Impact Statement (DEIS) for review and comment. Several hundred thousand
7 comments were received. On April 28, 2017, the co-lead agencies issued their Final
8 Environmental Impact Statement (FEIS). The FEIS has not been appealed by any party and its
9 findings and conclusions come to the Hearing Examiner unchallenged. The FEIS concludes that
10 the Project will have ten unavoidable, significant adverse impacts: to noise; increased risk of
11 cancer; traffic; community resources; cultural resources; rail capacity; rail safety; vessel
12 transportation; tribal resources; and Greenhouse Gas emissions.

13 There are several ongoing, related matters occurring with respect to the Project:

14
15 • On January 5, 2017, the Washington Department of Natural Resources (DNR)
16 denied the Applicant's request to sublease the aquatic lands under lease to Northwest Alloys.
17 This denial was appealed by the Applicant to the Cowlitz County Superior Court. On October
18 27, 2017, the Cowlitz County Superior Court orally ruled that DNR's denial was arbitrary and
19 capricious, but the court did not find that the Applicant was entitled to a sublease. Rather, the
20 court directed the parties to engage in further negotiations to determine if a sublease could be
21 agreed upon.

22
23 • On July 19, 2017, the County issued its Critical Areas Permit approving the
24 Mitigation Plan. The permit was not appealed.

1 Washington Physicians for Social Responsibility and Western Organization of Resource and
2 Councils (collectively "Riverkeeper"). These interested parties were represented by legal
3 counsel, allowed to make opening and closing presentations and given the opportunity to cross-
4 examine other parties' expert witnesses.

5 Also prior to the public hearing I undertook an independent site examination. This
6 included an examination of the site, the surrounding properties and the surrounding area.

7
8 The public hearing commenced at 9:00 a.m. on November 2, 2017 at the Cowlitz County
9 Expo Center in Longview. The public hearing continued for three days with testimony ending at
10 noon on Monday, November 6. The hearing was held open to the end of Monday, November 6,
11 to allow for additional written public comment. The hearing formally concluded at 5:00 p.m. on
12 Monday, November 6.

13 In advance of the public hearing a Pretrial Order was entered to assist in hearing
14 procedures. The Order established an identification system for exhibits including an exhibit
15 prefix to identify the presenting party. County exhibits bear the prefix "C" and begin with
16 exhibit C-1. The Applicant's exhibits bear the prefix "A" and begin with exhibit A-26.
17 Riverkeeper exhibits bear the prefix "I" and begin with exhibit I-101. Exhibits presented by the
18 public bear the prefix "P" and begin with exhibit P-126. A complete list of all exhibits is
19 attached to this decision.

20
21 Some of the core documents include:

22	C-1	County Staff Report to the Hearing Examiner.
23	C-7	Final EIS.
24	A-64	Applicant's Revised Comments to Proposed Permit Conditions.

25
*Findings of Fact, Conclusions
of Law and Decision Denying
Permits - 10*

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APP011

1 I-102 Ecology Decision denying Section 401 Clean Water Certification.

2 I-104 DNR Memorandum of Decision.

3 These core documents may be referred to by their title rather than their exhibit number
4 (for example, the "Staff Report", the "FEIS", the "Applicant's Response", the "Ecology Decision"
5 and the "Memorandum of Decision").

6 Cowlitz County appears through its Director of Community Development, Elaine
7 Placido, and its Senior Environmental Planner, Ron Melin. The County is represented by
8 Douglas Jensen of the Cowlitz County Prosecuting Attorney's Office. The Applicant is
9 represented by Craig Trueblood and Jon Sitkin. Riverkeeper is represented by Kristen Boyles.
10 Several hundred interested individuals were present at various times during the three-day
11 hearing.

12
13 The public hearing commenced with the testimony of Elaine Placido from County Staff.
14 Ms. Placido explained that the purpose of the hearing was to consider shoreline permits for Stage
15 1 of the Project, and she provided an overview of the Project's planned improvements. Ms.
16 Placido noted that the Project site has a zoning designation of MH (Heavy Industrial), and that
17 the Project is an allowed use in this zoning district. She added that the Project is vested under
18 the County's 1976 Comprehensive Plan (a new Plan has recently been approved) and that the
19 County finds the Project to be consistent with the applicable Comprehensive Plan. Ms. Placido
20 also confirmed that the Project is vested under the County's 1977 Shoreline Master Program
21 (SMP). County Staff finds the Project to be consistent with the SMP and that it satisfies all of
22 the requirements of the SMP and the Shoreline Management Act (SMA). County Staff
23 recommends approval of the Project subject to the 36 conditions found at the conclusion of the
24 Staff Report.
25

*Findings of Fact, Conclusions
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COWLITZ COUNTY HEARING EXAMINER
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APP012

1 Following Ms. Placido's testimony the Applicant's counsel, Craig Trueblood, made a
2 brief opening presentation. Mr. Trueblood then presented the testimony of the Applicant's
3 representatives, Kristen Gaines and Trevor Simmons; the Applicant's Environmental Consultant,
4 Glenn Grette; a representative from BNSF, Dava Kaitala; the Director of the Cowlitz County
5 Economic Development Council, Ted Sprague; and Mike Bridge, representative for the
6 Longview/Kelso Building Trades Associations. Most of these witnesses testified both orally and
7 by written testimony presented in advance of the public hearing.

8
9 At the conclusion of the Applicant's presentation the public testimony commenced.
10 Kristen Boyles, counsel for Riverkeeper, was allowed to make an opening presentation.
11 Pursuant to the Pretrial Order tribal representatives were given the first opportunity to testify,
12 followed by public officials and then members of the general public. Representatives of the
13 Cowlitz Tribe were not available on Thursday and were instead allowed to give testimony on
14 Friday and again on Monday. A few public officials testified followed by testimony from
15 members of the general public during the remainder of Wednesday. Those giving testimony
16 from prepared written statements were encouraged to have their written statements identified as
17 exhibits. During the course of the day written comments, both from those giving testimony and
18 others, were submitted and identified as public exhibits.

19
20 The hearing resumed at 9:00 a.m. on Friday, November 3, with continued public
21 testimony. Three representatives from the Cowlitz Tribe were allowed to testify. Public
22 testimony continued until mid-afternoon by which time all members of the public asking to
23 testify had been given the opportunity.

1 The hearing resumed on Monday, November 6 at 9:00 a.m. to hear from the Applicant's
2 responsive witnesses. Chip Halpert and Robert Scofield testified on air quality issues; David
3 Hauri testified on coal dust related issues; Peter Bennett, the Applicant's Vice President of
4 Business Development for Bulk Products, testified on business operations; Julie Carey and Mary
5 Hess testified on issues relating to air quality and Greenhouse Gas emissions; and the Applicant's
6 Representative, Kristen Gaines, responded to various questions asked by the Hearing Examiner
7 during the course of the hearing. These responses were reduced to writing and submitted as
8 Exhibit A-65. Ms. Gaines also testified regarding the Applicant's revised position on proposed
9 conditions of Project approval. This testimony was also reduced to writing and submitted as
10 Exhibit A-64. The Applicant also submitted the supplemental testimony of Dava Kaitala,
11 representative for BNSF (Exhibit A-66). The County had no additional witnesses and all
12 testimony was completed by noon on Monday, November 6 but members of the public were
13 given until 5:00 p.m. to present additional written comment.

15 At the conclusion of testimony, the County was asked if it had any changes or additions
16 to its proposed conditions for Project approval. The County replied that it is standing on the
17 conditions contained in the Staff Report. The Applicant's revised response to these proposed
18 conditions is found in Exhibit A-64, with additional comment found in Exhibit A-65.

20 None of the parties requested an opportunity to submit written post-hearing comments or
21 briefing. The hearing was therefore deemed closed as of 5:00 p.m. on Monday, November 6.

22 During the course of the hearing, there were no proposed changes to the Project. The
23 Applicant did, however, submit new information on the issue of "wake stranding" of fish,
24 including a proposed Mitigation Plan which has recently been presented to the National Marine
25

1 Fisheries Services (NMFS) (Exhibit A-60). These and other materials relating to wake stranding
2 will be discussed more fully in the Findings of Fact.

3 Based upon the Staff Report, the FEIS and related materials, the testimony and exhibits
4 presented by the Applicant and all other testimony, the Hearing Examiner makes the following:

5 **FINDINGS OF FACT**

6 **1. General Findings of Fact.**

7 1.1 Any Findings of Fact contained in the foregoing Background Section are
8 hereby incorporated as the Hearing Examiner's Findings of Fact.
9

10 **FINDINGS RELATED TO SEPA**

11 **2. Findings of Fact Relating to Noise Impacts.**

12 2.1 The Project's noise impacts are discussed in Section 5.5 of the FEIS. As
13 noted in the Background Section, loaded coal trains arriving at the Longview Junction Yard in
14 Kelso would transfer onto the BNSF spur, taking them across the Cowlitz River and into the
15 Longview industrial area. Coal trains would then transfer onto the Reynolds Lead which runs
16 through the Longview industrial area until reaching the Project site. Empty trains would reverse
17 this route back along the Reynolds Lead and BNSF spur to the BNSF mainline at the Longview
18 Junction Yard.

19 2.2 A map depicting the location of the BNSF spur and the Reynolds Lead is
20 found at Figure 2-2 of the FEIS.

21 2.3 The Reynolds Lead has four public at-grade crossings. These are located
22 at Third Avenue, California Way, Oregon Way and Industrial Way in Longview and identified in
23 Figure 2-2 in the FEIS.
24

1 2.4 The Project would result in 16 unit trains (8 loaded, 8 empty) traveling
2 through the public at-grade crossings along the Reynolds Lead.

3 2.5 Per Federal Railroad Administration (FRA) regulations, Project-related
4 trains would be required to sound their horns for public safety at the public at-grade crossings
5 along the Reynolds Lead.

6 2.6 The FEIS finds that the required use of train horns at public at-grade
7 crossings along the Reynolds Lead will expose 60 residences to a severe noise impact and an
8 additional 229 residences to a moderate noise impact.

9 2.7 Proposed transportation improvements would eliminate the public at-grade
10 crossings at Oregon Way and Industrial Way. If constructed, these improvements will eliminate
11 the noise impacts at these locations but similar improvements are not currently planned at the
12 public at-grade crossings at Third Avenue or California Way.

13 2.8 If the public at-grade crossings at Industrial Way and Oregon Way are
14 eliminated the number of residences suffering severe or moderate noise impacts will be reduced
15 but 10 residences will continue to be exposed to severe noise impact and 42 residences will
16 continue to be exposed to moderate noise impact due to the use of train horns at the Third
17 Avenue and California Way crossings.

18 2.9 The FEIS finds that the implementation of Quiet Zones at these at-grade
19 crossings would eliminate the Project's noise impacts. But without the implementation of Quiet
20 Zones the resulting train noise would be an unavoidable and significant adverse environmental
21 impact.
22
23
24
25

1 2.10 A Quiet Zone is a public at-grade crossing where additional safety
2 precautions have been constructed, reducing the federal requirements for trains to sound their
3 horns when approaching the crossing. Quiet Zones are subject to Federal Railroad
4 Administration approval.

5 2.11 The County does not propose the installation of necessary Quiet Zones as
6 a condition of Project approval. The County proposes the following two conditions instead:

7 **"Condition 25.** To address moderate and severe noise impacts along the
8 Reynolds Lead due to rail traffic, (e.g. horn blowing) before beginning full
9 operations, the Applicant shall coordinate with the Director of Cowlitz
10 County Building and Planning, the City of Longview, Longview
11 Switching Company, and the affected community to inform interested
12 parties on the Federal Railroad Administration process to implement a
13 Quiet Zone that will include the Third Avenue and California Avenue
14 crossings. Public outreach on the Quiet Zone process must include low
15 income and minority populations. The Applicant shall assist interested
16 parties in the preparation and submission of a Quiet Zone application to
17 the Federal Railroad Administration. If the Quiet Zone is approval, the
18 Applicant shall fund the Quiet Zone improvements, which could include
19 electronics, barricades and crossing gates.

20 **Condition 26.** If a Quiet Zone for the Reynolds Lead is not
21 implemented, the Applicant shall fund the Sound Reduction Study to
22 identify ways to mitigate the moderate and severe impacts from train noise
23 from proposed action-related trains along the Reynolds Lead. The study
24 methods shall be discussed with the Director of Cowlitz County Building
25 and Planning and the Washington State Department of Health for
approval."

26 2.12 With minor adjustment the Applicant concurs with the County's proposed
27 conditions to address train noise impacts. (Exhibit A-64) Further explanation of the Applicant's
28 position is found in Exhibit A-65.

29 3. **Findings Relating to Air Quality Impacts Including Increased Risk of** 30 **Cancer.**

31 3.1 The FEIS analyzes the Project's air quality impacts in Section 5.6.

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1 3.2 The FEIS finds that the Project will result in increased inhalation cancer
2 risk related to diesel particulate matter emissions from all operation sources (terminal, rail and
3 vessel) in the Project area, the Kelso/Longview area, and County-wide. The FEIS finds:

4 • Near the Project site there is an increased risk of ten cancers per million
5 extending across the Columbia River approximately 1.3 miles southwest of the Project area and
6 approximately .1 miles northeast of the Project area, and across Industrial Way near the
7 northwest boundary of the Project area.

8 • In the Kelso/Longview area there is an increased risk of ten cancers per
9 million for most of Longview south of Ocean Beach Highway, as well as a portion of Kelso
10 along the I-5 corridor. There is an increased risk of thirty cancers per million along the Reynolds
11 Lead a width of 3,000 feet and extending to the Highlands neighborhood. There is an increased
12 risk of fifty cancers per million along the Reynolds Lead a width of 1,000 feet bordering the
13 Highlands neighborhood.

14 • In Cowlitz County there is an increased risk of ten cancers per million
15 along the BNSF mainline a width of 2 miles throughout all of the County. There is an increased
16 risk of thirty cancers per million along the BNSF mainline a width of 1/2 mile through the entire
17 County.

18 3.3 The FEIS concludes that these increased risks of cancer are an
19 unavoidable and significant adverse impact.

20 3.4 The FEIS finds that the increased risk of cancer could be mitigated by use
21 of the newest generation of low-emission train locomotives, referred to as "Tier 4" locomotives,
22 first introduced in 2015. Unless Tier 4 locomotives are utilized the increased risk of cancer
23 cannot be mitigated.
24
25

1 3.5 The County does not propose any condition to mitigate the increased risk
2 of cancer.

3 3.6 The BNSF representative, Dava Kaitala, testified that 40% of its current
4 locomotive fleet has been purchased within the last ten years.

5 3.7 Ms. Kaitala also testified that perhaps 8% of BNSF's current locomotive
6 fleet consists of Tier 4 locomotives, or older locomotives retrofitted to Tier 4 emission standards.

7 3.8 By supplemental written testimony Dava Kaitala testifies that of BNSF's
8 current fleet of 8,640 locomotives, 275, or 3.1%, are Tier 4 compliant and an additional 275, or
9 an additional 3.1%, are "Tier 4 credit" locomotives. In other words, the current BNSF
10 locomotive fleet includes 550 Tier 4 or Tier 4 credit locomotives, or 6.2% of the fleet. (Exhibit
11 A-66)
12

13 3.9 BNSF declares that "a condition requiring a use of a particular type of
14 locomotive (Tier 4) to serve this Project would be an impermissible local regulation of freight
15 rail transportation, and would be preempted by federal law." (Exhibit A-66)

16 3.10 BNSF anticipates that the replacement or retrofitting of its locomotive
17 fleet to Tier 4 status will be achieved by the year 2040. (Testimony of Kaitala)

18 **4. Findings Relating to Vehicle Transportation.**

19 4.1 The FEIS discusses the Project's traffic impacts in Section 5.3.

20 4.2 Under current track conditions along the Reynolds Lead, a Project-related
21 train will take between 8 and 10 minutes to pass through each of the four public at-grade
22 crossings. Collectively, the 16 daily trains would increase the total gate down time along the
23 Reynolds Lead by over 130 minutes at each crossing during an average day.
24

1 4.3 At current train speeds, and assuming one Project train traveling along the
2 Reynolds Lead during the peak traffic hour, the Project would result in the Level of Service
3 (LOS) at the four public at-grade crossings along the Reynolds Lead, as well as at two private at-
4 grade crossings, to fall to unacceptable levels of either "E" or "F".

5 4.4 Similarly, and assuming one Project train traveling along the Reynolds
6 Lead during the peak traffic hour, blocked traffic would result in unacceptable queuing lengths at
7 several of these at-grade crossings.

8 4.5 Because vehicle delays will increase, emergency vehicle delays will also
9 increase. During a 24-hour period, Project-related trains would increase the probability of
10 emergency response vehicles being delayed by up to 10% at crossings along the Reynolds Lead.

11 4.6 Proposed improvements at the Industrial Way and Oregon Way crossings,
12 previously referred to in Finding of Fact 2.7, would eliminate LOS deficiencies, queuing
13 problems and emergency vehicle delays at these intersections but would not mitigate traffic
14 impacts at the California Avenue and Third Avenue rail crossings.

15 4.7 The FEIS concludes that these traffic impacts are an unavoidable and
16 significant adverse impact.

17 4.8 The FEIS further concludes that these significant traffic impacts can be
18 mitigated if all necessary track improvements to the Reynolds Lead are implemented, allowing
19 an increase in train speed from 10 to 25 miles per hour. Increased train speed would
20 significantly decrease the length of gate down time at each crossing. The only rail crossing to
21 still have an unacceptable LOS would be a private crossing at 38th Avenue. All of the public at-
22 grade crossings along the Reynolds Lead would have LOS of "D" or better and all queuing
23 lengths would be acceptable.
24
25

1 4.9 The FEIS concludes that the Project's traffic impacts cannot be reasonably
2 mitigated unless all necessary track improvements to the Reynolds Lead are made prior to
3 Project operations.

4 4.10 The Staff Report does not require all track improvements to be made as a
5 condition of Project approval. Instead, County Staff proposes the following condition:

6 **"Condition 19.** To address vehicle delay impacts at grade crossings at
7 the Reynolds Lead and BNSF spur, the Applicant shall notify the Director
8 of Cowlitz County Building and Planning, City of Longview, Cowlitz Fire
9 District, City of Rainier (Oregon), Port of Longview, and Cowlitz-
10 Wahkiakum Counsel of Governments before each identified operational
11 stage (Stage 1A, Stage 1B, and Stage 2) that will change average daily rail
12 traffic on the Reynolds Lead and BNSF spur. The Applicant shall prepare
13 a memorandum to document the changes to average daily rail traffic. The
14 memorandum must be submitted to these agencies at least six months
15 before the change in average daily rail traffic."

16 4.11 The Applicant supports the County's proposed condition with minor
17 revision. (Exhibit A-64)

18 4.12 In its additional response (Exhibit A-65), the Applicant adds that it would
19 not object to a requirement that all rail improvements be made prior to construction of Stage 2.

20 5. **Findings Relating to Social and Community Resources.**

21 5.1 The FEIS, in Section 3.2, finds that there is a disproportionate percentage
22 of minority and low income populations living near the Reynolds Lead.

23 5.2 The FEIS concludes that the Project's noise impacts (Findings 2.1 through
24 2.12) will have a disproportionately high and adverse effect on minority and low
25 income populations. Implementation of Quiet Zones would eliminate this disproportionate
impact. Without implementation of Quiet Zones, the Project's disproportionate adverse effect on
minority and low income populations will be unavoidable and significant.

1 5.3 The FEIS concludes that the Project's traffic impacts (Findings 4.1
2 through 4.12) will have a disproportionately adverse effect on minority and low income
3 populations. Without necessary track improvements to the Reynolds Lead, the Project's
4 disproportionate traffic impacts on minority and low income populations will be unavoidable and
5 significant.

