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BEFORE THE COWLITZ COUNTY HEARING EXAMINER

IN RE THE MATTER OF MILLENNIUM
BULK TERMINALS—LONGVIEW, LLC
COAL EXPORT FACILITY

APPLICANT:
MILLENNIUM BULK TERMINALS—
LONGVIEW, LLC

COWLITZ COUNTY SHORELINE
SUBSTANTIAL DEVELOPMENT AND
SHORELINE CONDITIONAL USE
PERMITS

File No. 12-04-0375
SHORELINE PERMIT NO. 17-0992

RIVERKEEPER’S PRE-HEARING BRIEF
[Exhibit I-101]

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1 INTRODUCTION

2 Millennium Bulk Terminals—Longview, LLC seeks permits to build a project of
3 unprecedented size, impact, and controversy—a massive coal export terminal on the banks of the
4 Columbia River, capable of handling up to 44 million metric tons of coal a year, operating 24
5 hours per day, seven days per week, for 30 years. The terminal would generate up to 16 trips by
6 loaded and unloaded trains along rail corridors in Washington, Oregon, Idaho, Montana, and
7 Wyoming each day, and would add approximately 1,680 transits per year of Panamax-class
8 vessels through the Columbia River estuary. It would present a sweeping range of adverse
9 impacts to Cowlitz County and the state as a whole, from clogged streets and unhealthy air, to
10 overburdened rail lines, to reduced Tribal fishing; the thousand-plus page Final Environmental
11 Impact Statement (“FEIS”) (Exhibit C-7) reviewed and analyzed this range of risks and harms.

12 Columbia Riverkeeper, Friends of the Columbia Gorge, Climate Solutions, Sierra Club,
13 Washington Environmental Council, Greenpeace USA, Association of Northwest Steelheaders,
14 Northern Plains Resource Council, Oregon Physicians for Social Responsibility, Washington
15 Physicians for Social Responsibility, and Western Organization of Resource Councils
16 (collectively “Riverkeeper”) oppose issuance of a Shoreline Substantial Development Permit and
17 Shoreline Conditional Use Permit for Millennium. In this proceeding, Riverkeeper will focus on
18 three critical issues.

19 First, the state and federal permitting processes for the Project have effectively been
20 terminated, as multiple permits have been rejected or otherwise suspended due to the
21 unprecedented threats posed by the scale of the project. Millennium has vowed to appeal these
22 denials, but faces lengthy legal battles to have any hope of resurrection. Proceeding on the
23 County permits in the interim—particularly when the Washington Department of Ecology is all
24 but certain to deny those permits under its Shorelines Management Act (“SMA”) authorities—is

1 a waste of the County's limited resources and confusing to the public.

2 Second, the FEIS found no fewer than nine significant, unmitigatable adverse impacts
3 arising from the project. Yet the Staff Report, Exhibit C-1, alternatively ignores or breezes over
4 these findings of harm. Significant, unmitigatable harm is precisely why the State Environmental
5 Policy Act ("SEPA") gives authority to the County to deny projects like this one, and that
6 authority should be exercised here.

7 Finally, for many of the same reasons, the project is inconsistent with County policies
8 governing shoreline use and critical areas. Millennium's attempt to bypass County Code
9 requirements, passed to protect the health, safety, and welfare of its citizens, should not be
10 countenanced.

11 I. STATE REGULATORS AND LEASEHOLDERS HAVE REJECTED THE PROJECT.

12 On September 26, 2017, the Washington Department of Ecology denied Millennium's
13 Section 401 Water Quality Certification *with prejudice*. Exhibit I-102, Ecology § 401 Denial
14 (Sept. 26, 2017). Millennium's project cannot proceed without this certification, nor can federal
15 agencies act on pending permit applications for federal permits. Ecology cited to the nine
16 unmitigatable adverse impacts discussed in the FEIS and a host of additional serious deficiencies
17 in Millennium's water quality mitigation plan and stormwater analysis. The agency questioned
18 whether Millennium had adequate water rights for its proposal, and whether the company had
19 adequately assessed the impacts of toxic cleanup on water quality at the site. In other words,
20 Ecology cited five separate grounds for denying § 401 Clean Water Act certification.

21 Within the past few days, Millennium filed an appeal to the Pollution Control Hearings
22 Board and a Cowlitz County Superior Court lawsuit challenging this decision. It has also
23 threatened to file a federal lawsuit. Out of dozens of challenges to Ecology § 401 certification
24 decisions, however, Riverkeeper is aware of only a single challenge that was successful. These

1 cases will take many months to resolve. It is a waste of time and fiscal resources for Cowlitz
2 County to push forward with review and hearing on this permit now. Moreover, it would be a
3 violation of the policies and purpose of the SMA to approve a shoreline permit where a § 401
4 water quality permit has already been denied due to shortcomings in water quality protection.
5 RCW 90.58.140 (development shall not be approved unless consistent with policies of the
6 Shorelines Management Act); WAC 173-27-150 (review criteria include need to be consistent
7 with policies and procedures of the SMA); RCW 90.58.020 (state policy enunciated).

8 Ecology’s denial follows two other agency decisions that also render the project
9 infeasible. On January 5, 2017, the Washington Department of Natural Resources (“DNR”)
10 denied an aquatic lands sub-lease assignment request, citing financial, environmental, and
11 experience/trust concerns with Millennium. Exhibit I-103, DNR Sub-Lease Denial (Jan. 5,
12 2017). Without this aquatic lands sub-lease, Millennium cannot build or operate its proposed
13 coal export terminal. Millennium has filed a lawsuit challenging this decision as well, and a
14 decision from the Cowlitz County Superior Court is expected soon. Appeals are expected
15 whatever the result. But Millennium’s situation is now even more dire, as on October 25, 2017,
16 DNR issued a second denial, this time denying authorization for Millennium to build the project
17 altogether. Exhibit I-104, DNR Construction Denial (Oct. 25, 2017). DNR’s denial was issued
18 pursuant to a provision in the aquatic lands lease that allows DNR to deny permission to build on
19 the site wherever such denial is “in the best interests of the State.”¹ As with Ecology, DNR cited
20 a multitude of different reasons why the project is not in the best interests of the state.

21
22 ¹ Millennium’s insistence that the export of millions of tons of coal and construction of new
23 docks is already authorized under the lease is factually incorrect. The dock references new docks
24 of 220 feet each—Millennium contemplates docks an order of magnitude larger. And whether or
25 not coal was “contemplated” on a list of possible products, a massive coal export terminal was
26 not, and the lease still requires approval from DNR for any “improvements” at the site.

1 As to the federal agencies, the process appears to be in limbo. Under the federal Clean
2 Water Act, the U.S. Army Corps of Engineers cannot issue necessary federal permits for
3 Millennium without a § 401 certification from the state. Since that certification has been denied
4 with prejudice, there is no path to receiving federal permits either. Normally in these situations,
5 the Army Corps denies permits until such time as a § 401 certification has been granted.

