Supreme Court No. 98428-0

SUPREME COURT OF THE STATE OF WASHINGTON

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, and COWLITZ COUNTY,

Petitioner,

and

BNSF RAILWAY COMPANY,

Respondent-Intervenor Below,

and

STATE OF WASHINGTON, SHORELINES HEARINGS BOARD, COWLITZ COUNTY HEARINGS EXAMINER,

Respondents Below,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Respondents.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S AND WASHINGTON ENVIRONMENTAL COUNCIL, ET AL.'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Sonia A. Wolfman, WSBA #30510
Thomas J. Young, WSBA #17366
P.O. Box 40117
Olympia, WA 98504-0117
360-586-6770
OID # 91024

EARTHJUSTICE

Kristen L. Boyles, WSBA #23806
Jan E. Hasselman, WSBA #29107
Marisa Ordonia, WSBA #48081
810 Third Ave., Suite 610
Seattle, WA 98104-1711
206-343-7340

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I. INTRODUCTION

Millennium Bulk Terminals-Longview seeks this Court's review of an unpublished decision by the Court of Appeals affirming the denial of shoreline permits for Millennium's massive coal export project. The Court of Appeals held that the Shorelines Hearings Board did not err when it considered the significant adverse impacts of the project at full buildout, as analyzed in unchallenged environmental review documents, rather than piecemealing the project and limiting its review.

Millennium has proposed to build a single, integrated coal export terminal, which it has broken into two interrelated construction stages. The Court of Appeals correctly recognized that consideration of the impacts of the project at full buildout was necessary to give effect to the mandates and purposes of the State Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA), where the full scope of the project and its impacts had been fully analyzed in an unchallenged environmental impact statement (EIS). The Court of Appeals decision is consistent with other appellate decisions as well as cases decided by the Shorelines Hearings Board. Moreover, the Court did not err in applying the summary judgment standard as there are no material facts in dispute. The EIS on which the permit denial was based was not challenged or appealed.

Because Millennium does not demonstrate that the criteria for review by this Court are met, review should be denied.

II. COUNTERSTATEMENT OF ISSUES

1. Did the Court of Appeals err in determining that summary judgment was proper, where the Court agreed with the Hearings Examiner and the Board that evidence addressing only Stage 1 impacts was inadequate because SEPA and the SMA mandate consideration of the full environmental impacts of the total project, and where there are no material facts in dispute as to the total impacts?

2. Did the Court of Appeals err in determining that the Hearings Examiner and the Shorelines Hearings Board properly considered the adverse impacts of the project at full buildout, rather than piecemealing the project and limiting their review to Stage 1?

III. STATEMENT OF THE CASE

A. Factual Background

Millennium seeks to construct the largest coal export facility in North America on the banks of the Columbia River in Longview, Washington. Coal would be brought to the site by train from mines in the Powder River basin in Wyoming and Montana, and the Uinta Basin in Utah and Colorado, stockpiled on site, and then loaded onto ships for transport to Asia, where the coal would be burned to generate electricity.

AR 0511. The vessel traffic from the facility would account for approximately one quarter of all vessel traffic on the Columbia River, with 1,680 vessel transits annually. AR 0677, 2063–64. At full buildout, eight trains, each a mile and a half long, would enter and depart from the site each day, resulting in 16 train trips per day in Cowlitz County and across Washington State. AR 2063–64. The project would operate 24 hours a day, seven days a week. *Id*.

