



**DEPARTMENT OF  
NATURAL RESOURCES**  
**OFFICE OF THE COMMISSIONER  
OF PUBLIC LANDS**  
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October 24, 2017

Mark Stiffler  
Northwest Alloys, Inc.  
201 Isabella Street  
Pittsburg, PA 15212

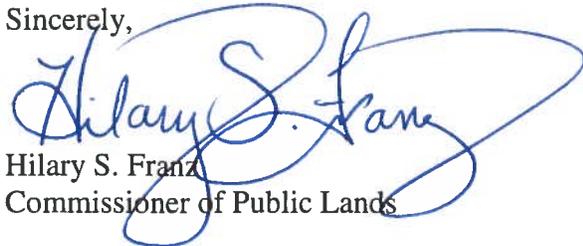
Re: Aquatic Lands Lease No. 20-B09222 Denial of Consent to Place Improvements

Dear Mr. Stiffler:

On August 29, 2017, DNR received a request from Northwest Alloys, Inc. for approval of plans for new improvements under Aquatic Lands Lease No. 20-B09222, which covers a portion of the bed of the Columbia River in Longview. The Lease contemplates that DNR will review Northwest Alloys' request and respond within 60 days. DNR has carefully considered Northwest Alloys' request and has determined that it is in the best interest of the State to deny the request at this time.

As described in detail in the attached Memorandum, DNR's decision to deny Northwest Alloys' request is based on several factors, including Northwest Alloys' failure to provide essential information, the Department of Ecology's decision to deny a permit necessary for construction of the improvements identified in the request, and DNR's previous denial of Northwest Alloys' sublease request related to the improvements.

Sincerely,



Hilary S. Franz  
Commissioner of Public Lands



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**October 24, 2017**

**TO:** NORTHEST ALLOYS, INC.

**FROM:** HILARY S. FRANZ, COMMISSIONER OF PUBLIC LANDS

**SUBJECT: REQUEST FOR APPROVAL OF IMPROVEMENTS FOR MILLENNIUM  
BULK TERMINALS – LONGVIEW, LLC, COAL EXPORT FACILITY;  
AQUATIC LANDS LEASE NO. 20-B09222**

Memorandum of Decision

On August 29, 2017, Northwest Alloys submitted plans and specifications for improvements to DNR under Aquatic Lands Lease No. 20-B0922 (Lease) requesting DNR's authorization under the Lease to construct the improvements. The plans and specification relate to the Millennium Bulk Terminals—Longview, LLC (Millennium) proposal to build a coal export terminal in Longview, Washington. As explained below, DNR has determined under Section 7.3(a) of the Lease that denial of Northwest Alloys' request is in the best interest of the State at this time.

**A. Aquatic Lands Management.**

The Legislature has delegated to DNR the responsibility of managing the State's 2.6 million acres of state-owned aquatic lands for the benefit of the public.<sup>1</sup> Recognizing that such lands are a finite natural resource of great value and irreplaceable public heritage that is subject to conflicting use demands,<sup>2</sup> the Legislature has directed DNR to strive to provide a balance of public benefits for all citizens of the state through its management decisions.<sup>3</sup> The Legislature has recognized the public benefits provided by state-owned aquatic lands include the following:

- (1) Encouraging direct public use and access;
- (2) Fostering water-dependent uses;
- (3) Ensuring environmental protection;
- (4) Utilizing renewable resources.<sup>4</sup>

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<sup>1</sup> RCW 79.105.010.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> RCW 79.105.030. When consistent with these criteria, generating revenue from use of state-owned aquatic lands is also a public benefit. *Id.*

DNR examines Northwest Alloys' request in light of the public benefits that DNR strives to provide through its management of state-owned aquatic lands.

**B. Aquatic Lands Lease No. 20-B09222.**

DNR implements its management authority through leases, which prescribe the terms and conditions under which the beds of navigable waters, such as those leased by Northwest Alloys, may be used.<sup>5</sup> In this case, the Lease authorizes Northwest Alloys to use of a portion of the state-owned bed of the Columbia River in Longview for a 30-year term that began January 1, 2008.

Northwest Alloys' request for approval of Millennium's plan for improvements falls under Section 7.3(a) of the Lease. Section 7.3(a) prohibits Northwest Alloys from building improvements on the leased property without DNR's prior written consent. Under Section 7.3(a), DNR may deny a request to build improvements on the leased property if DNR determines denial is in the best interest of the State. To obtain DNR's written consent to build improvements, Section 7.3(b) of the Lease requires Northwest Alloys to submit plans and specifications that describe the proposed improvements. Northwest Alloys did so on August 29, 2017.

