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No. 52215-2-II

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

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

Petitioners,

v.

STATE OF WASHINGTON SHORELINES HEARINGS BOARD, et al.,

Respondents.

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

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## I. INTRODUCTION

In urging affirmance of the Shoreline Hearings Board's ruling, the Department of Ecology ("Ecology") invites the Court to ignore clear rules set forth in statutes, regulations, and Supreme Court case law.<sup>1</sup> Ecology's arguments, if accepted, would rewrite Washington's environmental laws in manner wholly inconsistent with the State Environmental Policy Act's ("SEPA") goal of providing for balanced and responsible development. The Court should reject Ecology's invitation to rewrite the law and policies behind SEPA.

Millennium Bulk Terminals-Longview, LLC ("MBT-Longview") complied with SEPA by submitting its entire multi-stage development project for environmental review. After obtaining a final Environmental Impact Statement ("EIS") for the entire project (Stages 1 and 2 combined), MBT-Longview sought shoreline permits for Stage 1 of the project, consistent with Shorelines Hearings Board ("Board") precedent allowing for staged development under separate shoreline permits. Because the EIS did not analyze Stage 1 impacts or mitigation measures, MBT-Longview offered evidence regarding Stage 1 to the Hearing Examiner. The Hearing Examiner erroneously concluded that, because the EIS had not been challenged, he had to base his Stage 1 permitting decision solely on the EIS's analysis of impacts and mitigation measures of the project at full

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<sup>1</sup> MBT-Longview submits a single reply to the response briefs filed by respondents Ecology and Washington Environmental Council et al. ("WEC"). Due to overlap in the respondents' arguments, unless context suggests otherwise, references to arguments made by Ecology include those made by WEC.

build out. As a result, he refused to consider MBT-Longview's Stage 1 evidence as "largely irrelevant" and denied the Stage 1 permits based on the EIS's analysis of impacts and mitigation related to the larger project.

On review, the Board compounded that legal error by making several procedural mistakes and by affirming the Hearing Examiner's exercise of SEPA authority to deny the Stage 1 permits based on potential impacts of Stages 1 and 2 combined. The Court should reverse the Board's ruling and remand this case to the Board for further proceedings in compliance with the law.<sup>2</sup>

## II. ARGUMENT

### A. **SEPA does not require decision makers to consider only the EIS when making permitting decisions.**

Several of Ecology's arguments are founded on the legal fallacy that an "unchallenged" EIS precludes decision makers from considering evidence outside the EIS when making permitting decisions. *See, e.g.*, Ecy. Br. at 33 ("Where the EIS has not been challenged, there can be no dispute [about the project's impacts and mitigation]."); *id.* at 43 ("[T]he conclusions in the EIS are binding [and] Petitioners cannot now challenge its findings or present new information to rebut those findings."); *id.* at 39 ("The Hearing Examiner properly refused to credit this testimony because it conflicted with the unchallenged EIS."); *see also* WEC Br. at 41 ("Millennium chose not to challenge the EIS" and thus "gave up the

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<sup>2</sup> Ecology and WEC make factual assertions without citations to the record, in violation of RAP 10.3(5). WEC also cites extensively to materials outside the record. The Court should disregard these unsupported and extra-record factual assertions. *See Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d 217, 228–29, 551 P.2d 748 (1976) (evidence not in the record on appeal will not be considered).

ability to question the FEIS's findings on impacts and mitigation.""). Ecology's position is unsupported by authority, directly conflicts with SEPA and Washington case law, and would irrationally force decision makers to ignore evidence relevant to the permitting decisions before them. Fortunately, this is not the law in Washington.

The role 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); *see* WAC 197-11-400(2). An EIS "shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions." WAC 197-11-400(4) (emphasis added).

Consistent with SEPA regulations, the Washington Supreme Court has squarely held that SEPA does not require a decision maker to rely solely on the information contained in the EIS when making decisions. *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 313, 197 P.3d 1153 (2008) ("*Residents*") ("FEIS's are critical evaluative tools for decision makers, but nothing in SEPA requires decision makers to rely solely on the information contained in the FEIS's when making decisions."").

Moreover, the EIS is not determinative of any decision. As the Washington Supreme Court has also explained:

SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decisionmakers. It was not designed to

usurp local decisionmaking or to dictate a particular substantive result.