6 In short, this project has been rejected multiple times at the state level. It has no path to
7 getting federal permits. Disappointingly, the Staff Report—which has a section devoted to
8 “Other Permits and Approvals”—says nothing about these barriers to project implementation.
9 Cowlitz County should not waste its staff resources, or the time of the public, on a permitting
10 process for a project that cannot get requisite approvals from state and federal agencies.

11 **II. THE HEARING EXAMINER SHOULD DENY THE SHORELINE PERMITS UNDER**
12 **THE COUNTY’S SUBSTANTIVE SEPA AUTHORITY.**

13 SEPA authorizes Cowlitz County to deny the Shoreline Substantial Development Permit
14 and Shoreline Conditional Use Permit. Any state or local government may deny a proposed
15 action solely because the action conflicts with the policies of SEPA. RCW 43.21C.060. This
16 broad, substantive authority allows any government entity to deny a project when “(1) the
17 proposal would result in significant adverse impacts identified in a final or supplemental
18 environmental impact statement ...; and (2) reasonable mitigation measures are insufficient to
19 mitigate the identified impact.” *Id.*; see also WAC 197-11-660 (“Any governmental action on
20 public or private proposals that are not exempt may be conditioned or denied under SEPA to
21 mitigate the environmental impact”); WAC 197-11-030(1) (“The policies and goals set forth in
22 SEPA are supplementary to existing agency authority.”). The authority is echoed in Ecology’s
23 SEPA regulations, which also provide that any agency may deny a proposal under SEPA when it
24 finds that “reasonable mitigation measures are insufficient to mitigate the identified impact.”

1 WAC §197-11-660(f)(ii).

2 Here, the Hearing Examiner should deny Millennium’s shoreline permit because: a)
3 Cowlitz County has SEPA policies incorporated into its county code to protect the environment
4 and public health; b) the FEIS found that the project would result in significant adverse impacts;
5 and c) the FEIS acknowledged that reasonable measures cannot mitigate those impacts.

6 Remarkably, the County’s Staff Report either ignores the FEIS’s findings, summarily dismisses
7 them, or proposes alternative mitigation that is, in reality, no mitigation at all. This cannot
8 satisfy either SEPA or the County’s shoreline policies, and it will be the Hearing Examiner’s
9 obligation to closely probe the applicants’ assertions (and staff recommendations) that these
10 harms can be so readily ignored.

11 A. Courts Have Broadly Interpreted the Substantive SEPA Authority to Deny
12 Permits for Projects, Even When Projects Comply with All Other Laws and
13 Codes.

14 It is undisputed that a jurisdiction can deny a project under SEPA substantive authority,
15 even where projects otherwise comply with all relevant applicable codes. *See, e.g., Polygon*
16 *Corp. v. City of Seattle*, 90 Wn.2d 59 (1978). In order to properly invoke its substantive SEPA
17 denial authority, a decision-maker need only make a record which identifies the SEPA policy or
18 policies upon which it is basing its decision, conclude that there are environmental impacts
19 which cannot adequately be mitigated, and explain its reasoning. *Maranatha Min., Inc. v. Pierce*
20 *Cty.*, 59 Wn. App. 795, 803 (1990); *see also Cougar Mt. Assocs. v. King County*, 111 Wn.2d
21 742, 753 (1988); *Nagatani Bros. v. Skagit County Bd. of Comm'rs*, 108 Wn.2d 477, 482 (1987).
22 Indeed, adverse impacts included in a FEIS need not be specifically labeled “significant,”
23 provided the impacts are identified in the FEIS and the decision-maker explains why the impacts
24 warrant denial of the project. *West Main Assocs. v. City of Bellevue*, 49 Wn. App. 513, 523
25 (1987).

1 “Municipalities are necessarily vested with considerable discretion in implementing
2 SEPA policies.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 604 (1990). Indeed,
3 the Washington Supreme Court explicitly affirmed that “under the State Environmental Policy
4 Act of 1971 a municipality has the discretion to deny an application for a building permit
5 because of adverse environmental impacts even if the application meets all other requirements
6 and conditions for issuance.” *West Main Associates v. Bellevue*, 106 Wn.2d 47, 53 (1986)
7 (emphasis added). An appeals court similarly affirmed that “counties therefore have authority
8 under SEPA to condition or deny a land use action based on adverse environmental impacts even
9 where the proposal complies with local zoning and building codes.” *Donwood v. Spokane*
10 *County*, 90 Wn. App. 389 (1998).

11 Millennium claims that the only impacts the County can consider are those “associated
12 with the construction of the terminal that would be authorized by the requested permits.”
13 Applicant’s Response to Comments (Exhibit C-8 at 4). But it cites no authority for this
14 proposition, and it is incorrect as a matter of law. SEPA specifically requires consideration of
15 both the direct and indirect impacts of decisions. WAC 197-11-792; *Quinault Indian Nation v.*
16 *City of Hoquiam*, SHB No. 13-012c, Order on Summary Judgment (Dec. 9, 2013); *see also*
17 WAC 197-11-060(4)(b) (agency “shall not limit its consideration of a proposal’s impacts only to
18 those aspects within its jurisdiction, including local or state boundaries”). It makes no sense to
19 require the County to study indirect and cumulative effects like traffic, rail safety, noise, and
20 vessel accident risk if it could not act on that information. Decision-makers have denied permits
21 under this authority in a number of other contexts, many of which are similar to those of the
22 proposed Millennium terminal.²

24 ² *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69-70 (1978) (upholding denial of high-rise
25 project based on aesthetic, property values, and noise impacts); *Victoria Tower P’ship v. City of*

1 B. Cowlitz County Has Adopted SEPA Policies that Protect Many of the Values
2 Threatened by this Project.

3 Cowlitz County has adopted specific policies and procedures to govern denials under its
4 SEPA authority. *See* CCC §19.11.110(A) (“Cowlitz County is allowed to condition or deny
5 proposals if such decision is based on policies that have been identified and incorporated into
6 regulations, plans, or codes”). These policies are virtually identical to Ecology’s seven policy
7 mandates found in WAC 173-802-110(1)(b)(i-vii). Cowlitz County must:

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

23 CCC §19.11.110(B)(1). Cowlitz County further “recognizes that each person has a fundamental
24 and inalienable right to a healthful environment and that each person has a responsibility to
25

26 *Seattle*, 59 Wn. App. 592, 602 (1990) (upholding denial of 16-floor tower and mitigation to 8
floors); *State v. Lake Lawrence Pub. Lands Prot. Ass’n*, 92 Wn.2d 656, 659 (1979) (upholding
denial of development of 14-acre parcel because of effects on bald eagles); *Cook v. Clallam*
Cnty., 27 Wn. App. 410, 414 (1980) (upholding permit denial of commercial development in
rural area); *W. Main Associates v. City of Bellevue*, 49 Wn. App. 513, 521-23 (1987) (upholding
denial of permits based on historic/cultural impacts, view impacts, shadow impacts, traffic
impacts, and air impacts).