The Lease abuts the upland property owned by Northwest Alloys, which was the site of an aluminum smelter built by Reynolds Metals Company in the 1940s. The state-owned aquatic lands covered by the Lease contain a dock built in the mid-1960s to import alumina for the Reynolds' facility. Northwest Alloys' parent company, Alcoa, Inc., acquired ownership of Reynolds Metals and, in 2005, transferred ownership of the upland property to Northwest Alloys. Northwest Alloys then entered into the Lease with DNR for the dock in 2008. At the same time Northwest Alloys entered into the Lease, it executed a sublease with Chinook Ventures, Inc. Chinook Ventures no longer operates on the site but remains a nominal subtenant of Northwest Alloys.

Section 2.1 of the Lease describes the use of the property authorized by the Lease. It provides that the property may be used for "three 220' ship docks" and an outfall pipeline and "no other purpose." Of the three 220' ship docks contemplated in Section 2.1 of the Lease, only the dock built by Reynolds Metals in the 1960s exists. Chinook Ventures planned the remaining two 220' ship docks identified in Section 2.1 but never built them.<sup>6</sup>

The docks and outfall addressed in Section 2.1 of the Lease are shown on the survey attached to the Lease as Exhibit A. When it signed the Lease, Northwest Alloys warranted under Section 1.2(a) of the Lease that Exhibit A provides "a true and accurate description of the . . . improvements to be constructed or already existing in the Lease Area." According to Exhibit A, the conceptual plan for docks and trestles contemplated by Chinook would have added

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<sup>5</sup> RCW 79.130.020.

<sup>6</sup> Chinook Ventures never submitted plans and specifications for the docks as required by the Lease and its sublease with Northwest Alloys to obtain DNR's consent.

132,950 square feet of new over-water structure to the existing 55,682 square-foot dock and trestle under the Lease. Exhibit A shows proposed docks that are approximately 525 feet long by 55 feet wide.

### **C. Plans and Specifications for Millennium’s Coal Handling Facility.**

According to the plans Northwest Alloys submitted for DNR’s review, Millennium would build and operate two new docks dedicated to coal export and associated conveyors and ship loaders that would be separate from the use of the existing dock. The project would be built in two phases which, when completed, would support a planned total throughput capacity of 44 million metric tons of coal per year. The first phase of the project would involve construction of the two new docks, a trestle, an onload conveyor, and a ship loader. The second phase of the project would add a second onload conveyor and ship loader.

The docks and related facilities Millennium proposed to build in the Lease area are significantly larger than the improvements contemplated by Chinook Ventures and depicted on Exhibit A to the Lease. According to Millennium’s plans, including 2017 revisions, its new docks and trestle would add 4.53 acres (197,326.8 square feet) of new over-water structure below the depth of -20 CRD on the Columbia River and .3 acres (13,068 square feet) of over-water structure above that depth. At a minimum, the 4.53 acres of new over-water structure below -20 CRD would be within the Lease area.<sup>7</sup> Millennium’s docks and trestle would thus add a minimum of 64,376.8 square feet more over-water structure than the proposed structures depicted on Exhibit A. The increase would result in nearly 50 percent more over-water structure than proposed in Exhibit A. A direct comparison of the docks, without trestles, reveals an even greater disparity. The docks planned by Millennium are each 90.5 feet wide and together are 2,060 feet long, for a total of 186,430 square feet.<sup>8</sup> Based on Exhibit A from the Lease, the docks contemplated by Chinook were each approximately 525 feet long and 55 feet wide (a total of 57,750 square feet). Millennium’s docks depicted in the plans and specifications submitted with Northwest Alloys’ request are thus over three times as large as the docks depicted in Exhibit A, which were warranted as the planned improvements for the Lease. Moreover, the size of Millennium’s docks does not compare favorably with the size of the existing dock or the “220’ ship dock” description of the authorized use in Section 2.1 of the Lease.<sup>9</sup>

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<sup>7</sup> A portion of the .3 acres of over-water structure above -20 CRD is within the Lease area. The Lease boundary on the landward (northern) side of the Lease area is the line of extreme low tide. On page 3 of Millennium’s Coal Export Docks Plan View submitted with the request, the line of extreme low tide is shown at 0.0 CRD. Thus, the portions of the trestle between -20 and 0.0 CRD are within the leasehold. Thus, the over-water structure in the Lease area under Millennium’s plans is somewhat greater than 4.53 acres.