*Save Our Rural Env't v. Snohomish Cty.*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983) (emphasis added) (citations omitted); *cf. Quality Rock Prods., Inc. v. Thurston Cty.*, 139 Wn. App. 125, 140–41, 159 P.3d 1 (2007) (a mitigated determination of non-significance under SEPA was not a “binding conclusion” barring the decision maker from concluding that the project would result in significant adverse impacts).<sup>3</sup> Accordingly, while the role of the EIS is to identify potential adverse impacts of a proposed action, and a decision maker must consider the EIS, the decision maker must also consider other relevant information that is available and cannot rely solely on the conclusions in the EIS where (as here) other relevant information is available.

Other SEPA regulations confirm these principles. *See* WAC 197-11-448(1) (EIS “must be used by agency decision makers, along with other relevant considerations or documents, in making final decisions...SEPA does not require that an EIS be an agency’s only decision making document”); WAC 197-11-655(3)(b) (“[M]itigation measures adopted [by a decision maker] need not be identical to those discussed in the environmental document.”); WAC 197-11-660 (decision makers should consider other regulatory programs when deciding if and how to mitigate impacts).

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<sup>3</sup> Of course, SEPA also has a substantive component under RCW 43.21C.060, which allows a decision maker to condition or deny a proposal for environmental reasons, if certain requirements are met. *See* Section II(E), *infra*. That statute does not affect the purpose or use of an EIS as specified elsewhere in SEPA.

Neither case cited by Ecology supports its sweeping contention that the findings in the EIS “are verities for purposes of review of the exercise of substantive SEPA authority by the Hearings Examiner.” Ecy. Br. at 43 (citing *West Main Assocs. v. City of Bellevue*, 49 Wn. App. 513, 742 P.2d 1266 (1987), and *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978)). Those cases merely upheld the denial of projects under SEPA; nowhere do they discuss EIS findings as “verities” that decision makers must accept blindly to the exclusion of any other information.

Indeed, *West Main Associates* cuts against Ecology’s position. In that case, the EIS identified certain impacts associated with the proposed action, but concluded that those impacts were not “significant.” 49 Wn. App. at 520. The city council denied the proposal under SEPA after finding that those impacts would be significant. *Id.* The developer challenged that decision on the basis that “the adverse impacts found by the council were not specifically identified as ‘significant’ in the environmental impact statements.” *Id.*

Under Ecology’s theory, the city council’s conclusion in *West Main Associates* would amount to a “collateral attack” on the adequacy of the EIS because it was inconsistent with the findings and conclusions of the EIS. *See* Ecy. Br. at 41 (contending that the unchallenged EIS was “determinative” of the project’s impacts and mitigation). The Court of Appeals, however, upheld the council’s decision, noting that “[a]lthough the impacts were not labeled ‘significant’ in the EIS, it does not appear

from a fair reading of RCW 43.21C.031 and the other relevant statutes that adverse impacts must be specifically labeled ‘significant’ in order for the council to rely on them in making a decision.” *Id.* at 523. Thus, the findings in the EIS were not “verities” for purposes of exercising SEPA substantive authority.

Moreover, the Supreme Court has squarely rejected Ecology’s argument that relying on evidence outside of the EIS amounts to a “collateral attack” or challenge to the adequacy of the EIS. *See Residents*, 165 Wn.2d at 313. In *Residents*, the county argued that EFSEC’s use of evidence outside the EIS in approving the project was proof that the EIS was inadequate. *Id.* (“The County points out that EFSEC eventually approved a setback of four times turbine height, relying on testimony from the applicant’s expert. The County takes issue with the fact that such a setback distance was not specifically discussed in the FEIS.”).

The Court rejected the county’s argument and held that “EFSEC’s use of evidence outside the FEIS in its final certification decision does not render the FEIS inadequate.” *Id.* The Court explained that “FEIS’s are critical evaluative tools for decision makers, but nothing in SEPA requires decision makers to rely solely on the information contained in the FEIS’s when making decisions. The FEIS here was adequate, and EFSEC used it properly.” *Id.*

Thus, offering evidence outside the EIS to a decision maker does not amount to a challenge of the adequacy of the EIS. *See id.* SEPA requires decision makers to make specific, independent findings about

impacts and mitigation to deny a proposed action under SEPA based on all of the information before them. *See* RCW 43.21C.060; *see also* Section II(E)(1), *infra*. The EIS provides the decision maker with information about impacts and mitigation, but it does not dictate outcomes. *Save Our Rural Env't*, 99 Wn.2d at 371. Ecology's argument that an "unchallenged" EIS binds decision makers in some way is therefore meritless. This is especially true here, where the EIS does not provide information the decision maker needed (i.e., information about Stage 1 impacts and mitigation measures).