1 contribute to the preservation and enhancement of the environment. CCC §19.11.110(B)(2).³

2 Cowlitz County has incorporated by reference portions of its Land Use Codes, Building
3 Codes, and Environmental Codes into its substantive SEPA authority. CCC §19.11.110(b)(3).
4 Additionally, Cowlitz County has adopted specific policies pertaining to erosion control, noise
5 control, light and glare, road design and signing, debris on roads, aesthetics, safety, and state and
6 federal regulations. CCC §19.11.110(b)(4). For example, with respect to noise, the Cowlitz
7 County Code states “Inadequately controlled noise may adversely affect the health, safety and
8 welfare of the public, the value of property and the quality of the environment. Cowlitz County
9 may condition or deny proposals in order to reduce or prevent such adverse impacts.” CCC
10 §19.11.110(B)(4)(b).

11 In sum, Cowlitz County has broad, codified authority to deny a permit for a project on
12 substantive SEPA grounds, particularly with respect to the nine areas where the FEIS found
13 significant, unmitigatable adverse effects.

14 C. The Millennium FEIS and Other Evidence Identifies Multiple, Significant
15 Adverse Environmental Impacts That Cannot Be Mitigated.

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

23
24 ³ Ecology has similar substantive SEPA duties. WAC 173-802-110(1)(b)(i-vii) (seven policy
25 mandates); WAC 173-802-110(2) (authority to deny).

1 acknowledged these serious harms in their decisions rejecting authorization of this project.

2 Notably, the FEIS goes so far as to specifically characterize many impacts as both
3 significant, adverse, and unavoidable. In its table summarizing impacts requiring mitigation, the
4 FEIS identifies mitigation measures for each impact, and separately determines whether each
5 impact carries “Unavoidable and Significant Adverse Environmental Impact.” See FEIS Table
6 S-2. Even so, and despite its claim that the FEIS is no longer appealable,⁴ the County’s Staff
7 Report takes a remarkably dissembling approach to the FEIS’s findings. For starters, one must
8 read through dozens of pages of dense text before the staff even acknowledge the nine
9 “unmitigatable” findings, even they form the locus of the entire document. Then, the Staff
10 Report repeatedly ignores the FEIS findings with sweeping conclusions that the project will
11 cause no adverse harm. For example, the Staff Report claims that “construction activities would
12 not have disproportionately high and adverse effects on minority and low-income populations.”
13 Staff Report at 55. Such conclusion is hard to square with the FEIS, which explicitly states at S-
14 41, “the Proposed Action would have a disproportionately high and adverse effect on minority
15 and low-income populations.” The Staff Report observes that “the Project is not expected to
16 interfere with water dependent uses in this area of the river,” yet the FEIS documents significant
17 unmitigatable adverse impacts from increased shipping accidents and interference with Tribal
18 fishing. FEIS at S-42-43. Similarly, the Staff Report makes the extraordinary claim that the
19 “adverse environmental impacts of the proposed redevelopment are met or exceeded by the
20 benefits provided through mitigation.” Staff Report at 20; *id.* at 32 (“operations will therefore
21 have no significant adverse effect on the quality of life of county residents.”). But the FEIS says
22 exactly the opposite and finds extensive harm to the environment and human health *that cannot*

23
24 ⁴ Riverkeeper disagrees that the FEIS is no longer appealable and reserves its right to appeal in
the appropriate context.

1 *be mitigated.*

2 When the Staff Report finally acknowledges serious harms, it summarily dismisses them.
3 For example, without benefit of citation to any authority, the Staff Report asserts that the
4 “inability to meet an objective is not the same as failing to meet a regulatory requirement.
5 Failure to fully meet an objective is not sufficient reason to deny a permit.” Staff Report at 32-
6 33. Whatever the meaning of this platitude, it fails to grapple with the unprecedented level of
7 unmitigatable harm described in the FEIS. In perhaps its most inaccurate statement, the Staff
8 Report claims that the FEIS identifies potential mitigation measures that would eliminate adverse
9 impacts or reduce them below a level of significance. It is flatly wrong. The FEIS identified the
10 nine areas where significant impacts were *not mitigatable*. The Staff Report goes on to either
11 ignore or offer non-mitigation to avoid the conclusion that the project’s impacts warrant denial.
12 This hearing process cannot so easily circumvent SEPA and the FEIS’s findings.

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

15 Millennium would add 16 trains per day into and out of the Longview community.
16 Train-related noise impacts would be significant and unavoidable to residences near four at-
17 grade railroad crossings. Train-related noise includes operational noise as well as locomotive
18 horns sounded for safety reasons. Noise impacts would be particularly acute in the Highland
19 neighborhood, causing a disproportionately high adverse impacts on a minority, low-income
20 population. FEIS at S-41. The FEIS also concludes that, if the Federal Railroad Administration
21 does not approve a Quiet Zone near the terminal, “the impacts would be unavoidable and
22 significant.” FEIS at S-34-35.

23 Noise can have a significant negative impact on human health. Cardiovascular disease,
24 including increased blood pressure, arrhythmia, stroke, and ischemic heart disease; cognitive

1 impairment in children; sleep disturbance and resultant fatigue resulting in an increased rate of
2 work time accidents are perhaps the most difficult to modify but very easy to measure.

3 The Staff Report proposes mitigation of supporting a “quiet zone” along the Reynolds
4 lead. Staff Report at 18. Such a designation could mitigate the noise impacts found in the FEIS.
5 However, quiet zone status is decided by federal agencies, and it is not in the control of either the
6 County or the applicant. Accordingly, permits (if they are not denied outright) *should be*
7 *conditioned* on achieving quiet zone designation such that the project cannot begin operating
8 without it. However, the Staff Report makes no such suggestion, instead, calling for a “study” of
9 sound reduction options if the quiet zone is not implemented. But these options have already
10 been extensively “studied,” in the FEIS, which found noise to be unmitigatable without a quiet
11 zone. Further study will generate more paperwork, not reduce noise. The Hearing Examiner
12 should not allow non-mitigation like a “study” to effectively authorize serious impacts.

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

15 The FEIS found that increased diesel particulate matter would result in increased cancer
16 risk rates. FEIS at S-14. The modeled cancer risk rate in the FEIS found an increase for a
17 majority of the Highlands neighborhood of between 3 and 10 percent. FEIS at S-41, 5.6-20;
18 FEIS at Figure 5.6-3. Diesel particulate matter is associated with impaired pulmonary
19 development in adolescents; increased cardiopulmonary mortality and all-cause mortality;
20 measurable pulmonary inflammation; increased severity and frequency of asthma attacks,
21 emergency room visits, and hospital admissions in children; increased rates of heart attack in
22 adults, and an increased risk of cancer. Use of cleaner locomotives would reduce but not
23 eliminate diesel particulate matter in the Highlands neighborhood.

24 In evaluating the public interest, the Hearing Examiner must consider the conclusions of

1 the FEIS documenting disproportionate and unmitigatable impacts to Tribes and low-income and
2 minority communities. A Health Impact Assessment (“HIA”) is underway and, in turn, the FEIS
3 does not incorporate the HIA findings. Even without the HIA, the FEIS concludes that the
4 project’s impacts on public health are “unavoidable and significant.” FEIS at S-58. For example,
5 the FEIS found an increased cancer risk for people living near the terminal. The FEIS states:

6 Based on the inhalation-only health risk assessment, diesel particulate matter
7 emissions primarily from Millennium-related train locomotives traveling along
8 the Reynolds Lead, BNSF Spur, and BNSF main line in Cowlitz County would
9 result in areas of increased cancer risk. The maximum modeled cancer risk
10 increase in the City of Longview would be 50 cancers per million in the
11 Highlands neighborhood, a low-income and minority community. This impact
12 would constitute a disproportionately high and adverse effect on minority and
13 low-income populations and would be unavoidable and significant.

