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

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MILLENNIUM BULK TERMINALS LONGVIEW, LLC

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

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**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S  
RESPONSE BRIEF**

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## I. INTRODUCTION

The purpose of Washington's Public Records Act is to ensure the public's access to information concerning the government's conduct. Maintaining the integrity of the Act requires differentiating between valid claims brought with the intent of forwarding that purpose, and lawsuits brought solely as retribution against an agency. This case falls squarely in the latter category.

Millennium Bulk Terminals – Longview, LLC (Millennium) made several public records requests related to the Department of Ecology's four-year-long environmental review of Millennium's proposed coal terminal in Longview. Ecology spent 795 staff hours responding to the four requests at issue in this case, and produced over 377,000 responsive records in 32 installments over the course of one year. However, while Ecology was in the middle of responding to these requests, Millennium filed suit under the Public Records Act, claiming the agency was taking too long to respond, and was withholding responsive documents.

After a show cause hearing, the trial court dismissed Millennium's case, finding that Ecology's search for responsive documents was adequate, its production timely and complete, and that Millennium had failed to establish its claims. Millennium now appeals, but cannot show any legal error in the trial court's order. Instead, it misstates the facts,

raises a new issue not briefed below, and makes speculative claims. This Court should affirm the trial court's decision in its entirety, and dismiss this case.

## **II. COUNTER-STATEMENT OF ISSUES<sup>1</sup>**

1. Did Ecology conduct adequate searches for documents responsive to Millennium's four public records requests? (Appellant's Assignment of Error 1)
2. Did Ecology disclose all of the documents requested by Millennium in PDTS #42368?<sup>2</sup> (Appellant's Assignment of Error 2)
3. Did Millennium fail to establish its claims for violations of the Public Records Act? (Appellant's Assignment of Error 3)

## **III. COUNTER-STATEMENT OF THE CASE**

### **A. Environmental Review of Millennium's Proposed Coal Export Terminal**

Millennium proposes to construct and operate a coal export terminal on a 190-acre site in Cowlitz County, Washington, along the Columbia River. Clerk's Papers (CP) 349–50. In 2012, Cowlitz County and Ecology agreed to act as co-lead agencies to prepare an environmental

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<sup>1</sup> In its Complaint, Millennium also alleged that Ecology's responses to its four records requests were untimely. CP 5–6. Millennium has not assigned error to the trial court's finding that Ecology's response was timely, nor provided argument in support, and therefore Millennium has abandoned that issue on appeal. RAP 10.3(a).

<sup>2</sup> Ecology assigns each request a Public Disclosure Tracking System (PDTS) number.

impact statement (EIS) for the project under the State Environmental Policy Act (SEPA). CP 133, 136. The U.S. Army Corps of Engineers (Corps) also joined as a co-lead agency because the Corps planned to prepare an EIS under the federal National Environmental Policy Act (NEPA), to use in its own review of the project. CP 110.

Ecology, the County, and the Corps entered into a Memorandum of Understanding (MOU) that governed the terms of the agencies' work conducting parallel environmental reviews. CP 138–49. The MOU identified a third party contractor, ICF Jones & Stokes, Inc. (ICF), that would prepare the SEPA and NEPA EIS documents. CP 138. The MOU provided that the County:

shall have sole authority to enter into a professional services agreement with ICF. The County contract for professional services with ICF is not on behalf of the Corps or Ecology . . . . The Corps and Ecology expressly acknowledge that the County is not an agent or representative of the Corps or Ecology with respect to the ICF professional services agreement.

CP 141.

Accordingly, the County alone entered into a personal services contract with ICF. CP 151–81. All documents prepared by ICF were “the sole and absolute property of the County and constitute ‘work made for hire’ . . . .” CP 172. All three agencies could direct ICF’s work while the MOU remained in effect. CP 152. However, upon the MOU’s termination

in December 2017, only the County could direct ICF's work. CP 152.

Indeed, the County notified Ecology on August 10, 2017, that it would no longer authorize ICF to work on public disclosure requests. CP 119.

Due to the unprecedented level of public interest and media coverage of the coal terminal's environmental review, the agency co-leads anticipated that there would be litigation and public records requests, and took steps to ensure proper record keeping. CP 113. For example, ICF maintained an administrative record with all correspondence, meeting minutes, drawings, reports, and other documents received and generated in relation to the agencies' environmental review of the project. CP 156. ICF agreed to provide "access to all information that supports the findings, conclusions and recommendations of the Contractor's reports, including computer models and methodology for those models." CP 156.

The Attorney General's Office advised Ecology to place a hold on all records related to the project due to reasonably anticipated litigation. CP 113. Sally Toteff, Director of Ecology's Southwest Regional Office and the SEPA responsible official for Ecology's participation in the EIS, communicated this litigation hold to Diane Butorac, the project manager for the coal terminal's environmental review, who ensured every member of Ecology's technical team was aware of the hold and what it meant. CP 113.

The dual state-federal environmental review necessitated an integrated, transparent approach to reviewing and producing responsive records. The Corps was developing an EIS under NEPA, which would be issued after the SEPA EIS. CP 117. As such, the agencies believed they would likely receive requests seeking federal pre-decisional, deliberative documents that would likely be exempt from disclosure under the federal Freedom of Information Act, and might be subject to redactions under the state Public Records Act. CP 112, 117. To address this situation, the agencies agreed that when one of them received a request of this nature they would review responsive documents for potential exemptions, consult with each other, inform the others when documents would be released, and allow time to seek court protection if necessary. CP 112, 143–44. This added additional time and work to Ecology’s normal public records response process, as staff had to screen, identify, and gather pre-decisional documents for presentation to the Corps for its review and response prior to releasing them to requestors. CP 117.

In April 2017, after four years of work and over a quarter of a million public comments, the County and Ecology released the final SEPA EIS for Millennium’s proposed coal terminal. CP 116;

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*see also* Millennium Bulk Terminals-Longview NEPA/SEPA Environmental Impact Statements (2013), <https://www.millenniumbulkeiswa.gov/sepa-eis.html>. The resulting document is thousands of pages, containing multiple technical reports analyzing a wide range of potential environmental impacts including, most relevant here, a highly technical analysis of the coal terminal's greenhouse gas emissions. ICF, *Millennium Bulk Terminals—Longview, SEPA Environmental Impact Statement, SEPA Greenhouse Gas Emissions Technical Report* (2017), <https://www.millenniumbulkeiswa.gov/assets/greenhouse-gas-emissions2.pdf>.