**B. The Board's procedural errors require reversal.**

**1. The Board was required to review the Hearing Examiner's decision on a de novo record.**

The Board held that the scope of its review was limited to the record created by the Hearing Examiner. AR 2074. That holding conflicts with RCW 90.58.180(3), WAC 461-08-500(1), and Board precedent. To salvage that erroneous holding, Ecology urges a novel exception to the rules because this case involves a permit denial under SEPA where the adequacy of the EIS was not appealed. There is no legal basis for this exception and the Court should reject it.

MBT-Longview filed its petition for review with the Board pursuant to the Shoreline Management Act ("SMA"). *See* RCW 90.58.180(1). The SMA expressly provides that the Board's review of shoreline permit denials "are subject to the provisions of chapter 34.05 RCW pertaining to procedures in adjudicative proceedings." RCW 90.58.180(3). Such adjudicative proceedings are governed by Part IV of

RCW 34.05 (RCW 34.05.410–494), titled “Adjudicative Proceedings.” Those provisions contemplate a de novo scope of review involving discovery and trial-like procedures where evidence is presented to a decision maker. *See id.* By contrast, the next part of chapter 34.05 RCW, Part V, contemplates judicial review based on a fixed record. Judicial review of Board decisions is subject to those provisions. *See* RCW 90.58.180(3). The legislature could have similarly directed the Board to apply a limited scope of review, but it did not. *See id.*

Consistent with RCW 90.58.180(3), the Board’s own rules expressly and unambiguously require the Board to apply a de novo scope of review “unless otherwise required by law.” WAC 461-08-500(1). A de novo scope of review applies even where the Board applies the clearly erroneous standard of review, as the Board itself has acknowledged. *See, e.g., Luce v. City of Snoqualmie*, SHB No. 00-324, 2001 WL 1090674, at \*8 (Jan. 1, 2001) (“[T]he clearly erroneous standard as exercised by the board [for SEPA determinations] does not preclude consideration of extra-record testimony.”). Here, the Board acknowledged that “SEPA does not prescribe the scope...of review on appeal,” AR 2073, and it did not identify any “law” that required it to apply a different scope of review. In dispensing with a de novo scope of review, the Board simply ignored its own rules in addition to the controlling statute.

Like the Board, Ecology fails to identify any legal authority empowering the Board to apply a limited scope of review in this case. The Board and Ecology rely exclusively on *Cook v. Clallam County*, 27

Wn. App. 410, 618 P.2d 1030 (1980). *Cook*, however, did not involve a shoreline permit, the SMA, or the Board. Thus, the rules that control the outcome here, RCW 90.58.180(3), RCW 34.05.410 to .494, and WAC 461-08-500(1), were not at issue and had no relevance to the decision being reviewed in *Cook*. Thus, *Cook* has no relevance to this case.

Ecology also contends that the foregoing rules should not apply here because this case did not include an appeal of the adequacy of the EIS. This distinction lacks any supporting authority. Ecology cites no case, statute, or regulation to support the proposition that the scope of the Board's review changes based on whether the permit decision being appealed is accompanied by an appeal of the adequacy of the EIS. The legislature clearly did not intend that result. *See* RCW 90.58.180(3).

**2. The Board's failure to apply its chosen scope of review cannot be justified.**

The Board further erred by failing to actually obtain and review the record before the Hearing Examiner that it (wrongly) found should cabin its review. Ecology contends that "there was sufficient information for summary disposition" because "all parties moved for summary judgment." Ecy. Br. at 29–30. But MBT-Longview moved for summary judgment only on Issues 1 through 4, which were purely legal issues. *See* AR 434; AR 1968. MBT-Longview opposed Ecology and WEC's motions on Issues 5 through 9 by contending that factual disputes precluded summary judgment on those issues. AR 1708–11. Ecology's argument grossly mischaracterizes the procedural posture below.

Ecology also misses the point in contending that the Board did not need the entire record because the parties' summary judgment briefs included extensive information. Ecy. Br. at 30. Properly applying the clearly erroneous standard of review mandated the Board to review the entire record for itself, "rather than just [] 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). Ecology argues that *Swift* is distinguishable because it did not involve appellate review of a Board decision, but that is irrelevant. Ecy. Br. at 31. The point is that it was not possible for the Board to apply a clearly erroneous standard of review without obtaining and reviewing the entire record. *See* MBT-Longview Op. Br. at 30 (citing cases); *see also Polygon*, 90 Wn.2d at 67 (holding that the "availability of judicial review of the entire record under the clearly erroneous standard" was a necessary procedural safeguard for the exercise of SEPA substantive authority).