6 5.3 The increased risk of cancer resulting from the Project (Findings 3.1
7 through 3.10) will have a disproportionately adverse effect on minority and low income
8 populations. Use of Tier 4 locomotives would reduce but not eliminate this disproportionate
9 adverse effect, but otherwise this impact is unavoidable and significant.
10

11 **6. Findings Relating to Cultural Resources.**

12 6.1 The Project's impacts on cultural resources is discussed in Section 3.4 of
13 the FEIS.

14 6.2 The Project site was formerly used by the Reynolds Metal Company as an
15 aluminum plant. The former Reynolds facility was evaluated as a Historic District and
16 documented on a National Register of Historic Places (NRHP) nomination form as part of the
17 review undertaken by the Corps of Engineers. The former facility is officially referred to as the
18 "Reynolds Metals Reduction Plant Historic District" (the "Reynolds Historic District") and was
19 determined eligible for listing in the NRHP as a Historic District.
20

21 6.3 The Reynolds Historic District consists of 53 separate resources including
22 33 buildings, 12 structures and 8 landscape features. Of these 53 identified resources, 39 were
23 determined to contribute to the Reynolds Historic District's significance.
24
25

1 6.4 Construction of the Project would demolish 30 of the 39 identified
2 resources contributing to its historical significance. The destruction of these resources would
3 diminish the importance of the remaining resources and the Reynolds Historic District would no
4 longer be eligible for listing in the NRHP.

5 6.5 The FEIS notes that impacts to the Reynolds Historic District are
6 attempting to be resolved through a "Memorandum of Agreement" currently being negotiated
7 among the Corps of Engineers, Cowlitz County, the Department of Archeology and Historical
8 Preservation (DAHP), the City of Longview, BPA, the National Park Service, potentially
9 affected Native American Tribes, and the Applicant.

10 6.6 The FEIS concludes that demolition of the Reynolds Historic District is an
11 unavoidable and significant adverse environmental impact, but that an approved Memorandum
12 of Agreement may resolve this impact.

13 6.7 The Staff Report does not propose any conditions of approval relating to
14 the Reynolds Historic District.

15 6.8 The Applicant's response (Exhibit A-65) states:

16 "The Memorandum of Agreement process has been ongoing since 2014.
17 Multiple drafts have been circulated to the parties and stipulations have
18 been agreed to. The document is in its final draft and is awaiting
19 finalization and signatures by the parties."

20 6.9 The Applicant objects to the imposition of a condition that would require formal
21 approval of a Memorandum of Agreement as a condition of permit approval. The Applicant
22 adds that approval of a Memorandum of Agreement will be required for federal permit approval
23 and it is therefore unnecessary to impose it as a condition for this permit. (Testimony of Gaines)

1 7. **Findings Relating to Statewide Rail Transportation.**

2 7.1 The FEIS analyzes the Project's impact on projected BNSF rail capacity in
3 the State of Washington in Section 5.1.

4 7.2 In Table 5.1-5 the FEIS examines the various segments of BNSF mainline;
5 their length; their available number of tracks (1 or 2); their projected capacity in 2028; and the
6 impact of the Project on their projected capacity.

7 7.3 The FEIS finds that the BNSF segment from the Idaho border to Spokane,
8 having a length of 18.6 miles and 2 current tracks, has a projected capacity of 106 trains per day
9 in 2028. With inclusion of the Project's trains, this segment of the BNSF mainline is projected to
10 be 46 trains over its daily capacity by 2028.

11 7.4 The FEIS finds that the BNSF segment between Spokane and Pasco,
12 having a length of 145.5 miles and 1 current track, has a projected capacity of 56 trains per day
13 in 2028. With inclusion of the Project's trains, this segment of the BNSF mainline is projected to
14 be 34 trains over its daily capacity by 2028.

15 7.5 The FEIS finds that the BNSF segment from Pasco to Vancouver, having
16 a length of 221.4 miles and 1 current track, has a projected capacity of 48 trains per day in 2028.
17 With inclusion of the Project's trains, this segment of the BNSF mainline is projected to be 15
18 trains over its daily capacity by 2028.

19 7.6 The FEIS finds that the BNSF segments from Vancouver to Longview,
20 and from Longview to Auburn, are projected to be at capacity with the inclusion of the Project's
21 trains.
22
23
24
25

1 7.7 The FEIS anticipates that BNSF will make necessary investments or
2 operating changes to accommodate rail traffic growth, but it is unclear when these necessary
3 improvements can be taken or permitted. If all necessary improvements to increase capacity are
4 not made the Project will contribute to these capacity exceedances and will result in an
5 unavoidable and significant adverse impact on rail transportation.

6 7.8 The Staff Report does not include any condition that would require Project
7 trains to operate only on segments of BNSF line having adequate capacity. Instead, the Staff
8 Report proposes the following condition:
9

10 **"Condition 18.** To allow for adequate planning to address proposed
11 action-related trains contributing to segments exceeding capacity on
12 mainline routes in Washington State, the Applicant shall notify BNSF and
13 UP before each identified operational stage (Stage 1A, Stage 1B, and
14 Stage 2) begins that will change average daily rail traffic on mainline
15 routes in Washington State. The Applicant shall prepare a report that
16 documents the notification of BNSF and UP and tracks changes to average
17 daily rail traffic. The report must be submitted to BNSF, UP, Washington
18 State Department of Transportation, Utilities Transportation Commission,
19 and the Director of Cowlitz County Building and Planning at least 6
20 months before the change in average daily rail traffic."

21 7.9 The Applicant concurs with the County's proposed condition with minor
22 revisions. (Exhibit A-64)

23 7.10 The Applicant's Response (A-65) adds:

24 "Millennium does not control the railroad and how they manage
25 capacity. . . . Neither the County nor the Applicant would be able to
determine whether the rail lines were at capacity. Dava Kaitala testified
that the railroad continuously makes improvements to maintain or expand
capacity."

 7.11 In her supplemental written testimony the BNSF representative, Dava
Kaitala, adds:

1 "Recent investments in infrastructure in the Pacific Northwest and system
2 wide . . . demonstrate BNSF's continuing commitment to making needed
3 capacity upgrades. As a result, it is not necessary to condition coal
4 deliveries to the Project or lines being upgraded to a capacity set by the
5 State of Washington and Cowlitz County." (Exhibit A-66 at Page 9)

6
7 **8. Findings Related to Rail Safety.**

8 8.1 The FEIS discusses the Project's impacts on rail safety in Section 5.2.

9 8.2 Assuming that track improvements are made to the BNSF spur and
10 Reynolds Lead (Finding 4.8), the Project is likely to result in an accident on this rail segment
11 involving a fully loaded unit train once every 4 years, and an accident involving an empty train
12 once every 4 years. Collectively, with all track improvements having been made there is a 50%
13 chance of a Project-related train accident on the BNSF spur or Reynolds Lead each year.

14 8.3 If track improvements are not made the FEIS predicts that the number of
15 Project-related train accidents on the BNSF spur or Reynolds Lead would be approximately 1.5
16 to 3 times higher, or up to 1.5 accidents per year.

17 8.4 The FEIS predicts that the addition of Project trains would increase
18 statewide rail accidents by 11.38 accidents per year. This is a 22% increase in rail accidents.

19 8.5 The FEIS finds that the increase in rail line accidents is, at least in part, the
20 product of insufficient rail line capacity as discussed in the previous section of Findings.

21 8.6 The FEIS concludes that the Project would increase the potential for train
22 accidents in both Cowlitz County and across the State of Washington. The rail line operators
23 could improve rail safety through investments or operational changes but it is unknown when or
24 if these actions will be taken or permitted. Therefore, the FEIS concludes that Project-related
25 trains could result in an unavoidable and significant adverse impact on rail safety.

1 8.7 The responses of the County, the Applicant and BNSF are the same as
2 their responses to the rail capacity issued discussed above.

3 **9. Findings Relating to Vessel Transportation.**

4 9.1 The FEIS discusses the Project's impacts on vessel transportation in
5 Section 5.4.

6 9.2 At completion the Project is expected to load 70 oceangoing vessels per
7 month, or 840 vessels per year. Each vessel makes 2 "transits" of the Columbia River, resulting
8 in 1,680 total transits annually.

9 9.3 80% of the Project vessels are expected to be in the "Panamax" class,
10 having a capacity of up to 100,000 tons and with a draft of 43 feet. The remaining 20% are
11 expected to be of the "Handymax" class having smaller capacities and somewhat shallower
12 drafts.

13 9.4 Currently there are approximately 3,800 annual transits of the Lower
14 Columbia by commercial vessels unrelated to the Project. These are commercial vessels going
15 to and coming from upriver ports in Portland, Vancouver and elsewhere.

16 9.5 By 2028 the number of transits by unrelated commercial vessels is
17 expected to increase to 4,440. Addition of the Project's vessels would increase the total number
18 of annual transits of the Lower Columbia to 6,120.

19 9.6 The Project would therefore result in a 38% increase in 2028 vessel traffic.

20 9.7 An increase in vessel traffic increases the risk of vessel incidents including
21 collisions, groundings, fire, explosions and other emergencies.
22
23

1 9.8 The FEIS anticipates that the Project will result in an increase of 2.8 vessel
2 incidents per year along the Lower Columbia.

3 9.9 The severity of a vessel incident can vary greatly from no damage to total
4 loss, and not all incidences are likely to result in notable damage.

5 9.10 The FEIS finds that if a Project-related vessel incident occurs the impacts
6 could be significant depending on the nature and location of the incident, the weather conditions
7 at the time and the discharge of oil.

8 9.11 The FEIS concludes that although the likelihood of a serious Project-
9 related vessel incident is low, there are no mitigation measures that could completely eliminate
10 the possibility of an incident or the resulting impacts.

11 9.12 The Staff Report does not propose any conditions to mitigate the impacts
12 of a significant vessel incident.

13 9.13 The Hearing Examiner proposed a condition of Project approval similar to
14 one imposed recently in *In re NWIW*, Cowlitz County Hearing No. SL 16-0975. That project is
15 located a few miles upriver near Kalama and involves the production and shipping of methanol
16 by vessel. Its shoreline permit contains the following condition:

17
18 "20. **Methanol Spill Mitigation.** In the event of a spill of methanol
19 from the Project site or from a methanol cargo vessel, resulting in
20 demonstrable impact to the natural shoreline and the resources and
21 ecology of the shoreline, as a condition of continued permit approval the
22 Permittees shall promptly prepare and undertake full mitigation of all
23 impacts to the natural shoreline and resources and ecology of the shoreline
24 as required by the Department of Ecology, the Environmental Protection
25 Agency or any other agency with jurisdiction pursuant to applicable state
or federal law. In the event of any uncertainty as to the sufficiency of
mitigation or its implementation the issue shall be returned to the Hearing
Examiner."

1 9.14 The Applicant objects to the imposition of a similar condition on this
2 Project. The Applicant argues that the vessels used for transporting coal will not belong to the
3 Applicant and it will not have control over them. The Applicant therefore objects to being held
4 responsible for the actions of third parties. (Testimony of Gaines) Additional objections to this
5 proposed condition are found in the Applicant's Responses, Exhibit A-65 in Section 4.

6 10. **Findings Relating to Tribal Resources.**

7 10.1 The FEIS discusses impacts on tribal resources in Section 3.5.

8 10.2 A section of the Columbia River located upstream from the Project site,
9 commonly referred to as "Zone 6", is a critical tribal commercial, subsistence and ceremonial
10 fishing area for a number of American Indian Tribes. Zone 6 consists of that portion of the
11 Columbia River approximately bounded by Bonneville Dam to the west and by McNary Dam to
12 the east, a distance of 147 miles. The location of Zone 6 is identified on Figure 3.5-1 in the
13 FEIS.

14 10.3 Four tribes or confederation of tribes: the Confederated Tribes and Bands
15 of the Yakima Nation, the Confederated Tribes of the Umatilla Indian Reservation, the
16 Confederated Tribes of Warm Springs and the Nez Perce Tribe, have reserved rights to fish in
17 the Columbia River and its tributaries. Collectively these tribes and confederations form the
18 "Columbia River Inter-Tribal Fish Commission" (CRITFC). Member tribes of CRITFC rely on
19 Zone 6 for fishing and are referred to as "Treaty Tribal Fishers".

20 10.4 Chinook Salmon is the most abundant species caught by Treaty Tribal
21 Fishers.

1 10.5 The Department of Interior, through the Bureau of Indian Affairs, has
2 established 31 fishing access sites on the Columbia River within Zone 6 for the exclusive use of
3 Treaty Tribal Fishers. The sites are managed by CRITFC for the benefit of member tribes. The
4 sites were set aside by the U.S. Congress to provide fishing access to tribal fishers whose
5 traditional fishing grounds were inundated by the Columbia River dams. These sites are deemed
6 to be culturally significant in that they are at or near traditional villages or fishing locations. Of
7 these 31 sites, 20 are located on the Washington side of the Columbia River.
8

9 10.6 Treaty Tribal Fishers gain access to these sites either by boat or from the
10 highway. Highway access often requires crossing the BNSF tracks at-grade. Treaty Tribal
11 Fishers may set up residence at the access sites in May and remain until October. At times
12 during this period there may be as many as 80 tribal members camping at any one of the many
13 access sites.

14 10.7 In addition to these managed access sites, Treaty Tribal Fishers also access
15 the river at many other unimproved points along Zone 6.

16 10.8 Project-related BNSF trains would travel through Zone 6, generally
17 between the highway and the tribal fishing access areas.

18 10.9 The FEIS finds that Project-related trains could result in delays to tribal
19 fisher's access to traditional fishing sites as well as delays to delivery of fish to buyers.
20

21 10.10 In addition, as Treaty Tribal Fishers access the Columbia River at multiple
22 unmapped locations using unimproved, at-grade crossings, Project-related trains could impair
23 Treaty Tribal Fishers' ability to access these traditional fishing locations, especially during
24 summer months.
25

1 10.11 The FEIS finds that Project's new docks, dredging, etc., would cause
2 physical and behavioral responses in fish that would result in injury, and would affect aquatic
3 habitat. Affected fish could include those heading upstream to Zone 6.

4 10.12 The FEIS finds that Project vessels could result in wake stranding and
5 other impacts affecting fish, including those heading upstream to Zone 6, and could have the
6 greatest impact on Chinook Salmon.

7 10.13 The FEIS finds that these construction and operational impacts could
8 reduce the number of fish surviving to adulthood and returning to Zone 6, and could affect the
9 number of fish available for harvest by Native American Tribes.

10 10.14 The FEIS also finds that the Project would result in fugitive coal dust
11 particles being generated by rail transport. Maximum coal dust concentrations would occur
12 within approximately 100 feet from the rail line.

13 10.15 Coal dust particles generated by Project operations as well as Project-
14 related trains would enter into the aquatic environment. This impact is unavoidable but would
15 not be expected to affect fish behavior or fish survival.

16 10.16 To mitigate these various impacts a number of proposed mitigation
17 measures are imposed on the Project and are included in the County's conditions of Project
18 approval.

19 10.17 Despite the imposition of these mitigating measures, the FEIS concludes
20 that construction and operation of the Project could result in indirect impacts on tribal resources,
21 causing physical or behavioral responses to fish and affecting aquatic habitat. These impacts
22 could reduce the number of fish surviving to adulthood and returning to Zone 6, which could
23 affect the number of fish available for harvest by Treaty Tribal Fishers.
24
25

1 10.18 The FEIS also concludes that Project-related trains would travel through
2 areas adjacent to and within the usual and accustomed fishing areas of Treaty Tribal Fishers, and
3 could restrict access to tribal fishing areas, although various factors make the scope of this
4 impact difficult to quantify.

5 10.19 Additional tribal impacts unrelated to the FEIS are addressed in Section
6 20.

7
8 **11. Findings Relating to Net Greenhouse Gas (GHG) Emissions.**

9 11.1 The FEIS analyzes the Project's Greenhouse Net Gas (GHG) emissions in
10 Section 5.8.

11 11.2 The FEIS analyzes the Project's net GHG emissions under four scenarios:
12 (1) the 2015 U.S. and International Energy Policy Scenario; (2) the No Clean Power Plan
13 Scenario; (3) the Lower Bound Scenario; and (4) the Upper Bound Scenario. These four
14 scenarios and their key concepts are explained on page 5.8-8 of the FEIS. The four scenarios
15 were compared against a baseline representing conditions if the Project was not built.

16 11.3 The FEIS concludes that the 2015 U.S. and International Energy Policy
17 Scenario best represented existing conditions under which the Project would operate.

18 11.4 Relying on the 2015 U.S. and International Energy Policy Scenario, the
19 FEIS concludes that the average net emissions during full Project operations is 1.99 Million
20 Metric Tons of carbon dioxide equivalent (CO_{2e}).

21 11.5 The FEIS concludes that unless the net GHG emissions (1.99 Million
22 Metric Tons) is fully mitigated, these emissions will have an unavoidable, significant adverse
23 environmental impact.
24

1 11.6 The FEIS, at page 5.8-24, states that the Applicant proposed to mitigate
2 100% of the GHG identified in the 2015 U.S. and International Energy Policy Scenario. That is,
3 at operations at maximum capacity, the Applicant proposed to mitigate 1.99 Million Metric Tons
4 per year from 2028 to 2038.

5 11.7 During the hearing the Applicant announced that this statement in the
6 FEIS is incorrect. The Applicant does not propose to mitigate 100% of the GHG emissions
7 identified in the 2015 U.S. and International Energy Policy Scenario.
8

9 11.8 It does not appear that this correction was made known to any parties prior
10 to this hearing. In particular, Ecology was not notified of this correction during its consideration
11 of the Applicant's request for a Section 401 Clean Water Certification.

12 11.9 Despite the FEIS conclusions, County Staff does not propose any
13 condition of Project approval that would require mitigating for net GHG emissions.

14 11.10 The Applicant instead proposes to mitigate 100% of the Project's "Scope
15 1" emissions. The Applicant calculates that this would amount to approximately 10,000 tons per
16 year, or 1/2 of 1% of the mitigation required in the FEIS.

17 11.11 The term "Scope 1" refers to a GHG emissions measuring system
18 involving three tiers of emissions: Scope 1 emissions are also referred to as "direct GHG" and
19 are defined as "emissions from sources that are owned or controlled by the organization"; Scope
20 2 emissions are also referred to as "energy indirect GHG" and are defined as "emissions from the
21 consumption of purchased electricity, steam, or other sources of energy generated upstream from
22 the organization"; and Scope 3 emissions are also referred to as "other indirect GHG" and are
23 defined as "emissions that are a consequence of the operations of an organization, but are not
24 directly owned or controlled by the organization".
25

1 11.12 The FEIS does not use the terminology Scope 1, Scope 2 and Scope 3, but
2 its analysis of net emissions appears to include Scope 1, Scope 2 and Scope 3 emissions.

3 **12. FINDINGS RELATING TO THE PROJECT'S COMPLIANCE WITH THE**
4 **SHORELINES MANAGEMENT ACT (SMA) AND THE COUNTY SHORELINE**
5 **MASTER PROGRAM (SMP).**

6 12.1 The Columbia River is a shoreline of statewide significance.

7 12.2 For shorelines of statewide significance the SMA and the SMP declare
8 that preference is given in the following order to uses which: (1) recognize and protect the
9 statewide interest over local interests; (2) preserve the natural character of a shoreline; (3) result
10 in long term over short term benefit; (4) protect the resources and ecology of the shoreline; (5)
11 increase public access to publicly owned areas of the shoreline; and (6) increase recreational
12 opportunities for the public in the shoreline;
13

14 12.3 The Applicant has the burden of proving that all of the requirements of the
15 SMA and the Cowlitz County SMP have been met.