As identified in Millennium's permit application, Millennium proposes to construct the facility in two stages.[1] AR 0472, 0608. According to the application, Stage 1 would involve construction of two docks, one ship loader and related conveyors, berthing facilities, a stockpile area including two stockpile pads, rail car unloading facilities, one operating rail track and eight rail storage tracks, as well as dredging of approximately 350,000 cubic yards of sediment necessary to accommodate deep draft vessels. AR 0472–77, 0530. Stage 1 includes construction of most of the infrastructure necessary to export 44 million

[1] This is not the first time that Millennium has attempted to piecemeal its project to hide its full environmental and public health impacts. In 2010, Millennium obtained a shoreline permit under the SMA to build a facility capable of exporting 5 million metric tons of coal each year. AR 0551–53. Later litigation revealed that Millennium planned to build a much larger facility, and that it intended to seek additional permits to expand the facility after the initial project was approved. *Id*. AR 0603–06. When Millennium's plans became public, Millennium withdrew its original application and submitted a revised shoreline permit application for a facility that, at full buildout, would be capable of handling 44 million metric tons of coal each year. AR 0553, 2063–64.

metric tons of coal. AR 0472–77. The facility would be operable upon completion of Stage 1, at which time the facility would have the capacity to ship up to 25 million metric tons of coal per year, and would utilize up to five trains and forty vessels. *Id*., AR 0533, 0536.

The application also describes the construction of Stage 2. AR 0472–77. Construction of Stage 2 would start immediately after Stage 1. Stage 2 involves the construction of an additional ship loader, two additional stockpile pads, and additional conveyors. Relative to the construction occurring during Stage 1, these are minor physical additions to the overall project. Operations at Stage 2 would add three additional trains and thirty additional vessels. AR 0533, 0536.

Acting as a co-lead under SEPA with the Department of Ecology, and under an agreement with Millennium, Cowlitz County hired a third party consultant to prepare an EIS. AR 1479, 1598. The EIS analyzed the project's impacts at full buildout (i.e., both Stage 1 and Stage 2), and concluded that the project will cause unavoidable, significant adverse impacts in nine resource areas. The EIS found that the project will cause an increased cancer risk to local residents, a high level of noise impacts to residential areas, an increase in rail and vessel accidents, and local traffic congestion with two hour delays in a 24-hour period. AR 1346, 1306–13, 1184, 1280, 1216. The project would block access to at least 20 federally

established tribal fishing sites on the Columbia River, impact tribal fish resources, and contribute to capacity exceedances on Washington's rail lines. AR 1106–11, 1176. The EIS also found that the project would have disproportionate adverse impacts on the minority and low-income populations in the neighborhoods near the project site. AR 1068–69. These conclusions in the EIS were made after a thorough analysis of the potential mitigation that might eliminate or minimize these impacts. AR 0518. The EIS was not challenged.

B. Procedural Background

The Cowlitz County Hearings Examiner held a three day open record public hearing on Millennium's shoreline permit application during which the Hearings Examiner allowed Millennium and the County the opportunity to present expert and fact witness testimony and exhibits. Respondents Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club, and Columbia Riverkeeper (collectively WEC) intervened and participated in the County hearing. During the hearing, Millennium repeatedly represented that it was not challenging the EIS, although most of its evidence attempted to contradict the EIS findings and was not specific to Stage 1. AR 0056, 2077. After consideration of the evidence presented, the Hearings Examiner found that Millennium failed to propose reasonable mitigation measures that would

sufficiently address the impacts identified in the EIS. AR 0021–40, 0047–59. In addition to the nine areas of significant adverse unavoidable impacts identified in the EIS, the Hearings Examiner also found that greenhouse gas emissions from the project would create a tenth significant adverse unavoidable impact that could not reasonably be mitigated. AR 0038–40. The Hearings Examiner's finding was based on Millennium's testimony that it would mitigate only half of 1 percent of the greenhouse gas emissions calculated in the EIS. *Id*. The Hearings Examiner made specific findings as to the inadequacy of the proposed mitigation, and concluded that the impacts were inconsistent with "virtually every one" of Cowlitz County's adopted SEPA policies. AR 0057–59. The Hearings Examiner exercised his substantive authority under SEPA, and denied the shoreline permits.[2] *See* RCW 43.21C.060.[3]

[2] The Hearings Examiner also concluded that the project was inconsistent with the Shoreline Management Act. AR 0040–42.