Ecology's attempts to fault MBT-Longview for failing to supply the Board with the entire record and for failing to raise the issue of an incomplete record before the Board are similarly unavailing. There is no rule requiring transmission of the record to the Board, likely because the scope of the Board's review is supposed to be *de novo*. *See* Section II(B)(1), *supra*. Moreover, MBT-Longview had no notice that the Board would violate its own rule and rely solely on portions of the record submitted by the parties. *See* AR 423–32 (pre-hearing order contemplating *de novo* hearing).

**3. Ecology concedes that the Board erred in accepting Ecology’s extra-record evidence.**

Despite concluding that its review was limited to the record before the Hearing Examiner, the Board inexplicably accepted and relied on new evidence submitted by Ecology. Ecology concedes this was error, but wrongly characterizes the error as “harmless.” Ecy. Br. at 32. An error in the admission of evidence is not harmless if it is reasonably probable that the evidence changed the outcome of the decision. *Brundage v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 452, 191 P.3d 879 (2008).

Here, it is probable that the extra-record evidence affected the outcome of the Board’s decision. No other evidence on this point was in the record, and the Board specifically cited this evidence for its finding that MBT-Longview “determined that, in order for a coal export terminal to be economically viable, it needed a throughput capacity of 40 to 50 MMTPY.” *See* AR 2064. Furthermore, the Board ruled against MBT-Longview on the very issue at which that evidence was directed (i.e., that the Hearing Examiner could consider Stage 2 impacts in denying Stage 1 permits).<sup>4</sup> *See* AR 2023–26 (Ecy. Reply Br. in Support of Mot. For Summ. J.) (citing extra-record evidence to support piecemealing argument). The Board’s acceptance of, and citation to, this evidence in ruling against MBT-Longview on the issue to which the evidence was

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<sup>4</sup> Even now, before this Court, WEC relies on that same inaccurate, extra-record evidence to support its misguided argument that MBT-Longview’s staged development proposal would coerce permitting for Stage 2. WEC Br. at 15 n.5.

directed makes it reasonably probable that this evidence affected the outcome of the Board's decision. The error, therefore, was not harmless.

**C. Ecology's redefined concept of "piecemealing" under SEPA and the SMA is meritless and cannot salvage the Hearing Examiner's decision.**

As MBT-Longview argued in its opening brief, the Board erred in holding that the Hearing Examiner properly denied Stage 1 permits based upon potential impacts from Stages 1 and 2 combined. *See* MBT-Longview Op. Br. at 32–37. Among other flaws, the Board did not identify any legal authority to support this holding. Ecology attempts to justify the Board's ruling by redefining the concept of "piecemealing" under SEPA and the SMA. As the Board has recognized, prohibitions against piecemealing under SEPA and the SMA arise from different statutes and employ different legal tests. *See Iddings v. Griffith*, SHB No. 08-031, 2009 WL 1817902, at \*12 (June 22, 2009). Ecology ignores these differences and wrongly contends that piecemealing under SEPA and the SMA can be determined by a single legal test. A proper analysis of piecemealing under SEPA and the SMA demonstrates that neither of those concepts applies here to support the Board's ruling.<sup>5</sup>

**1. SEPA's prohibition on piecemealing is inapplicable.**

SEPA's prohibition against piecemealing is inapplicable here because it is undisputed that the entire project was submitted for

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<sup>5</sup> Ecology and WEC rely on prior permitting decisions for the project from 2010 in an attempt to bolster their theories regarding impermissible piecemealing. The 2010 permitting actions are irrelevant to this Court's resolution of this appeal. *See* AR 1971 n.5.

environmental review and analysis under SEPA. The prohibition against piecemealing under SEPA focuses on whether a project has been segmented to avoid full environmental review. *See Merkel v. Port of Brownsville*, 8 Wn. App. 844, 851–52, 509 P.2d 390 (1973); WAC 197-11-060(3)(b) (under SEPA, proposals “that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document”). Here, as Ecology admits, the entire project—both Stages 1 and 2—was submitted for environmental review under SEPA and a single EIS was prepared for the facility at full build out. That is dispositive; because the entire project was reviewed in the same environmental document, “piecemealing” under SEPA did not occur as a matter of law.