<sup>8</sup> The Project Description Update, submitted with Northwest Alloys’ request, appears to contain an error on page 1 in the description of the changes to the trestle under Dock 2 Reconfiguration. The report states the length of Dock 2 to be 842 feet. 842 feet appears to be a reference to the length of the access trestle.

<sup>9</sup> The “220’ ship dock” refers to the “existing wharf” between the middle and south fender piles (dolphins) on the property, which is approximately 220 feet long. *See, e.g.,* August 30, 2010 Joint Aquatic Resources Permit Application for the Millennium Bulk Terminal Facility Maintenance and Repair Project (site plan). The size of the two “Proposed Docks” depicted on Exhibit A compares much more favorably with the 220’ ship dock description in Section 2.1 of the Lease.

DNR notes that Millennium recently reduced the length of the proposed docks. In the 2012 plans submitted by Northwest Alloys with its request, Millennium's proposed docks are shown extending to the downstream (western) limit of the leasehold.<sup>10</sup> According to the memorandum explaining 2017 changes to the plans submitted by Northwest Alloys, Millennium has proposed reducing the length of the docks, thus shifting the downstream (western) edge of the docks upstream 142 feet. The revised site plans, however, continue to show the downstream edge of the docks at the downstream edge of the leasehold. Accordingly, the location of the docks relative to the Lease boundary on at least one of the site plans is incorrect.<sup>11</sup> Leases for operations involving fixed structures, such as those planned by Millennium, must include the area physically encumbered by the improvements and the open water area needed to operate the facility.<sup>12</sup> The site plans provided by Northwest Alloys with its request are insufficient for DNR to determine whether the planned improvements and necessary area to operate the docks would be contained within the leasehold.

Millennium's plans are also inconsistent with Exhibit B to the Lease, which describes the authorized use of the docks Chinook Ventures planned. Millennium's new docks would be dedicated to a coal export terminal to maximize throughput of coal. Exhibit B to the Lease envisions a flexible import and export facility in which the new docks contemplated by Chinook Ventures would be used for multiple dry bulk and packaged products. According to Exhibit B, Chinook Ventures would have used one of the two new docks it planned as an open dock with no equipment on which cargo bagged or packaged for handling by crane would be loaded or offloaded from vessels. Exhibit B states the other dock planned by Chinook Ventures would have onload and offload conveyors used for multiple general dry bulk products.<sup>13</sup>

The size of the improvements planned by Millennium correlates to a substantially more intensive use of the leased property than previously contemplated under the Lease. According to the Final Environmental Impact Statement for the project, at full build-out, Millennium plans to use the two new docks on the leased property to load approximately 840 Panamax and Handymax

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<sup>10</sup> Millennium has presented the location of the docks in this position relative to the Lease boundary on several different occasions. *See, e.g.*, July 13, 2016 JARPA, Millennium Bulk Terminals—Longview, LLC (MBT-Longview) Coal Export Terminal ("2016 JARPA") (site plan); 2016 Joint Public Notice, NWS-2010-1225 (Dock Plan View); 2016 Millennium Bulk Terminals—Longview Draft SEPA Environmental Impact Statement, Appendix C (Overall Site Plan); 2017 Millennium Bulk Terminals—Longview Final SEPA Environmental Impact Statement, Appendix C (Overall Site Plan).

<sup>11</sup> Additionally, the copies of the site plans provided to DNR are poor quality scans that render much of the information provided in the site plans illegible.

<sup>12</sup> WAC 332-30-122(1)(b)(i).