14 *Id.* at S-14. The FEIS goes on to conclude that, “[b]ased on an inhalation-only health risk
15 assessment, coal export terminal operations and Proposed Action-related trains would increase
16 the cancer risk associated with diesel particulate matter emissions.” *Id.* at S-35.

17 The Staff Report seeks to have it both ways on this issue. On the one hand, it claims that
18 the FEIS is final and its conclusions are binding. Yet at the same time, the Report simply rejects
19 the FEIS’s findings based on the applicant’s belief that the FEIS is wrong and that a new EPA
20 regulatory program will resolve the issue. The air quality issue was extensively studied and the
21 County and Ecology made well-supported findings with respect to cancer risks. The Staff
22 Report cannot simply wave those findings away based on Millennium’s preferences.⁵

23 ⁵ The Staff Report also treats the cancer findings dismissively, observing that an increase in 10
24 cancers per million would represent a small increase in the overall cancer risk in the County.
25 Staff Report at 70 (counting all cancers from all sources). Not only does this biased accounting
26 reveal it to be partisan in favor of the project, but it is startlingly insensitive. Even small
increases in overall cancer rates are devastatingly important to County residents who actually get
cancer.

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

4 Vessels serving Millennium would travel up and down the Columbia River, through areas
5 adjacent to and within the usual and accustomed Tribal fishing areas. Fishing access at both
6 designated and unmapped Tribal fishing access areas would be restricted. FEIS at S-17; 3.5-13
7 to 15. No mitigation measure can be implemented to eliminate these impacts.

8 Millennium proposes to build and operate the nation’s largest coal export terminal in the
9 Columbia River estuary, an area designated under Ecology’s water quality standards as spawning
10 and rearing habitat for salmon, primary contact recreation, and water supply for domestic,
11 industrial, and agricultural uses. WAC 173-201A-602. This area of the Columbia is also
12 protected for wildlife habitat, fish harvesting, and many other uses. *Id.*

13 Of particular concern is the use of the Columbia River for salmon spawning, rearing, and
14 harvesting—all protected designated uses. The FEIS makes clear that the project would
15 adversely affect *all* of these uses in ways that cannot be mitigated. Most prominently, the FEIS
16 finds that the project’s interference with Tribal fisheries harvest would be a significant adverse
17 impact. FEIS 3.5-20 (describing problems of access, and “difficult to quantify” potential
18 reductions in harvestable fish resources due to behavioral and habitat impacts).

19 The FEIS identifies numerous other harms to salmon spawning, rearing, and migration.
20 For example, the FEIS discusses the potential impact on wake stranding from the dramatic
21 increase in large ship traffic, and harm to habitat from dredging and pollution. *See generally*
22 FEIS § 4.7. While the FEIS does not explicitly find that harm to fisheries and water quality is
23 “significant and adverse,” the FEIS nonetheless describes project impacts that rise to the level of
24 violations of water quality standards. The fact that the impacts of Millennium’s project are
25 difficult to quantify (e.g., stranding of juveniles) does not mean that the project complies with

1 water quality standards. It calls for a more, not less, precautionary approach. Moreover, these
2 harms are particularly acute in the context of cumulative effects—with substantially increased
3 fish stranding, vessel noise, and other habitat impacts anticipated in the years ahead. FEIS at 6-
4 30, 6-53.

5 Multiple populations of salmon and other fish are protected as endangered or threatened
6 species under federal law due to their imperiled status. The federal and state governments, as
7 well as Tribes, are spending billions of dollars to restore this part of the Columbia for salmon
8 recovery. The Millennium project, in contrast, would set those efforts back. Indeed, authorizing
9 this project is arguably prohibited under federal law due to its impacts on listed salmon. 16
10 U.S.C. 1538 (prohibiting actions which result in death or injury, including habitat loss, of
11 federally listed species). To date, the Endangered Species Act (“ESA”) expert agencies—NOAA
12 Fisheries and the U.S. Fish and Wildlife Service (“FWS”)—have not issued Biological Opinions
13 for the Millennium project. However, in comments on the DEIS, the U.S. Fish and Wildlife
14 Service stated:

15 The Service believes that the Millennium Longview Coal Terminal project will
16 cause or result in significant coal dust deposition along the rail transport corridor.
17 We do not agree that the risk of accumulation in soils, sediments, and water is
18 negligible or insignificant. The Service expects that the proposed action will
measurably increase toxic pollutant concentrations in soils, sediments, and water,
and will very likely result in exposures, potential toxic effects, and impacts to the
Service’s trust resources.

19 U.S. Fish and Wildlife Service Comments on Millennium SEPA DEIS (June 13, 2016))
20 (emphasis added). FWS also recognized the project’s direct impacts to fish, wildlife, and their
21 habitats from increased marine vessel traffic (e.g., wake stranding of salmonids) and concludes
22 “[t]he applicant and SEPA co-leads have failed to identify mitigation measures that would
23 adequately avoid significant impacts resulting from wake stranding along the marine vessel
24 transport corridor.” *Id.*

1 The FEIS also finds:

- 2 • “Dredging and in-water work would result in temporary increases in suspended
3 sediment and turbidity.” FEIS at 4.5-21.
- 4 • “Release of creosote would occur from the removal of existing creosote-treated
5 timber piles associated with two pile dikes. Creosote is composed of more than
6 300 chemicals, including PAHs, which have been shown to be fatal to marine life
7 (Washington State Department of Natural Resources 2008) ...The removal of
8 creosote-treated piling would result in temporary suspension of sediments and a
9 potential long-term increase in the exposure of creosote in the project area.” *Id.* at
10 4.5-22.
- 11 • “Coal and coal dust could enter the Columbia River directly or via the
12 surrounding drainage channels from spills during loading or unloading or through
13 airborne transport of coal dust during operations. The extent of average annual
14 coal dust deposition was modeled and mapped (Chapter 5, Section 5.7, Coal Dust,
15 Figure 5.7-3). Coal dust is anticipated to deposit a maximum of 0.40 grams per
16 square meter per month (g/m2/month) in or adjacent to the project area. This
17 amount of deposition is well below the benchmark for dust nuisance impacts (2.0
18 g/m2/month), which is defined as the level of dust deposition that affects the
19 aesthetics, look, or cleanliness of surfaces. Annually, coal dust is anticipated to
20 deposit a maximum of 1.99 grams per square meter per year (g/m2/year) in or
21 adjacent to the project area, including Docks 2 and 3 in the Columbia River.
22 Additional information on these deposition levels is found in Chapter 5, Section
23 5.7, Coal Dust; the spatial extent of the maximum annual coal dust deposition
24 near the project area is shown in Figure 5.7-3.” *Id.* at 4.5-24.
- 25 • “While a release is likely to be relatively small (less than 50 gallons), locomotives
26 have a fuel capacity of 5,000 gallons and could potentially release fuel during
operations. Also, fuel trucks would visit the site as required during operations.
The frequency would vary based on usage and could range from once or twice per
day to once or twice per week. Fuel trucks typically have a 3,000- to 4,000-gallon
capacity. A spill could have potential impacts on water quality.” *Id.* 4.5-27.
- “Propeller wash increases the potential for scour and erosion of the sides and
bottom of the navigation channel, and thus, could cause temporary, localized
increase in turbidity. During transit of the Columbia River to and from Docks 2
and 3, the large propellers on cargo vessels would create turbulence close to the
river bottom that could erode bottom sediments. The propeller wash from
tugboats transiting to and from Docks 2 and 3 to assist cargo vessels would be
nearer the surface and would, thus, have less potential to result in scour or erosion
of bottom sediments.” *Id.* at 4.5-29–30.
- “Coal and fuel spills could occur if the cargo tanks on a vessel are ruptured during
such events as a grounding or collision; however, the potential for a vessel rupture
incident is low.” *Id.* at 4.5-30.