## **B. Millennium's Public Records Requests**

Over the next three months, Millennium made several public records requests to Ecology seeking numerous categories of documents created during the preparation of the SEPA EIS. Ecology received those requests on May 17, May 22, July 7, and July 27, 2017. CP 185–89 (PDTS #40713); CP 191–93 (PDTS #41839); CP 196–99 (PDTS #42368); and CP 201–03 (PDTS #42527).<sup>3</sup>

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<sup>3</sup> The original text of all four requests are attached as appendices to this brief.

Contrary to Millennium’s characterization, these four requests were not “narrow.” Appellant’s Opening Br. at 8 (Opening Br.). Three of the four requests sought records dating back to February 2012. CP 187, 192, 197. PDTS #41839 sought *all* of Diane Butorac’s records for that period relating to Ecology’s preparation of the EIS. CP 192. PDTS #40713 and #41839 collectively sought all documents related to the EIS’s air quality analysis. *See* CP 185–93. And PDTS #42368, the main focus of Millennium’s appeal, sought all “data and assumptions” related to five aspects of the EIS’s greenhouse gas emissions analysis. CP 196–97.

While Ecology was working on responding to these four broad public records requests, Millennium filed several lawsuits against the agency in response to Ecology’s September 2017 denial of a Clean Water Act Section 401 water quality certificate for the coal terminal. CP 205–327. As it was diligently responding to Millennium’s public records requests, Ecology had to simultaneously defend against actions before the Pollution Control Hearings Board, Shorelines Hearings Board, Cowlitz County Superior Court, and the U.S. District Court for the Western District of Washington. *Id.* In three of those cases, Millennium submitted numerous discovery requests that overlapped significantly with the subject matter of the public records requests. CP 114. As such, many Ecology personnel had to devote substantial resources to working on

time-sensitive discovery productions while continuing to gather and review documents responsive to Millennium's public records requests.

CP 114. Straining Ecology's resources further, Millennium deposited two Ecology employees central to records production for the public records requests. CP 114–15.

**C. Ecology's Responses to Millennium's Records Requests**

Ecology assembled a large team of staff to ensure compliance with the Public Records Act, Ecology's internal process for responding to records requests, and the terms of the MOU. CP 118. Millennium submitted each public records request to the Public Records Office at Ecology's Headquarters. CP 115. The Headquarters Office then forwarded each request to the Southwest Regional Office, whose staff had worked with the County in preparing the EIS. CP 108. The Southwest Regional Office Public Disclosure Coordinator advised and oversaw staff responses with assistance from the Headquarters Public Disclosure Office, the Southwest Regional Office Director, and the Southwest Regional Office's Planner. CP 118.

The Southwest Regional Office planner created a flowchart to capture the steps staff took in responding to each of Millennium's four requests. CP 336. For each public records request, Ecology conducted an exploratory search to determine the complexity of the task. Next, Ecology

gave Millennium a timely initial response that included an estimate for the first production installment. CP 117. Then, Ecology began the process of searching, collecting, reviewing, and producing documents. CP 117.

For each request, Ecology created broad search criteria and identified locations and staff reasonably likely to have possession of the requested records. CP 118. Ecology then conducted an internal search for responsive records that included: (1) employee e-mails using accelerated comprehensive search software with search criteria tailored to each request along with the term “Millennium” and various misspellings thereof; (2) paper records and electronic files maintained by the EIS project team at Ecology, as well as technical staff from the Headquarters Air Quality Program and other Ecology programs, communications consultants, staff from other regional offices, and Ecology’s executive office; (3) an Ecology SharePoint Site created for the Millennium EIS project; and (4) former Project Manager Diane Butorac’s computer drives, paper files, file drawers, e-mail vault and e-mail inbox. CP 120–21.

Once Ecology had completed its searches, it saved all responsive records on one network drive managed by the Southwest Regional Office Public Disclosure Coordinator. CP 121. The Coordinator then reviewed and screened all records for responsiveness, statutory exemptions, and pre-decisional content. CP 121–22. Ecology received a significant amount

of advice from the Attorney General's Office throughout the preparation of the EIS, which required additional time to screen for documents subject to attorney-client privilege. CP 116. Ecology project staff would then review all records flagged as potentially privileged or pre-decisional, and forward them to, respectively, the Attorney General's Office for redaction of privileged material, or the Corps for determination of whether to seek protection of pre-decisional documents. CP 122–23; *see, e.g.*, CP 367–46.<sup>4</sup>

Ecology produced responsive records to Millennium in installments. CP 123. Given the large volume of potential responsive documents, the installment productions allowed Ecology to get records to Millennium more quickly, instead of having to wait for Ecology to complete its collection and review of all the records. When an installment was ready for disclosure, Ecology emailed the requestor, Mr. Sitkin, and included a link to download records in electronic format from Ecology's secured file transfer protocol (FTP) site. CP 123. Ecology produced most records electronically. CP 123. If an installment contained records in paper format, Ecology notified Mr. Sitkin of the documents' availability and asked him how he preferred to receive the records. CP 123, 429–31.

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<sup>4</sup> The Corps did not seek a protective order for any responsive documents in this case. CP 123.

In accordance with the terms of the MOU, Ecology forwarded each of Millennium's requests to ICF, Cowlitz County, and the Corps. CP 119. The co-leads and ICF discussed the requests on their weekly conference calls to ensure ICF would be providing responses. CP 119. Because ICF had only contracted for services with the County, ICF would wait for the County's authorization before responding to the requests. CP 119. ICF provided documents to Ecology for each request, along with a memorandum describing its response. CP 119, 352. Ecology then included ICF's records in its installment productions to Millennium. CP 119, 413-14.

In total, Ecology staff spent approximately 795 hours responding to Millennium's four requests, and produced over 377,000 responsive records to the company in 32 installments. CP 115. This included the administrative record for the EIS that ICF prepared as part of its scope of work. CP 123. Ecology concluded its production for all requests on May 16, 2018, almost exactly one year after it received Millennium's first request. Ecology did not withhold any documents from disclosure, and redacted only those containing material subject to attorney-client privilege. CP 82, 122.