16 12.4 The noise impacts of the Project, as set forth in Section 2 of the Findings,
17 preclude any conclusion that the use results in long term over short term benefit.

18 12.5 The increased risk of cancer related to the Project, as set forth in Section 3
19 of the Findings, precludes any conclusion that the Project results in a long term over short term
20 benefit.
21

22 12.6 The traffic impacts of the Project, as set forth in Section 4 of the Findings,
23 preclude any conclusion that the Project results in a long term over short term benefit.
24
25

1 12.7 The disproportionate impacts of the Project on minority and low income
2 populations as a result of noise impacts, as set forth in Section 5 of the Findings, preclude any
3 conclusion that the Project results in a long term over short term benefit.

4 12.8 The impacts of the Project on the Reynolds Historic District, as set forth in
5 Section 6 of the Findings, preclude any conclusion that the Project results in a long term over
6 short term benefit.

7 12.9 The impacts of the Project on statewide rail capacity, as set forth in
8 Section 7 of the Findings, preclude any conclusion that the Project recognizes and protects
9 statewide interest over local interests.

10 12.10 The impacts of the Project on rail safety, as set forth in Section 8 of the
11 Findings, preclude any conclusion that the Project recognizes and protects statewide interest over
12 local interests.

13 12.11 The impacts of the Project on vessel transportation, as set forth in Section
14 9 of the Findings, preclude any conclusion that the Project recognizes and protects statewide
15 interest over local interest. These Findings further preclude any conclusion that the Project
16 protects the resources and ecology of the shorelines.

17 12.12 The impacts of the Project on tribal resources, as set forth in Section 10 of
18 the Findings, preclude any conclusion that the Project recognizes and protects statewide interest
19 over local interest, and further precludes any conclusion that the Project protects the resources
20 and ecology of the shorelines.

21 12.13 The impacts of the Project on net Greenhouse Gas emissions, as set forth
22 in Section 11 of the Findings, preclude any conclusion that the Project recognizes and protects
23

1 statewide interest over local interest, and further preclude any conclusion that the Project protects
2 the resources and ecology of the shorelines.

3 **FINDINGS RELATING TO UNRESOLVED ISSUES.**

4 **13. Finding Relating to the Applicant's Ability to Construct Docks and Other**
5 **Improvements on Leased State-owned Aquatic Lands.**

6 13.1 As noted in the Background Section, the aquatic lands adjacent to the
7 Project site are owned by the State of Washington. These aquatic lands are leased to Northwest
8 Alloys under Aquatic Lands Lease No. 20-B09222 through January 2038 (the "Aquatics Lease").
9

10 13.2 Docks 2 and 3 would be constructed within the area of the Aquatics Lease.

11 13.3 On October 24, 2017, DNR issued its written "Memorandum of Decision"
12 (the "Memorandum of Decision") notifying Northwest Alloys, as Lessee, that DNR is denying
13 permission to construct Docks 2 and 3 and other necessary improvements within the Aquatics
14 Lease area. (Exhibit A-104)

15 13.4 The Memorandum of Decision notes that Northwest Alloys cannot build
16 improvements on the leased property without DNR's prior written consent. The Aquatics Lease
17 gives DNR the right to deny requests to build improvements if it determines that denial is in the
18 best interest of the State. The Memorandum of Decision analyzes the proposed improvements
19 and concludes that it is not in the State's best interest for these improvements to be constructed
20 on State-owned aquatic lands.
21

22 13.5 Although the Memorandum of Decision is addressed to Northwest Alloys
23 it would apply equally to the Applicant, either as the operator for Northwest Alloys or as its
24 sublessee.
25

1 14. **Findings Relating to the Ability of the Applicant to Conduct Dredging on**
2 **Non-Leased State-owned Aquatic Lands.**

3 14.1 To accommodate berthing of Panamax-size vessels the Project requires
4 substantial dredging adjacent to proposed Docks 2 and 3.

5 14.2 Much of the proposed dredging area lies outside of the Aquatics Lease
6 area. Exhibit A-27 identifies both the Aquatics Lease area (surrounding Docks 1, 2 and 3) as
7 well as the proposed dredging area, referred to as the "Dredging Prism", which lies mostly south
8 and west of the Aquatics Lease area.

9 14.3 The Memorandum of Decision reminds Northwest Alloys that the
10 Aquatics Lease:

11 "Applies only to the leased property. The lease does not authorize
12 activities on lands outside the leased area. Accordingly, a separate
13 authorization from DNR would be required for dredging areas outside the
14 leasehold. DNR has not received an application to conduct dredging
15 outside the leased area associated with the plan submitted by Northwest
16 Alloys."

17 14.4 To date Northwest Alloys (and by extension, the Applicant) has not
18 applied for or been given permission to conduct dredging on State-owned aquatic lands lying
19 outside the Aquatics Lease area.

20 14.5 Without the proposed dredging of the "Dredging Prism" as shown on
21 Exhibit A-27, Project vessels will be unable to berth at proposed Docks 2 and 3.

22 14.6 Although DNR has not expressly denied permission to dredge outside of
23 the Aquatics Lease area, its refusal to allow construction of Docks 2 and 3 suggests that a request
24 to undertake dredging on nearby aquatic lands, once made, will likely be denied as well.
25

1 15. **Findings Relating to the Applicant's Ability to Dispose of State-owned**
2 **Dredge Materials.**

3 15.1 If dredging on State-owned aquatic lands is eventually approved, the
4 resulting dredging will produce 350,000 yards of dredge material requiring disposal.

5 15.2 The Memorandum of Decision reminds Northwest Alloys (and by
6 extension the Applicant) that the disposal of these State-owned dredge materials must be
7 approved by DNR. The Memorandum states:

8 "The plan submitted for DNR's approval by Northwest Alloys also failed
9 to identify how Millennium would dispose of the significant amount of
10 dredge material generated by the proposal. . . .

11 From the information Northwest Alloys submitted, it appears Millennium
12 may be contemplating removal of dredge materials from the Columbia
13 River. DNR has an interest in ensuring that the State receives
14 compensation for valuable material removed from the Columbia River and
15 that removal is in the State's best interest. Removal of rock, gravel, sand,
16 silt, and any other valuable material from the River requires a contract of
17 lease from DNR that authorizes the removal of the valuable material and
18 fixes the compensation owed the State. Northwest Alloys lease with
19 DNR does not provide the required authorization. . . .

20 Because the plans and specifications submitted by Northwest Alloys are
21 inconsistent with the lease and fail to provide essential information
22 necessary to review the proposal, DNR has determined that it is in the best
23 interest of the State to deny Northwest Alloys request at this time."
24 (Exhibit I-104, pages 5 and 6 of Memorandum)

25 15.3 The Staff Report, at page 6, notes that the Applicant had been working
with the Corps of Engineers and other agencies for permission to place the dredge material at the
Ross Island Sand & Gravel site in Oregon. The Corps' approval of this request is currently
pending.

1 15.4 Even if the Corps of Engineers approves the Applicant's request to dispose
2 of the dredge material at the Ross Island Sand & Gravel site, this proposed disposal lacks the
3 necessary permission from DNR.

4 15.5 The Project's dredge material could be placed elsewhere in the Columbia
5 River but this alternative has been found to be problematic. As noted in both the Staff Report
6 and the testimony of the Applicant's consultant, Glenn Grette, the physical composition of the
7 dredge material has prevented finding a suitable location in the river to deposit it.
8

9 15.6 As the Applicant does not have DNR's permission to place the State-
10 owned dredge material in Oregon, and as its placement in other areas of the river has proven
11 problematic, there is no approved plan for the disposal of the Project's dredge materials.

12 **16. Findings Relating to Water Availability.**

13 16.1 As set forth at page 2-15 of the FEIS, the Applicant's intended primary
14 source of industrial water for Project operations is treated stormwater. Onsite wells are intended
15 as a backup source during dry weather and as otherwise needed.

16 16.2 Water will be needed for both Project operations and fire protection.
17 Operations include dust control, stockpile spraying, and equipment wash down. The Project is
18 reliant upon water to properly manage coal dust.

19 16.3 It is anticipated that peak process water demand would be approximately
20 5,000 gallons per minute, and peak emergency fire water demand would be approximately 1,500
21 gallons per minute. The Applicant's existing activities on the leased property have a current
22 demand of approximately 1,063 gallons per minute (FEIS at 4.4-15).
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1 16.4 The Applicant's lease with Northwest Alloys includes an assignment of
2 historical water rights to withdraw groundwater from onsite wells. These historical groundwater
3 rights allow withdrawal of 23,150 gallons per minute.

4 16.5 The FEIS finds that the Project's anticipated industrial water need, coupled
5 with its current needs, is within the volume of water rights held by Northwest Alloys. It adds,
6 however, that it is unknown whether these water rights were relinquished back to the State of
7 Washington for nonuse. The FEIS concludes that if these historical water rights have been
8 relinquished new water rights will need to be applied for under the normal regulatory process.

9 16.6 Ecology, in its Decision denying the Applicant's request for a Section 401
10 Water Quality Certification, reminds the Applicant that its plan to collect and use stormwater
11 requires that the Applicant obtain a water right permit in accordance with Chapter 90.03 RCW.
12

13 16.7 To date the Applicant has not applied for a water right permit to collect
14 and reuse stormwater as its primary source of water.

15 16.8 Ecology also notes that the historical groundwater rights held by
16 Northwest Alloys may no longer be valid as Ecology has not been provided with any information
17 documenting their continued beneficial use since the early 2000's.

18 16.9 In December 2016, Ecology requested information from the Applicant
19 documenting the current and recent water uses at the Project site. As of September 26, 2017, the
20 Applicant had not provided this information.
21

22 16.10 Ecology concludes that without proof of water rights the Applicant will
23 not be able to legally carry out the Project.
24
25

1 16.11 As the Applicant has not received, or even applied for, a water right to
2 collect and use stormwater and as the Applicant has so far failed to produce any evidence
3 proving the continued validity of historic groundwater rights, there is currently no evidence that
4 the Project has sufficient water to properly manage coal dust, provide for other operational needs
5 or assure adequate fire suppression.

6 **17. Findings Relating to Anti-Idling Policies.**

7 17.1 The shipping of coal will result in the arrival of 840 oceangoing vessels at
8 the Project's docks annually and the arrival of over 23,000 locomotives at the Project's railyard
9 annually. These vessels and locomotives will rely on diesel motors.

10 17.2 The use of these diesel motors will result in Diesel Particulate Matter
11 (DPM). The FEIS finds that DPM is harmful and is the cause of the increased risk of cancer
12 from the Project. The FEIS therefore recommends that "anti-idling" policies be imposed upon
13 both vessels and locomotives to eliminate or at least minimize DPM caused by unnecessary
14 idling.

15 17.3 The County Staff Report recognizes the benefit of anti-idling policies but
16 proposes that the Applicant implement its own anti-idling policies. (Condition 32)

17 17.4 The County's proposed Condition 32 would allow the Applicant to decide
18 what anti-idling policies to impose on its operations, or whether to impose any at all.

19 17.5 The Hearing Examiner proposed a condition of Project approval similar to
20 one imposed recently in *In re NWIW*, Cowlitz County Hearing No. SL 16-0975. As previously
21 noted in Finding 9.13, that project involves a nearby methanol production and shipping facility.
22 That project anticipates a maximum of 72 vessels annually, or less than 10% of this Project's
23
24
25

1 vessels. Despite the Project's fewer number of vessels, it was determined that an anti-idling
2 policy was nonetheless important. In order to minimize vessel-related DPM the following
3 condition was imposed on that project's shoreline permit:

4 "(A) All methanol cargo vessels shall be equipped with the necessary
5 technology to rely on shore power for all onboard activity while berthed at
6 the marine terminal. No berthed methanol vessel shall operate its engines
7 to provide electrical power except in the event of an emergency outage to
8 shore power."

9 17.6 In the industry, the use of shore power for all shipboard activity while
10 docked is known as "cold ironing".

11 17.7 The Applicant objects to the imposition of a cold ironing policy on this
12 Project. The Applicant argues that such a policy would be expensive, impractical and
13 unprecedented in the bulk products shipping business. (Testimony of Bennett)

14 17.8 The Applicant adds that in the Kalama Methanol Project, the developer
15 owned the fleet of vessels being used and could construct the vessels to a common electrical
16 system. In contrast, this Project will rely on independent bulk carriers and the Applicant will not
17 have the same control over the electrical systems they use. (Testimony of Bennett)

18 17.9 The Applicant has not prepared a formal anti-idling policy for vessels.
19 When asked what its anti-idling policy would be the Applicant replied that it would "be the same
20 as is done elsewhere." (Testimony of Bennett)

21 17.10 In regard to an anti-idling policy for locomotives, the Applicant testified
22 that it would rely on the policies of BNSF. (Testimony of Bennett)

1 **18. Findings Relating to Possible Impacts from Wake Stranding.**

2 18.1 When the wake from a vessel meets the shoreline it can carry fish and
3 deposit them on the beach, potentially stranding them where they would be susceptible to stress,
4 suffocation, and predation before they could return to the water. This phenomenon is referred to
5 as "wake stranding".

6 18.2 Wake stranding depends on various factors such as the slope and breadth
7 of a beach; the river's stage; tide stage; depth of water; vessel size; direction of travel and speed
8 and wakes from other passing vessels.

9 18.3 Wake stranding has been documented at various locations along the Lower
10 Columbia River. Those portions of the Lower Columbia shoreline having gentle shoreline
11 slopes, sandy beaches, a confined river channel and close proximity to the navigation channel,
12 along with various other factors, tend to have a higher incident of wake stranding. Studies have
13 also suggested that wake stranding is particularly troublesome along "Barlow Point", located a
14 short distance downriver from the Project site. Studies to date have concluded that sub-yearling
15 Chinook Salmon are particularly susceptible to wake stranding due to their small size and
16 preference for swimming near the shore. Lower Columbia Chinook Salmon are a threatened
17 species.
18

19 18.4 The FEIS, at page 4.7-33, notes that while the scientific literature
20 generally acknowledges the problem of wake stranding in the Lower Columbia River, the
21 literature has not yet identified methods to quantify its impact to Chinook Salmon or other fish.
22 Nonetheless, the FEIS concludes that this Project's 1,680 transits will have an adverse effect on
23 Chinook Salmon and other fish as a result of wake stranding.
24

1 18.5 During the environmental review process several federal and State
2 agencies, including U.S. Fish and Wildlife, Washington Department of Fish and Wildlife
3 (WDFW) and Washington Department of Natural Resources (DNR) expressed concerns that the
4 DEIS understated the Project's additional impact to the wake stranding problem, and encouraged
5 additional study of the phenomenon to determine the Project's impact and necessary mitigation.

6 18.6 The County Staff Report does not discuss wake stranding or propose any
7 mitigation. The County explains that this is an issue best addressed through the federal
8 permitting process. (Testimony of Placido)

9 18.7 In response to questioning from the Hearing Examiner, the Applicant
10 revealed that it has recently proposed a mitigation plan for wake stranding. This proposed
11 mitigation plan is contained in a Memorandum from Mr. Grette to National Marine Fishery
12 Services (NMFS) dated May 30, 2017. (Exhibit A-60)

13 18.8 According to the Applicant's proposed mitigation plan, the Applicant
14 believes that its Project activities will cause the 3,800 unrelated commercial vessels going to and
15 from upriver ports to slow for several miles. The Applicant asserts that this will reduce vessel
16 speeds past Barlow Point, thereby reducing wake stranding at this critical location and mitigating
17 for any wake stranding the Project's vessels might cause further downriver.

18 18.9 The various upriver ports (Portland, Vancouver, etc.) have not been
19 notified of this mitigation plan or of its claim that the Project will force their vessels to slow. It
20 is unknown whether these ports will disagree or, conversely, whether these ports will argue that,
21 if true, the Project fails to recognize and protect the statewide interest over local interest.
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1 18.10 During the hearing there was conflicting testimony as to whether the
2 Project would cause all non-project vessel traffic to slow past Barlow Point. The Applicant's
3 witness, Dan Mills, testified in writing that the Project would force all other traffic to slow to 8
4 knots past Barlow Point (Exhibit 206). But a member of the public, Rob Rich, who has several
5 decades of experience with Columbia River transportation, testified that the Project would not
6 cause other vessels to slow.

7
8 18.11 On October 10, 2017, NMFS issued its Biological Opinion for NWIW (the
9 Kalama Methanol Project) (Exhibit A-61), previously referred to in Findings 9 and 17. It
10 includes a Wake Stranding Monitoring Plan for the Kalama facility. (Exhibit A-62) The
11 monitoring plan requires NWIW to fund, either individually or with others, a study to examine
12 the rates of fish stranding at three sites along the Columbia River: Barlow Point, County Line
13 Park and Sauvie Island. Studies will extend over seven months (March through September) in
14 years one, three and five of the project, with year zero being the first March after product is
15 shipped from the Kalama facility. The study can be delayed up to two years to allow other
16 applicants from other projects to participate in funding. (The Kalama project is not yet
17 approved, let alone operational, and so "year zero" of the study remains at least a few years
18 away.)

19 **18. Findings Relating to Statewide Impacts from At-Grade Rail Crossings.**

20
21 18.1 The Project has been formally opposed by the cities of Vancouver,
22 Washougal, Camas, Olympia, Tacoma, Seattle, Stevenson, and North Bonneville in the State of
23 Washington; by the cities of Sandpoint, Dover, Ponderay and Kootenai in the State of Idaho; by
24 the cities of Livingston, Missoula and White Fish in the State of Montana; and by the cities of
25 Portland, Milwaukie and Hood River in the State of Oregon.

1 18.2 These cities have expressed a common concern that the Project's trains
2 will have significant adverse impacts to traffic at at-grade rail crossings and impair the cities'
3 ability to deliver emergency services.

4 18.3 As examples, Vancouver (population 175,000) notes that it has 27 at-grade
5 crossings, 13 of which have no alternate access. Nearby Washougal notes that it has 5 at-grade
6 crossings including the most heavily used at-grade rail crossing in the State.

7 18.4 The FEIS, in Section 5.3.4.2, contains a study of selected at-grade rail
8 crossings throughout the State. A list of the selected crossings is found at 5.3-21 and a map
9 showing their location is at 5.3-23 (the "FEIS Study"). The FEIS Study examines 44 at-grade
10 rail crossings throughout the State. The selected crossings are largely in sparsely populated areas
11 of rural counties, and are almost entirely in Eastern Washington.
12

13 18.5 The only selected crossings in Western Washington are 6 crossings in
14 mostly-rural Lewis County (population 75,000). These include the crossing in Vader (SR 506)
15 with a population of 600 residents; the crossing in Winlock (SR 505) with a population of 1,200;
16 the crossing at Big Hanaford Road north of Centralia with no nearby population; and 3 crossings
17 on the east side of Centralia (population 15,000).

18 18.6 The FEIS does not examine any crossings in Vancouver (population
19 175,000) or the rest of Clark County; Olympia/Lacey (population 100,000) or the rest of Thurston
20 County; Tacoma (population 211,000) or the rest of Pierce County; or Auburn (population
21 78,000) or the rest of King County.
22

23 18.7 The FEIS concludes that, *at the selected sites*, the Project will not result in
24 unavoidable, significant adverse impacts to traffic. But the FEIS does not reach any conclusion
25 as to the Project's impacts at the at-grade rail crossings not studied.

1 18.8 As the FEIS Study does not examine impacts to traffic in any of
2 Washington's urban centers, especially those in Western Washington, the Study does not inform
3 the decision making as to whether the Project recognizes and protects the statewide interest over
4 local interest.

5 **19. Findings Relating to the Lease of BPA Property.**

6 19.1 Portions of the proposed Project site are located on property owned by the
7 Bonneville Power Administration (BPA). Areas owned by BPA are identified on the map
8 submitted as Exhibit A-27.