[3] RCW 43.21C.060 states "[t]he policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies . . . . *Any governmental action may be conditioned or denied pursuant to this chapter . . . .*" (Emphasis added.) The authority to condition or deny permits pursuant to SEPA has been repeatedly confirmed by courts over many decades in a variety of settings. *E.g., Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978); *Dep't of Natural Res. v. Thurston Cty.*, 92 Wn.2d 656, 601 P.2d 494 (1979); *Brinnon Grp. v. Jefferson Cty.*, 159 Wn. App. 446, 245 P.3d 789 (2011); *Adams v. Thurston Cty.*, 70 Wn. App. 471, 855 P.2d 284 (1993); *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 800 P.2d 380 (1990); *West Main Assoc. v. City of Bellevue*, 49 Wn. App. 513, 742 P.2d 1266 (1987). This is commonly referred to as "substantive SEPA" authority.

Millennium appealed the Hearings Examiner's denial of the shoreline permits to the Shorelines Hearings Board. Ecology, BNSF, Cowlitz County, and WEC intervened in the Board proceeding. Ecology and WEC filed motions for summary judgment on all legal issues, and Millennium moved for partial summary judgment. Millennium's main contention was that the Hearings Examiner should have limited his review to only those impacts that Millennium alleged were attributable to Stage 1 of the project, and that the Hearings Examiner's decision was erroneous because he had based his decision on the project's impacts at full buildout. AR 2074.

The Board rejected Millennium's argument that the Hearings Examiner was precluded from considering the impacts of the project at full buildout, and concluded that his exercise of substantive SEPA authority to deny the permits was not clearly erroneous. AR 2079–80. The Board also rejected Millennium's contention that there were facts in dispute regarding mitigation of the project's impacts. The Board stated that "the Hearing Examiner found that the conditions proposed in the Staff Report did not reasonably mitigate the identified impacts," and that "[t]he Hearing Examiner identified specific shortcomings he found in the proposed mitigation." AR 2086.

Millennium appealed the Board's decision to the Cowlitz County Superior Court, and respondents Ecology and WEC sought and obtained direct review by the Court of Appeals. The Court of Appeals affirmed the Board's decision upholding the denial of the shoreline permits. The Court of Appeals rejected Millennium's argument that the Hearings Examiner and the Board were required to ignore the impacts of the project at full buildout, finding it contrary to the prohibition on piecemeal review in SEPA and the SMA. *Millennium Bulk Terminals-Longview v. Dep't of Ecology,* No. 52215-2-II (Wash. Mar. 17, 2020) (slip op.) at 13–16.[4] The Court found that Stage 1 and Stage 2 were interrelated and interdependent, and that completion of Stage 1 would have a coercive effect on the approval of Stage 2. Slip op. at 16–17. The Court stated that to accept Millennium's argument that the project should be piecemealed "would effectively allow Millennium to nullify SEPA substantive authority" and "would dilute the SMA review process and public scrutiny of Millennium's Stage 1 permit application, in contravention of the purposes that the SMA was intended to achieve." Slip op. at 16.

[4] The Court of Appeals March 17, 2020 Unpublished Opinion is attached to Millennium's Petition for Review as Appendix A.

IV. AUTHORITY AND ARGUMENT

A. The Court of Appeals Correctly Applied Settled Law in Concluding That Summary Judgment Was Proper Where the Parties Do Not Dispute Material Facts, and Only Dispute the Legal Conclusions That Can Be Drawn From Millennium's Allegations Regarding Stage 1 Impacts

Millennium's argument that the Court of Appeals misapplied the summary judgment standard relies on the assumption that the project can be lawfully piecemealed. It cannot, for reasons explained in Section B below. Millennium's assertion that the impacts of Stage 1 could be mitigated is immaterial where SEPA and the SMA require consideration of the full scope of the project's impacts.