Moreover, the Board has rejected Ecology’s argument that allowing phased development would undermine SEPA review and this Court should do the same. In *Walker v. Point Ruston LLC*, SHB Nos. 09-013, 09-016, 2010 WL 235153, at \*12–13 (Jan. 19, 2010), the Board held that it was not improper for a city to issue shoreline permits for only part of a large, mixed-use development project where the entire project had been reviewed under SEPA:

Petitioner alleges that the Project has not been reviewed comprehensively and has been piecemealed....

While the petitioner is correct that the Legislature, in [the SMA], encourages a coordinated approach to shoreline development, the Project at issue here is an example of that type of coordination. The SEPA review, which was conducted for the entire Project, constituted a comprehensive review. It covered both the portions of the

Project located in and out of the shoreline areas...Further, the Board has held in past decisions that phasing of Projects under more than one shoreline permit is permissible.

*Id.* at \*13 (footnote omitted). So too, here, MBT-Longview's submittal of the entire project for SEPA review ensured a comprehensive environmental review of the project. The fact that MBT-Longview applied for shoreline permits only for Stage 1 does not change this conclusion.

**2. Nor is SMA piecemealing applicable here.**

Nor did MBT-Longview's application for shoreline permits for only Stage 1 violate the SMA's prohibition on piecemeal development. The prohibition on piecemealing under the SMA "focuses on whether the project has been segmented to avoid shoreline review and whether the approval of one aspect of the proposal will coerce an approval of a later stage of the development." *Iddings*, 2009 WL 1817902, at \*12 (emphasis added); *Batchelder v. City of Seattle*, 77 Wn. App. 154, 160, 890 P.2d 25 (1995) (*Merkel* "stands for the proposition that a single project may not be divided into segments for purposes of avoiding compliance with the SMA."). The Board has held that "[s]imply applying for one permit rather than all the permits ultimately required for a proposed development is not necessarily a piecemealing violation [under the SMA]." *Iddings*, 2009 WL 1817902, at \*13. The Board has also held that "[i]t is not necessary that one apply for all shoreline permits that may ultimately be required for a proposed development." *Scheyer v. Dep't of Ecology*, SHB No. 98-66, 1999 WL 418004, at \*5 (June 16, 1999).

For example, in *Scheyer*, the property owners applied for a shoreline variance permit for a proposed house. *Id.* at \*1. The permit application only contained a conceptual footprint of the future house, and the applicants had not yet applied for building permits or other shoreline permits for construction of the house. *Id.* at \*2. The Board determined that there was no issue of improper segmentation under the SMA, because “any impacts associated with a residence will be addressed through the review of a building permit.” *Id.* at 5.

These cases demonstrate that the Board’s holding in *Guon v. City of Vancouver*, SHB No. 93-53, 1994 WL 905449 (Mar. 31, 1994), is not limited to cases involving a master plan, as Ecology suggests. *See Ecy. Br.* at 37. To the contrary, the Board has consistently held that a multi-phase project that has been submitted for SEPA review can apply for and receive shoreline permits for fewer than all phases of the development without violating the piecemealing prohibition in the SMA regardless of whether a master plan was involved.

Nor is there any “coercion” involved in permitting only Stage 1 at this time. An approval of one part of the project is coercive if it dictates a result for the remainder of the project. For example, the Board has found that approval of a shoreline permit allowing construction of a home on a landslide area would later coerce approval of emergency permits for the construction of bulkhead to prevent the home from sliding down the hillside. *Bhatia v. Dep’t of Ecology*, SHB No. 95-34, 1996 WL 538822, at \*14 (Jan. 9, 1996).

No such coercion is at issue here. As in *Scheyer*, MBT-Longview's project has not been divided into segments to avoid shoreline review and, unlike *Bhatia*, approval of Stage 1 permits will not coerce the issuance of Stage 2 permits. Ecology contends that approving Stage 1 would "coerce" approval of State 2 because "otherwise the facility would be oversized for its throughput." Ecy Br. at 35. But Ecology acknowledges that Stage 1 of the terminal can operate independently of Stage 2. See Ecy. Br. at 7 ("The facility would be operable upon completion of Stage 1..."). Moreover, the record demonstrates that the two stages are operationally distinct. See AR 1727–28 (describing Stage 1 as a terminal facility with a throughput capacity of 25 MMTPY, and Stage 2 as an expansion that will increase capacity through an additional shiploader on Dock 3). Ecology fails to adduce any evidence showing that approval of Stage 1 would force the County to issue, and Ecology to approve, SMA permits for Stage 2.