9 19.2 As noted in the Staff Report, a portion of the Project's rail loop would be
10 constructed on 2 parcels currently owned by BPA. BPA has not yet made a determination
11 whether to grant necessary easements to the Applicant. BPA will not make this determination
12 until the Corps of Engineers has issued the NEPA FEIS.

13 19.3 The Applicant responds that it has 3 alternative site layouts, one of which
14 does not require use of BPA property.

15 **20. Findings Relating to Further Analysis of Coal Dust Impacts on Aquatic and**
16 **Tribal Resources.**

17 20.1 Nearly 30 American Indian Tribes or Nations have formally opposed the
18 Project.^{1, 2} These Tribes express a number of common concerns including: an increased risk of
19 rail accidents on tribal property and appropriate mitigation; increased risk of fire; impacts from
20
21

22
23 ¹ These include the 12 Confederated Tribes or Nations of the Yakima Nation; the 5 tribes comprising the Columbia
24 River Inter-Tribal Fish Commission; the 4 tribes comprising the Upper Columbia United Tribes; the 3 tribes of the
25 Umatilla Reservation; the Northern Cheyenne; the Nez Perce; the Lummi Nation; and the Cowlitz Tribe.

² Another American Indian Tribe, the Crow Tribe, is in support of the Project.

1 train horn noise, increased risk of train strike, especially to Tribal Treaty Fishers; and effects on
2 fish populations and the Tribes' treaty rights.

3 20.2 The FEIS addresses some of the tribal concerns but acknowledges that
4 many tribal issues fall outside of its scope.

5 20.3 A commonly expressed tribal concern is that coal and coal dust from
6 Project-related trains, along with diesel emissions, will have significant adverse impacts upon
7 tribal property and tribal resources, including fish.

8 20.4 The FEIS, at page 5.7-6, notes that: "the U.S. Geological Survey (USGS)
9 is preparing a study that identifies methods for determining potential impacts on aquatic
10 resources from coal dust exposure ."

11 20.5 The official website for the USGS confirms that such a study is being
12 undertaken. The USGS website states:

13
14 "Federal and state natural resource managers and Northwest Indians are
15 concerned with potential impacts from unintentional release of coal dust
16 from train cars during transport through the Northwest. . . . To date, very
17 little scientific data exists that is suitable to address these concerns. There
18 exists a strong desire and need for science to better understand and
19 determine if transporting coal can have any measurable environmental
20 impacts. Multiple USGS science centers are collaborating on a pilot that
21 leverages the Survey's chemical, hydrological, and biological expertise to
22 conduct reconnaissance-level sampling and analysis of mercury (Hg) and
23 Polycyclic Aromatic Hydrocarbon (PAH) levels in air, water, sediment,
24 and biota at sites of interest near rail lines. . . .

25 This study will evaluate some of the risks to Indian trust resources
associated with coal transport. If coal transport continues to grow in the
region, this study will provide critical baseline data necessary in order to
determine whether the expanded transport results in increased contaminate
distribution and exposure. If this study is not conducted, and coal
transport continues to grow, we will be unable to determine whether and
to what extent coal transport results in environmental contamination and
risk to wildlife, fishes, and any Indian trust resources.

1 20.6 The USGS website does not indicate the current status of this study and
2 none of the parties are aware of its status.

3 20.7 The USGS study, if completed, would inform the decision making with
4 respect to protecting the ecology and resources of the shoreline including tribal resources.

5 **22. Findings Relating to the Impact of the Recent Repeal of the Clean Power**
6 **Plan.**

7 22.1 As set forth in Section 11 of the Findings, the FEIS analyzes the Project's
8 net GHG emissions under four scenarios and concludes that the "2015 U.S. and International
9 Energy Policy Scenario" is the most representative of current U.S. policy.

10 22.2 One of the alternative scenarios examined in the FEIS is the "No Clean
11 Power Plan Scenario". An explanation of this scenarios is found on page 5.8-8 of the FEIS:

12 "The No Clean Power Plan scenario represents the state of the energy
13 markets as of 2016. It does not include implementation of the Clean
14 Power Plan. The No Clean Power Plan scenario uses the base set of
15 assumptions and assumes that no additional national or international
16 climate policies will be enacted beyond those implemented by mid-2015."

17 22.3 Under the "No Clean Power Plan Scenario" the Project's net GHG
18 emissions are substantially higher than under the "2015 U.S. and International Energy Policy
19 Scenario". Table 5.8-7 of the FEIS identifies the total GHG emissions under each scenario for
20 the Project from 2021 to 2038. Under the 2015 U.S. and International Energy Policy Scenario
21 the total emissions are 21.58 Million Tons, but under the No Clean Power Plan Scenario total
22 emissions increase to 50.97 Million Tons, or approximately two and a half times more net GHG
23 emissions.
24
25

1 The conditions proposed in the Staff Report do not reasonably mitigate these impacts. At
2 the conclusion of the hearing the County chose not to propose any new conditions, and the
3 Applicant's position is nearly identical to the County's. As a result, neither the County nor the
4 Applicant propose reasonable mitigation for any of the unavoidable, significant adverse
5 environmental impacts identified in the FEIS.

6 More specifically:

7 • The parties' proposed mitigation for noise impacts is insufficient to ensure that
8 Quiet Zones will be implemented.

9 • The parties do not propose any mitigation for the increased risk of cancer. Their
10 only suggestion is that eventually the BNSF fleet will upgrade to Tier 4 status, but currently only
11 6% of the BNSF fleet meets this standard. The remainder of the fleet will not be completely
12 upgraded for more than 20 years.

13 • The parties' proposed conditions to mitigate traffic impacts do not ensure that the
14 necessary track improvements will be made to the Reynolds Lead.

15 • The parties do not propose any conditions addressing the impacts to the Reynolds
16 Historic District.

17 • The parties' proposed conditions fail to ensure rail capacity or rail safety.

18 • The parties do not propose any conditions to ensure vessel safety and appropriate
19 responsibility for any vessel accident.

20 • The Mitigation Plan, approved as part of the Critical Areas Permit, will address
21 some tribal concerns but not all of them. The parties do not propose any additional conditions to
22 address additional tribal impacts.
23
24
25

1 • The County proposes no Greenhouse Gas mitigation, while the Applicant
2 proposes less than 1% of that required under the FEIS.

3 Cowlitz County has adopted SEPA rules promulgated by the Department of Ecology.
4 CCC 19.11.020. Cowlitz County recognizes its right to condition or deny permits if such
5 decision is based upon policies that have been identified and incorporated into regulations, plans,
6 or codes formerly designated as possible bases for the exercise of substantive authority under
7 SEPA. CCC 19.11.110

8 The County has adopted the following bases for the exercise of substantive authority
9 under SEPA:

10 Cowlitz County shall use all practicable means, consistent with other
11 essential considerations of State policy, to improve and coordinate plans,
12 functions, programs, and resources to the end that the State and its citizens
13 may:

- 14 (a) Fulfill the responsibilities of each generation as trustee of
15 the environment for succeeding generations.
16 (b) Assure for all people of Cowlitz County safe, healthful,
17 productive, and aesthetically and culturally pleasing surroundings.
18 (c) Attain the widest range of beneficial uses of the
19 environment without degradation, risk to health or safety, or other
20 undesirable and unintended consequences.
21 (d) Preserve important historic, cultural, and natural aspects of
22 our national heritage.
23 (e) Maintain, whenever possible, an environment which
24 supports diversity and variety of individual choice.
25 (f) Achieve a balance between population and resource use
which will permit high standards of living and a wide sharing of life's
amenities.
 (g) Enhance the quality of renewable resources and approach
the maximum attainable recycling of depletable resources.

CCC 19.11.110(b)(1)

1 Cowlitz County also recognizes that each person has a fundamental and inalienable right
2 to a healthful environment and that each person has a responsibility to contribute to the
3 preservation and enhancement of the environment. CCC 19.11.110(b)(2)

4 Again, the parties have not reasonably mitigated the ten unavoidable, significant adverse
5 environmental impacts identified in the FEIS. Failure to reasonably mitigate these impacts
6 conflicts with virtually every one of the County's environmental policies stated above.

7 Accordingly, the requested Shoreline Permits must be denied under the County's substantive
8 SEPA authority.

9
10 **2. Compliance with the Requirements of the SMA and the SMP.** In order for the
11 Shoreline Permits to be approved, the Applicant must meet its burden of proving that all of the
12 requirements of the SMA and SMP have been met. As a result of the Applicant's inability to
13 reasonably mitigate the unavoidable, significant environmental impacts identified in the FEIS, it
14 has failed to meet this burden. The Project does not recognize and protect statewide interest over
15 local interest; result in a long term over short term benefit; or protect the resources and ecology
16 of the shorelines, all as set forth more fully in the Findings of Fact.

17 **3. Unresolved Issues.** A number of unresolved issues further preclude the
18 Applicant from meeting its burden of proving that all requirements of the SMA and SMP have
19 been met:

- 20 • The Applicant has been denied permission from the State to build Docks 2 and 3
21 in the Aquatics Lease area; to engage in dredging outside of the Aquatics Lease area; and to
22 remove dredging materials from the Columbia River. Collectively these three denials preclude
23 constructing Docks 2 and 3 and performing necessary dredging. Unless these barriers are
24 overcome the requested Shoreline Permits cannot be granted.

1 • Although this application has been pending for five years, the Applicant has not
2 yet applied for the necessary water permits. Large quantities of water are essential for this
3 Project, especially for control of coal dust. The current absence of any assurance that necessary
4 water is available prevents further consideration of the needed permits.

5 • Anti-idling policies for both vessels and locomotives must be established. To
6 date no formal policies have been presented. The Applicant's proposal to "do what is done at
7 other ports" is not an acceptable anti-idling policy. Given the number of vessels and locomotives
8 involved and the harmful impact of diesel particulate matter resulting from needless idling, there
9 must be a more robust effort to avoid this problem. This includes a thorough analysis of whether
10 "cold ironing" is possible. Similarly, given that more than 23,000 locomotives will arrive at the
11 site each year the anti-idling policy for locomotives cannot be left up to BNSF and requires a
12 more thorough analysis.

13 • Wake stranding has been increasingly recognized as a significant problem along
14 the Lower Columbia River, with its greatest impact on young Chinook Salmon, a threatened
15 species. Federal and State agencies have universally recognized the need to better understand
16 the impacts of this phenomenon and determine proper mitigation. The Applicant's recently
17 revealed Mitigation Plan is noteworthy in that it claims the Project will cause all other
18 commercial vessel traffic on the river to slow past Barlow Point, and that this disruption serves
19 as mitigation for the Project's own wake stranding impacts. The upriver ports affected by this
20 claim have not yet been alerted to this plan, or given a chance to respond. It is possible that the
21 Project will effectively create a "no wake" zone past Barlow Point, but ports and State agencies
22 must be allowed to participate in the discussion. Ultimately the Project's impact on wake
23 stranding needs to be calculated and mitigated.
24
25

1 2 Any Conclusions of Law contained in the foregoing Background Section,
2 Findings of Fact or Analysis Section are hereby incorporated by reference and adopted by the
3 Hearing Examiner as his Conclusions of Law.

4 3. All public notice requirements for this application have been met.

5 4. The Project is located within 200 feet of the Ordinary High Water Mark of the
6 Columbia River. The Columbia River is a shoreline of statewide significance. This Project is
7 therefore subject to the requirements of the Shoreline Management Act (SMA), Chapter 90.58
8 RCW.

9 5. For shorelines of statewide significance, Ecology and local governments shall
10 give preference in the following order to uses which: (1) recognize and protect the statewide
11 interest over local interest; (2) preserve the natural character of a shoreline; (3) result in long
12 term over short term benefit; (4) protect the resources and ecology of the shoreline; (5) increase
13 public access to publicly owned areas of the shorelines; (6) increase recreational opportunities
14 for the public in the shoreline; (7) provide for any other element as defined in RCW 90.58.100
15 deemed appropriate or necessary. (RCW 90.58.020)

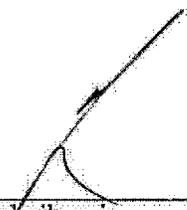
16 6. The Washington Legislature enacted the SMA because Washington's shorelines
17 are fragile and the mounting pressure of development in the shorelines necessitates coordination
18 in their management. The SMA is broadly construed to protect the State's shorelines as fully as
19 possible. All development on the shorelines of the State must conform to the SMA. *Beuchel v.*
20 *Department of Ecology*, 125 Wn.2d 196, 203 (1994).

21 7. The Applicant has the burden of proving that all requirements of the SMA and the
22 Cowlitz County SMP have been met for the issuance of a Shoreline Substantial Development
23 Permit and Shoreline Conditional Use Permit.
24
25

*Findings of Fact, Conclusions
of Law and Decision Denying
Permits - 55*

COWLITZ COUNTY HEARING EXAMINER
299 N.W. CENTER ST. / P.O. BOX 939
CHEHALIS, WASHINGTON 98532
Phone: 360-748-3386

DATED this 14 day of November, 2017.



Mark C. Scheibmeir
Cowlitz County Hearing Examiner

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*Findings of Fact, Conclusions
of Law and Decision Denying
Permits - 57*

COWLITZ COUNTY HEARING EXAMINER
299 N.W. CENTER ST. / P.O. BOX 939
CHEHALIS, WASHINGTON 98532
Phone: 360-748-3386

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APP058

INDEX OF AGENCY RECORD
COWLITZ COUNTY FILE NO. 12-04-0375
Millennium Bulk Terminals - Longview, Coal Export Terminal
Shorelines Substantial Development Permit and Conditional Use Permit No. SL 17-0992

- C-1 Staff Report to the Hearing Examiner
- C-2 JARPA (July 13, 2016)
- C-3 Critical Areas Permit Issued July 19, 2017
- C-4 Shoreline Application Notice September 8, 2017
- C-5 Hearing Notice
- C-6 SEPA Determination
- C-7 Final EIS
- C-8 Shoreline Application Response Document
- C-9 Coal Export Terminal Wetland Impact Report - Parcel 619530400 (Grette Associates, September 15, 2014)
- C-10 Conceptual Mitigation Plan (Grette Associates, May 25, 2017)
- C-11 Sediment Characterization Report (Dalton, Olmsted, Fuglevand, July 12, 2017)
- C-12 2017 Dredge Material Management Program (DMMP) Dredge Suitability Determination
- C-13 Oregon Department of Environmental Quality Acceptance of Dredge Material at Ross Island
- C-14 Economic & Fiscal Impacts of Millennium Bulk Terminals Longview (Berk, April 12, 2012)

APPLICANT EXHIBIT LIST
COWLITZ COUNTY FILE NO. 12-04-0375
Millennium Bulk Terminals - Longview, Coal Export Terminal
Shorelines Substantial Development Permit and Conditional Use Permit No. SL 17-0992

- A 26 MBT - Longview Pre-hearing Memorandum
- A 27 Site Map
- A 28 2012 JARPA
- A 29 Applicant Proposed Mitigation Measures
- A 30 BNSF Comment Letter in Response to Notice of Application, October 8, 2017
- A 31 Critical Areas Report, Glenn Grette, 2017
- A 32 Technical Response Analysis Population Level Impact of Tribal Resources in Zone 6 (2016)
- A 33 Technical Memorandum, Clarification on the DEIS Comments, Technical Response Analysis of Population - level Impacts on Tribal Fish Resources in Zone
- A 34 Glenn Grette, Tribal Fisheries Impact, Pre-filed Testimony
- A 35 Expert Report of NERA and ERM
- A 36 Expert Opinion of Robert Scofield, Assessment of Health Risks Associated with Diesel Exhaust
- A 37 Expert Report, Air Quality Impacts, Landau
- A 38 Export Report, Evaluation of Potential Coal and Coal Dust Impacts on Aquatic Resources - Anchor QEA
- A 39 Curriculum Vitae for Trevor Simmons
- A 40 Curriculum Vitae for Glenn Grette
- A 41 Curriculum Vitae for Ted Sprague

Applicant's Exhibit List Updated
Applicant's Exhibit A 67

- A 42 Curriculum Vitae for Charles "E" Halbert
- A 43 Curriculum Vitae for Robert Scofield
- A 44 Curriculum Vitae for David Haury
- A 45 Curriculum Vitae for Julie Carey
- A 46 Curriculum Vitae for Mary Hess
- A 47 Curriculum Vitae for Dan Mills
- A 48 Curriculum Vitae for Kurt Reichelt
- A 49 Curriculum Vitae for Peter Rawlings
- A 50 Curriculum Vitae for Dustin Pittman
- A 51 Applicant's Preliminary List of Witnesses
- A 52 Applicant's Preliminary List of Exhibits
- A 53 Certificate of Service of Rhonda S. Vogelzang
- A 54 K. Gaines power point
- A 55 T. Simmons power point
- A 56 G. Grette power point
- A 57 D. Kaitala Written Testimony
- A 58 T. Sprague Power point
- A 59 M. Bridges written testimony
- A 60 Addendum to the Biological Assessment for NOAA Fisheries Species, May 30, 2017, G. Grette & Associates

Applicant's Exhibit List Updated
Applicant's Exhibit A 67

- A 61 Kalama Manufacturing and Marine Export Facility Biological Opinion, October 10, 2017
- A 62 Updated Wake Stranding Monitoring Plan, for the October 10, 2017 Kalama Manufacturing and Marine Export Facility Biological Opinion
- A 63 GHG Scope of Emissions power point slides (2) supporting responsive testimony
- A 64 Applicant's Proposed Mitigation Measures Table (Update to Exhibit A 29)
- A 65 Table of Responses-Applicant
- A 66 Dava Kaitala, BNSF, Supplemental Written Testimony
- A 67 Applicant Exhibit List, (Update to Exhibit 52)

Applicant's Exhibit List Updated
Applicant's Exhibit A 67

INTERVENOR'S EXHIBIT LIST
COWLITZ COUNTY FILE NO. 12-04-0375
Millennium Bulk Terminals - Longview, Coal Export Terminal
Shorelines Substantial Development Permit and Conditional Use Permit No. SL 17-0992

- I-101 Riverkeeper's Pre-hearing Brief
- I-102 DOE 401 Denial
- I-103 DNR Sublease Denial
- I-104 DNR Construction Denial
- I-105 DNR SSDP Comment Letter (October 6, 2017)

PUBLIC EXHIBIT LIST
COWLITZ COUNTY FILE NO. 12-04-0375
Millennium Bulk Terminals - Longview, Coal Export Terminal
Shorelines Substantial Development Permit and Conditional Use Permit No. SL 17-0992

- P-126 Ed or Harriet Griffith Shoreline Email of October 24, 2017
- P-127 Standard Letter from Various Individuals Starting With "I urge Cowlitz County and the Department of Ecology to reject the Shoreline Substantial Development"
- P-128 Steve Harrington Email of October 18, 2017
- P-129 Standard Letter from Various Individuals Starting With "I am writing to reaffirm our support of Millennium Bulk Terminal"
- P-130 Charles Pace Email of October 9, 2017
- P-131 Richard I. Woods Letter of October 4, 2017
- P-132 BNSF Comments on Millennium Dated October 8, 2017
- P-133 Standard Letter from Various Individuals Starting With "I would like to thank the Washington Department of Ecology"
- P-134 Mark Uhart, LTC USA Ret., Email of October 17, 2017
- P-135 Thrinley DiMarco, Email of October 17, 2017
- P-136 David M. Scheer, D.C., Email of October 12, 2017
- P-137 Mike Conlan, Email of October 9, 2017
- P-138 Rodger Wehage Email of October 31, 2017