Millennium tries to reframe a legal disagreement regarding the relevance of its Stage 1 allegations as an issue of fact, misstating the Court of Appeals decision in the process. Petition for Review at 9–10. In fact, the Court of Appeals recognized that "the parties simply dispute what conclusions can be drawn from such undisputed evidence." Slip op. at 15. When "a determination is made by a process of legal reasoning from, or interpretation of the legal significance of, the evidentiary facts," courts label it a conclusion of law. *Goodeill v. Madison Real Estate*, 191 Wn. App. 88, 99, 362 P.3d 302 (2015) (citation omitted).

Millennium, not the Court of Appeals, misapplies the summary judgment standard. The Board may hear and rule on summary judgment

motions prior to a scheduled adjudicatory hearing, and here, Ecology, WEC, and Millennium all moved for summary judgment. In such summary judgment proceedings, parties may submit evidence. Slip op. at 21. While Millennium asserts that it would have presented additional evidence at the scheduled hearing, its litigation strategy decisions cannot undermine the use of summary judgment by the Board.

The Court of Appeals did not err in applying the summary judgment standard, where the parties simply dispute the legal conclusions that can be drawn from Millennium's allegations regarding Stage 1. As the Court of Appeals correctly recognized, the Board did not err in concluding that no genuine issues of material fact exist where Millennium's Stage 1 argument is predicated on Millennium's erroneous assertion that the project can be piecemealed. Slip op. at 14. Any dispute about what the impacts of Stage 1 are, or what mitigation is necessary for Stage 1, is immaterial because the project's impacts at full buildout—both Stages 1 and 2—must be, and properly were, considered by the Board. And because the EIS was not challenged, there are no material issues of fact regarding the project's impacts at full buildout, including the EIS findings that the project will cause numerous, significant and unavoidable adverse environmental impacts.

B. The Court of Appeals Decision Upholding the Board's Consideration of the Project at Full Buildout Is Consistent with Statute and Precedent and Provides No Basis for This Court's Review

This case presents a textbook example of a project proponent attempting to piecemeal its project in an effort to prevent review of the project's full environmental impacts. Such piecemealing—i.e., artificial division of a complete project into smaller segments—is prohibited under SEPA and the SMA. The Hearings Examiner, the Board, and the Court of Appeals all properly rejected Millennium's piecemealing arguments. The Court of Appeals' application of well-settled principles and precedent disfavoring piecemealing presents no conflict, and no other reason meriting this Court's review. *See* RAP 13.4.

The purpose of SEPA is not to generate information for its own sake but "to enable the decision-maker to ascertain whether they require either mitigation or denial of the proposal." *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990). Millennium's argument that the project must be reviewed in phases under the SMA is contrary to SEPA's mandate that an agency "be cognizant of and responsive to possible environmental consequences in their actions" and defeats the whole point of SEPA review. *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 847, 509 P.2d 390 (1973). The disclosure of the full

impacts of a project in an EIS would be meaningless if a permitting authority could not consider those impacts either during permit review or in exercising its substantive SEPA authority. "[T]he piecemeal consideration of environmental impacts from broader development plans, is one which strikes at the very core of both the State Environmental Policy Act and the Shorelines Management Act." *Appletree Cove Prot. Fund v. Kitsap Cty.*, No. 93-055, 1994 WL 905514, at *2 (Wash. Shorelines Hearings Bd. Oct. 6, 1994).

The Court of Appeals did not err in concluding that consideration of the project's impacts at full buildout was appropriate. The Court of Appeals correctly applied the law to the facts of this case. Since piecemealing under the SMA has been prohibited ever since the statute was enacted in 1972, Millennium's contrary contentions do not require review by this Court.