**D. Ecology’s Response to PDTS #42368**

Millennium’s appeal focuses on the adequacy of Ecology’s search for, and response to, PDTS #42368. Opening Br. at 21–30. Ecology received PDTS #42368 on July 7, 2017. CP 196. The request sought “[a]ny and all records (including without limitation all communications)” relating to “data and assumptions” for a Greenhouse Gas Emissions Technical Report prepared by ICF for the EIS. CP 196–97. Within thirty days, Ecology provided a first installment of responsive documents to Millennium, and completed production on March 29, 2018 after nine installments. CP 114.<sup>5</sup>

As part of a September 6, 2017 installment for PDTS #42368, Ecology produced documents it received from ICF, along with a memo from ICF describing its response to each of the five areas for which Millennium sought “data and assumptions.” CP 119; 352–53; 388. For some areas, ICF directed Millennium to existing documents where it could locate the requested data and assumptions. For others, ICF noted that it had provided additional files containing the requested information. CP 352.

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<sup>5</sup> A summary of Ecology’s installment responses to Millennium’s other three requests can be found at CP 114.

ICF provided:

[d]ata files used to create the coal supply curves and final coal supply curves . . . . [a]ssumptions regarding [greenhouse gas] mitigation and reduction . . . . [d]ata and assumptions related to rail, vessel, and tug [greenhouse gas] emissions calculations and displacement . . . . [t]he general assumptions document [related to coal substitution] . . . . [c]oal pricing and consumption data . . . . [and] net greenhouse gas emissions . . . .

CP 352–53. ICF’s memo shows it reasonably understood “data and assumptions” to mean the inputs to the model it used to produce reports on the project’s greenhouse gas emissions. *Id.*

Importantly, after it received these documents, Millennium did not inform Ecology that it believed the documents that ICF produced were missing, corrupted, or incomplete. CP 413. If it had, an Ecology public records officer would have endeavored to resolve the issue with Millennium. CP 413.

#### **E. Procedural History**

On December 4, 2017, as Ecology was in the process of responding to Millennium’s public records requests, Millennium filed yet another lawsuit against the agency, this time under the Public Records Act. CP 1–7. Millennium claimed that Ecology’s responses were untimely, and that the agency had wrongfully withheld responsive records. CP 6. Millennium requested an order directing Ecology to produce all

documents requested by the company, statutory per diem damages for violations of the Public Records Act, and attorney fees and costs. CP 6.

On May 11, 2018, Millennium moved for an order to show cause. CP 13. In its motion, Millennium finally identified documents that it believed were missing from Ecology's response to PDTS #42368. CP 17–18. Specifically, Millennium alleged that the “data and assumptions” it requested relating to the greenhouse gas emissions analysis should have included output files known as System Summary Reports (SSRs), and ICF's “CoalDOM Cost Model,” which was referenced by some of the documents provided by ICF. CP 17. Millennium also alleged that an excel spreadsheet titled “MBTL\_GHG\_Analysis\_FinalEIS.xls” was incomplete because calculations had been removed and the numbers within the spreadsheet were hard-coded. CP 17–18. Again, this was the first time Millennium had told Ecology that they believed anything to be wrong with the records provided in response to PDTS #42368.

Ecology responded with a declaration from Sally Toteff that provided a detailed description of the process Ecology followed in searching for, locating, reviewing, screening, and producing responsive documents. CP 107. Ms. Toteff addressed the allegedly missing documents from the productions for PDTS #42368, clarifying that ICF's

memo showed it understood the request was seeking inputs. CP 119. Moreover, PDTS #42368 does not ask for System Summary Reports or SSRs, and Ecology had not heard of such documents prior to receiving Millennium's motion and did not know if they existed. CP 119. This is because ICF translated their highly technical outputs and results into more understandable formats such as slide presentations, memos, fact sheets, and discussions. CP 120. Indeed, the County hired ICF because the co-lead agencies did not have the expertise required for conducting such modelling and calculations necessary for the greenhouse gas emissions analysis. CP 120.

The trial court denied Millennium's motion to show cause, finding that Ecology's production time was reasonable, the search conducted by Ecology was adequate, and that Ecology disclosed all of the documents requested. CP 446. Millennium timely appealed to this Court.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Judicial review under the PRA is de novo, as to both the agency's actions and the court decisions below. RCW 42.56.550(3); *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). Appellate courts stand in the shoes of the trial court when reviewing declarations, memoranda of law, and other documentary

evidence. *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 177 Wn.2d 467, 478, 300 P.3d 799 (2013). This Court can affirm the trial court on any basis supported by the record. *Johnson v. Dep’t of Corr.*, 164 Wn. App. 769, 779, 265 P.3d 216 (2011).

**B. Ecology Performed an Adequate Search for Responsive Documents**

Millennium concedes that Ecology performed an adequate search for internal records (i.e., those in Ecology’s custody). Opening Br. at 29. However, Millennium now argues, for the first time on appeal, that Ecology’s overall search was inadequate because it did not provide evidence of the specific steps ICF took to respond to the requests. *Id.* Millennium did not raise this issue below and this Court can, and should, disregard it. RAP 2.5(a); *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 377–78, 389 P.3d 677, 683 (2016). “The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Because Millennium did not properly raise the issue below, the trial court could not rule on it, nor did Ecology have the opportunity to place evidence in the record rebutting the claim. Regardless, Ecology provided sufficient evidence to demonstrate that it performed an adequate search.

An agency is required to conduct an adequate search in response to a PRA request and on review show that the search was adequate. *Fisher Broad.-Seattle*, 180 Wn.2d at 522. The focus of review “is the agency’s search process, not the outcome of its search.” *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 866, 288 P.3d 384 (2012). “A reasonable search need neither be exhaustive or successful.” *Kozol v. Dep’t of Corr.*, 192 Wn. App. 1, 9, 366 P.3d 933 (2015); *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 719–20, 261 P.3d 119 (2011).

Adequacy of a search is “judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.” *Id.* at 720. Reasonableness depends on the facts of each case. *Id.* The reasonableness of an agency’s search turns on “the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.” *Forbes*, 171 Wn. App. at 866 (citation omitted).

An agency may demonstrate an adequate search by having its employees submit “‘reasonably detailed, nonconclusory affidavits’ attesting to the nature and extent of their search.” *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 885, 357 P.3d 45 (2015) (quoting *Neighborhood All.*, 172 Wn.2d at 721). “These should include the search terms and the type of

search performed, and they should establish that all places likely to contain responsive materials were searched.” *Neighborhood All.*, 172 Wn.2d at 721. “Purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit, which is accorded a presumption of good faith.” *Forbes*, 171 Wn. App. at 867.