- 1 • “Day-to-day rail operations could release contaminants to stormwater, including
2 coal dust, metals, hydraulic and brake fluid, oil, and grease from track
lubrication.” *Id.*
- 3 • “Construction of the Proposed Action would result in the permanent loss of 24.10
4 acres of wetlands (Table 4.3-4). Construction activities would permanently fill
Wetlands A, C, Z, and P2 and a portion of Wetland Y (Figure 4.3-2) (Grette
5 Assoc. 2014d) to construct rail lines and coal handling facilities.” *Id.* at 4.3-11.
- 6 • “Placement of fill material to construct the proposed coal export terminal would
7 result in the permanent total loss of wetland functions across 24.10 acres of
wetlands (Table 4.3-4). The functions most affected would be water quality and
8 wildlife habitat, as evidenced by the rating system scores for the affected wetlands
(Grette Associates 2014d). Wetland scores for the Category III wetlands are
9 highest for the water quality and wildlife habitat functions. Wetland scores for
Wetland P2 (the only Category IV wetland) were low for all three functions.” *Id.*
- 10 • “All water quality and hydrology functions would be lost from Wetlands A, C, Z,
and P2, with a portion of those functions lost in Wetland Y.” *Id.*
- 11 • “Wetland Y vegetation would likely be affected by coal dust. The impact of coal
12 dust on vegetation would depend on dust load, climatic conditions, and physical
characteristics of the vegetation. Impacts could include blocked stomata, which
13 would reduce respiration and/or decrease transpiration; altered leaf surface
reflectance and light absorption; and increased leaf temperature due to optical
14 properties of the dust (Chaston and Doley 2006; Doley 2006:38; Farmer 1993).”
Id. at 4.3-4.

15 In short, Millennium’s increased vessel activity will cause harmful impacts to fish and
16 aquatic habitat, as well as non-mitigatable harm to treaty-reserved Tribal fishing rights and
17 access.⁶

18 The Staff Report misleadingly claims to propose mitigation on all issues. For impacts to
19 Tribal fishing rights and access, however, it simply repeats other mitigation measures taken to
20 reduce impacts to fish. Staff Report at 58. This is not mitigation; the FEIS considered such

22 ⁶ DNR, a state agency with special expertise under SEPA with regard to water resources and
23 water quality, submitted comments to Cowlitz County noting five categories of water quality
24 impacts caused by the project that were not adequately addressed in the FEIS, including river and
shorelands contamination from coal dust, operations, and coal spills. *See Exhibit I-105, DNR
SSDP Comment Letter (Oct. 6, 2017).*

1 measures and found them to be insufficient. The truth is that there is no mitigation that would
2 allow this project to go forward without creating serious adverse effects to Treaty reserved and
3 protected rights, and that reason alone demands project denial.

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

6 With the current track status on the Reynolds Lead and BNSF Railway spur, by 2028, the
7 FEIS predicts Millennium coal trains would increase the total gate downtime by over 130
8 minutes during an average day at six specific crossings. FEIS at S-33; 5.3-30. Even with
9 potential track upgrades, the FEIS identifies continued delay at four crossings, particularly
10 during peak traffic hours. These delays would delay emergency vehicles at at-grade crossings as
11 well. The FEIS does not identify any certain mitigation that could address this. The Staff Report
12 breezes past this concern with a proposal that the applicant “notify” local agencies when it
13 intends to start construction. Staff Report at 68. Of course, such notification will do nothing to
14 address, let alone mitigate, the actual traffic delay concerns.

15 *5. Increased rail transport would increase the train accident rate by 22*
16 *percent.*

17 The FEIS found that Millennium-caused trains would increase the train accident rate by
18 22 percent. FEIS at S-31, 5.2-8 (presenting a baseline of 4.30 average accidents per year and a
19 project-related average of 5.25 accidents per year). Here again, the Staff Report simply
20 disavows the findings of the FEIS. As noted above, its proposal to “notify” agencies of its
21 construction efforts will do nothing to reduce this increase in risks that put the health, safety and
22 welfare of the community at risk.

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

25 The FEIS found that Millennium would have significant adverse effects on vessel
26 transportation that cannot be mitigated. Millennium would add 1,680 ship transits per year to the

1 Columbia River. Added to the current 4,440 ship transits, Millennium would be responsible for
2 over one quarter of the traffic on the Columbia River. This increased vessel traffic would
3 increase the frequency of collisions, groundings, and fires by approximately 2.8 incidents per
4 year. A coal spill would have significant and unavoidable impacts to the environment and
5 people. While claiming that such effects can be mitigated, the Staff Report proposes only that
6 the applicant attend a safety meeting once a year and notify the County if it wants to start
7 bunkering (i.e. refueling) at the dock site. Staff Report at 69. Neither of these measures mitigate
8 any risks of collisions, groundings, fires, or coal spills.

9 7. *Air pollution, including greenhouse gas emissions, are inconsistent with*
10 *Cowlitz County's Public Health and Safety Standards.*

11 The Millennium project, if built, would be unable to comply with Cowlitz County's
12 public health and safety standards outlined in CCC §19.30.010 (legislative findings to
13 establish/join the Southwest Air Pollution Control Authority). Cowlitz County "deem[ed] it to
14 be in the best interests of the public to secure and maintain such levels of air quality as will
15 protect human health and safety and to the greatest degree practicable, prevent injury to plant and
16 animal life and property; foster the comfort and convenience of the county inhabitants; promote
17 the economic and social development of the county and facilitate the enjoyment of the natural
18 attractions of the county." According to the FEIS, toxic air pollutants like diesel particulate
19 matter would be emitted at the project site and the rail line. These kinds of air pollutants are
20 known human carcinogens and are linked to lung cancer, respiratory problems, asthma, heart and
21 attacks, and impaired lung growth in children, among other serious health concerns. FEIS at S-
22 35. These health effects would be especially severe for sensitive populations living along the rail
23 line, as there are no state or local regulations for diesel particulates from mobile sources. FEIS at
24 1-5.6, Table 1-2 (listing regulations, statutes, and guidance for federal, state, and local

1 governments on air quality control).