			Received
P-139	Chris Turner	Comments and materials	11-2-17
P-140	Gregory Monahan Phd	Comment Letter	11-2-17
P-141	Patricia Bellamy RN	Comment Letter	11-2-17
P-142	Diane Winn RN	Comment Letter	11-2-17
P-143	Pat Dubke	Comment Letter	11-2-17
P-144	Leigh McKeirnan	Comment Letter	11-2-17
P-145	Susan Schwartz	Comment Letter	11-2-17
P-146	James Lanz	Comment Letter	11-2-17
P-147	Kathryn Ketcham	Comment Letter	11-2-17
P-148	Patricia Kullberg	Comment Letter	11-2-17
P-149	Peter Cornelison	City of Hood River Councilor / Comments	11-2-17
P-150	Larry Horst	Comment Letter	11-2-17
P-151	Linda Leonard	Comment Letter	11-2-17
P-152	Dave Gillihan	Comment Letter	11-2-17
P-153	Larry Wilhelmsen	Comment Letter	11-2-17
P-154	Marilee Dea	Comment Letter	11-2-17
P-155	Diane Dick	Comment Letter	11-2-17
P-156	Stephen Chandler MD	Comment Letter	11-2-17
P-157	Alona Steinke RN	Comment Letter	11-2-17
P-158	Cathryn Chudy	Comment Letter	11-2-17
P-159	Jessica Zimmerle	Comment Letter	11-2-17
P-160	Leda Zakarison	Comment Letter	11-2-17
P-161	Daniel Jaffee	Comment Letter	11-2-17
P-162	Edith Gillis	Comment Letter	11-2-17
P-163	Mona McNeil	Comment Letter	11-2-17
P-164	Emma Lamb-Smith	Comment Letter	11-2-17
P-165	Mark Keely	Comment Letter	11-2-17

P-166	Sally Keely	Comment Letter	11-2-17
P-167	Cambria Keely	Comment Letter	11-2-17
P-168	Theodora Tsongas Phd	Comment Letter	11-2-17
P-169	Don Steinke	Comment Letter	11-2-17
P-170	Christine Dupris - Cowlitz Tribe	Comment Letter & materials	11-3-17
P-171	Norman Roark Monahon - Cowlitz Tribe	Comment / Testimony	11-3-17
P-172	Celine Cloquet - Cowlitz Tribe	Comment / Testimony	11-3-17
P-173	David Isaacs	Comment Letter/ Testimony	11-3-17
P-174	Pamela Mattson-McDonald	Comment Letter/ Testimony	11-3-17
P-175	Fred Greef	Comment Letter/ Testimony	11-3-17
P-176	Joel Rupley	Comment Letter/ Testimony	11-3-17
P-177	Paul Youman	Pathway 2020 materials	11-3-17
P-178	Darrel Whipple	Comment Letter/ Testimony	11-3-17
P-179	Mike Wallin	"Build it Right" document	11-3-17
P-180	Mike Elliott	Comment Letter/ Testimony	11-3-17
P-181	Nate Stokes	Comment Letter/ Testimony	11-3-17
P-182	Dixie Bailey	Comment Letter/ Testimony	11-3-17
P-183	Michelle Nelson	Comment Letter/ Testimony	11-3-17
P-184	Shannon Stull	Comment Letter/ Testimony	11-3-17
P-185	Thomas Gordon	Comment Letter/ Testimony	11-3-17
P-186	Shane Nehls	Comment Letter/ Testimony	11-3-17
P-187	Jeff Childers	Comment Letter/ Testimony	11-3-17
P-188	Diana Gordon	Comment Letter/ Testimony	11-3-17
P-189	Lori Black	Comment Letter/ Testimony	11-3-17
P-190	Deborah Romerein	Comment Letter/ Testimony	11-3-17
P-191	John Sutton	Comment Letter	11-6-17
P-192	Chris Turner	Comment Letter	11-6-17
P-193	Diane Dick	Comment Letter	11-6-17
P-194	Jerry Iyall - Cowlitz Tribe	Comment / Testimony	11-6-17
P-195	Anita Thomas	Comment Letter	11-6-17
P-196	Nadine Haynes	Comment Letter	11-6-17

P-197	Capt. Kimberly Higgins	Comment Letter	11-6-17
P-198	Marcia Denison	Comment Letter	11-6-17
P-199	Jeff Wilson - Longview Port Commissioner	Comment Letter	11-6-17
P-200	Alyse Vasil	Comment Letter	11-6-17
P-201	Katie Frei	Comment Letter	11-6-17
P-202	Rodger Wehage	Comment Letter	11-6-17
P-203	Rick Gill	Comment Letter	11-6-17
P-204	Bo McCall	Comment- Email	11-6-17
P-205	Kate Mickelson - Columbia River Steamship Operators Assoc.	Comment	11-6-17
P-206	Jason Jenkins	Comment - Email	11-6-17
P-207	Aaron Barber-Strong	Comment - Email	11-6-17
P-208	Jeff Wilson - Longview Port Commissioner	Comment Email	11-6-17
P-209	Diana Leigh	Comment/handouts	11-6-17
<i>Hearing adjourned - all further comments have been received by E-mail</i>			
P-210	Monty Anderson	Comment - Email	11-6-17
P-211	Jason Howard	Comment - Email	11-6-17
P-212	Russell Thompson	Comment - Email	11-6-17
P-213	Christian Daniels - IBEW Rep	Comment - Email	11-6-17
P-214	Michael Bosse' - IUOE Rep	Comment - Email	11-6-17
P-215	Josh Swanson - IUOE Rep	Comment - Email	11-6-17
P-216	Den Mark Wichar	Comment Email	11-6-17
P-217	Marcie Keever, Oceans & Vessels Program Director	E-mailed Comment	11-6-17
	2,064 letters from Friends of the Earth members		
P-218	S.J. Jacky	Comment - Email	11-6-17
P-219	Rejean Idzerda	Comment - Email	11-6-17
P-220	Ann Turner	Comment - Email	11-6-17
P-221	Sharon Miller	Comment E-mail	11-6-17
P-222	Laura Skelton, MS	Comment E-mail	11-6-17
P-223	Capt. Dan Jordan - Columbia River Bar Pilots	Comment E-mail	11-6-17
	Dated 11-1-17		
P-224	Spencer Ward	Comment E-mail	11-6-17
P-225	Don Jensen - Mayor City of Longview	Comment E-mail	11-6-17

P-226	Inga Fisher Williams	Comment E-mail	11-6-17
P-227	Paul Moyer	Comment E-mail	11-6-17
P-228	Liz Wainwright - Merchants Exchange of Portland	E-mail Comment	11-6-17

SHORELINES HEARINGS BOARD'S ORDER ON MOTIONS
(SHB No. 17-017C), APRIL 20, 2018

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 MILLENNIUM BULK TERMINALS
4 LONGVIEW, LLC, and COWLITZ
5 COUNTY,

6 Petitioners,

7 and

8 BNSF RAILWAY COMPANY,

9 Petitioner-Intervenor,

10 v.

11 COWLITZ COUNTY HEARING
12 EXAMINER and STATE OF
13 WASHINGTON, DEPARTMENT OF
14 ECOLOGY,

15 Respondents,

16 And

17 WASHINGTON ENVIRONMENTAL
18 COUNCIL, CLIMATE SOLUTIONS,
19 FRIENDS OF THE COLUMBIA GORGE,
20 SIERRA CLUB, and COLUMBIA
21 RIVERKEEPER,

Respondent-Intervenor.

SHB No. 17-017c

ORDER ON MOTIONS

INTRODUCTION

Millennium Bulk Terminals-Longview, LLC (Millennium) filed a petition with the Shorelines Hearings Board (Board) requesting review of the Cowlitz County Hearing

1 Examiner's Findings of Fact, Conclusions of Law, and Decision Denying Permits, File No. 12-
2 04-0375, Shoreline Permit Application No. 17-0992 (Hearing Examiner Decision). Cowlitz
3 County separately petitioned the Board for review of the Hearing Examiner Decision. The
4 matters were consolidated for hearing. Washington Environmental Council, Climate Solutions,
5 Friends of the Columbia Gorge, Sierra Club and Columbia Riverkeeper (WEC) were granted
6 intervention as respondents. BNSF Railway Company (BNSF) was granted intervention as a
7 petitioner. Separate motions for summary judgment were filed by Millennium, Ecology, and
8 WEC.

9 The Board considering this matter was comprised of Board Chair Joan M. Marchioro,
10 Presiding, and Members Kay M. Brown, Neil L. Wise, Grant Beck, Allen Estep and Keith
11 Goehner. Attorneys Craig S. Trueblood, Ankur K. Tohan and Jonathan K. Sitkin represented
12 Millennium. Chief Civil Deputy Douglas E. Jensen represented Cowlitz County. Senior
13 Counsel Thomas J. Young and Assistant Attorney General Sonia A. Wolfman represented
14 Ecology. Attorneys Kristen L. Boyles, Jan E. Hasselman and Marisa C. Ordonia represented
15 Intervenors WEC. Attorneys James M. Lynch, Kari L. Vander Stoep and Daniel C. Kelly-
16 Stallings represented Intervenor BNSF.

17 In rendering its decision, the Board considered the following submittals:

- 18 1. Petitioner Millennium Bulk Terminals-Longview, LLC's Motion for Summary
19 Judgment and Request for Remand;
- 20 2. Declaration of Craig Trueblood In Support of Petitioner Millennium Bulk
21 Terminals-Longview, LLC's Motion for Summary Judgment and Request for
Remand, with Exhibits A-D;

- 1 3. Washington Environmental Council *et al.* Motion for Summary Judgment;
- 2 4. Declaration of Kristen L. Boyles Re: Exhibits to WEC Motion for Summary
- 3 Judgment, with Exhibits A-J;
- 4 5. Cowlitz County's Joinder of Petitioner Millennium Bulk Terminals-Longview,
- 5 LLC's Motion for Summary Judgment and Request for Remand;
- 6 6. Declaration of Elaine Placido In Support of County's Joinder of Motion for
- 7 Summary Judgment and Request for Remand (Placido Decl (1/25/18)), with
- 8 Exhibit C-1;
- 9 7. Respondent State of Washington, Department of Ecology's Motion for Summary
- 10 Judgment, with Appendix A;
- 11 8. Declaration of Sonia A. Wolfman In Support of Department of Ecology's
- 12 Motion for Summary Judgment, with Exhibits A-F;
- 13 9. Declaration of Rebecca Rothwell In Support of Department of Ecology's Motion
- 14 for Summary Judgment, with Exhibit A;
- 15 10. WEC Opposition to Millennium Motion for Summary Judgment and Remand;
- 16 11. Second Declaration of Kristen L. Boyles, with Exhibits K-1;
- 17 12. Respondent Department of Ecology's Response to Petitioner Millennium Bulk
- 18 Terminals-Longview, LLC's Motion for Summary Judgment and Request for
- 19 Remand;
- 20 13. Declaration of Thomas J. Young In Support of Ecology's Response to Petitioner
- 21 Millennium Bulk Terminals-Longview, LLC's Motion for Summary Judgment
- and Request for Remand, with Exhibits A-D;
- 14. Respondent Department of Ecology's Joinder In Intervenor-Respondents
- Washington Environmental Council. Et Al. Motion for Summary Judgment;
- 15. Cowlitz County's Response to WEC's Motion for Summary Judgment;
- 16. Petitioner Millennium Bulk Terminals-Longview, LLC's Opposition to
- Respondent Department of Ecology and Intervenor-Respondents Washington
- Environmental Council Et Al.'s Motions for Summary Judgment;

- 1 17. Declaration of Ankur K. Tohan In Opposition to Ecology and WEC's Motions
2 for Summary Judgment, with Exhibits A-K;
- 3 18. Cowlitz County's Response to Dept. of Ecology's Motion for Summary
4 Judgment;
- 5 19. Declaration of Elaine Placido In Support of County's Response to Motion for
6 Summary Judgment (Placido Decl. (2/8/18));
- 7 20. BNSF Railway Company's Joinder to Millennium Bulk Terminals-Longview's
8 Opposition to Ecology and WEC's Motions for Summary Judgment;
- 9 21. Reply In Support of Millennium Bulk Terminals-Longview, LLC's Motion for
10 Summary Judgment;
- 11 22. WEC Reply In Support of Motion for Summary Judgment;
- 12 23. Respondent State of Washington, Department of Ecology's Reply In Support of
13 Motion for Summary Judgment;
- 14 24. Second Declaration of Sonia A. Wolfman In Support of Ecology's Motion for
15 Summary Judgment, with Exhibit A; and
- 16 25. The Board's file in this matter.

17 The following issues, which were submitted by the parties and set out in the
18 Consolidation, Intervention and Prehearing Order, are the subject of the pending motions:

- 19 1. Did the Cowlitz Hearing Examiner unlawfully or fail to apply, or misinterpret
20 the County's Shoreline Master Program (SMP) and the Shoreline Management
21 Act (SMA)?
2. Did the Cowlitz Hearing Examiner misinterpret, misapply or fail to apply the
State Environmental Policy Act (SEPA) or County SEPA regulations and other
regulations?
3. Did the Cowlitz Hearing Examiner fail to analyze the Project as presented in the
applications and in light of substantial evidence and the County SMP?

- 1 4. Did the Cowlitz Hearing Examiner commit an error by imposing preconditions
2 from other permits and approvals outside of his scope of authority provided for
3 in the SMA, and that would be separately addressed in pending or subsequent
4 reviews?
- 5 5. Did the Hearing Examiner commit an error by interjecting areas of further
6 environmental study and imposing additional mitigation discussion despite the
7 lapse of jurisdiction for appeal of SEPA adequacy?
- 8 6. Is the Project consistent with the state SMA?
- 9 7. Is the Project consistent with the Cowlitz SMP?
- 10 8. Whether Millennium and Cowlitz County are barred from challenging the Final
11 Environmental Impact State Environmental Policy Act (FEIS) findings and
12 conclusions regarding the ten areas of significant, adverse, unmitigated impacts
13 cited in the Hearing Examiner decision?
- 14 9. Did the Hearing Examiner lawfully exercise substantive authority under the
15 SEPA, RCW 43.21C.060 and WAC 197-11-660(1), to deny the shoreline
16 permit?
- 17 9.a Does substantial evidence support the Hearing Examiner's conclusion
18 that the FEIS identified significant adverse impacts?
- 19 9.b Does substantial evidence support the Hearing Examiner's conclusion
20 that reasonable mitigation measures are insufficient to mitigate the
21 identified significant adverse impacts?
- 9.c Is the Hearing Examiner's denial of the shoreline permits based on
policies or rules that have been designated by the County as a basis for
the exercise of substantive authority, as required under WAC 197-11-
660(1)(a)?

18 Based on the record and evidence before the Board on the motions, the Board enters the
19 following decision:
20
21

1 **BACKGROUND**

2 Millennium proposes to construct and operate a coal export terminal (the Project) on an
3 existing industrial site in and adjacent to the Columbia River in Cowlitz County. The Project
4 would be developed on 190 acres primarily within a 540-acre site leased by Millennium. Coal
5 would be transported to the Project site by rail and stockpiled for eventual loading onto ocean-
6 going vessels for transport to Asia via the Columbia River and Pacific Ocean. The completed
7 Project would consist of "one operating rail track, eight rail tracks for storing up to eight unit
8 trains, rail car unloading facilities, a stockpile area for coal storage, conveyor and reclaiming
9 facilities; two new docks in the Columbia River (Docks 2 and 3), and shiploading facilities on
10 the two docks. Dredging of the Columbia River would be required to provide access to and
11 from the Columbia River navigation channel and for berthing at the two new docks." Wolfman
12 Decl., Ex. A at FS-1.

13 Millennium intends to construct the Project in two stages. During Stage 1, Millennium
14 would construct the two docks, two stockpile pads, railcar unloading facilities, the operating rail
15 track and rail storage tracks, Project site area ground improvements, associated facilities and
16 infrastructure. Millennium would also conduct necessary dredging for the two docks. The
17 Project's throughput capacity at the completion of Stage 1 would be 25 million metric tons of
18 coal per year (MMTPY). Stage 2 facilities, construction of which would begin at the
19 completion of Stage 1, would consist of "one additional shiploader on Dock 3, two additional
20 stockpile pads, conveyors, and equipment necessary to increase throughput by approximately 19
21 MMTYP[.]" Trueblood Decl., Ex. B at 7. The Project is intended to operate 24 hours per day,

1 seven days per week, and is designed for a minimum 30-year period of operation. Wolfman
2 Decl., Ex. A at FS-1.

3 Millennium determined that, in order for a coal export terminal to be economically
4 viable, it needed a throughput capacity of 40 to 50 MMTPY. Second Wolfman Decl., Ex. A at
5 3-1, D-5. At the completion of Stage 2, the Project will have a throughput capacity of up to 44
6 MMTPY. Trueblood Decl., Ex. B at 7. At full terminal operations, the Project would "bring
7 approximately 8 loaded unit trains each day carrying coal to the project area, send out
8 approximately 8 empty unit trains each day from the project area, and load an average of 70
9 vessels per month or 840 vessels per year, which would equal 1,680 vessel transits in the
10 Columbia River annually." Wolfman Decl., Ex. A at FS-1.

11 Cowlitz County and Ecology served as co-lead agencies for environmental review of the
12 Project under the Washington State Environmental Policy Act (SEPA), ch. 43.21C RCW. On
13 September 9, 2013, Cowlitz County issued a revised Determination of Significance stating that
14 the Project was likely to result in significant adverse environmental impacts and that an
15 environmental impact statement (EIS) was required. Wolfman Decl., Ex. A at S-2. Cowlitz
16 County and Ecology elected to prepare a joint SEPA EIS. Trueblood Decl., Ex. B at 23.

17 On April 28, 2017, Cowlitz County and Ecology issued the final EIS (FEIS) for the
18 Project. The FEIS identified unavoidable and significant adverse environmental impacts
19 associated with construction and operation of the Project, as well as proposed mitigation
20 measures. With respect to the significant adverse environmental impacts and mitigation, the
21 FEIS stated:

1 If the proposed mitigation measures were implemented, they would reduce but
2 not completely eliminate significant adverse environmental impacts resulting
3 from construction and operation of the [Project]. Unavoidable and significant
4 adverse environmental impacts could remain for nine environmental resource
5 areas: social and community resources; cultural resources; tribal resources; rail
6 transportation; rail safety; vehicle transportation; vessel transportation; noise
7 and vibration; and air quality.

8 Wolfman Decl., Ex. A at S-41; *see also* S-41-44, S46-60.

9 The Project requires several local, state and federal authorizations to proceed. *Id.* at S-
10 43-44. Pertinent permits from Cowlitz County include a Critical Areas Permit, Shoreline
11 Substantial Development Permit (SSDP) and Shoreline Conditional Use Permit (SCUP).
12 Authorizations from Ecology include an SCUP and Clean Water Act Section 401 Certification.
13 Millennium must also obtain a Clean Water Act Section 404 Permit from the U.S. Army Corps
14 of Engineers. *Id.*

15 On July 19, 2017, Cowlitz County issued Millennium a Critical Areas Permit for the
16 Project. Tohan Decl., Ex. H; Wolfman Decl., Ex. H. Pursuant to RCW 43.21C.080,
17 Millennium issued a Notice of Action, which established August 18, 2017, as the deadline for
18 appealing the FEIS. Tohan Decl., Ex. K (Trans. p. 20); Placido Decl. (2/8/18) at ¶ 2. BNSF
19 filed “a precautionary appeal” of the FEIS on May 12, 2017, but subsequently withdrew its
20 appeal on August 24, 2017. Placido Decl. (2/8/18) at ¶ 2. As no other appeal was filed, “the
21 FEIS stands as jointly written and approved.” *Id.*

Millennium applied to Cowlitz County requesting a SSDP and SCUP for Stage 1 of the
Project. Cowlitz County’s Department of Building and Planning prepared a Staff Report
explaining its evaluation of the Project for consistency with the Shoreline Management Act

1 (SMA), Cowlitz County's Shoreline Management Master Program (County SMP), and existing
2 land uses in the Project area. Placido Decl. (1/25/18), Ex. C-1. The Staff Report utilized the
3 FEIS in its review of Millennium's shoreline permit application. The Staff Report described the
4 impacts caused by the Project during both Stage 1 and Stage 2. *See e.g., Id.* at 16-20 (noise,
5 dust). The Staff Report recommended approval of the SSDP and SCUP subject to 36
6 conditions. *Id.* at 75-79. In addition to analyzing aspects of the Project at full buildout, the
7 Staff Report proposed conditions applicable to both Stage 1 and Stage 2. *Id.* at 77-79. The
8 Staff Report concluded that the Project, if constructed consistent with those conditions, would
9 be consistent with the SMA, the County SMP and existing land uses. *Id.* at 75.