1. Both SEPA and the SMA prohibit piecemealing where a project is segmented to evade full environmental review and where approval of one phase would coerce approval of a subsequent phase

Piecemealing occurs when environmental review is conducted for only a portion of a project, and the remaining elements are reviewed later, when construction occurs. *Concerned Taxpayers Opposed to the Modified Mid-South Sequim Bypass v. Dep't of Transp*., 90 Wn. App. 225, 231 n.2,

951 P.2d 812 (1998). The concern with piecemealing arises when a large project is divided into smaller parts such that the environmental impact from each individual part appears insignificant, and the sum total impact from all the parts is never considered. *Id*. Additionally, piecemealing "is disfavored because the later environmental review often seems merely a formality, as the construction of the later segments of the project has already been mandated by the earlier construction." *Id*. As permits for individual segments are approved, they exert a "coercive effect" on the consideration of future segments, leading to incremental degradation of the environment. *Merkel,* 8 Wn. App. at 851.

SEPA prohibits piecemealing where "[p]roposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action . . . ." WAC 197-11-060(3)(b); *Indian Trail Prop. Owner's Assoc. v. City of Spokane*, 76 Wn. App. 430, 443, 886 P.2d 209 (1994). Parts of a proposal are closely related under SEPA if they: "(i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation." WAC 197-11-060(3)(b). SEPA also expressly prohibits "phased review" when "[i]t would merely divide a larger system into exempted fragments or avoid

discussion of cumulative impacts." WAC 197-11-060(5)(d)(ii). "Implicit in the statute is the requirement that the decision makers consider more than what might be the narrow, limited environmental impact of the immediate, pending action. The agency cannot close its eyes to the ultimate probable environmental consequences of its current action." *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

The SMA also prohibits piecemeal review of development. RCW 90.58.020 (enactment of SMA necessary "to prevent the inherent harm occasioned by piecemeal development of the shorelines"); *Merkel*, 8 Wn. App. at 849. The Shorelines Hearings Board applies criteria similar to SEPA, where project elements that are part of a single integrated plan of development must be reviewed together under the SMA. *Bhatia v. Dep't of Ecology*, No. 95-34, 1996 WL 538822, at *14 (Wash. Shorelines Hearings Bd. Jan. 9, 1996). The Board's test for impermissible piecemealing under the SMA and SEPA is whether a project has been divided into segments that are interrelated and interdependent or whether the approval of one aspect of the proposal will coerce an approval of a later stage of development. *Iddings v. Griffith*, No. 08-031, 2009 WL 1817902, at *12 (Wash. Shorelines Hearings Bd. June 22, 2009);

Jarvis v. Kitsap Cty., No. 08-001, 2008 WL 11462915, at *4–5 (Wash. Shorelines Hearings Bd. Apr. 8, 2008) (citing *Merkel,* 8 Wn. App. 844).

2. The Court of Appeals applied settled law to conclude that Stage 1 and Stage 2 are interrelated and interdependent, and that approval of Stage 1 would coerce approval of Stage 2

The record demonstrates that Millennium has consistently presented its proposed coal export terminal as a single integrated project that would be built in two stages. The project application describes the purpose and the objectives of the single "proposal" as being "to (1) make use of existing rail infrastructure (freight corridors) and an efficient, direct shipping route to Asia; and (2) reuse and redevelop an existing industrial terminal into an American Pacific Coast export terminal in Cowlitz County capable of exporting up to 44 MMTPY [million metric tons per year] of coal to meet international demand." AR 0474. The application states that the project will be constructed in a continuous sequence "5 to 8 years after the start date to allow for construction of both Stage 1 and Stage 2." AR 0477; *see also* AR 1664 (predicting commencement of operations in 2015 to "gradually ramp up" to a full 44 million metric tons per year by 2018, only three years later).