2 Moreover, the project would conflict with Washington’s goal to reduce its greenhouse
3 gas emissions. The FEIS concludes that the greenhouse gas impact of exporting 44 million tons
4 of coal varies significantly based on different assumptions but suggests that under the “preferred
5 scenario,” the impact would be just under 2 million tons of CO2 equivalent annually. This
6 amount is very significant (equivalent to adding 425,000 cars to the road annually) and far above
7 the thresholds of what should be considered acceptable at a time when the state is committed to
8 reducing carbon pollution. Emissions could be as high as 55 million tons of greenhouse gases,
9 substantially higher than Washington state’s entire greenhouse gas footprint from all sources.
10 The climate impacts alone demonstrate that the project is not in the public interest.

11 Washington adopted greenhouse gas reduction standards via legislation adopted in 2008.
12 See RCW 70.235.070(1)(a). The statute establishes that by 2020, emissions shall be reduced to
13 1990 levels. By 2035, greenhouse gas emissions are to be 25 percent below 1990 levels and by
14 2050, they are to be 50 percent below 1990 levels. This project is inconsistent with the state’s
15 responsibility to curb its greenhouse gas emissions and reduce the effects of climate change.

16 The FEIS did not find that greenhouse gases were an “adverse, unmitigatable” impact,
17 but only because of proposed mitigation that 100% of expected emissions would be mitigated.
18 Remarkably, however, the Staff Report does not recommend implementing the proposed
19 mitigation. Without it, the project’s significant greenhouse gas emissions are an unmitigated
20 adverse impact requiring denial.

21 D. Denial under SEPA Would Serve Cowlitz County’s Substantive SEPA Policies as
22 well as the County’s Overarching Duty to Protect the Health, Safety, and Welfare
 of Its Citizens.

23 Many of the impacts of this project—vast increases in train and vessel traffic, for
24 example—are intrinsic to the project itself, and cannot be reasonably limited without

1 fundamentally changing the project. Moreover, limitations on local government’s ability to
2 directly mitigate some effects mean that some potential mitigation measures to promote safety
3 may not be “capable of being accomplished.” For example, federal preemption prevents direct
4 regulation of rail carriers by state and local governments. *See, e.g.*, 49 U.S.C. 10501(b)
5 (providing that the Surface Transportation Board has exclusive jurisdiction over “transportation
6 by rail carriers”); *see also* 49 U.S.C. 20106(a)(2) (providing that laws and regulations related to
7 rail safety and security are generally preempted under the Federal Rail Safety Act with limited
8 exceptions). These significant impacts, including train horn blasts, vehicle and emergency
9 vehicle delays at rail crossings, and derailments leading to coal spills, would accordingly go
10 largely unabated if this permit is granted. The answer, of course, is not to simply acknowledge
11 or bemoan the limitations of federal preemption, but to take control of matters within the
12 County’s jurisdiction: that is, deny the permit based on substantive SEPA authority.

13 Finally, a substantive SEPA denial of Millennium’s shoreline permit application would
14 serve a number of Cowlitz County’s SEPA policy mandates. Most obviously, a denial would
15 “[f]ulfill the responsibilities of each generation as trustee of the environment for succeeding
16 generations” and “assure ... safe, healthful, productive, and aesthetically and culturally pleasing
17 surroundings.” WAC 173-802-110(1)(b)(i-ii); CCC §19.11.110(B)(1)(a-b). Cowlitz County
18 specifically recognizes noise as an impact that may adversely affect health, safety, and welfare.
19 CCC §19.11.110(B)(4)(b). For these reasons, the Millennium Bulk Logistics Terminal would be
20 incompatible with Cowlitz County’s policy mandates to protect the environment for future
21 generations and assure a safe and healthy environment.

22 III. THE PROJECT IS INCONSISTENT WITH COUNTY SHORELINE POLICIES.

23 The FEIS findings, as documented and amplified in decisions by Ecology and DNR,
24 further call into question whether this project can comply with County shorelines policy.

1 Applicable authorities include CCC §19.11 (Environmental Policy), §19.20 (Shoreline
2 Management), §19.15 (Critical Areas), and §16.25 (Floodplain Management). Again, the Staff
3 Report simply sidesteps these critical questions, putting the onus on the hearings process to
4 squarely address them.

5 A. The Proposed Project Conflicts with Cowlitz County’s Shoreline Management
6 Master Program.

7 Cowlitz County’s Shoreline Management Master Program (“SMP”) was adopted in
8 1977.⁷ The Master Program provides overarching policies that must be followed when the City
9 exercises its authority under the Shoreline Management Act. These regulations stem from the
10 recognition “that the shorelines of the state of Washington are among the most valuable and
11 fragile of its natural resources” Cowlitz County Shorelines Management Master Program,
12 page 1. Accordingly, the County promotes uses of the shoreline in this the following order of
13 preference:

- 14 1) Recognize and protect statewide interest over local interest.
- 15 2) Preserve the natural character of the shoreline.
- 16 3) Address uses which result in a long-term over short-term benefit.
- 17 4) Protect the resources and ecology of the shorelines.
- 18 5) Increase public access to publicly owned areas of the shoreline.
- 19 6) Increase recreational opportunities for the public on the shorelines.

20 The Master Plan also commands that “[w]hen considering development along, or any use of,
21 shorelines of statewide significance, special attention will be given to ensure that the state and
22 regional interests are reflected, as well as local needs and desires.” *Id.* at 2. The guiding policy
23 behind Cowlitz County’s shoreline management regulations emphasizes the need to prioritize

24 ⁷ Cowlitz County updated its Shoreline Master Program through a final November 2016 draft,
25 but until Ecology approves the update, the 1977 Master Program controls.

1 protection of the natural shoreline ecosystems and their resources, as well as promotion of the
2 statewide public's interest in shorelines, including the interest in increased public access and
3 recreational opportunities.

4 *1. Millennium does not meet the purposes of Cowlitz County's Shoreline*
5 *Master Program.*

6 In the case of Millennium's proposal, the proposed uses of the shorelines would provide
7 short-term financial benefit to one private company, in exchange for long-term adverse impacts
8 to the state's shoreline ecosystems, and adverse impacts to public access and recreational
9 opportunities. The shoreline permit should be denied because it does not fulfill the County's
10 stated policy goals for the permitting projects under the policy and provisions of the SMA or
11 Cowlitz County's SMP. See WAC 173-27-140(1).

12 a. Millennium does not protect statewide interests over local interest.

13 The County should not authorize Millennium to undertake the use or development
14 described of its shorelines because the proposed project would not protect statewide interest over
15 local interest. One example is the degradation of critical migration and rearing habitat for
16 juvenile salmonids, which provide commercial, subsistence, and recreational fishing
17 opportunities throughout the length of the Columbia River in Washington and in Washington's
18 costal ocean and Puget Sound. As discussed above, Millennium jeopardizes the lower Columbia
19 River and estuary, an area at the center of a regional and national effort to restore both vibrant
20 fisheries and endangered and threatened species. The Columbia River estuary is a federally-
21 designated Estuary of National Significance under the Clean Water Act's National Estuary
22 Program.⁸ The U.S. Environmental Protection Agency ("EPA") has designated the Columbia

23 ⁸ U.S. Environmental Protection Agency ("EPA"), *National Estuary Program in Region 10*
24 (online at: <http://yosemite.epa.gov/R10/ECOCOMM.NSF/6da048b9966d22518825662d00729a35/c7a2ab5e252f309688256fb600779ea6!OpenDocument>).