<sup>13</sup> Dry bulk commodities include forest, agricultural, or mining products that are particulate in nature; are minimally processed, if at all; and are not bagged or wrapped. Dry bulk commodities are mainly transported as shiploads or trainloads and handled using large-capacity containers or storage pads and dedicated transfer machinery generally incorporating conveyor systems. Gateway Pacific Terminal, Revised Project Information Document, pp. 1-5, n.1 (March 2012), available at <http://www.co.whatcom.wa.us/DocumentCenter/Home/View/2797> (last accessed September 28, 2017).

vessels with up to 44 million metric tonnes of coal per year.<sup>14</sup> In the absence of the proposal, Millennium estimates that the leased property would be used for loading and unloading of approximately 14 vessels per year.<sup>15</sup> Historically, the existing dock on the property was used to unload alumina from approximately six to eight vessels per year.<sup>16</sup> More recently, any use of the existing dock has been limited following the announcement by Northwest Alloys' parent company, Alcoa, Inc., that it would close its Wenatchee Works, which imported the alumina unloaded at the dock.<sup>17</sup>

To build and operate the new terminal and provide continuous access for deep draft vessels would require a significant increase in the amount of dredging of the property. As noted by the U.S. Army Corps of Engineers, before Millennium's dredge project in 2011, the property was last dredged in 2000 to an authorized depth of -40 feet CRD.<sup>18</sup> To restore the berth at the existing dock to the depth authorized in 2000, Millennium's Corps permit allowed removal of 31,300 cubic yards of material.<sup>19</sup> According to the plans Northwest Alloys submitted, construction of Millennium's new facility would require dredging of a 41-acre section of Columbia River bed including new areas and areas outside Northwest Alloys' leasehold to -43 feet CRD (with a two-foot overage allowance), and removal of over 10 times the amount of dredge material than authorized in 2011.<sup>20</sup> In addition, annual or biannual dredging would be required to maintain the depth of the facility.

DNR notes the Lease applies only to the leased property. The Lease does not authorize activities on lands outside the leased area. Accordingly, a separate authorization from DNR would be required for dredging areas outside the leasehold. DNR has not received an application to conduct dredging outside the Lease area associated with the plans submitted by Northwest Alloys.

The plans submitted for DNR's approval by Northwest Alloys also fail to identify how Millennium would dispose of the significant amount of dredge material generated by the proposal. Previous permits for dredging of the leased property authorized flow lane disposal which places dredge materials back into the Columbia River.<sup>21</sup> The memorandum submitted with

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<sup>14</sup> Millennium Bulk Terminals—Longview Final SEPA Environmental Impact Statement (SEPA FEIS), 2-27 (April 2017); SEPA FEIS, 2-11.

<sup>15</sup> SEPA FEIS, 2-30, Table 2-5.

<sup>16</sup> SEPA FEIS, 2-7, 2-8, Table 2-1; Table 2-5.

<sup>17</sup> SEPA FEIS, 2-7, 2-8, Table 2-1.

<sup>18</sup> Chinook Ventures-Longview DMMP Suitability Determination, CENWS-OD-TS-DMMO, (November 4, 2010).

<sup>19</sup> *Id.*

<sup>20</sup> According to the plans submitted by Northwest Alloys, 320,000 cubic yards of material would be dredged and disposed of at an appropriate disposal site identified by the Corps.

<sup>21</sup> *See, e.g.*, Joint Public Notice, Northwest Alloys Inc./Millennium Bulk Terminals-Longview, LLC, NWS-2015-324 (September 29, 2015); Chinook Ventures-Longview DMMP Suitability Determination, CENWS-OD-TS-DMMO (November 4, 2010).

Northwest Alloys' request states disposal of dredge material in the flow lane of the Columbia River is no longer an option under consideration for this project. With respect to the disposal site for the dredge materials, the memorandum provides only that Millennium is "discussing designation of an appropriate disposal site with the U.S. Army Corps of Engineers."

From the information Northwest Alloys submitted, it appears Millennium may be contemplating removal of dredge materials from the Columbia River. DNR has an interest in ensuring that the State receives compensation for valuable material removed from the Columbia River<sup>22</sup> and that removal is in the State's best interest.<sup>23</sup> Removal of rock, gravel, sand, silt, and any other valuable material from the River requires a contract or lease from DNR that authorizes the removal of the valuable materials and fixes the compensation owed the State.<sup>24</sup> Northwest Alloys' Lease with DNR does not provide the required authorization. Section 1.1(c) of the Lease states that the Lease does not include any right to excavate or withdraw sand, gravel, or other valuable materials. Without a description of Millennium's plans to dispose of dredged materials generated by construction and operation of its planned facilities, DNR lacks sufficient information to evaluate Northwest Alloys' request.

Because the plans and specifications submitted by Northwest Alloys are inconsistent with the Lease and fail to provide essential information necessary to review the proposal, DNR has determined that it is in the best interest of the State to deny Northwest Alloys' request at this time.