Moreover, Millennium and the County continued to rely on the economic benefits of the project at full buildout—that is, upon

construction of both Stages 1 and 2. AR 1581 (touting 30-year present value of tax revenues); AR 1660–64 (describing tax and job benefits); AR 1491–92, 1495, 1509 (same). The County conducted its environmental review of the project, and Millennium's proposed mitigation for the project, as a single integrated plan of development. The County staff report analyzed the entire project for compliance with the SMA, and assumed full buildout in analyzing the proposal against the local Shoreline Master Program policies and shoreline permit criteria. For example, the County considered the project's rail traffic at full buildout in evaluating the project's noise impacts, and considered the project's vessel traffic at full buildout in evaluating the project's impacts on recreational use of the Columbia River. AR 1480, 1485, 1493. The County also issued a single critical areas permit for Stage 1 and 2. AR 1448. Nowhere in the County staff report is there any justification or analysis supporting the segmentation of the project under the SMA. Further, the EIS reviewed the entire project without objection by Millennium, and Millennium seeks to permit it under a single authorization from the Corps of Engineers and from Ecology through a section 401 water quality certification. AR 0472, 0667–69. Millennium's proposal has an artificially imposed and contrived "phasing" in name only.

Contrary to Millennium's assertions, the decision by the Court of Appeals is not "novel," nor does it redefine or expand the concept of piecemealing. Petition at 8. The Court relied on and cited to settled law in correctly concluding that Stage 1 and Stage 2 are interrelated and interdependent. "Stage 1 involves the construction of a large coal export terminal, and Stage 2 involves far less construction but allows the terminal to vastly increase the amount of coal it processes. This is precisely the type of piecemealing that the legislature was concerned about." Slip op. at 17.

It is undisputed that a significant portion of the work that would be completed during Stage 1 is necessary for the successful completion of Stage 2, and is necessary for the facility to operate to its maximum capacity. Simply put, Stage 2 is dependent on Stage 1. Conversely, Stage 1 is dependent on Stage 2, where a large portion of the infrastructure built at Stage 1 would be underutilized until Stage 2 could be built. For example, the eight rail tracks proposed in Stage 1 are not necessary to park the five trains utilized in Stage 1. AR 1937. Similarly, one of the two docks that would be built in Stage 1 will be not be used for coal loading until Stage 2, and the dredging proposed in Stage 1 will accommodate the increased number of vessels that would enable the facility to increase its throughput to the maximum of 44 million metric tons. AR 0530–35. Given the

substantial developments proposed in Stage 1 that are not necessary for implementation of Stage 1, Stage 1 depends on Stage 2 to justify its implementation.

These undisputed facts also support the Court of Appeals' conclusion that approval of Stage 1 will coerce approval of Stage 2. Slip op. at 17. Stage 2 is not a separate project but is a necessary addition to Stage 1 for the facility to operate at full capacity. Upon completion of Stage 1, the facility would be significantly oversized for its throughput, calling into question its economic viability as a standalone operation. "The Applicant has determined an economically viable coal export terminal must have a throughput capacity of 40 to 50 million metric tons per year of coal . . . ." AR 2045–46. Economies of scale, and the sunk costs associated with the construction of nearly all of the infrastructure to support the facility's maximum throughput, would coerce approval of Stage 2.

Additionally, there is nothing uncertain about the final project here. In most situations, a project proponent seeks to limit the evaluation of scope of SEPA review at the beginning of the process, not at the end. *See, e.g., Merkel*, 8 Wn. App. at 847–48; *Bhatia,* 1996 WL 538822, at *8–9. Here, Millennium seeks to limit consideration of an already finalized, unchallenged, and comprehensive EIS. Allowing such an interpretation

would flip the purpose of an EIS on its head. To argue that the Court of Appeals should have limited review of the project to Stage 1 impacts turns the SEPA review process into a game, where Millennium may duck consideration of all the impacts it would cause by breaking the project in smaller sections for permitting.

The Court of Appeals was also correct in finding that piecemealing the project would dilute review under the SMA. Slip op. at 16. If the Court adopted Millennium's piecemealing argument and limited project review to Stage 1 impacts, the same rationale would then limit review of Stage 2 permits to the additional Stage 2 impacts only. Under this framework, the total cumulative impacts of the entire project would never be considered. Where phasing serves only to thwart full environmental review, as it would here, it is improper under both SEPA and the SMA. *Indian Trail Prop. Owner's Assoc.,* 76 Wn. App. at 443; *Merkel*, 8 Wn. App. at 850–51.