As the County acknowledged in the Staff Report, development of Stage 2 improvements, if pursued, would require a separate shoreline permit, AR 710, which in turn, will require the County to evaluate Stage 2 improvements for consistency with the SMA and the County's Shoreline Master Program. Thus, issuing shoreline permits for Stage 1 of the project does not allow MBT-Longview to avoid shoreline review of Stage 2.

**D. The Board erred in concluding that the Hearing Examiner took due account of evidence about impacts and mitigation.**

Ecology contends that the Hearing Examiner took due account of the testimony about impacts and mitigation for Stage 1 because he

mentioned that testimony in his decision. Ecy. Br. at 39. Ecology then argues that the Hearing Examiner “properly refused to credit” that testimony because it conflicted with the unchallenged EIS. *Id.* Neither of these conflicting arguments is persuasive.

**1. The Hearing Examiner wrongly concluded that he was barred from relying on evidence other than the EIS.**

On appeal, Ecology argues that “there is no merit to Petitioners’ claims that the Hearing Examiner disregarded their evidence that purported to address Stage 1 impacts.” Ecy. Br. at 38. That argument, however, directly conflicts with Ecology’s position before the Board, in which it conceded that the Hearing Examiner disregarded and ignored MBT-Longview’s evidence. AR 1555–56, n.1 (stating that the “Hearing Examiner . . . disregarded” arguments and “ignored” evidence challenging the findings of the EIS); AR 1648 (stating that the Hearing Examiner ignored the evidence challenging the EIS “and that was not an error”).

In any case, a careful review of the Hearing Examiner’s decision demonstrates that he did not merely “discredit” the testimony MBT-Longview offered, he refused to even consider it based on a misunderstanding about the legal effect of the unchallenged EIS on his evaluation of the Stage 1 permits. The Hearing Examiner expressly stated that the evidence presented by MBT-Longview was “largely irrelevant” because the EIS had not been appealed. AR 56. Thus, while the Hearing Examiner allowed testimony at the hearing, he did not consider any of that evidence because he found it to be irrelevant to his decision making. This

was error, because the Hearing Examiner was required to consider the EIS “and other relevant information” when making his decision. WAC 197-11-400(4).

**2. Introducing evidence outside the EIS does not constitute a challenge to the adequacy of the EIS.**

Nor was MBT-Longview’s evidence a challenge to the adequacy of the EIS. The EIS evaluated the potential environmental impacts of, and mitigation for, a two-stage project at full build out. Accordingly, while the EIS acknowledged that the project was multi-stage, it did not separately analyze the potential impacts of, or mitigation for, each stage. Ecology and the County, as co-leads in the SEPA process, decided to evaluate the project in this manner.

MBT-Longview always intended to seek separate shoreline permits for Stage 1 and Stage 2, and Ecology was well aware of this project phasing. AR 472. Because Stage 1, by definition, involves fewer impacts than Stage 2, MBT-Longview presented evidence to the Hearing Examiner that the impacts of Stage 1 would have fewer and less intense impacts, and more opportunities for mitigation where available, than what is identified in the EIS for the project at full build out.

Ecology contends that this evidence was a “collateral attack” on the adequacy of the EIS. This argument fails because, as explained above in Section II(A), introducing evidence outside the EIS does not constitute a “collateral attack” on the adequacy of the EIS. *See Residents*, 165 Wn.2d at 313. “EIS adequacy refers to the legal sufficiency of the

environmental data contained in the impact statement.” *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993). A challenge to the adequacy of the EIS asks whether the EIS presents decision makers with a reasonably thorough discussion of significant aspects of probable environmental consequences of an agency’s decision. *Id.*

Here, MBT-Longview’s evidence about Stage 1 impacts and mitigation did not challenge the adequacy of the EIS. Rather it was an attempt to provide specific information on the impacts of, and mitigation for, Stage 1, that simply did not exist in the EIS. In this case, because Stage 2 may never be developed, and Ecology’s EIS did not separately evaluate the potential impacts of Stage 1, evidence of impacts and mitigation specific to Stage 1 was not only relevant but necessary. SEPA required the Hearing Examiner to consider that evidence. *See* Section II(A), *supra*. His failure to do so was error.