1 River as one of seven Priority Large Aquatic Ecosystems.⁹ The federal government, and public
2 and private entities, have invested billions of dollars to restore endangered and threatened salmon
3 in the Columbia River Basin.¹⁰

4 Millennium—with its 85-foot high, 1.5-million-ton pyramid of coal and parade of coal
5 ships—will degrade an ecosystem that is a local and regional treasure, a national priority for
6 watershed health and salmon recovery.

7 b. Millennium does not protect the resources and ecology of the
8 shoreline.

9 Neither will Millennium protect the resources and ecology of the shoreline. The project
10 vicinity is designated critical habitat for several species of federally threatened or endangered
11 species and used by many other species of conservation concern. The FEIS found significant
12 negative impacts on aquatic and near-shore habitat and aquatic life at and downstream from the
13 project site.

14 Ecology’s order denying Millennium’s Clean Water Act 401 certification includes
15 multiple findings describing how and why Millennium failed to demonstrate the project would
16 protect the resources and ecology of the shoreline. *See* Order #15417 at 13-18. To issue a CWA
17 § 401 certification, Ecology must have reasonable assurance that the Project as proposed will
18 meet applicable water quality standards and other appropriate requirements of state law.

19 Ecology concluded, “Millennium’s current application and supplemental documents fails to
20 demonstrate reasonable assurance.” For example, Ecology found:

22 ⁹ EPA, *Columbia River Basin: State of the River Report for Toxics* (Jan. 2009) (online at:
23 http://www2.epa.gov/sites/production/files/documents/columbia_state_of_the_river_report_jan2009.pdf.)

24 ¹⁰ Thom, R. *et al.*, *Columbia River Estuary Ecosystem Restoration Program, 2012 Synthesis Memorandum* (2013).

- 1 • “The draft wetland mitigation plan is inadequate and does not demonstrate that
2 the proposed mitigation will offset the Project’s wetland impacts.” *Id.* at 13.
- 3 • “Millennium has not provided a complete [credit-debit analysis for wetland
4 mitigation] to Ecology, thereby failing to demonstrate that the proposed
5 mitigation would be adequate.” *Id.* at 14.
- 6 • “Millennium’s submittals, including the submittal of September 20, 2017, did not
7 provide sufficient information to determine whether AKART [All Known,
8 Available, and Reasonable Methods of Prevention, Control, and Treatment] will
9 be met for both process and wastewater and stormwater generated for the
10 Project.” *Id.* at 15.
- 11 • “Millennium’s submittals did not include a detailed Tier II [antidegradation]
12 analysis for process wastewater and stormwater to determine whether the Project
13 has the potential to cause measurable degradation at the edge of the chronic
14 mixing zone.” *Id.* at 17.
- 15 • “Millennium’s submittals do not provide sufficient information to evaluate the
16 impact of the potential discharge of contaminated stormwater and ground water
17 during the construction and operation of the Project. As a result, Millennium
18 failed to demonstrate reasonable assurance that the Project will meet water quality
19 standards.” *Id.* at 18.

20 Ecology’s expert analysis on Millennium’s impact to water quality and designated uses
21 demonstrates that Millennium’s project would harm the resources and ecology of the shoreline.

- 22 c. Millennium will not increase public access or recreational
23 opportunities.

24 Millennium will not increase public access to publicly owned shorelines or recreational
25 opportunities for the public. *See* RCW 90.58.020(5), (6). As Cowlitz County’s SMP explains,
26 “[o]nce shorelines become occupied with permanent urban development, the number and quality
of recreational experiences available to the public often become severely limited.” Cowlitz
County Shoreline Master Program, p.12.

- 27 d. Millennium does not meet the SMP overall goals.

28 Millennium does not comply with the SMP’s Overall Goals 2 and 4 because it would not
29 “[m]aintain a high quality environment” or “[p]reserve and protect those fragile and natural
30 resources, and culturally significant features along the shorelines of Cowlitz County.” Cowlitz

1 County Shoreline Master Program, p.1. Construction and operation of a 44-million metric ton
2 per year coal export terminal in the lower Columbia River incompatible with maintaining a high
3 quality environment or protecting and preserving Columbia River salmon runs, which are among
4 the most important—and most fragile—of the natural and culturally significant resources along
5 the County’s shorelines.

6 Neither does Millennium comply with the SMP’s Overall Goal 5 to provide “safe ...
7 access for the public in the shorelines of Cowlitz County.”

8 2. *Erosion Control*

9 Cowlitz County’s environmental regulations specifically call out erosion as a concern due
10 to “subsequent loss of land and degradation of water quality from increased silt in lakes, rivers
11 and streams.” CCC 19.11.110(B)(4)(a). The FEIS reports that the construction of Millennium
12 project would require soil-disturbing activities which would both expose soil and result in soil
13 stockpiles. FEIS at 4.1-13, 4.1-14. The soil exposure would lead to sediment flowing into
14 nearby waters, increasing turbidity and adversely affecting water quality. Pollutants in the
15 sediment could also harm water quality. Even if control plans and best management practices
16 are fully implemented by Millennium, these mitigations would only reduce, and not eliminate,
17 the sedimentary impacts. FEIS at S-41, 4.1-17. Cowlitz County should reject these half-
18 measures and deny the shoreline permit.

19 B. The Proposed Project Is Inconsistent with Cowlitz County’s Public Health and
20 Safety Standards.

21 As the Staff Report demonstrates, one of the criteria to determine whether a Conditional
22 Use permit should be granted is whether there is a “substantial detriment to the public interest”.
23 The Report points to mitigation that does not exist and to the alleged economic benefits of the
24 project to claim that the overall impact of the project is positive. Staff Report at 46. In doing so,

1 it wholly ignores the findings of the FEIS, Ecology, and DNR, which all specifically found this
2 project not to be in the public interest. This hearing process should not so blithely dismiss the
3 project's inconsistency with the public interest, health, and safety.

4 *1. Air Pollution*

5 The Millennium project, if built, would be unable to comply with Cowlitz County's
6 public health and safety standards outlined in CCC §19.30.010 (legislative findings to
7 establish/join the Southwest Air Pollution Control Authority). Cowlitz County "deem[ed] it to
8 be in the best interests of the public to secure and maintain such levels of air quality as will
9 protect human health and safety and to the greatest degree practicable, prevent injury to plant and
10 animal life and property; foster the comfort and convenience of the county inhabitants; promote
11 the economic and social development of the county and facilitate the enjoyment of the natural
12 attractions of the county." According to the FEIS, toxic air pollutants like diesel particulate
13 matter would be emitted at the project site and the rail line. These kinds of air pollutants are
14 known human carcinogens and are linked to lung cancer, respiratory problems, asthma, heart and
15 attacks, and impaired lung growth in children, among other serious health concerns. FEIS at S-
16 35. These health effects would be especially severe for sensitive populations living along the rail
17 line, as there are no state or local regulations for diesel particulates from mobile sources. FEIS at
18 1-5.6, Table 1-2 (listing regulations, statutes, and guidance for federal, state, and local
19 governments on air quality control).