3. The Court of Appeals decision does not expand the rule against piecemealing

Millennium asserts, inaccurately, that the Court of Appeals decision marks an unprecedented departure from piecemealing cases decided by the Board. The cases discussed by Millennium are distinguishable on a number of grounds, the most notable being that none

of the cases cited involved a decision-maker's exercise of SEPA substantive authority based on findings of significant, adverse, and unavoidable impacts in an unchallenged EIS. Millennium's invocation of these cases fails to establish an issue of substantial public importance that warrants this Court's review.

Whether a proposed project is being impermissibly piecemealed is a fact-driven question. Slip op. at 14; *Jarvis,* 2008 WL 11462915, at *5–6. At least half of the Board cases relied upon by Millennium involve the construction of appurtenances to single family residences. Unlike this massive industrial facility, single family residences are exempt from the requirement to obtain a shoreline substantial development permit. RCW 90.58.030(3)(e)(vi). *See Iddings*, 2009 WL 1817902 (shoreline permit authorized for driveway in absence of building permit for house); *Scheyer v. Dep't of Ecology*, No. 98-66, 1999 WL 418004 (Wash. Shorelines Hearings Bd. June 16, 1999) (shoreline variance permit authorized in absence of building permit); *cf. Bhatia*, 1996 WL 538822 (bulkhead, septic system, road, and house should have been reviewed in a single permit where evidence demonstrated harm to shoreline would occur).

Unlike the facts in *Walker* and *King*, this case involves the construction of a single integrated facility in a single location that is not

part of a master site development plan with multiple and unrelated components. *Walker v. Point Ruston*, *LLC*, Nos. 09-013, 09-016, 2010 WL 235153 at *4, *13 (Wash. Shorelines Hearings Bd. Jan. 19, 2010) (approving mixed use development where SEPA review was properly phased, and where the permittee was required to obtain shoreline permits from each jurisdiction); *King v. Port of Vancouver*, No. 97-17, 1997 WL 804291 at *2, *4 (Wash. Shorelines Hearings Bd. Nov. 20, 1997) (approving filling of wetlands where specific development plans were unknown, and other unrelated facilities had already been built). *Jarvis* is also distinguishable, where the Board approved a dock by itself even though the proposal had originally included mooring buoys. The Board did not find piecemealing in *Jarvis* because unlike the facts here, where Stage 1 and 2 are thoroughly intertwined, "there [was] no showing of a linkage between permitting the current proposal and a possible future buoy project application." *Jarvis*, 2008 WL 11462915, at *5.

Millennium fails to identify a single case that comes close to the present facts, where a massive industrial facility was reviewed as a single integrated project under SEPA and by the local permitting authority, where the specific development plans for the entire proposal are known and have been fully analyzed in an unchallenged EIS indicating the project would have many significant, adverse, and unavoidable impacts, and

where phasing the project under the SMA would preclude consideration of the EIS's adverse findings at the permitting stage. The Court of Appeals correctly concluded that, under the facts presented here, Millennium's attempt to phase the project violates the prohibition against piecemealing in the SMA and SEPA.

Contrary to Millennium's arguments, the Court of Appeals decision does not require applicants of an actual phased project to obtain permits for all phases at once, nor does it preclude appropriate phasing of future development projects. It merely requires that the impacts of the entire project be considered when permits are sought for the first phase and the impacts of the entire project are known, and when the phases are interrelated or the first phase would coerce approval of a later phase. This has been the law in our state for decades. The Court of Appeals decision neither expands nor redefines the concept of piecemealing, and does not conflict with precedent.