**E. The Board erred in affirming the Hearing Examiner’s exercise of SEPA substantive authority to deny the permits.**

**1. Permit denials under SEPA require detailed findings, which the Hearing Examiner did not make.**

There is no dispute that SEPA provides independent authority for a decision maker to deny a permit, even where the permit complies with other laws and regulations. *See Cougar Mountain Assocs. v. King Cty.*, 111 Wn.2d 742, 752, 765 P.2d 264 (1988). However, in giving decision makers this authority, the legislature set a high bar for its use, amending the statute twice to “significantly limit[] the government’s authority to

condition or deny action.” *Polygon*, 90 Wn.2d at 64 (describing 1977 amendment); *see* MBT-Longview Op. Br. at 42 (describing 1983 amendment); *compare* RCW 43.21C.060 (1971), *with* RCW 43.21C.060 (1978), *and* RCW 43.21C.060 (2019).

The statutory language is clear. To deny a project under SEPA, a decision maker “must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.” RCW 43.21C.060 (emphasis added).

Denial of a project under SEPA is reserved for the rare case where significant impacts are certain to occur notwithstanding compliance with all applicable laws and regulations, and where there is nothing at all that can be done with reasonable measures to alleviate those impacts to any degree. *See, e.g., West Main Assocs.*, 49 Wn. App. at 521 (constructing a 22-story building in Bellevue would block views and create shadows, which could only be mitigated if the building was “fundamentally redesigned” by “greatly reducing the height and intensity”).<sup>6</sup> The Washington Supreme Court has reached this same conclusion. *See Cougar Mountain*, 111 Wn.2d at 757 (setting forth findings necessary to deny a project under SEPA); *Nagatani Bros., Inc. v. Skagit Cty. Bd. of Comm’rs*, 108 Wn.2d 477, 482, 739 P.2d 696 (1987) (SEPA denials

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<sup>6</sup> Because of the statute’s high bar, permit denials under SEPA are rare; of the five examples cited by WEC (at 23 n.6), none occurred after the 1983 amendments that raised the bar for denials. *See* Op. Br. at 42.

require “specific, proven significant environmental impacts”).

The Hearing Examiner’s decision is fatally flawed because he did not make the specific findings required by RCW 43.21C.060 as to the “proposal” before him, which was only Stage 1. *See* MBT-Longview Op. Br. at 39–47. Instead, the Hearing Examiner irrationally assumed, based solely on the EIS, that impacts and mitigation for Stage 1 (with output of only 25 MMTPY, 5 trains per day, and 40 vessels per month, AR 714; AR 717), would be the same as Stages 1 and 2 combined (with output of 44 MMTPY, 8 trains per day, and 70 vessels per month, *id.*). The impacts of and mitigation specific to Stage 1 cannot be “proven” by merely reciting the findings in an EIS that does not assess impacts and mitigation for Stage 1.

Ecology does not dispute that the shoreline permit applications before the Hearing Examiner were only for Stage 1. Nor does Ecology dispute that the Hearing Examiner failed to make specific findings about impacts and mitigation for Stage 1, which was the “proposal” in front of him for purposes of RCW 43.21C.060. Those two points are dispositive.

**2. The EIS did not conclude that adverse impacts would occur or that no mitigation existed.**

Ecology argues that the EIS concludes that significant adverse impacts would occur. It does not. Rather, Ecology takes the conclusions in the EIS about potential impacts and grossly mischaracterizes them as definite and certain. *See* Ecy. Br. at 45 (“The conclusions of the Hearing Examiner are drawn from the findings in the EIS that the project “would

cause significant and unavoidable impacts...”) (emphasis added). However, the actual language of the EIS is far more circumscribed, and discusses impacts that “could” occur or be significant. *See* AR 983 (“Unavoidable and significant adverse environmental impacts could remain for nine environmental resource areas[.]”) (emphasis added); *see also* BNSF Reply at Section II(C) (citing examples). Indeed, the County, which was a co-lead with Ecology in preparing the EIS, submitted a declaration to the Board describing how Ecology mischaracterized the findings in the EIS, as it has continued to do before this Court. *See* AR 1950–55.