10 Pursuant to Cowlitz County Code (CCC), the Director of the Department of Building
11 and Planning transmitted Millennium's permit application and pertinent documents to the
12 Cowlitz County Hearing Examiner (Hearing Examiner) for action. CCC 19.20.050(A)(1).
13 Because the application involved a request for a SSDP and SCUP, the Hearing Examiner was
14 required to hold a public hearing prior to taking action. *Id.* The Hearing Examiner held a three-
15 day public hearing on Millennium's shoreline permit application on November 2, 3 and 6, 2017.
16 During the proceedings, the Hearing Examiner heard the testimony of witnesses and received
17 evidence into the record. Hearing Examiner Decision at 9-14.

18 The Hearing Examiner noted that Ecology had recently denied Millennium's request for
19 a Clean Water Act Section 401 Certification, based in part, on the agency's use of its SEPA
20 substantive authority. According to the Hearing Examiner, Ecology's decision was reached by
21 examining the FEIS and determining that the identified unavoidable and significant adverse

1 impacts could not be mitigated. The Hearing Examiner expressed concern that Ecology had not
2 provided Millennium with the opportunity to offer evidence of possible, reasonable mitigation.
3 To address this concern, during the public hearing the Hearing Examiner provided Cowlitz
4 County and Millennium with the opportunity to propose reasonable mitigation. Hearing
5 Examiner Decision at 2-3,

6 Elaine Placido, Director of the Department of Building and Planning, testified for
7 Cowlitz County and presented the County Staff Report. Tohan Decl., Ex. K (Trans. pp. 11-28).
8 Ms. Placido stated that the purpose of the public hearing was to address Millennium's request
9 for shoreline permits for Stage 1 of the Project. After describing the planned improvements,
10 Ms. Placido testified that Cowlitz County staff recommended approval of the shoreline permits
11 subject to the conditions set forth in the Staff Report. *Id.* (Trans. p. 28).

12 Millennium presented testimony from several witnesses. The witnesses included
13 representatives from Millennium, the company's environmental consultant, a representative
14 from BNSF and a representative from the Longview/Kelso Building Trades Association. At the
15 conclusion of Millennium's initial presentation, testimony was received from the public. This
16 included a presentation by counsel for the identified interested parties, and testimony by tribal
17 representatives, public officials, and members of the general public. *Id.* at 12.

18 Millennium was then provided with an opportunity to present responsive witnesses.
19 Millennium presented expert witness testimony on issues related to air quality, greenhouse gas
20 emissions, and coal dust. *Id.* at 13. Kristen Gaines, Millennium's Vice President of
21 Environmental Planning and Services, responded to questions asked by the Hearing Examiner

1 during the course of the proceedings. Ms. Gaines' responses were reduced to writing and
2 submitted as an exhibit. *Id.*; Tohan Decl., Ex. G. Millennium entered a number of exhibits into
3 the record, including several expert reports addressing Project impacts and Millennium's
4 proposed mitigation measures. *Id.* at 59-61.

5 At the close of testimony, the Hearing Examiner asked Cowlitz County whether it had
6 any changes or additions to its proposed conditions for Project approval. Cowlitz County
7 responded that it had no changes to the conditions set forth in the Staff Report. Hearing
8 Examiner Decision at 13.

9 The Hearing Examiner issued his decision on November 14, 2017. In the Findings of
10 Fact, the Hearing Examiner began by setting forth his factual findings related to SEPA. Those
11 Findings of Fact described each of the nine unavoidable, significant adverse environmental
12 impacts identified in the FEIS and the proposed mitigation measures. Hearing Examiner
13 Decision at 14-31. The Hearing Examiner also found that the Project's net greenhouse gas
14 emissions constituted an additional unavoidable, significant adverse environmental impact
15 because the mitigation described in the FEIS to address that impact was incorrect. The
16 proposed mitigation addressed only a fraction of the estimated greenhouse gas emissions
17 associated with the Project. *Id.* at 31-33.

18 The Hearing Examiner next made factual findings concerning the Project's compliance
19 with the SMA and County SMP. The Columbia River is a shoreline of statewide significance.
20 Under the SMA and County SMP, for shorelines of statewide significance preference shall be
21 given in the following order to uses which: "(1) recognize and protect the statewide interests

1 over local interest; (2) preserve the natural character of the shoreline; (3) result in long term
2 over short term benefit; (4) protect the resources and ecology of the shoreline; (5) increase
3 public access to publicly owned areas of the shoreline; and (6) increase recreational
4 opportunities for the public in the shoreline.” Hearing Examiner Decision at 33; *see also* RCW
5 90.58.020; County SMP at 2. Applying the use preferences to each of the Project’s impacts
6 described in the SEPA findings, the Hearing Examiner found that those impacts precluded a
7 conclusion that the Project met the applicable criterion. Hearing Examiner Decision at 33-35.

8 Finally, the Hearing Examiner made findings regarding unresolved issues: (1) the status
9 of other authorizations required for Millennium to construct docks and other improvements on
10 state-owned aquatic lands; (2) Millennium’s ability to conduct dredging on non-leased state-
11 owned aquatic lands; (3) Millennium’s ability to dispose of state-owned dredged materials; (4)
12 water availability; (5) anti-idling policies; (6) possible impacts from wake stranding; (7) state-
13 wide impacts from at-grade rail crossings; (8) the lease of property owned by the Bonneville
14 Power Administration; (9) further analysis of coal dust impacts on aquatic and tribal resources;
15 (10) impacts related to the repeal of the Clean Power Plan; and (11) Millennium’s compliance
16 with Ecology’s request for additional information. Hearing Examiner Decision at 35-49.

17 In the analysis portion of the Decision, the Hearing Examiner first stated that, because
18 the FEIS was not appealed, its findings and conclusions are unchallenged for purposes of the
19 hearing. Considering the testimony presented by Millennium’s expert witnesses, the Hearing
20 Examiner stated that their opinions were in conflict with the FEIS. As the FEIS was not
21 appealed, the Hearing Examiner concluded that the testimony “was largely irrelevant to the

1 issue of whether the ten unavoidable, significant adverse environmental impacts identified in
2 the FEIS can be reasonably mitigated.” *Id.* at 49.

3 The Hearing Examiner determined that the conditions proposed in the Staff Report,
4 which remained unchanged at the conclusion of the hearing, failed to reasonably mitigate those
5 impacts. Because Millennium’s position on mitigation was “nearly identical” to the County’s,
6 the Hearing examiner concluded that “neither the County nor [Millennium] propose reasonable
7 mitigation for any of the unavoidable, significant adverse impacts identified in the FEIS.” *Id.* at
8 50. The Hearing Examiner then described the deficiencies in the mitigation proposed to address
9 those impacts. *Id.* at 50-51.

10 The Hearing Examiner addressed the application of SEPA substantive authority.
11 Cowlitz County adopted rules concerning the integration of SEPA policies and procedures into
12 programs within the County’s jurisdiction. CCC 19.11.010(A). Under those rules, Cowlitz
13 County has the authority to condition or deny a proposal if such decision is based on policies
14 identified and incorporated into regulations, plans, or codes designated as possible grounds for
15 the exercise of substantive authority under SEPA. CCC 19.11.110(A). After setting out the
16 policy basis adopted by Cowlitz County for the exercise of SEPA substantive authority, former
17 CCC 119.11.110(B)(1) and (2),¹ the Hearing Examiner found that the failure to reasonably
18 mitigate the unavoidable, significant adverse environmental impacts identified in the FEIS
19 conflicted with practically all of those policies. Based on that finding, the Hearing Examiner
20

21 ¹ On February 13, 2018, the Cowlitz County Board of Commissioners amended CCC 19.11.110, deleting the policies for the exercise of SEPA substantive authority that formed the basis of the Hearing Examiner’s use of substantive SEPA authority.

1 determined that the shoreline permits must be denied under Cowlitz County's SEPA substantive
2 authority. Hearing Examiner Decision at 51-52. The Hearing Examiner concluded that "[t]he
3 Project, as conditioned, fails to reasonably mitigate the ten unavoidable, significant adverse
4 environmental impacts identified in the FEIS[.]" and as a result, "the Project has not satisfied
5 the environmental standards found in [former] CCC 19.11.110(b)(1), or in CCC
6 19.11.110(b)(2)." *Id.* at 56.

7 Turning to the SMA and County SMP, the Hearing Examiner noted that Millennium
8 bore the burden of proving that all of the requirements of the SMA and County SMP have been
9 met for issuance of the requested shoreline permits. The Hearing Examiner concluded that
10 Millennium did not meet its burden as it failed to reasonably mitigate the ten unavoidable,
11 significant adverse environmental impacts identified in the FEIS. *Id.* at 52. Addressing the use
12 preferences applicable to shorelines of statewide significance, RCW 90.58.020, the Hearing
13 Examiner determined that "[t]he Project, as conditioned, does not recognize and protect the
14 statewide interest over local interest[;] . . . does not result in long term over short term benefit[;
15 and] . . . does not protect the resources and ecology of the shoreline." *Id.* at 56. The Hearing
16 Examiner thus concluded that the Project, as conditioned, was not consistent with the policies of
17 the SMP and was not consistent with the County SMP. *Id.*

18 Finally, the Hearing Examiner summarized the "unresolved issues" described in the
19 Findings of Fact and concluded that those matters further precluded Millennium from carrying
20 its burden to prove that all requirements of the SMA and County SMP have been met. *Id.* at 52.
21 Based on the Findings of Fact and Conclusions of Law, the Hearing Examiner denied

1 Millennium's request for a SSDP and SCUP for Stage 1 of its proposed coal export terminal.

2 *Id.* at 56.

3 Millennium filed a timely petition for review and requested that the Board reverse the
4 Hearing Examiner Decision and issue an order granting the shoreline permits subject to
5 appropriate conditions. Cowlitz County separately petitioned the Board for review of the
6 Hearing Examiner Decision and requested that the Board grant similar relief.

7 ANALYSIS

8 A. Standards of Review

9 Summary judgment is a procedure available to avoid unnecessary trials where there is
10 no genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667,
11 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if
12 only questions of law remain for resolution, and neither party contests the facts relevant to a
13 legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
14 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

15 The party moving for summary judgment must show there are no genuine issues of
16 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
17 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
18 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
19 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
20 then the nonmoving party must present evidence demonstrating that material facts are in
21 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

1 Bare assertions concerning alleged genuine material issues do not constitute facts sufficient to
2 defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40
3 (2014). When determining whether an issue of material fact exists, all facts and inferences are
4 construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45
5 P.3d 1068 (2002). The Board will enter summary judgment for a non-moving party under
6 appropriate circumstances. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842
7 P.2d 470 (1992).

8 Unless otherwise required by law, the Board's scope and standard of review shall be de
9 novo. WAC 461-08-500(1). SEPA does not prescribe the scope or standard of review on
10 appeal. Deferring to case law, the Board reviews the exercise of SEPA substantive authority to
11 condition or deny a proposal under the "clearly erroneous" standard of review. *Polygon Corp.*
12 *v. Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *McQuarrie v. Seattle*, SHB No, 08-033
13 (Findings of Fact, Conclusions of Law, and Order, Aug. 5, 2009) ("review of an agency's
14 exercise of substantive SEPA authority (i.e. the content of agency action, such as mitigation or
15 conditions) is also under the clearly erroneous standard"). Under this standard, the Board "does
16 not substitute its judgment for that of the administrative body and may find the decision clearly
17 erroneous only when it is left with the definite and firm conviction that a mistake has been
18 committed." *Polygon*, 90 Wn.2d at 69 (*quoting Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461
19 P.2d 531 (1969)) (internal quotations omitted). To properly employ the clearly erroneous
20 standard of review to the exercise of SEPA substantive authority, where there has been an open
21 record hearing below and there is an unchallenged FEIS which identifies significant adverse

1 unmitigated environmental impacts, the Board concludes that the appropriate scope of review is
2 limited to the record created during that hearing.² *Cf. Cook v. Clallam County*, 27 Wn. App.
3 410, 413, 618 P.2d 1030 (1980) (because issue on appeal was whether environmental
4 documents identified specific adverse environmental impacts, trial court erred in conducting
5 new trial; environmental documents were the proper evidence to use to evaluate local
6 government's permit denial).

7 A shoreline permit for a proposed development is reviewed for consistency with the
8 SMA and the applicable SMP. WAC 461-08-505. The consistency of the shoreline permit with
9 SMA and SMP is considered de novo and no particular deference is accorded the decision of the
10 local government. *Buechel v. Department of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910
11 (1994).

12 **B. Parties' Motions For Summary Judgment**

13 Contending that the Hearing Examiner Decision is fundamentally flawed, Millennium
14 moved for summary judgment on Issues 1-4. Millennium asserts that the Hearing Examiner
15 erred by (1) considering the entire project, not just Stage 1 as was the subject of its shoreline
16 permit applications; (2) failing to review the applications for consistency with the SMA and
17 County SMP; (3) misapplying SEPA; and (4) wrongly concluding that the shoreline permits

18 ² In *McQuarrie v. City of Seattle*, the Board permitted the admission of evidence on appeal; however, there had not
19 been a hearing at the local level allowing the parties to establish a record regarding the local government's
20 threshold SEPA decision. See *McQuarrie v. City of Seattle*, SHB No. 08-033 (Order on Summary Judgment, April
21 27, 2009)(Noting that because there had been no hearing at the local level to provide the parties with an
opportunity to establish a record, the clearly erroneous standard did not preclude the Board's consideration of
evidence not considered by the City.); see also *Luce v. City of Snoqualmie*, SHB No. 00-034 (Final Findings of
Fact, Conclusions of Law and Order, Aug. 27, 2001)(allowing consideration of evidence not reviewed by the local
government where there was no open record at the local level).

1 could be denied because there are a number of Project authorizations required from other
2 agencies that are outstanding. Millennium requests that the Board reverse the Hearing
3 Examiner Decision and remand the shoreline permit applications to Cowlitz County with
4 instructions.³

5 WEC and Ecology oppose Millennium's motion for summary judgment and remand,
6 asserting that the Hearing Examiner did not commit error in his analysis of the Project or in his
7 exercise of substantive SEPA authority to deny the shoreline permits. WEC and Ecology
8 separately seek summary judgment on Issues 1, 2, 5, 6, 7, 8 and 9, contending that the Hearing
9 Examiner Decision complied with applicable SEPA requirements and that the Project is
10 inconsistent with the SMA and County SMP. WEC and Ecology request that the Board uphold
11 the Hearing Examiner Decision and dismiss the petitions for review.

12 **1. Effect of Unchallenged FEIS (Issue 8)**

13 SEPA requires an EIS only for "major actions having a probable significant, adverse
14 environmental impact." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137
15 (2002); RCW 43.21C.031(1). "The primary function of an EIS is to identify adverse impacts to

16
17 ³ If remanded, Millennium requests that the Board "instruct the County to take evidence regarding Stage 1, the
18 subject of the permit applications, and fully apply the Cowlitz SMP as well as the SMA to the permit applications
19 to determine whether Stage 1 is consistent with the SMP and the SMA. If the County determines that Stage 1 is
20 consistent with the SMP and SMA, then it should also determine whether the County should exercise SEPA
21 substantive authority considering all of the evidence regarding Stage 1 impacts and potential mitigation."
Millennium Motion for Summary Judgment and Request for Remand at 16. It is unclear if Millennium is
requesting that the Board remand the matter for further proceedings before the Hearing Examiner or to Cowlitz
County staff to issue a new staff report. In addition, Millennium's proposed remand instruction that additional
evidence be taken appears to contradict the company's assertions that "[b]efore the Hearing Examiner,
[Millennium] offered extensive evidence that pertained specifically to the Stage 1 proposal at issue" and "presented
substantial evidence of both the impacts on, and reasonable mitigation for, the nine resource areas identified in the
EIS." Millennium Opp. to Summ. J. at 7, 21.

1 enable the decisionmaker to ascertain whether they require either mitigation or denial of the
2 proposal.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380
3 (1990); WAC 197-11-400(2) (“An EIS shall provide impartial discussion of significant
4 environmental impacts and shall inform decision makers and the public of reasonable
5 alternatives, including mitigation, that would avoid or minimize adverse impacts or enhance
6 environmental quality.”) The purpose of an EIS is to provide decision makers with “sufficient
7 information to make a reasoned decision.” *Citizens Alliance To Protect Wetlands v. City of
8 Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).

9 Acting as co-lead agencies, Cowlitz County and Ecology determined that the Project
10 was likely to result in significant adverse impacts on the environment and, therefore, required
11 the preparation of an EIS. Wolfman Decl., Ex. A at S-2. The FEIS for the Project was issued
12 on April 28, 2017. Millennium elected to publish a Notice of Action under RCW 43.21C.080,
13 which established August 18, 2017, as the deadline for filing an appeal challenging the
14 adequacy of the FEIS.⁴ Tohan Decl., Ex. K (Trans. p. 20); Placido Decl. (2/8/18) at ¶ 2. The
15 FEIS for the Project was not appealed.

16 Issue 8 asks whether Millennium or Cowlitz County can challenge the FEIS’s findings
17 and conclusions concerning the ten areas of significant, adverse, unmitigated environmental
18 impacts cited in the Hearing Examiner Decision. WEC and Ecology contend that, because the
19

20 ⁴ An appeal of an EIS can be procedural or substantive. According to Ecology’s SEPA Handbook: “Procedural
21 appeals include the appeal of a threshold determination . . . and of the adequacy of a final [EIS]. Substantive
appeals are challenges of an agency’s use (or failure to use) SEPA substantive authority to condition or deny a
proposal.” State Environmental Policy Act Handbook, Washington State Department of Ecology, Publication #
98-114 (2003) at 109 (emphasis omitted).

1 FEIS was not appealed, Millennium and Cowlitz County are barred from collaterally attacking
2 its findings or presenting new information to counter those findings. As the adequacy of the
3 FEIS was not challenged, WEC and Ecology assert that the findings in the FEIS are binding or
4 verities in this proceeding. WEC Mot. for Summ. J. at 20-21; Ecology Mot. for Summ. J. at 18-
5 19.

6 Millennium responds that it is not challenging the adequacy of the FEIS.⁵ Rather, its
7 appeal is substantive as it is challenging the Hearing Examiner's decision to deny the shoreline
8 permits based on SEPA. Arguing that WEC and Ecology overstate the effect of an
9 unchallenged FEIS, Millennium asserts that the Board can consider evidence in addition to the
10 FEIS in deciding the appeal. Millennium Opp. to Summ. J. at 17-21.

11 EIS adequacy refers to the legal sufficiency of the environmental data contained in the
12 impact statement.⁶ *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122
13 Wn.2d 619, 633, 860 P.2d 390, 398-99 (1993), amended, 866 P.2d 1256 (Wash. 1994)(citing R.
14

15
16 ⁵ Cowlitz County joined and adopted Millennium's motion for summary judgment and Millennium's opposition to
17 WEC's and Ecology's summary judgment motions, and provided additional arguments. Unless referring to
18 Cowlitz County's additional contentions, the Board will refer to the arguments as being advanced by Millennium.