#### **D. Sublease Denial.**

On January 5, 2017, DNR denied a request by Northwest Alloys for DNR's consent to a sublease to Millennium under the Lease. NWA and Millennium appealed DNR's denial under RCW 79.02.030. The appeal is pending in Cowlitz County Superior Court.<sup>25</sup>

Millennium's proposal does not present facts under which Millennium could build and operate its coal export facility as a contractor for Northwest Alloys without at least a sublease interest in the leased property. As Northwest Alloys has explained in its communications with DNR, Millennium is not acting as an agent of Northwest Alloys in seeking to build and operate the coal export facility:

Millennium's plans for infrastructure and maintenance upgrades to accommodate their coal handling plans . . . are solely Millennium's and Millennium alone needs to obtain whatever permits and approvals they need for . . . those plans. Northwest Alloys' involvement . . . is to ensure the plans

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<sup>22</sup> RCW 79.140.100.

<sup>23</sup> RCW 79.140.150

<sup>24</sup> *Id.*

<sup>25</sup> Cowlitz County Superior Court, Case No. 17-2-00125-3. In making its decision in this matter, DNR took into consideration the record filed in the appeal and incorporates the record here by reference.

provide for the continuing supply of alumina to Alcoa's Wenatchee Works and adhere to [the Lease]<sup>26</sup>

Northwest Alloys' negotiations with DNR confirm that the proposal for development of a coal export facility is Millennium's proposal.<sup>27</sup> Those negotiations are consistent with Millennium's permit applications, which show, as stated above, that Millennium is the project proponent and is seeking the necessary permits for the project on its own behalf.<sup>28</sup>

Millennium's work as a contractor for Northwest Alloys on the existing dock does not establish Millennium could build and operate its coal export terminal as a contractor for Northwest Alloys.

As noted by Millennium in multiple permit applications, the planned coal-handling terminal is separate from activities on the existing dock, which Millennium operates as a contractor for Northwest Alloys. Northwest Alloys maintains the existing dock to serve its needs as a conduit for alumina to Northwest Alloys' affiliate, the Wenatchee Works.<sup>29</sup> As Millennium explained in its 2012 and 2016 JARPA for its coal export terminal, use of the existing dock "will remain as a separate use and will operate independently from the coal export terminal on a separate portion of the property."<sup>30</sup>

Northwest Alloys' business relationship with Millennium also shows that Millennium is not merely acting as an agent of Northwest Alloys with respect to Millennium's coal export plans. As noted in several permit applications for the proposal, Millennium owns the improvements, assets, and other facilities on the adjacent upland property under "a long term ground lease with

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<sup>26</sup> March 25, 2011, letter from Northwest Alloys to DNR; *see also* February 11, 2011, letter from Northwest Alloys to DNR ("our request is separate and apart from . . . Millennium's proposed improvements to facilities within the aquatic lands."); December 23, 2010, email from Northwest Alloys to DNR; December 12, 2013, letter from Northwest Alloys' President to DNR ("As has been stated many times in the past, Northwest Alloys is not asking DNR to approve anything specific to coal or additional facilities. . .").

<sup>27</sup> E.g., March 9, 2016, letter from Millennium CEO to DNR (describing "MBT-Longview's plans for future operations."); December 3, 2014, letter from Northwest Alloys' President to DNR (describing "Millennium's 'Construction Proposal'").

<sup>28</sup> *See, e.g.*, January 23, 2012, letters from Millennium describing its attached Joint Aquatic Resources Permit Application for the Proposal; February 13, 2012, letter from counsel for Millennium to the United States Corps of Engineers (describing Millennium's plans to develop its project in two stages); February 22, 2012, Cowlitz County Building Permit Application ("Millennium . . . proposes to build a Coal Export Terminal . . ."); February 22, 2012, JARPA for "Millennium Bulk Terminals Longview, LLC (MBTL) Coal Export Terminal (Part 6 describing the proposal as Millennium's proposal); July 13, 2016, JARPA (Same).

<sup>29</sup> *See, e.g.*, February 4, 2016, letter from Northwest Alloys to DNR ("the dock, tanks, and unloading equipment are critical to Wenatchee's alumina supply. . ."); December 15, 2015, email from Northwest Alloys to DNR ("Longview will continue to be critical to Wenatchee supply chain."); March 25, 2011, letter from Northwest Alloys to DNR.