Similarly, Ecology argues that the EIS concludes that “no mitigation is possible.” Again, it does not. Rather, the EIS identified potential mitigation for each of the resource areas, and concluded that the mitigation measures would reduce the adverse environmental impacts associated with the project. AR 518. Ecology recognized this fact in its own Clean Water Act Section 401 decision. *See, e.g.*, AR 671, AR 675 (stating that air quality and health impacts “could be mitigated” by use of Tier 4 locomotives); AR 673 (stating impacts to vehicle transportation “could be reduced by further improvements to rail and road infrastructure”); AR 677 (stating impacts to rail safety could be reduced). A decision maker could conclude that these mitigation measures were reasonable and sufficient and condition the permits upon their implementation. *See Marantha Mining, Inc. v. Pierce Cty.*, 59 Wn. App. 795, 804–05, 801 P.2d 985 (1990). Ecology’s position that impacts

cannot be mitigated because mitigation measures may be uncertain to occur is baseless.

Ecology's misrepresentations about the EIS, and the absurdity of its legal position before the Court, are underscored by a close examination of the EIS. For instance, with respect to rail transportation, the EIS describes the potential impact of MBT-Longview's terminal on rail traffic on BNSF's rail line. AR 997. The EIS notes that while it "is expected that BNSF would make the necessary investments...to accommodate the rail traffic growth," it is "unknown when these actions would be taken or permitted." *Id.* The EIS concludes that: "If improvements to rail capacity were not made, Proposed Action-related trains would contribute to these capacity exceedances and could result in an unavoidable and significant adverse impact on rail transportation." *Id.* Contrary to Ecology's position, this conclusion is not (and cannot) be a "verity." Rather, it is a conditional "if-then" statement that requires additional information before any "finding" could be made that the "proposal would result in significant adverse impacts" and that "reasonable mitigation measures are insufficient to mitigate the identified impact" under RCW 43.21C.060. The Hearing Examiner received but disregarded such information, and thus failed to make the findings SEPA requires to deny a proposal.

**3. Material issues of fact existed regarding Stage 1 impacts and mitigation that precluded summary judgment on Issue 9.**

Resolution of whether the Hearing Examiner erred in denying the permits under SEPA involved disputed questions of fact regarding Stage 1

impacts and whether there were any reasonable mitigation measures to address those impacts. Ecology conceded this very point before the Board, stating that “the extent of impacts associated with Stage 1 is a factual issue that cannot be decided on summary judgment.” AR 1558 (Ecology’s Response to MBT-Longview Motion for Summary Judgment). Ecology offers no explanation for its reversal of position.

Ecology’s only argument to support the Board’s grant of summary judgment on Issue 9 is that MBT-Longview “conceded there are no issues of material fact” when it filed its motion for summary judgment. Ecy. Br. at 41 (citing *Pleasant v. Regence BlueShield*, 181 Wn. App. 252, 261, 325 P.3d 237 (2014)). Again, this is incorrect. See *Taft v. Central Co-Op*, 2016 WL 7470088, at \*5 (Wn. App. 2016) (unpublished) (distinguishing *Pleasant* and holding that there can be no concession about lack of disputed facts where, as here, a party argues that genuine issues of fact exist).

**F. The Board should have entered judgment for MBT-Longview on Issue 8.**

Issue 8 asked 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’s decision?” AR 426 (emphasis added). The Board agreed with MBT-Longview on this issue, but inexplicably entered judgment for Ecology and WEC. AR 2078.

Ecology does not defend this error on appeal. WEC misses the point, and reverts back to a about a purported challenge to the adequacy of the EIS. However, Issue 8 was only directed at whether MBT-Longview could challenge the Hearing Examiner’s use of the EIS in his SEPA denial decision. The Board held it could, and thereby rejected Ecology’s argument that the findings in the EIS “are verities for purposes of review of the exercise of substantive SEPA authority by the Hearing Examiner,” which they repeat on appeal. *See* AR 806 (Ecy. Mot. for Summ. J.); Ecy. Br. at 43. The Court should remand with instructions to enter judgment for MBT-Longview on Issue 8.

### III. 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 1st day of April, 2018.

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## 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 April 1, 2019, I caused the foregoing document to be filed

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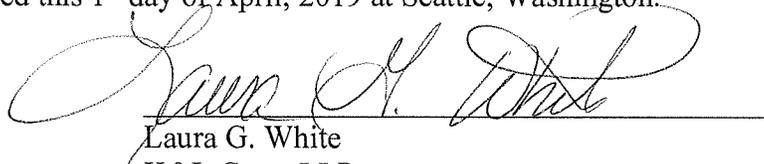
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 1<sup>st</sup> day of April, 2019 at Seattle, Washington.

A handwritten signature in cursive script, appearing to read "Laura G. White", is written over a horizontal line.

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