Here, Ecology provided evidence showing that its search was more than adequate. Ecology looked for electronic and hardcopy responsive documents across multiple agency programs using comprehensive search software employing broad search terms. These searches netted hundreds of thousands of documents, all of which required Ecology’s multi-step review. With the County’s permission, Ecology sent all four requests to ICF, which provided many documents in response, as well as memos explaining those responses. CP 119. Ecology, the County, and the Corps discussed Millennium’s requests on their weekly calls to ensure ICF would provide responses. CP 119.

Millennium’s reliance on *Neighborhood Alliance* is misplaced. In that case, our Supreme Court adopted the federal standard for determining what constitutes an adequate search under the state Public Records Act. *Neighborhood All.*, 172 Wn.2d at 719–20. The Court then applied that standard to the case before it, in which a requestor claimed Spokane

County had performed an inadequate search for electronic records because the County only searched an employee's new computer, even though it knew the requested documents resided on the employee's old computer. In holding that the search was inadequate, the Court explained that an agency "cannot limit its search to only one record system if there are other that are likely to turn up the information requested." *Neighborhood All.*, 172 Wn.2d at 722 (citation and quotation marks omitted). However, the Court emphasized that agencies are only required to search for a record in "those places where it is *reasonably likely* to be found." *Id.* at 720.

Ecology did precisely that. In addition to its own files and servers, the agency, with the County's permission, had ICF search its own files knowing it was reasonably likely that ICF could have responsive documents. ICF is a third party contractor for the County, and Ecology did not have authority to control ICF's method of searching for potentially responsive documents. It was sufficient for Ecology to show, as it did here, the process it followed to accurately transmit the requests to ICF, and then do additional follow up and coordination with all co-lead agencies regarding ICF's responses. The memos ICF provided identified the documents it was producing, all of which Ecology transmitted in their original format to the requestor. Millennium cites no law in support of its argument that the Public Records Act requires Ecology to recount the

details of searches performed by third parties in order to demonstrate that its own search was reasonable. This Court should hold Ecology performed adequate searches for these requests.

**C. Ecology Produced All Records Responsive to PDTS #42368**

Millennium incorrectly asserts that Ecology “will not produce” the data and assumptions requested by PDTS #42368. Opening Br. at 22. To the contrary, Ecology *did* produce the requested information by passing PDTS #42368 onto ICF, and then delivering ICF’s responses to Millennium electronically. CP 119. Ecology did not withhold any documents responsive to PDTS #42368.

All of Millennium’s complaints regarding Ecology’s response to PDTS #42368 could have been resolved without litigation. After reviewing the documents provided by ICF and concluding that certain information was missing, Millennium could have contacted Ecology to supplement its request to include the specific, highly technical information it apparently believed was encompassed by the term “data and assumptions” in PDTS #42368. As it had with all of Millennium’s other requests, Ecology would have endeavored to assist the company in obtaining that information. Instead, Millennium chose to “remain silent” and attempt to manufacture a Public Records Act violation where none

exists. This Court should hold that Ecology produced all responsive records for this request, and affirm.

**1. Julie Carey’s declaration is not “unchallenged fact”**

Millennium falsely claims “Ecology did not introduce any evidence refuting [Julie] Carey’s declaration,” and that Ms. Carey’s declaration is now “unchallenged fact.” Opening Br. at 11. Millennium’s argument ignores the de novo review this Court conducts of declarations and other documentary evidence submitted below. *See Ameriquest*, 177 Wn.2d at 478. Moreover, Ecology responded to Ms. Carey’s speculations that Ecology did not produce all responsive records with declarations from Sally Toteff, Tanya Rose-Johnson, and Susan Baxter. CP 107–375, 407–11, 412–31. Therefore, this Court should not treat Ms. Carey’s declaration as “unchallenged fact.”

**2. Ecology produced the “data and assumptions” requested by PDTS #42368**

Public records requestors should not “remain silent and wait until final agency action to voice concerns regarding agency actions or inaction.” *Hobbs v. State*, 183 Wn. App. 925, 941 n.12, 335 P.3d 1004 (2014). “[T]he purpose of the PRA is best served by communication between agencies and requesters, not by playing ‘gotcha’ with litigation.” *Id.* At minimum, a requestor must identify the documents it seeks with

reasonable clarity to allow the agency to locate them. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). The Public Records Act does not require agencies to be mind readers, nor can an agency be expected to disclose records that have not yet been requested. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998).

Throughout this entire process, Ecology has erred on the side of transparency and completeness. Ecology expended considerable time and resources to ensure it could complete its multiple levels of internal review while still meeting the installment deadlines it voluntarily set for productions to Millennium. If Millennium had contacted Ecology after it received the September 6, 2017 production to request the additional documents and models, Ecology would have assisted Millennium in attempting to obtain that information. CP 413. There is no evidence in the record to suggest otherwise.

By its own account, Millennium's request was "intentionally narrowly focused," and that focus was on documentation of "data and assumptions" that ICF used in conducting modeling, i.e., inputs. *See* CP 119–20. In PDTS #42368, Millennium made five numbered sub requests, each asking for "data and assumptions related to" different subject areas. CP 50–52. Ecology, with notice to the County that it was seeking documents from the County's contractor, provided to ICF a copy

of PDTS #42368. ICF responded by providing to Ecology the files containing the data and assumptions that Millennium sought; Ecology produced these to Millennium. This does not amount to a violation of the Public Records Act.

**3. Ecology did not alter any of the documents it received from ICF**

Millennium also repeats to this Court the same baseless accusation it made below that “someone” nefariously altered the excel spreadsheet “MBTL\_GHG\_Analysis\_FinalEIS.xls”, which Ecology produced in response to PDTS #42368. Opening Br. at 26–27. According to Millennium, the spreadsheet produced was “incomplete” because it did not contain the formulae and calculations used to create the numbers contained in the spreadsheet. *Id.* at 10. Millennium claims “Ecology’s failure to produce the original work papers is a violation of the PRA.” Opening Br. at 27. It is not.

First, the plain language of PDTS #42368 does not seek “formulae” or “calculations.” CP 50–52. If it had, or if Millennium had notified Ecology that it desired more information than what ICF provided, Ecology would have obliged. CP 413. Second, Ecology does not have the knowledge or expertise to use, let alone modify, ICF’s highly technical spreadsheet. CP 120. This is why the County hired ICF in the first place.

*Id.* Finally, Millennium admits that if anyone altered the spreadsheet, it was ICF. Opening Br. 29–30. Regardless, Millennium can point to no evidence in the record to support this allegation, save for Ms. Carey’s speculative declaration. No production violation arises from mere speculation about what might exist. *See Forbes*, 171 Wn. App. at 867.