19 ⁶ The adequacy of an EIS is tested under the "rule of reason." *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609,
20 614-15, 744 P.2d 1101 (1987); *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344-45, 552 P.2d 184 (1976). As
21 the Court in *Klickitat County Citizens* explained:

In order for an EIS to be adequate under this rule, the EIS must present decisionmakers with
a "reasonably thorough discussion of the significant aspects of the probable environmental
consequences" of the agency's decision. The rule of reason is "in large part a broad, flexible
cost-effectiveness standard," in which the adequacy of an EIS is best determined "on a case-
by-case basis guided by all of the policy and factual considerations reasonably related to
SEPA's terse directives."

Klickitat County Citizens, 122 Wn.2d at 633 (internal citations omitted). When reviewing an EIS, the Legislature
has directed that the decision of the agency regarding the adequacy of an EIS is to be "accorded substantial
weight." RCW 43.21C.090.

1 Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14(a)(i)
2 (4th ed. 1993)). The adequacy of the FEIS was not appealed.

3 The Board concludes that the FEIS's determination of adverse environmental impacts
4 associated with the Project and their significance cannot be challenged in this proceeding. As
5 Ms. Placido, Cowlitz County's Director of the Department of Building and Planning, stated,
6 "the FEIS stands as jointly written and approved." Placido Decl. (2/8/18) at ¶ 2. As discussed
7 below, the Hearing Examiner's use of the FEIS can be challenged in addressing whether the
8 exercise of SEPA substantive authority was clearly erroneous.

9 **2. Consideration of the Entire project (Issue 3)**

10 In its applications to Cowlitz County, Millennium requested shoreline permits for Stage
11 1 of the Project. Millennium asserts that the Hearing Examiner committed legal error in
12 denying the applications based on the environmental impacts of the Project in its entirety.
13 Millennium argues that under WAC 197-11-400(4), not only was the Hearing Examiner
14 required to use the FEIS in rendering his decision, he was also required to consider "other
15 relevant materials and considerations." Millennium contends that the Hearing Examiner
16 rejected evidence presented at the hearing that would have assisted him in understanding the
17 difference between Stage 1 and Stage 2 impacts and mitigation. According to Millennium, the
18 FEIS is not determinative and it was clearly erroneous for the Hearing Examiner to disregard
19 other evidence such as its application, the County staff report and testimony provided at the
20 public hearing. Finally, Millennium states that the Board has acknowledged that a project can
21 be advanced in phases when SEPA has been performed on the entire project. Millennium

1 argues its Project fits that scenario and, contrary to the assertions by WEC and Ecology, it has
2 not sought to improperly piecemeal the Project. Millennium Mot. for Summ. J. at 8-9; Reply at
3 3-9.

4 In response, WEC and Ecology argue that the Hearing Examiner correctly considered
5 the entire Project and its impacts when exercising SEPA substantive authority. Because the two
6 stages of the Project are related to and dependent upon one another, WEC and Ecology assert
7 that they must be considered as a whole. WEC and Ecology contend that Millennium's attempt
8 to obtain shoreline permits for only a portion of the Project violates the prohibitions in the SMA
9 and in SEPA on piecemealing project review. WEC Resp. to Summ. J. at 4-10; Ecology Resp.
10 to Summ. J. at 6-11.

11 The Board concludes that the Hearing Examiner's consideration of the Project as a
12 whole was not clearly erroneous. The FEIS, which recognized that the Project was divided into
13 two stages, analyzed the environmental impacts of the Project at full build out. Wolfman Decl.,
14 Ex. A at S-4 (Proposed Action is the construction and operation of a coal export terminal) and
15 S-8 (construction and operation would consist of two stages; for FEIS analysis, Proposed Action
16 assumed fully operational by 2028). Based on that analysis, the FEIS identified potential
17 impacts requiring mitigation, proposed applicant mitigation measure(s), and unavoidable and
18 significant adverse environmental impacts. *Id.* at S-46-S-60. Cowlitz County staff utilized the
19 FEIS in their review of Millennium's shoreline permit applications. While acknowledging that
20 the Project was divided into two stages and Millennium was seeking shoreline permits for Stage
21 1, the Staff Report relied on the FEIS's evaluation of the Project in its entirety. The Staff

1 Report quoted at length from sections of the FEIS's analysis of Project impacts at full
2 operations and recommended permit conditions drawn from the FEIS applicable to both Stage 1
3 and Stage 2.⁷ Wolfman Decl., Ex. F.

4 Like County staff, the Hearing Examiner recognized that Millennium was seeking
5 shoreline permits for Stage 1. Hearing Examiner Decision at 4. Similarly, the Hearing
6 Examiner also used the FEIS to evaluate the environmental impacts of the Project as a whole.
7 The record does not support Millennium's contention that the Hearing Examiner rejected
8 evidence regarding Stage 1 impacts and mitigation.⁸ Millennium cites to no evidence excluded
9 by the Hearing Examiner. Nor does Millennium claim it was precluded from presenting
10 testimony at the public hearing. While Millennium may dispute the weight the Hearing
11 Examiner accorded its evidence, based on the record presented, the Board is not left with the
12 definite and firm conviction that Hearing Examiner committed a mistake when he considered
13 the Project as a whole.

14 3. Application of SEPA Substantive Authority (Issues 2 and 9)

15 As stated above, the purpose of an EIS is to provide decision makers with "sufficient
16 information to make a reasoned decision." *Citizens Alliance*, 126 Wn.2d at 362. Issuance of an

17 ⁷ For example, with respect to noise impacts, the Staff Report evaluated the Project's rail operations at full coal
18 export terminal operations (adding 16 trains per day on the Reynolds lead and BNSF Spur). The evaluation
19 included impact analysis drawn from the FEIS and recommended conditions based on the FEIS's mitigation
20 measures that applied to the Project at full operation. Wolfman Decl., Ex. F at 17-18. *See also, e.g.*, Conditions 17
21 and 18 (applies to all Project stages).

⁸ The Hearing Examiner provided Cowlitz County and Millennium the opportunity to propose reasonable
mitigation. Hearing Examiner Decision at 3. Millennium presented numerous exhibits and the testimony of
several expert witnesses. *Id.* at 12-13, Applicant Exhibit List (appended to Hearing Examiner Decision). Prior to
the close of the record below, Millennium submitted a table summarizing its responses, including its proposed
mitigation, to 19 areas of questions the Hearing Examiner posed to Ms. Placido during the public hearing. Tohan
Decl., Ex. G.

1 EIS does not approve or deny a project. Rather, the EIS accompanies a proposal through the
2 existing agency review process so that agency officials can use the document when making
3 permitting decisions. RCW 43.21C.030(2)(d). "Any governmental action may be conditioned
4 or denied" based on the adverse environmental impacts disclosed in an EIS. RCW 43.21C.060;
5 WAC 197-11-66; *Polygon*, 90 Wn.2d at 64 ("SEPA confers substantive authority to the
6 deciding agency to act on the basis of the impacts disclosed").

7 The policies and goals of SEPA are supplementary to the existing authority of all
8 branches of government. RCW 43.21C.060. SEPA serves as an "overlay" on existing
9 authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65.
10 Pursuant to the SMA and Cowlitz County Code, the County has authority to issue or deny
11 shoreline permits. RCW 90.58.050, .140; CCC 19.20. Using SEPA substantive authority, a
12 local government may deny a permit even if it meets all of the requirements for approval under
13 permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc. v. City of Bellevue*, 106 Wn.2d
14 47, 53, 720 P.2d 782 (1986) ("under [SEPA], a municipality has the discretion to deny an
15 application for a building permit because of adverse environmental impacts even if the
16 application meets all other requirements and conditions for issuance").

17 The denial of a proposal must be predicated "upon policies identified by the appropriate
18 governmental authority and incorporated into regulations, plans, or codes which are formally
19 designated by the agency" or appropriate legislative body. RCW 43.21C.060; WAC 197-11-
20 660(1)(a). In order to deny a proposal under SEPA, a decision maker must find that

1 (1) The proposal would be likely to result in significant adverse environmental
2 impacts identified in a final or supplemental environmental impact statement
3 prepared under this chapter; and (2) reasonable mitigation measures are
4 insufficient to mitigate the identified impact.

5 RCW 43.21C.060; WAC 197-11-660(1)(f). "The decision maker shall cite the agency SEPA
6 policy that is the basis of any condition or denial under this chapter[.]" WAC 197-11-660(1)(b).
7 Failure to sufficiently document compliance with these requirements can result in reversal of a
8 SEPA-based denial. *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 752-53, 765
9 P.2d 264 (1998).

10 Cowlitz County adopted bases for the exercise of substantive authority under SEPA as
11 part of the County Code. Pertinent sections of the Cowlitz County Code provided:

- 12 1. Cowlitz County shall use all practicable means, consistent with other
13 essential considerations of state policy, to improve and coordinate plans,
14 functions, programs and resources to the end that the state and its citizens
15 may:
 - 16 a. Fulfill the responsibilities of each generation as
17 trustee of the environment for succeeding generations;
 - 18 b. Assure for all people of Cowlitz County safe, healthful,
19 productive, and aesthetically and culturally pleasing
20 surroundings;
 - 21 c. Attain the widest range of beneficial use of the
environment without degradation, risk to health or safety,
or other undesirable and unintended consequences;
 - d. Preserve important historic, cultural, and natural aspects
of our national heritage;
 - e. Maintain, whenever possible, an environment which
supports diversity and variety of individual choice;

1 f. Achieve a balance between population and resource use
2 which will permit high standards of living and a wide
3 sharing of life's amenities;

3 g. Enhance the quality of renewable resources and
4 approach the maximum attainable recycling of depletable
5 resources.

- 5 2. Cowlitz County recognizes that each person has a fundamental and
6 inalienable right to a healthful environment and that each person has a
7 responsibility to contribute to the preservation and enhancement of the
8 environment.

7 Former CCC 19.11.110(B)(1), (2).

8 Millennium asserts that the Hearing Examiner failed to conduct the necessary analysis to
9 use substantive SEPA authority to deny the shoreline permits. Citing *Cougar Mountain*, 111
10 Wn.2d at 755, Millennium argues that in order to invoke substantive SEPA authority the
11 Hearing Examiner was required to first analyze the Project, as set forth in the shoreline permit
12 applications, for compliance with the SMA and County SMP. The Hearing Examiner was then
13 required to consider the impacts of the Project and evaluate what mitigation measures, if
14 necessary, were appropriate and capable of being accomplished. Millennium contends that the
15 Hearing Examiner did not follow this process; rather he bypassed the SMA and County SMP
16 and relied on the FEIS's impact analysis of the entire Project. As a result, the Hearing
17 Examiner erred in concluding that SEPA required him to deny the shoreline permits in light of
18 the Project's overall impacts and the County's SEPA policies. Millennium Mot. for Summ. J. at
19 9-15; Reply at 9-12, Opp. to Summ. J. at 21-27.

1 Millennium also contends that there are material issues of fact in dispute regarding the
2 Hearing Examiner's denial of the shoreline permits on SEPA substantive grounds. Citing to
3 evidence offered at the public hearing, Millennium asserts that it "presented substantial
4 evidence of both the impacts on, and reasonable mitigation for, the nine resource areas
5 identified in the EIS." Millennium argues that due to these factual disputes, WEC and Ecology
6 are not entitled to summary judgment on Issues 2 and 9. Millennium Opp. to Summ. J. at 6-11,
7 24-27.

8 WEC and Ecology argue that there is no requirement that the Hearing Examiner begin
9 his analysis by reviewing the permit applications for consistency with the SMA and County
10 SMP. WEC and Ecology assert that *Cougar Mountain* does not mandate a particular order of
11 review. As the courts recognized in *Polygon* and *West Main*, a permit can be denied under
12 substantive SEPA even if it meets all permit criteria. WEC and Ecology contend that in this
13 case, unlike King County in *Cougar Mountain*, the Hearing Examiner properly complied with
14 the procedural requirements for the exercise of substantive SEPA by (1) providing a lengthy
15 description of significant, adverse environmental impacts identified in the FEIS; (2) explaining
16 why the conditions proposed in the Staff Report and by Millennium do not reasonably mitigate
17 Project impacts; and (3) identifying the provisions of Cowlitz County's SEPA policies upon
18 which he based his decision. WEC Mot. For Summ J. at 21-24; Summ. J. Reply at 11-13;
19 Ecology Mot. for Summ. J. at 19-25; Summ. J. Reply at 18-23.

20 WEC and Ecology reject Millennium's claim that there are material issues of fact in
21 dispute. They assert that this argument is part of Millennium's attempt to collaterally attack the

1 unappealed FEIS. According to WEC and Ecology, there is no factual or legal dispute that the
2 Hearing Examiner properly invoked SEPA substantive authority to deny the shoreline permits.
3 Because the Hearing Examiner's reliance on the unchallenged findings in the FEIS in exercising
4 substantive SEPA authority was not clearly erroneous, WEC and Ecology contend that the
5 Board should grant summary judgment in their favor on Issues 2 and 9. WEC Summ. J. Reply
6 at 7-10; Ecology Reply at 8-9.

7 There is no legal requirement that the Hearing Examiner begin his analysis of the
8 shoreline permit applications by first considering their consistency with the SMA and County
9 SMP. SEPA substantive authority stands separate and apart from the requirements of other
10 permitting schemes. Courts have held that SEPA substantive authority can be used to deny a
11 proposal independent of the permit being sought, even if the proposal meets all other
12 requirements and conditions for the underlying permits. *West Main*, 106 Wn.2d at 53;
13 *Donwood v. Spokane Cy.*, 90 Wn. App. 389, 398, 957 P.2d 775 (1998). The Board concludes
14 that the Hearing Examiner did not commit error by initially evaluating the Project under SEPA.

15 The Board further concludes that the Hearing Examiner fully complied with SEPA's
16 procedural requirements in exercising SEPA substantive authority to deny the shoreline permits.
17 To deny the Project using substantive SEPA authority, the Hearing Examiner had to find that
18 (1) the Project is likely to result in significant adverse environmental impacts identified in the
19 FEIS and (2) reasonable mitigation measures were insufficient to mitigate those impacts. RCW
20 43.21C.060; WAC 197-11-660(1)(f). The Hearing Examiner was also required to cite Cowlitz
21 County's SEPA policy that served as the basis for the denial. WAC 197-11-660(1)(b). The

1 Board concludes that the Hearing Examiner sufficiently documented compliance with these
2 requirements.

3 In his decision, the Hearing Examiner described in detail the ten unavoidable, significant
4 adverse environmental impacts documented in the FEIS. Hearing Examiner Decision at 14-33.
5 Turning to mitigation, the Hearing Examiner found that the conditions proposed in the Staff
6 Report did not reasonably mitigate the identified impacts. *Id.* at 50. As the mitigation proposed
7 by Millennium was “nearly identical to the County’s,” the Hearing Examiner concluded that
8 “neither the County nor [Millennium] propose reasonable mitigation for any of the unavoidable,
9 significant adverse environmental impacts identified in the FEIS.” *Id.* The Hearing Examiner
10 identified specific shortcomings he found in the proposed mitigation. *Id.* at 50-51. Lastly, the
11 Hearing Examiner cited to and quoted sections of Cowlitz County’s Code governing the use of
12 substantive SEPA authority. *Id.* at 51-52 (quoting Former CCC 19.11.110(b); *see supra* at 25-
13 26. The Hearing Examiner concluded that the failure to reasonably mitigate the ten
14 unavoidable, significant adverse environmental impacts conflicted with “virtually every one of
15 the County’s environmental policies” he cited. *Id.* at 52. Accordingly, the Hearing Examiner
16 denied the requested shoreline permits under Cowlitz County’s substantive SEPA authority.

17 Finally, there are no material issues of fact in dispute that preclude the granting of
18 summary judgment. As explained above, to determine whether the Hearing Examiner’s
19 exercise of SEPA substantive authority was clearly erroneous, the Board reviews the record
20 created at the open record hearing below. The Board will not substitute its judgment for that of
21 the Hearing Examiner. Because it is not left with the definite and firm conviction that a mistake

1 has been committed, the Board concludes that the Hearing Examiner's decision to deny the
2 shoreline permits under Cowlitz County's substantive SEPA authority was not clearly
3 erroneous.

4 **4. SMA/SMP Compliance and Other Issues (Issues 1, 4, 5, 6, and 7)**

5 The remaining issues ask whether the shoreline permit applications are consistent with
6 the SMA and County SMP, and whether the Hearing Examiner erred in concluding that there
7 was insufficient information concerning other approvals required for the Project to proceed.
8 Because the Board concludes that the Hearing Examiner's exercise of SEPA substantive
9 authority to deny the shoreline permits was not clearly erroneous, it need not reach Issues 1, 4,
10 5, 6 and 7.

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1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 MILLENNIUM BULK TERMINALS
4 LONGVIEW, LLC, and COWLITZ
5 COUNTY,

6 Petitioners,

7 and

8 BNSF RAILWAY COMPANY,

9 Petitioner-Intervenor,

10 v.

11 COWLITZ COUNTY HEARING
12 EXAMINER and STATE OF
13 WASHINGTON, DEPARTMENT OF
14 ECOLOGY,

15 Respondents,

16 And

17 WASHINGTON ENVIRONMENTAL
18 COUNCIL, CLIMATE SOLUTIONS,
19 FRIENDS OF THE COLUMBIA GORGE,
20 SIERRA CLUB, and COLUMBIA
21 RIVERKEEPER,

Respondent-Intervenor.

SHB No. 17-017c

DISSENT

19 The Shorelines Hearings Board must review a local government's action to deny a
20 shoreline permit when the denial relies solely on the substantive authority of the State
21

DISSENT
SHB No. 17-017c

1 Environmental Policy Act, de novo. I would deny the motions for summary judgement and
2 decide the merits of the Hearing Examiner's denial de novo. Thus, I respectfully dissent.

3 **BACKGROUND**

4 Before 1971, Washington State did not require cities and counties to plan for growth nor
5 establish regulations that protected environmental resources. Many, if not most, local
6 jurisdictions at that time did not adopt zoning regulations or environmental protection standards.

7 The Shoreline Management Act of 1971 changed the regulatory landscape and required
8 local jurisdictions to protect the shoreline environment in a manner consistent with statewide
9 polices. The Legislature addressed the lack of clear local and judicial processes for adjudicating
10 land use and environmental permit disputes in the 1970s through the creation of the Shoreline
11 Hearings Board, a body with expertise in the implementation of the Shoreline Management Act
12 through local Shoreline Master Programs, to adjudicate permit disputes.

13 The State Environmental Policy Act (SEPA) of 1971 provided broad authority to
14 decision makers to condition or deny permits based on their environmental impacts, beyond
15 local land use and environmental regulations. The use of the substantive authority of the State
16 Environmental Policy Act is an important tool to allow decision makers to address impacts not
17 addressed by land use or environmental regulations.

18 The planning and regulatory system in Washington State changed dramatically when the
19 legislature adopted the Growth Management Act, a series of state statutes first adopted in 1990.
20 The Growth Management Act requires all cities and counties to protect environmentally
21 sensitive areas through local critical areas regulations and requires the largest and fastest

1 growing counties and the cities therein to carefully plan and provide for growth, and requires
2 that development regulations implement the plans.

3 The Regulatory Reform Act of 1995 further refined the permitting scheme created by
4 the Growth Management Act. Regulatory reform included the Land Use Petition Act, which
5 provides clear standards for the review and appeal procedures of most land use and
6 environmental permitting decisions, but not shoreline permits.

7 The Shoreline Hearings Board, created in the early 1970s, has and continues to struggle
8 with the overlap between Growth Management and Shoreline Management and specifically
9 how to deal with those permits and decisions that fall under both the Growth Management Act
10 and Shoreline Management Act regulatory systems.