<sup>30</sup> February 22, 2012, JARPA, Millennium Bulk Terminals—Longview, LLC (MBT-Longview) Coal Export Terminal ("2012 JARPA"), Part 5m.; July 13, 2016, JARPA, Millennium Bulk Terminals—Longview, LLC (MBT-Longview) Coal Export Terminal ("2016 JARPA"), Part 5m.

[Northwest Alloys] to occupy, develop and operate the Property.”<sup>31</sup> Millennium’s right to occupy property and ownership of improvements under a long-term ground lease a part of its plans to develop the coal export terminal are inconsistent with a mere agency relationship with Northwest Alloys.<sup>32</sup> Additionally, Northwest Alloys’ request for and pursuit of a sublease for Millennium strongly supports the conclusion that Millennium requires an interest in the property to build and operate its facility.

Under the facts presented, Millennium cannot proceed with its plans to build and operate the coal export facilities on the leased property without a sublease from DNR.<sup>33</sup> Because Millennium cannot presently obtain a sublease, DNR has determined that denial of Northwest Alloys’ request is in the best interest of the State under Section 7.3(a) of the Lease at this time pending the results of the appeal of DNR’s sublease decision.

#### **E. Denial of Water Quality Certification.**

On September 26, 2017, the Department of Ecology denied Millennium’s request for water quality certification for Millennium’s planned coal export facility under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. The Department of Ecology’s decision is well reasoned and raises many significant concerns regarding Millennium’s proposal described in the plans and specifications Northwest Alloys submitted to DNR.

In its decision, the Department of Ecology makes a number of findings that are directly relevant to DNR’s management authority over state-owned aquatic lands. Consistent with concerns raised by DNR in its comments on Millennium’s permit application,<sup>34</sup> Ecology’s decision finds fugitive coal dust and spilled coal from Millennium’s planned facility and related rail transportation would increase suspended solids in the Columbia River.<sup>35</sup> Ecology also found construction activities, including dredging and pile driving, could harm fish resources and affect aquatic habitat.<sup>36</sup> As a result, Ecology concluded that Millennium’s proposal could reduce the number of fish surviving to adulthood and affect the number of fish available for harvest by Native American Tribes.<sup>37</sup>

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<sup>31</sup> 2012 JARPA, Part 2b; 2016 JARPA, Part 2b. DNR requested a copy of Northwest Alloys’ lease with Millennium in 2016, but Northwest Alloys has not provided it.

<sup>32</sup> According to Millennium, the company was established in 2010 for the sole purpose of acquiring Chinook Ventures’ assets; obtaining a ground lease from Northwest Alloys, and a sublease for the state-owned aquatic lands for purposes of its proposal. November 23, 2010, letter from Millennium to DNR; November 22, 2010, letter from Millennium to DNR.

<sup>33</sup> DNR has requested a copy of Northwest Alloys’ lease with Millennium, but the lease has never been provided.

<sup>34</sup> July 17, 2017, letter from DNR to Department of Ecology—SEA Program, Re 401 Water Quality Certification from Millennium Bulk Terminals Longview LLC.

<sup>35</sup> Order #15417, Corps Reference #NWS-2010-1225, Millennium Bulk Terminals-Longview (Order), p. 12 (September 26, 2017).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ; FEIS, 3.5.8.

In addition to environmental concerns over the impacts of fugitive coal dust and spilled coal, Ecology found that the project would have significant adverse impacts to access to the Columbia River. Ecology found the projected increase in 16 additional trains per day associated with Millennium's plans would restrict access to 20 tribal fishing sites along the rail route above Bonneville Dam and impact additional unmapped traditional access sites.<sup>38</sup>

Based on its findings regarding impacts to fishing by Tribes, Ecology concluded that Millennium's planned facility at full operation would result in unavoidable significant adverse impacts to tribal resources.<sup>39</sup> Ecology's conclusion directly relates to DNR's directives to ensure environmental protection and encourage direct public use and access through its management decisions.