**4. The documents Millennium alleges should have been produced in response to PDTs #42368 were not “records” under the Public Records Act**

A “public record” is “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”

RCW 42.56.010(3). Under the Public Records Act, an agency “uses” a record when it is “applied to a given purpose or instrumental to [a governmental] end or process” and where “a nexus exists between the information and an agency’s decision-making process . . . .”

*Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark Cty., Wash.*, 138 Wn.2d 950, 952, 983 P.2d 635 (1999).

In *Concerned Ratepayers*, our Supreme Court analyzed whether the Clark County PUD had “used” a technical document that the PUD did not possess, but did review when electing the turbine generator component of a proposed power plant. In holding that the PUD had “used” the

document, the Court explained that “information that is reviewed, evaluated, or referred to and has an impact on an agency’s decision-making process would be within the parameters of the Act.” *Concerned Ratepayers*, 138 Wn.2d at 961. The Court noted that the PUD had reviewed the technical document when it met with its general contractor, and various documents relating to the project proposal referred to the technical document by name.

In contrast, Ecology did not review the SSRs, formulae, or calculations Millennium now seeks. Indeed, Ecology did not know SSRs existed until Millennium mentioned them in its motion to show cause. Although Ecology did review the reports, presentations, and other documents prepared by ICF for the co-lead agencies as deliverables, Ecology never possessed or reviewed the highly technical System Summary Reports, formulae, or calculations Millennium claims should have been included in the response to PDTS #42368. They are not part of the administrative record ICF prepared, which contains all communications, drafts, notes, and other documents Ecology relied on when preparing the coal terminal EIS.

Millennium argues that whether Ecology possessed or used the documents is “irrelevant” because ICF used them in preparing the reports

it presented to the EIS co-leads. Opening Br. at 21.<sup>6</sup> Not so. The Court in

*Concerned Ratepayers* clarified:

the critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. A nexus between the information at issue and an agency's decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary function, but is also a relevant factor in the agency's action.

138 Wn.2d at 960–61. Here, the SSRs, formulae, and calculations Millennium claims that Ecology should have produced are too attenuated to form the nexus contemplated by *Concerned Ratepayers*. In that case, the PUD carefully reviewed the requested technical document *with its own contractor*, as part of its decision to use a particular turbine generator. In contrast, Ecology never reviewed or possessed, even briefly, the SSRs and other technical information now requested by Millennium. Millennium urges this Court to expand existing precedent in a manner that would require Ecology to produce documents created by another agency's contractor that Ecology had never possessed or even seen, and would not have understood if it did. This would place an undue burden on public agencies to be accountable not only for the documents they actually use and possess, but for any documents used in creating those documents as

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<sup>6</sup> Millennium refers to the “findings and conclusions in the FEIS” as ICF’s, but only the County and Ecology have authority to make findings and conclusions in an EIS.

well. Although the Court need not reach this issue in order to affirm the trial court, if it does, it should hold that the SSRs, formulae, and calculations Millennium now seeks are not public records.

**5. ICF was not Ecology’s “functional equivalent”**

Millennium also relies on this Court’s decision in *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015) to argue that ICF was acting as the “functional equivalent” of Ecology in performing work on the project’s EIS. Again, Millennium is incorrect. In *Cedar Grove*, a composting company sought records of communications between the City of Marysville and a consulting firm hired by the City that Cedar Grove believed had been spearheading a smear campaign against the company. *Id.* at 703–04. The City initially produced completely redacted emails between the City Attorney and the consulting firm, which the City claimed were exempt as “Attorney Client Privilege/Work Product.” *Id.* at 704–05. Cedar Grove sued the City under the Public Records Act, alleging wrongful withholding of responsive records under an improper claim of attorney-client privilege.

On cross-appeals of the trial court’s grant of summary judgment in Cedar Grove’s favor, the City argued that the consulting firm was not a public agency, and therefore was not subject to the Public Records Act.

This Court disagreed, employing the balancing test in *Telford v. Thurston Cty. Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886 (1999) to conclude that the consulting firm was performing as the functional equivalent of the City. In so holding, this Court noted that (1) the City had conceded that the firm was performing a governmental function by claiming attorney-client privilege covered the City Attorney's communications with the firm, (2) the City paid the firm for the majority of the work at issue, and (3) the City was heavily involved in the work performed by the firm. *Cedar Grove*, 188 Wn. App. at 720. The Court also noted that the City had directed and delegated work to the consulting firm "with the express object of avoiding the reach of the PRA." *Id.*

The facts in this case are plainly distinguishable. First, Ecology did not withhold its communications with ICF under an attorney-client privilege exemption. Second, the County, not Ecology, entered into a personal services agreement with ICF that provided the County alone would pay ICF for its work. CP 166. Third, Ecology and the County jointly provided direction to ICF in its work completing the EIS, but the County retained ultimate authority to direct ICF's work. CP 128, 152. Finally, there is no evidence that Ecology attempted to use ICF as a proxy in order to avoid the Public Records Act. To the contrary, Ecology

exceeded what the law requires by working with the County to ensure ICF provided responsive documents for Millennium's request.

**6. Millennium misrepresents Ecology's response to Interrogatory No. 13**

Millennium can point to no evidence to support its baseless claim that Ecology or ICF intentionally withheld the information sought by PDTS #42368. Instead, Millennium wields Ecology's response to an interrogatory as "evidence" that the agency understood PDTS #42368 to be seeking the outputs and models Millennium claims should have been included in the productions it received from Ecology. Again, Millennium misrepresents the facts.

Ecology answered Interrogatory 13 on or about January 11, 2018. CP 389. The Interrogatory asks if Ecology possessed "modeling data related to, used, or considered in the [greenhouse gas] calculations contained in the FEIS"; the date Ecology obtained possession; and whether the modeling data was ready to be produced. CP 387.

Understanding the Interrogatory as relating to PDTS #42368, Ecology responded that it had already provided the data to Millennium in August and September 2017, a short time after Ecology received it from ICF. *Id.*

It is undisputed that Millennium did not tell Ecology it expected to receive SSRs or models in response to PDTS #42368 until May 2018, in

the context of litigation, when Millennium stated so in its motion to show cause. CP 119. Prior to that, Ecology did not know that such documents existed. CP 120. Thus, when Ecology answered the Interrogatory in January 2018, it understood the term “modeling data” as analogous to “data and assumptions,” which it had already produced in response to PDTS #42368. Again, Millennium misses the “gotcha” moment it seeks with this litigation.