V. CONCLUSION

This case involves the routine application of settled law. The only aspect of the case that is exceptional is the massive scope of the proposed project and its attendant environmental harms. The Court of Appeals followed uncontroversial precedent regarding the piecemealing of projects and summary judgment, and did not err in affirming the denial of the

shoreline permits. Millennium fails to make the case that review is appropriate under RAP 13.4(b), and the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 15th day of May, 2020.

ROBERT W. FERGUSON
Attorney General

SONIA A. WOLFMAN, WSBA #30510
Assistant Attorney General
sonia.wolfman@atg.wa.gov
THOMAS J. YOUNG, WSBA #17366
Senior Counsel
tom.young@atg.wa.gov
360-586-6770

Attorneys for Respondent
State of Washington, Department of Ecology

KRISTEN L. BOYLES, WSBA #23806
JAN E. HASSELMAN, WSBA #29107
MARISA C. ORDONIA, WSBA #48081
EARTHJUSTICE
810 Third Ave., Suite 610
Seattle, WA 98104-1711
206-343-7340 ext. 1033
kboyles@earthjustice.org
jhasselman@earthjustice.org
mordonia@earthjustice.org

Attorneys for Respondents
Washington Environmental Council, et al.

*Signed per email authorization 05/15/2020

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 15, 2020, I caused to be served the State of Washington, Department of Ecology's Answer in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

CRAIG TRUEBLOOD ANKUR TOHAN J. TIMOTHY HOBBS K & L GATES LLP 925 FOURTH AVENUE, SUITE 2900 SEATTLE WA 98104-1158	[x] Email: craig.trueblood@klgates.com; ankur.tohan@klgates.com; tim.hobbs@klgates.com; gabrielle.thompson@klgates.com; carol.bradford@klgates.com; ethan.morss@klgates.com
JONATHAN SITKIN CHMELIK SITKIN & DAVIS PS 1500 RAILROAD AVENUE BELLINGHAM WA 98225	[x] Email: jsitkin@chmelik.com; kbarnhill@chmelik.com
DOUGLAS E. JENSEN CHIEF CIVIL DEPUTY COWLITZ COUNTY PROSECUTING ATTORNEY HALL OF JUSTICE 312 SW 1ST AVENUE KELSO, WA 98626	[x] Email: jensend@co.cowlitz.wa.us
MARK C. SCHEIBMEIR COWLITZ COUNTY HEARING EXAMINER 299 NW CENTER STREET PO BOX 939 CHEHALIS WA 98532	[x] Email: scheibmeir@localaccess.com
KRISTEN BOYLES JAN E. HASSELMAN MARISA C. ORDONIA EARTHJUSTICE 705 SECOND AVENUE, STE. 203 SEATTLE, WA 98104	[x] Email: kboyles@earthjustice.org; jhasselman@earthjustice.org; mordonia@earthjustice.org; apatel@earthjustice.org

JAMES M. LYNCH BART FREEDMAN K & L GATES LLP 925 FOURTH AVENUE, SUITE 2900 SEATTLE, WA 98104-1158	[x] Email: jim.lynch@klgates.com; bart.freedman@klgates.com
LISA PETERSEN ASSISTANT ATTORNEY GENERAL LICENSING & ADMINISTRATIVE LAW DIV. 800 FIFTH AVENUE, STE 2000 SEATTLE WA 98104	[x] Email: lisa.petersen@atg.wa.gov; lalseaef@atg.wa.gov

DATED this 15th day of May, 2020, at Olympia, Washington.

/s/ *Sonia A. Wolfman*
SONIA A. WOLFMAN, WSBA #30510

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98428-0
Appellate Court Case Title:	Millennium Bulk Terminals-Longview, LLC v. Dept.of Ecology, et al.
Superior Court Case Number:	18-2-00571-1

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- joan.hadley@klgates.com
- jsitkin@chmelik.com
- kboyles@earthjustice.org
- lalseaef@atg.wa.gov
- laura.white@klgates.com
- mary.klemz@klgates.com
- mordonia@earthjustice.org
- thomas.young@atg.wa.gov
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