11 ANALYSIS

12 The majority confuses its role in this case as to the Hearing Examiners use of
13 substantive SEPA authority to deny a shoreline permit. The permit under appeal is a shoreline
14 substantial development permit denied by the Cowlitz County Hearing Examiner based solely
15 on significant environmental impacts identified in the Final Environmental Impact Statement.

16 The majority relies on *McQuarrie* to conclude that the Shoreline Hearings Board stands
17 in the place of the Court when reviewing a local government's use of SEPA's substantive
18 authority and that the appropriate standard of review is "clearly erroneous". In some situations,
19 this is correct, including the situation presented to the Board in *McQuarrie*.

20 The Board in *McQuarrie* concluded that in the situation where a local SEPA
21 Responsible Official uses substantive authority to condition a Determination of Non-

1 Significance, which is then appealed to the Board along with a shoreline substantial
2 development permit, the appropriate standard of review is "clearly erroneous". Since the Board
3 in *McQuarrie* was acting on a SEPA appeal of the DNS, it was acting in the same capacity as
4 the Court in *Polygon*.

5 The Shorelines Hearings Board has never faced the situation found in *Millennium* where
6 1) the underlying environmental document is not under appeal; and 2) the local decision maker
7 used SEPA's substantive authority directly to deny a shoreline substantial development permit.

8 The majority correctly notes that, unless otherwise required by law, the Board's scope
9 and standard of review shall be de novo. WAC 461-08-500(1). The majority also correctly
10 notes that SEPA does not prescribe the scope or standard of review on appeal. Since there has
11 been no SEPA appeal in this case however, the Board's scope and standard must be de novo. It
12 is incumbent upon the Shoreline Hearings Board, as the decision maker for the shoreline
13 substantial development permit, to conduct its normal de novo review

14 SO ORDERED this 20 day of April, 2018.

15 SHORELINES HEARINGS BOARD

16
17 
18 GRANT BECK, Member

COWLITZ COUNTY CODE CHAPTER 19.20: SHORELINE
MANAGEMENT

Chapter 19.20 SHORELINE MANAGEMENT

Sections:

- 19.20.010 Responsible official.
- 19.20.020 Application for permit.
- 19.20.030 Public notice of application.
- 19.20.040 Department of Building and Planning review.
- 19.20.050 Hearing Examiner action.
- 19.20.060 Notice to Department of Ecology and Attorney General.
- 19.20.070 Exemptions.
- 19.20.080 Violations.
- 19.20.090 County compliance with SEPA.
- 19.20.100 Fees and charges.

Cross-references:

- Chapter 90.58 RCW: Shoreline Management Act.
- Chapter 43.21C RCW: State Environmental Policy Act.
- Chapter 173-14 WAC: Permits for substantial developments.
- Chapter 197-10 WAC: SEPA guidelines.

19.20.010 Responsible official.

The provisions of this chapter shall be administered by the Director of the Department of Building and Planning or his or her duly authorized designee. [Ord. 03-048, § 1, 4-8-03.]

19.20.020 Application for permit.

All applications for a permit required under the Shoreline Management Act, Chapter 90.58 RCW, and information related thereto, shall be submitted to the Department of Building and Planning. Upon receipt of the permit application, the Director shall determine whether the information submitted meets the requirements of WAC 173-27-180, Application requirements for substantial development, conditional use, or variance permit, RCW 90.58.140, Development permits, and any additional information required by the Director. [Ord. 03-048, § 2, 4-8-03.]

19.20.030 Public notice of application.

Upon receipt of a complete application the Director shall ensure that notice is made to the general public and the property owners in the vicinity of the proposed project by at least one of the following methods:

- A. Mailing to the latest recorded real property owners as shown by the County Assessor within at least 300 feet of the boundary of the property upon which the substantial development is proposed; or
- B. Posting in a conspicuous manner on the property upon which the project is to be constructed; or
- C. Any other manner deemed appropriate by the Director to accomplish the objectives of reasonable notice to adjacent landowners and the public. [Ord. 03-048, § 3, 4-8-03.]

19.20.040 Department of Building and Planning review.

The Director may refer the permit application for a review by departmental staff for knowledgeable comments from interested departments. All pertinent county departments shall participate. When the Director has made a final SEPA threshold determination, the Director shall transmit the permit application and SEPA review to the Cowlitz County Hearing Examiner for public hearing per the provisions of this chapter and Chapter 19.11 CCC. [Ord. 12-112, § 3, 8-28-12; Ord. 03-048, § 4, 4-8-03.]

19.20.050 Hearing Examiner action.

A. 1. The Director at the termination of the required review period shall transmit the permit application and all pertinent review comments, findings and recommendations to the Cowlitz County Hearing Examiner for action. For applications involving shoreline substantial development permits, conditional use permits, and variance permits, the Hearing Examiner shall hold a public hearing prior to taking action. The mailing and legal advertisement for such public hearing shall be made not less than 30 days prior to the open record public hearing.

The Hearing Examiner has discretion to hold a public hearing on other types of actions transmitted by the Director prior to taking action.

2. There shall be no more than one open record hearing on any application regulated by this section, except for those applications which are associated with a determination of significance under SEPA and this chapter. [Ord. 12-112, § 3, 8-28-12; Ord. 03-048, § 5, 4-8-03.]

19.20.060 Notice to Department of Ecology and Attorney General.

The Director shall transmit copies of the original application and other pertinent materials he deems necessary to the regional office of the Department of Ecology and the Attorney General's office within eight days of the final decision. [Ord. 03-048, § 6, 4-8-03.]

19.20.070 Exemptions.

As required in WAC 173-27-050, when federal permits are required, the Director shall take action on exemption requests and transmit copies of a letter of exemption to the Department of Ecology and the applicant. [Ord. 03-048, § 7, 4-8-03.]

19.20.080 Violations.

The Director shall transmit Shoreline Management Act violation reports to the Cowlitz County Prosecuting Attorney's office and/or the Department of Ecology for prompt appropriate legal action. [Ord. 03-048, § 8, 4-8-03.]

19.20.090 County compliance with SEPA.

The Director shall ensure that any official action will comply with the State Environmental Policy Act, the SEPA Rules and the Cowlitz County SEPA Ordinance, Chapter 19.11 CCC. [Ord. 03-048, § 9, 4-8-03.]

19.20.100 Fees and charges.

The fees and charges for processing applications for shoreline permits, and for other administrative actions under this chapter, shall be as established from time to time by resolution by the Board. [Ord. 03-048, § 10, 4-8-03.]

The Cowlitz County Code is current through Ordinance 18-103, passed November 6, 2018.

Disclaimer: The Clerk of the Board's Office has the official version of the Cowlitz County Code. Users should contact the Clerk of the Board's Office for ordinances passed subsequent to the ordinance cited above.

RCW 43.21C.060

West's Revised Code of Washington Annotated
Title 43. State Government--Executive (Refs & Annos)
Chapter 43.21C. State Environmental Policy (Refs & Annos)

West's RCWA 43.21C.060

43.21C.060. Chapter supplementary--Conditioning or denial of governmental action

Currentness

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. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished. 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. Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.

Credits

[1983 c 117 § 3; 1977 ex.s. c 278 § 2; 1971 ex.s. c 109 § 6.]

Notes of Decisions (36)

West's RCWA 43.21C.060, WA ST 43.21C.060

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

End of Document

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WAC 197-11-400

Washington Administrative Code
Title 197. Ecology, Department of (Environmental Policy, Council on)
Chapter 197-11. SEPA Rules (Refs & Annos)
Part Four. - Environmental Impact Statement (EIS)

WAC 197-11-400

197-11-400. Purpose of EIS.

Currentness

(1) The primary purpose of an environmental impact statement is to ensure that SEPA's policies are an integral part of the ongoing programs and actions of state and local government.

(2) An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality.

(3) Environmental impact statements shall be concise, clear, and to the point, and shall be supported by the necessary environmental analysis. The purpose of an EIS is best served by short documents containing summaries of, or reference to, technical data and by avoiding excessively detailed and overly technical information. The volume of an EIS does not bear on its adequacy. Larger documents may even hinder the decision making process.

(4) The EIS process enables government agencies and interested citizens to review and comment on proposed government actions, including government approval of private projects and their environmental effects. This process is intended to assist the agencies and applicants to improve their plans and decisions, and to encourage the resolution of potential concerns or problems prior to issuing a final statement. An environmental impact statement is more than a disclosure document. It shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions.

Credits

Statutory Authority: RCW 43.21C.110. WSR 84-05-020 (Order DE 83-39), S 197-11-400, filed 2/10/84, effective 4/4/84.

Current with amendments adopted through the 18-19 Washington State Register, dated October 3, 2018.

WAC 197-11-400, WA ADC 197-11-400

WAC 197-11-448

Washington Administrative Code

Title 197. Ecology, Department of (Environmental Policy, Council on)

Chapter 197-11. SEPA Rules (Refs & Annos)

Part Four. - Environmental Impact Statement (EIS)

WAC 197-11-448

197-11-448. Relationship of EIS to other considerations.

Currentness

(1) SEPA contemplates that the general welfare, social, economic, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives and in making final decisions. However, the environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision or to contain the balancing judgments that must ultimately be made by the decision makers. Rather, an environmental impact statement analyzes *environmental* impacts and must be used by agency decision makers, along with other relevant considerations or documents, in making final decisions on a proposal. The EIS provides a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts. SEPA does not require that an EIS be an agency's only decision making document.

(2) The term 'socioeconomic' is not used in the statute or in these rules because the term does not have a uniform meaning and has caused a great deal of uncertainty. Areas of urban environmental concern which must be considered are specified in RCW 43.21C.110 (1)(f), the environmental checklist (WAC 197-11-960) and WAC 197-11-440 and 197-11-444.

(3) Examples of information that are not required to be discussed in an EIS are: Methods of financing proposals, economic competition, profits and personal income and wages, and social policy analysis (such as fiscal and welfare policies and nonconstruction aspects of education and communications). EISs may include whether housing is low, middle, or high income.

(4) Agencies have the option to combine EISs with other documents or to include additional analyses in EISs, that will assist in making decisions (WAC 197-11-440(8) and 197-11-640). Agencies may use the scoping process to help identify issues of concern to citizens.

Credits

Statutory Authority: RCW 43.21C.110. WSR 84-05-020 (Order DE 83-39), S 197-11-448, filed 2/10/84, effective 4/4/84.

Current with amendments adopted through the 18-19 Washington State Register, dated October 3, 2018.

WAC 197-11-448, WA ADC 197-11-448

WAC 197-11-660

Washington Administrative Code
Title 197, Ecology, Department of (Environmental Policy, Council on)
Chapter 197-11, SEPA Rules (Refs & Annos)
Part Seven. - SEPA and Agency Decisions

WAC 197-11-660

197-11-660. Substantive authority and mitigation.

Currentness

(1) Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations:

(a) Mitigation measures or denials shall be based on policies, plans, rules, or regulations formally designated by the agency (or appropriate legislative body, in the case of local government) as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is issued.

(b) Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker. The decision maker shall cite the agency SEPA policy that is the basis of any condition or denial under this chapter (for proposals of applicants). After its decision, each agency shall make available to the public a document that states the decision. The document shall state the mitigation measures, if any, that will be implemented as part of the decision, including any monitoring of environmental impacts. Such a document may be the license itself, or may be combined with other agency documents, or may reference relevant portions of environmental documents.

(c) Mitigation measures shall be reasonable and capable of being accomplished.

(d) Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal. Voluntary additional mitigation may occur.

(e) Before requiring mitigation measures, agencies shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact.

(f) To deny a proposal under SEPA, an agency must find that:

(i) The proposal would be likely to result in significant adverse environmental impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and

(ii) Reasonable mitigation measures are insufficient to mitigate the identified impact.

(g) If, during project review, a GMA county/city determines that the requirements for environmental analysis, protection, and mitigation measures in the GMA county/city's development regulations or comprehensive plan adopted under chapter 36.70A RCW, or in other applicable local, state or federal laws or rules, provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action under RCW 43.21C.240, the GMA county/city shall not impose additional mitigation under this chapter.

(2) Decision makers should judge whether possible mitigation measures are likely to protect or enhance environmental quality. EISs should briefly indicate the intended environmental benefits of mitigation measures for significant impacts (WAC 197-11-440(6)). EISs are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures:

(a) Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; and

(b) Will not be analyzed in a subsequent environmental document prior to their implementation.

(3) Agencies shall prepare a document that contains agency SEPA policies (WAC 197-11-902), so that applicants and members of the public know what these policies are. This document shall include, or reference by citation, the regulations, plans, or codes formally designated under this section and RCW 43.21C.060 as possible bases for conditioning or denying proposals. If only a portion of a regulation, plan, or code is designated, the document shall identify that portion. This document (and any documents referenced in it) shall be readily available to the public and shall be available to applicants prior to preparing a draft EIS.

Credits

Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110. WSR 97-21-030 (Order 95-16), S 197-11-660, filed 10/10/97, effective 11/10/97. Statutory Authority: RCW 43.21C.110. WSR 84-05-020 (Order DE 83-39), S 197-11-660, filed 2/10/84, effective 4/4/84.

Current with amendments adopted through the 18-19 Washington State Register, dated October 3, 2018.

WAC 197-11-660, WA ADC 197-11-660

EXCERPTS OF THE FINAL REPORT OF THE WASHINGTON
STATE'S COMMISSION ON ENVIRONMENTAL POLICY, JUNE
1983

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Ten Years' Experience With SEPA

Final Report of the
Washington (state) Commission on Environmental Policy

June 1983



Prepared under RCW 43.21C.200-204

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relevant sections of an EIS would be a preferable way to clarify the existing requirements.

Section 2

This section would delete the sunset clause on the exemption contained in RCW 43.21C.037 regarding Class I, II, and III forest practices.

This section recognizes that there is continuing debate on the complex and technical subject of what forest practices should be subject to SEPA. This section acknowledges the appropriateness of continuing permanent exemptions for Class I, II, and III forest practices from the requirement of RCW 43.21C.030(2)(c) and intends that the Forest Practices Board continue to meet its ongoing responsibilities under the Forest Practices Act, including determining what practices should be included in Class I, II, and III forest practices, and what practices should be subject to RCW 43.21C.030(2)(c) as Class IV forest practices.

Section 3

Section 3 would enact certain amendments concerning aspects of SEPA's "substantive authority". SEPA's substantive authority is contained in several provisions, most notably: the declaration of a substantive state environmental policy in RCW 43.21C.020 (which the state courts have held contains sufficiently definite standards to be interpreted and enforced); the requirement in RCW 43.21C.030(1) to interpret and administer state law in accordance with those policies; and the supplementary mandate provision of RCW 43.21C.060, which states that the policies and goals set forth in the Act are supplementary to those set forth in agencies' existing authorizations.

Despite various state court decisions, there has been substantial controversy over the past ten years concerning whether SEPA was intended to have substantive effect, and whether SEPA does or should have substantive effect (in contrast to whether SEPA should be viewed as an essentially procedural statute or disclosure law).

The intent of this section, among other things discussed below, is to settle this issue and affirm that SEPA is more than a disclosure law and that it grants agencies authority over public and private proposals. This corresponds with existing case law, such as the Polygon v. City of Seattle case, 90 Wn.2d 59 (1978), which upheld and applied SEPA's substantive and supplementary authority. This section clearly grants agencies the authority to mitigate their own proposals or to condition or deny proposals of

applicants. The section clarifies how agencies may condition or deny proposals based on the environmental impacts, following specified rules and safeguards. The process for conditioning or denying a proposal under this section would require that:

1. An agency must identify policies which will serve as a possible basis for conditioning or denying proposals under SEPA.
2. These policies must be formally designated by the agency or, for local governments, by the local legislative body, within six months of the effective date of the revised SEPA rules.
3. If an agency conditions or denies a proposal, the agency must identify the environmental impacts in its environmental documents.
4. The agency must state any conditions in writing.
5. An agency may condition a proposal to avoid or reduce ("mitigate") environmental impacts.
6. In order to deny a proposal under SEPA, 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 SEPA; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.

The phrase "capable of being accomplished" maintains the existing law. SEPA currently requires agencies "to use all practicable means, consistent with other essential considerations of state policy" to preserve and enhance environmental quality. The dictionary defines the word "practicable" as "capable of being accomplished." This determination is made by the government agency, which is the entity responsible for SEPA compliance. An agency can deny a project, as noted above, if the impacts cannot be sufficiently mitigated.

The term "possible basis" is used because a particular proposal may or may not be conditioned or denied, and if it is, the particular environmental impact may involve one or another policy for protecting the environment. The section requires that agencies formally designate the policies which will be used as potential bases for the exercise of this authority. This section gives agencies enough latitude to articulate policies broadly enough that they need not predict every future environmental problem or concern. It is expected that agencies will prepare a document which contains their SEPA policies, so that members of the public and applicants know what these policies are. This section is not intended to allow agencies to adopt policies which conflict with the state's environmental policy as set forth in SEPA.

The section requires the agencies to identify these policies in any form, whether regulation, plan or code, which has the force of law and serves a regulatory function for the agency. In the case of local government, the appropriate legislative body is required to make this designation. The term "identify" is used to clarify that the agency need not have created or developed the policy as long as it formally designates the policy as a possible basis for the exercise of authority under the Act. The section does not specify the level of detail for these identified SEPA policies. It is intended that this be left to each agency, as long as they are formally designated and identified for the public to know.

Some of the major differences between this amendment and the existing law (which was last amended in 1977) include: (1) Limitations and requirements for the exercise for substantive authority apply to all local officials (the 1977 amendments and existing law apply mainly to actions not requiring a legislative decision); (2) The section makes clear that agencies may condition proposals to mitigate specific adverse impacts which are identified in the environmental documents prepared under SEPA, but may only deny a proposal if these impacts are significant and if they cannot be sufficiently mitigated. This determination will be made by the governmental agency. The existing law does not distinguish between conditions and denials or require an agency to make any findings in denying a proposal; (3) Mitigation measures which are required for a proposal shall be reasonable and capable of being accomplished. This follows the rule of reason and makes clear that mitigation must be reasonably related to a proposal's identified adverse environmental impacts and be technically or otherwise capable of being carried out. This requirement is consistent with SEPA's directive to use "all practicable means and measures" to implement its policies (RCW 43.21C.020). The state rules would additionally clarify the principles for the exercise of substantive authority and mitigation measures (see RCW 43.21C.110(1) in Section 7 below); (4) The section would retain an appeal to locally elected officials, but would allow the local legislative authority to eliminate such an appeal (the appeal to the local legislative authority was originally desired in 1977 as a check on nonelected officials).

Section 4

This section specifies general principles and specific requirements for appeals under SEPA, especially regarding the time periods for commencing an appeal under SEPA.

Current case law has not recognized a statutory right of appeal under SEPA. Instead, the courts have fallen back on other

DECLARATION OF SERVICE

Laura G. White declares as follows:

1. I am over the age of 18 and am competent to testify herein.
2. I am a practice assistant at the law firm of K&L Gates LLP.
3. On December 28, 2018, I caused the foregoing document to be filed electronically with the court and also to be served on the parties below through the Washington State Appellate Courts' eFiling Portal:

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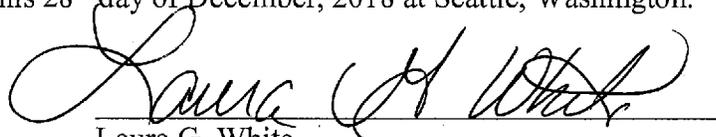
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated this 28th day of December, 2018 at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Laura G. White", written over a horizontal line.

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Attached for filing is the Opening Brief of Petitioner Millennium Bulk Terminals-Longview LLC

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