## V. CONCLUSION

The Court should affirm the trial court’s denial of Millennium’s motion to show cause, and dismissal of its Public Records Act lawsuit.

RESPECTFULLY SUBMITTED this 4th day of February 2019.

ROBERT W. FERGUSON  
Attorney General

*s/ Emily C. Nelson*  
EMILY C. NELSON, WSBA #48440  
Assistant Attorney General  
Attorneys for Respondent  
State of Washington  
Department of Ecology  
emily.nelson@atg.wa.gov  
360-586-4607

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, I certify that on the 4th day of February 2019, I caused to be served the State of Washington, Department of Ecology's Response Brief in the above-captioned matter upon the parties herein as indicated below:

JOSEPH VANCE PC	<input type="checkbox"/> U.S. Mail
MILLER NASH GRAHAM & DUNN LLP	<input checked="" type="checkbox"/> Email:
500 BROADWAY STREET, SUITE 400	joseph.vance@millernash.com
VANCOUVER WA 98660	<input type="checkbox"/> Hand Delivered
	<input type="checkbox"/> Overnight Express

DATED this 4th day of February 2019, in Olympia, Washington.

*s/ Meaghan Kohler*  
\_\_\_\_\_  
MEAGHAN KOHLER, Legal Assistant

## **TABLE OF APPENDICES**

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Public Records Request PDTS # 41839, dated May 22, 2017	APP0005-07
Public Records Request PDTS # 42368, dated July 7, 2017	APP0008-11
Public Records Request PDTS # 42527, dated July 27, 2017	APP0012-13

## Harmon, Heather

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**From:** CSD - Jon Sitkin <jsitkin@chmelik.com>  
**Sent:** Wednesday, May 17, 2017 11:07 AM  
**To:** PublicRecordsOfficer@ecy.wa.gov  
**Subject:** Public Records Request

- 1 **Sir or Madam:** Please find the following records request, with definitions supplemental directions and definitions below. An expeditious, installment response is anticipated. This request is intentionally narrowly focused on specific records identified above. Most of which are known to be or believed to be in the immediate possession of Ecology agency staff or consultants, such as ICF International. Accordingly, it is excepted that a reasonably timely response to this request would be completed within 14 calendar days (2 weeks).

The following Definitions are provided for clarity, for your convenience, to provide greater efficiency and speed in response to the request below:

### Definitions:

- i. **"Proposal"** means the Millennium Bulk Terminals – Longview LLC coal export terminal proposal located at 4028 Industrial Way, Longview WA
- ii. **"FEIS"** means the Final Environmental Impact Statement issued on April 28, 2017 for the Proposal.
- iii. **"AQ Analysis"** and/or **"Air Quality Analysis"** means Chapter 5.6 Air Quality Analysis in the FEIS.
- iv. **"DEIS"** means the Draft Environmental Impact Statement issued on April 29, 2016 for the Proposal.
- v. **"Ecology"** means the Washington State Department of Ecology.
- vi. **"Communication"** includes but is not limited to emails, letters, reports, memorandum, and file notes.
- vii. **"DPM"** means Diesel Particulate Matter.
- viii. **"AERMOD"** is the dispersion model referred to on page 5.6-19 of the FEIS.
- ix. **"Consultant"** includes and is not limited to ICF International and Berger ABAM,

## Records Requests

- 1) All records considered in the preparation of the AQ Analysis in the FEIS for the Millennium Bulk Terminals –Longview LLC coal export terminal proposal to evaluate and translate average, estimated and/or modeled DPM concentrations from stationary, mobile, line or other sources, and their respective relations to cancer risks. This request includes all records related to risk assessment calculations related the source based dose response relationship, i.e. the relationship between stationary, mobile and line sources.
- 2) All records related to the evaluation of, and the comparison of stationary sources and mobile or line sources, considered in the AQ Analysis related to diesel particulates from stationary and mobile or line sources. This would include all raw files, all records of factors considered, rejected and/or utilized, and all correspondence, file records and notes.
- 3) All spreadsheets that contain locomotive emission information and all back up data related thereto utilized or considered in the preparation of the AQ Analysis.
- 4) All data, inputs, assumptions, parameters considered, used or rejected, in relation to the AERMOD model and all model runs of the AERMOD including model runs that were rejected or modified, in relation to the AQ Analysis in the FEIS related to DPM released from stationary and mobile or line sources. This would include all raw files, all records of factors considered, rejected and/or utilized, and all correspondence, file records and notes.
- 5) All AERMET processing files for the modeling utilized in the AQ Analysis.
- 6) All surface and upper air meteorological files considered and/or applied in AERMOD.
- 7) All records detailing the following in relation to the AQ Analysis:
  - a. Location of meteorological stations
  - b. Location and characteristics of sources used to represent locomotive emissions
  - c. Location and height of receptors
  - d. Specification of surface roughness, albedo and Bowen Ration

### Supplemental Instructions Responding to this Records Request:

- 1 Unless otherwise specified, the period covered by this request is from February 2012 to the date of this request.

- 2 If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An detailed explanation of why full compliance is not possible should be provided along with any partial production.
- 3 In the search, retrieval and production of records in response to this request, such production is specifically directed to all such records in the possession of or used and considered by either the Department of Ecology and/or the consultants that prepared the Final Environmental Impact Statements, including ICF International and Berger ABAM, and any sub consultants to those entities.
- 4 In complying with this request, you are requested (and required) to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present employees, elected officials, consultants and representatives acting on behalf of the agency. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party, including but not limited to any consultant that prepared any component of the FEIS or the DEIS, including the AQ Analysis, and any record in the possession of ICDF.
- 5 When you provide the record, you should identify the source of the record, i.e. which employees or consultant's file and type of file.
- 6 The preference is to receive the records in a pdf electronic form whether on a thumb drive or a zip file. Documents produced in an electronic format should also be organized, identified and indexed electronically.
- 7 If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
- 8 If a document is withheld on the basis of privilege or exemption, provide a privilege log containing the following information concerning any such document:
  - a. the privilege asserted;
  - b. the type of document;
  - c. the general subject matter;
  - d. the date, author and subject of the record;

- e. the relationship of the author and agency to each other,
- f. the basis of the exemption, including statute, agency rule, policy and/or regulation
- g. the agency and the individual or individuals who made this determination of privileged or exemption,
- h. the date the determination was made, and
- i. the location of the record or portion thereof that was determined to be exempt or subject to privilege.