20 Moreover, the project would conflict with Washington's goal to reduce its greenhouse
21 gas emissions. The FEIS concludes that the greenhouse gas impact of exporting 44 million tons
22 of coal varies significantly based on different assumptions but suggests that under the "preferred
23 scenario," the impact would be just under 2 million tons of CO₂ equivalent annually. This
24 amount is very significant (equivalent to adding 425,000 cars to the road annually) and far above

1 the thresholds of what should be considered acceptable at a time when the state is committed to
2 reducing carbon pollution. Under some scenarios, emissions could be as high as 55 million tons
3 of greenhouse gases. This project is inconsistent with the state’s responsibility to curb its
4 greenhouse gas emissions and reduce the effects of climate change. As discussed above, the
5 FEIS found that greenhouse gas impacts were not a serious, unmitigatable impact only because it
6 assumed a 100% offset with emissions reductions verified by Ecology. The Staff Report does
7 not recommend adoption of this mitigation requirement, yet without it, the project just presents
8 more adverse harm that warrants rejection under the Cowlitz County Code.

9 2. *Noise Pollution*

10 Millennium would cause a significant increase in noise pollution along the rail line,
11 making it inconsistent with the Cowlitz County Code that states “[i]nadequately controlled noise
12 may adversely affect the health, safety and welfare of the public, the value of property and the
13 quality of the environment.” CCC §19.11.110(B)(4)(b). Communities along the rail line will
14 experience increased train horn noise as a result of this project. FEIS at S-35, 5.5-32, 33. The
15 rail line also impacts many sensitive receptors near grade crossings, such as residences.

16 3. *Hazardous substances, floodplain protection, and earthquake and
17 liquefaction risks.*

18 The shoreline permit should be denied for failure to comply with Cowlitz County’s
19 public health and safety standards. The Millennium project would be inconsistent with the
20 county code which variously requires public protection from hazardous substances. *See, e.g.,*
21 CCC 15.50, Illicit Discharge Detection and Elimination. Coal and coal dust are hazardous
22 materials under the County Code. *See* CCC §15.50.030 (definition of hazardous materials as
23 “any material, including any substance, waste, or combination thereof, which because of its
24 quantity, concentration, or physical, chemical, or infectious characteristics may cause, or

1 significantly contribute to, a substantial present or potential hazard to human health, safety,
2 property, or the environment when improperly treated, stored, transported, disposed of, or
3 otherwise managed.”). The problems with coal and coal dust are exacerbated by Millennium’s
4 location in a designated floodplain, FEIS at 4.2-13 and map on 4.3-14, as well as a geologic
5 hazard area, prone to liquefaction. FEIS at 4.1-7. 4.1-15.

6 Moreover, in denying authorization under § 401 of the CWA, Ecology specifically cited
7 the risk of releases of toxics from the ongoing work at the contaminated site. *See* Exhibit I-102.
8 Ecology § 401 Denial at 18. The failure to provide sufficient information on potential hazardous
9 releases from the site due to construction was yet another reason that Millennium had not
10 demonstrated “reasonable assurances” that the project would meet water quality standards. The
11 Staff Report, in contrast, ignores the issue altogether, finding that there would be no release of
12 hazardous materials.

13 C. The County Should Also Deny the Conditional Use Permit.

14 Cowlitz County should also deny Millennium a Shoreline Conditional Use Permit
15 (“CUP”). It is all but certain that the Department of Ecology will disapprove it if granted for the
16 same reasons as it denied the § 401 certification. RCW 90.58.140(10). Ecology routinely
17 disapproves CUPs issued by local governments when proposals fail to meet the criteria in the
18 SMA and SMP.¹¹ It seems unlikely that there is any other outcome under these facts.

20 ¹¹ *See, e.g., Ryan Hudson v. Ecology*, SHB No. 15-007, Final Findings of Fact, Conclusions of
21 Law, and Order, p.1 (2015) (Ecology disapproved CUP and variance issued by Snohomish
22 County); *see also, e.g., Jeff and Erin Wriston and Wahkiakum Cnty. v. Ecology*, SHB No. 05-
23 005, Findings of Fact, Conclusions of Law, and Order, p.1 (2005) (Ecology disapproved CUP
24 and variance issued by Wahkiakum County); *see also, e.g., Dennis and Roberta Youde v.*
Ecology, SHB No. 04-006, Order on Summary Judgment, p.3 (2004) (Ecology disapproved CUP
issued by San Juan County); *see also, e.g., Rodger Bennett et al. v. Ecology*, SHB No. 95-30,
Final Findings of Fact, Conclusions of Law and Order, p.2 (1996) (Ecology disapproved CUP
and variance issued by Town of Friday Harbor).

1 The same analysis and authority for substantive SEPA review and denial applies to
2 Ecology as it does to Cowlitz County, *see* Section II above. Indeed, part of Ecology’s recent
3 CWA § 401 denial rests on using its substantive SEPA authority to “fulfill the responsibilities of
4 each generation as trustee of the environment for succeeding generations; assure for all people of
5 Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
6 and attain the widest range of beneficial uses of the environment without degradation, risk to
7 health and safety, or other undesirable and unintended consequences.” WAC 173-802-110.

8 Moreover, as discussed above, the Millennium proposal would be an enormous cause of
9 greenhouse gas pollution, responsible for up to an estimated 55 million metric tons of CO_{2e} each
10 year. FEIS at 5.8-19, Table 5.8-10, *see also* FEIS Vol. III(c) Greenhouse Gas Emissions, Table
11 69 (April 2017) (estimating the Upper Bound of Average Annual Emissions to be 55.92 million
12 metric tons of CO_{2e}). The SMA’s first review criterion requires that all shoreline developments
13 “protect the statewide interest over local interest.” *See* WAC 173-27-140(1) (“Review criteria
14 for all development.”) referencing RCW 90.58.020(1). Adding a massive new source of
15 greenhouse gas pollution in Washington would sacrifice the statewide interest in healthy
16 shorelines and a stable climate.

17 CONCLUSION

18 Riverkeeper asks the Hearing Examiner to deny Millennium’s Shorelines applications
19 under the County’s substantive SEPA authority, the Shorelines Management Act, and the
20 Cowlitz County Code.

1 Respectfully submitted this 26th day of October, 2017.

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3 

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1 **DECLARATION OF SERVICE**

2 I, Aanal Patel, declare that on October 26, 2017, I caused to be served a true and correct
3 copy of the foregoing on the following by e-mail:
4

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6 Cowlitz County Hearing Examiner
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17
18 I declare under penalty of perjury under the laws of the State of Washington that the
19 foregoing is true and corrected.

20 Dated this 26th day of October, 2017, in Seattle, Washington.

21
22 /s/ Aanal Patel
23 Aanal Patel, Litigation Assistant