9 This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

**Thank you.**

**Jon Sitkin**

**Chmelik Sitkin & Davis P.S.**

**1500 Railroad Ave.**

**Bellingham, WA**

**360.306.3007**

## Harmon, Heather

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**From:** CSD - Jon Sitkin <jsitkin@chmelik.com>  
**Sent:** Monday, May 22, 2017 2:15 PM  
**To:** PublicRecordsOfficer@ecy.wa.gov  
**Subject:** Records Request Date May 22, 2017

**Sir or Madam:** Please find the following records request, with definitions and supplemental directions. An expeditious, installment response is anticipated. This request is intentionally narrowly focused on specific records identified above. Most of which are known to be or believed to be in the immediate possession of Ecology agency staff or consultants, such as ICF International. Accordingly, it is expected that a reasonably timely response to this request would be completed within 14 calendar days (2 weeks). Duplicate documents that are responsive to more than one request below are not sought.

The following Definitions are provided for clarity, for your convenience, to provide greater efficiency and speed in response to the request below:

### Definitions:

- i. **"Proposal"** means the Millennium Bulk Terminals –Longview LLC coal export terminal proposal located at 4028 Industrial Way, Longview WA
- ii. **"FEIS"** means the Final Environmental Impact Statement issued on April 28, 2017 for the Proposal.
- iii. **"AQ Analysis"** and/or **"Air Quality Analysis"** means Chapter 5.6 Air Quality Analysis in the FEIS.
- iv. **"DEIS"** means the Draft Environmental Impact Statement issued on April 29, 2016 for the Proposal.
- v. **"Ecology"** means the Washington State Department of Ecology.
- vi. **"Communication"** includes but is not limited to emails, letters, reports, memorandum, and file notes.
- vii. **"DPM"** means Diesel Particulate Matter.
- viii. **"AERMOD"** is the dispersion model referred to on page 5.6-19 of the FEIS.
- ix. **"Consultant"** includes and is not limited to ICF International and Berger ABAM,

### Records Requests

- 1) All records consulted or considered the co-lead agencies or their consultants to consider adjustment to the formulas for the percentage of time residents spend at home, as adjusted for life cycle in the preparation of the AQ analysis as it relates to the DPM from locomotives as increasing cancer risk in communities near or adjacent to railroad tracks.
- 2) All literature considered by the co-lead agencies or their consultant to review or utilize the 1998 CARB risk factor that evaluates the carcinogenic effects of diesel exhaust particles in relation to the AQ Analysis.
- 3) All records of communications including emails, letters, reports, memos, and file notes between the Department of Ecology and ICF International and/or BergerABAM re: the air quality analysis for or in the DEIS and AQ Analysis related to DPM from stationary, mobile, line or other sources.
- 4) All Ecology internal records including communications, including letters, reports, emails, memo, and file notes re: the air quality analysis for or in the DEIS and the FEIS related to DPM from stationary and mobile or line sources.

- 5) Copies of all scientific studies, including all back up data with raw files considered, evaluated by Ecology or its consultants in the preparation of the AQ analysis as it relates to the DPM from locomotives as increasing cancer risk in communities near or adjacent to railroad tracks in the State of Washington or any other state.
- 6) All of Diane Butorac's records, including but not limited to notes, emails, memorandum, text messages sent internally to Ecology staff or any third party, and all draft documents, including hand written or typed notes thereon related to the Millennium Bulk Terminals –Longview LLC coal export terminal proposal.
- 7) Copies of all written or electronic communications and all records related to verbal communications received from the following related to AQ analysis in the DEIS and/or the FEIS:
  - a. EarthJustice, including from their staff and/or attorneys
  - b. Riverkeepers, including from their staff and/or attorneys
  - c. Sierra Club, including from their staff and/or attorneys
  - d. Power Past Coal, including from their staff and/or attorneys
  - e. Daniel Jaffee, including from their staff and/or attorneys
  - f. Oregon Physicians for Social Responsibility
  - g. Washington Physicians for Social Responsibility

**Supplemental Instructions Responding to this Records Request:**

1. Unless otherwise specified, the period covered by this request is from February 2012 to the date of this request.
2. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. A detailed explanation of why full compliance is not possible should be provided along with any partial production.
3. In the search, retrieval and production of records in response to this request, such production is specifically directed to all such records in the possession of or used and considered by either the Department of Ecology and/or the consultants that prepared the Final Environmental Impact Statements, including ICF International and Berger ABAM, and any sub consultants to those entities.
4. In complying with this request, you are requested (and required) to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present employees, elected officials, consultants and representatives acting on behalf of the agency. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party, including but not limited to any consultant that prepared any component of the FEIS or the DEIS, including the AQ Analysis, and any record in the possession of ICDF.
5. When you provide the record, you should identify the source of the record, i.e. which employees or consultant's file and type of file.
6. The preference is to receive the records in a pdf electronic form whether on a thumb drive or a zip file. Documents produced in an electronic format should also be organized, identified and indexed electronically.
7. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

8. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
9. If a document is withheld on the basis of privilege or exemption, provide a privilege log containing the following information concerning any such document:
  - a. the privilege asserted;
  - b. the type of document;
  - c. the general subject matter;
  - d. the date, author and subject of the record;
  - e. the relationship of the author and agency to each other,
  - f. the basis of the exemption, including statute, agency rule, policy and/or regulation
  - g. the agency and the individual or individuals who made this determination of privileged or exemption,
  - h. the date the determination was made, and
  - i. the location of the record or portion thereof that was determined to be exempt or subject to privilege.

Jon Sitkin  
Chmelik Sitkin & Davis P.S.  
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f: 360.671.3781

Legal Assistant to Jon Sitkin is Rhonda Vogelzang at ext. 211

**Confidential Communication:  
Attorney-Client Privileged and  
Attorney Work Product**

**Harmon, Heather**

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**From:** CSD - Jon Sitkin <jsitkin@chmelik.com>  
**Sent:** Friday, July 07, 2017 3:15 PM  
**To:** PublicRecordsOfficer@ecy.wa.gov  
**Subject:** Public Records Request

**Importance:** High

**Sir or Madam:** Please find the following records request, with definitions supplemental directions and definitions below. An expeditious, installment response is anticipated. This request is intentionally narrowly focused on specific records identified above. Most of which are known to be or believed to be in the immediate possession of Ecology agency staff or consultants, such as ICF International. Accordingly, it is expected that a reasonably timely response to this request would be completed within 14 calendar days (2 weeks).

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- iv. **“Ecology”** means the Washington State Department of Ecology.
- v. **“Communication”** includes but is not limited to emails, letters, reports, memorandum, and file notes.
- vi. **“Consultant”** includes and is not limited to ICF International and Berger ABAM,

**Records Requests**

Any and all records (including without limitation all communications) obtained, retained, considered, and/or utilized by Ecology or any of the Consultants in the preparation of the DEIS and/or the FEIS for the Proposal:

- 1) Data and assumptions related to supply curves and pricing for the US and Asia under all scenarios;
- 2) Data and assumptions related to Japan, S. Korea and Taiwan energy planning and greenhouse gas (GHG) mitigation and reductions;
- 3) Data and assumptions related to rail, vessel, and tug GHG emissions calculations and displacement;
- 4) Data and assumptions related to coal substitution for Powder River Basin coal; and
- 5) Data and assumptions related to net GHG emissions from natural gas substitution in the US under all scenarios.

### **Supplemental Instructions Responding to this Records Request:**

- 1 Unless otherwise specified, the period covered by this request is from February 2012 to the date of this request.
- 2 If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An detailed explanation of why full compliance is not possible should be provided along with any partial production.
- 3 In the search, retrieval and production of records in response to this request, such production is specifically directed to all such records in the possession of or used and considered by either the Department of Ecology and/or the consultants that prepared the Final Environmental Impact Statements, including ICF International and Berger ABAM, and any sub consultants to those entities.
- 4 In complying with this request, you are requested (and required) to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present employees, elected officials, consultants and representatives acting on behalf of the agency. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party, including but not limited to any consultant that prepared any component of the FEIS or the DEIS, including the AQ Analysis, and any record in the possession of ICDF.
- 5 When you provide the record, you should identify the source of the record, i.e. which employees or consultant's file and type of file.
- 6 The preference is to receive the records in a pdf electronic form whether on a thumb drive or a zip file. Documents produced in an electronic format should also be organized, identified and indexed electronically.

- 7 If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
  
- 8 If a document is withheld on the basis of privilege or exemption, provide a privilege log containing the following information concerning any such document:
  - a. the privilege asserted;
  - b. the type of document;
  - c. the general subject matter;
  - d. the date, author and subject of the record;
  - e. the relationship of the author and agency to each other,
  - f. the basis of the exemption, including statute, agency rule, policy and/or regulation
  - g. the agency and the individual or individuals who made this determination of privileged or exemption,
  - h. the date the determination was made, and
  - i. the location of the record or portion thereof that was determined to be exempt or subject to privilege.
  
- 9 This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

Jon Sitkin  
Chmelik Sitkin & Davis P.S.  
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e: [jsitkin@chmelik.com](mailto:jsitkin@chmelik.com)  
d: 360.306.3007  
p: 360.671.1796 ext. 214  
f: 360.671.3781

Legal Assistant to Jon Sitkin is Rhonda Vogelzang at ext. 211

**Confidential Communication:  
Attorney-Client Privileged and  
Attorney Work Product**

## Harmon, Heather

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**From:** CSD - Jon Sitkin <jsitkin@chmelik.com>  
**Sent:** Friday, July 28, 2017 10:48 AM  
**To:** PublicRecordsOfficer@ecy.wa.gov  
**Cc:** Beth Ginsberg (BSGINSBERG@stoel.com); Craig S Trueblood - K&L Gates (craig.trueblood@klgates.com); Tom Newlon (tanewlon@stoel.com); Eric Laschever; 'Tohan, Ankur K.'  
**Subject:** RE: Records Request to Ecology-- CLARIFICATION

Sir or Madam-I am providing the clarification to the request below as noted in underline and strikethrough.

Jon Sitkin  
Chmelik Sitkin & Davis P.S.  
1500 Railroad Ave.  
Bellingham, WA  
98225

e: [jsitkin@chmelik.com](mailto:jsitkin@chmelik.com)  
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Legal Assistant to Jon Sitkin is Rhonda Vogelzang at ext. 211

**Confidential Communication:**  
**Attorney-Client Privileged and**  
**Attorney Work Product**

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**From:** CSD - Jon Sitkin  
**Sent:** Thursday, July 27, 2017 2:33 PM  
**To:** 'PublicRecordsOfficer@ecy.wa.gov' <[PublicRecordsOfficer@ecy.wa.gov](mailto:PublicRecordsOfficer@ecy.wa.gov)>  
**Subject:** Records Request to Ecology  
**Importance:** High

**Sir or Madam:** Please find the following records request, with assisting definitions.

The following Definitions are provided for clarity, for your convenience, to provide greater efficiency and speed in response to the request below:

**Definitions:**

- i. **"Proposal"** means the Millennium Bulk Terminals –Longview LLC coal export terminal proposal located at 4028 Industrial Way, Longview WA
- ii. **"FEIS"** means the Final Environmental Impact Statement issued on April 28, 2017 for the Proposal.
- iii. **"DEIS"** means the Draft Environmental Impact Statement issued on April 29, 2016 for the Proposal.
- v. **"Ecology"** means the Washington State Department of Ecology, and Ecology staff.
- vi. **"Communication"** includes but is not limited to emails, letters, reports, memorandum, and file notes.
- vii. **"Consultant"** includes and is not limited to ICF International and Berger ABAM and their staff,

**Records Request:**

All records of communications including without limitations all emails, letters, reports, memos, and file notes created, sent or received between the Department of Ecology and ICF International and/or BergerABAM and their respective staff regarding the Proposal, including but not limited to the FEIS, including but not limited to the preparation, drafting and revising of the draft FEIS and the final FEIS, and comments received on the DEIS. The request is limited to such records received and/or created during the time period of April 29, 2016 and April 28, 2107.

An expeditious, installment response is anticipated. This request is intentionally narrowly focused on specific records and time period identified above. Most of which are known to be or believed to be in the immediate possession of Ecology agency staff or consultants, such as ICF International. Accordingly, it is expected that a reasonably timely response to this request would be completed within 14 calendar days (2 weeks). Duplicate documents that are responsive to the request are not sought.

Thank you.

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**Confidential Communication:  
Attorney-Client Privileged and  
Attorney Work Product**

**ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION**

**February 04, 2019 - 3:58 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52270-5  
**Appellate Court Case Title:** Millennium Bulk Terminals Longview, LLC, Appellant v. WA State Dept. of Ecology, Respondent  
**Superior Court Case Number:** 17-2-06442-1

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