In its denial, Ecology also found Millennium failed to provide sufficient information to evaluate impacts from wastewater discharge from operations at the planned coal export terminal. Ecology concluded that Millennium failed to adequately identify sources of wastewater, wastewater volumes, and pollutant concentrations related to its plans.<sup>40</sup> Wastewater discharge could have a direct impact on property managed by DNR and leased by Northwest Alloys. As found by Ecology, characterization of wastewater is necessary to evaluate the impact of discharges on the receiving water, including sediments on the leased property, and determine the need for effluent limits, monitoring requirements, and other special conditions in the Section 401 certification, which would protect the leased property.<sup>41</sup>

Ecology faulted Millennium for failure to provide sufficient information to determine whether its plans would satisfy obligations to treat wastewater and stormwater discharge with "all known, available, and reasonable methods of prevention and treatment ("AKART").<sup>42</sup> Ecology found that Millennium's AKART analysis failed to address wastewater from construction and operation of Millennium's planned facilities and specific best management practices for stormwater management.<sup>43</sup> Ecology also found Millennium failed to provide sufficient information regarding stormwater collection and treatment facilities (including for the dock and trestle), proposed modifications to the existing wastewater treatment system, and changes to hydraulic loading through the existing outfall structures which are on the leased property.<sup>44</sup> Millennium also failed to provide adequate information for analysis of mixing zones, construction impacts on water quality, and anti-degradation policy compliance.<sup>45</sup>

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<sup>38</sup> Order at 12.

<sup>39</sup> *Id.* at 13; FEIS 3.5.8.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 15-16.

<sup>45</sup> *Id.* at 16-17.

The issues identified by Ecology regarding wastewater and stormwater discharges are important considerations under the Lease. Under the Lease, Northwest Alloys acknowledged the goal of reducing discharges, including wastewater and stormwater, into the receiving waters of Washington State.<sup>46</sup> Section 2.5 of the Lease provides DNR the right to amend the terms and conditions of the Lease in the event any regulatory permit is modified in any manner that affects performance of any obligation related to the outfalls authorized under the Lease. DNR's right to amend the Lease specifically includes circumstances in which a permit is modified to allow for a change in the manner in which an outfall is operated. A 401 certification for planned improvements would thus affect DNR's review of plans and specifications under the Lease.

Even in the event Millennium successfully appeals Ecology's decision, the concerns raised in Ecology's Section 401 decision could result in significant changes to Millennium's plans. It is therefore important that the concerns are addressed as part of the Section 401 water quality certification process prior to consideration of the plans by DNR.

Denial of Northwest Alloys' request is also appropriate because the improvements identified in Northwest Alloys' request cannot be built without a Section 401 certification from Ecology. A Section 401 certification is required whenever construction or operation of a proposal may result in discharge into navigable waters. Section 401 prohibits issuance of a federal permit or license that may result in a discharge to waters of the United States unless Section 401 certification has been issued or waived. A Section 401 certification is thus a prerequisite for obtaining a federal permit for dredging and construction of improvements in navigable waters under Section 404 of the Clean Water Act<sup>47</sup> and Section 10 of the Rivers and Harbors Act.<sup>48</sup> Because Millennium's proposal involves construction and dredging in the Columbia River, Millennium must acquire a Section 404/Section 10 permit but cannot obtain the permit at this time.

Denial is consistent with DNR's rule and statutory authority that require an applicant to obtain permits before DNR authorizes a use of the bed of a navigable river. By rule, DNR may not authorize use of state-owned aquatic lands until the project proponent obtains all necessary federal, state, and local permits for the use.<sup>49</sup> Additionally, by statute, an applicant must obtain a permit from the United States Army Corps of Engineers, or other federal regulatory agency authorizing placement of the improvements, and file a copy of the permit with DNR before DNR may lease the beds of navigable waters for improvements.<sup>50</sup>

Based on Ecology's denial of the water quality certification for improvements identified in Northwest Alloys' request, DNR has determined under Section 7.3(a) of the Lease it is in the best interest of the State to deny Northwest Alloys' request at this time.

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<sup>46</sup> Lease Section 3.5.

<sup>47</sup> 33 U.S.C. § 1344.

<sup>48</sup> 33 U.S.C. § 403.

<sup>49</sup> WAC 332-30-122(1)(c).

<sup>50</sup> RCW 79.130.030.

**F. Conclusion.**

Northwest Alloys' August 29, 2017, request for approval of plans and specifications for construction of improvements under the Lease is denied. The plans identified in Northwest Alloys' request are inconsistent with the Lease and do not provide information necessary for DNR's review. In addition, the plans as submitted cannot be built because Ecology has denied a permit and DNR has denied a sublease request, necessary for construction. Denial is without prejudice. If, in the future, Northwest Alloys demonstrates that the required sublease and permits for the proposal have been acquired, Northwest Alloys may resubmit its request. Provided the request includes the information necessary for DNR's review, DNR will review the request under the Lease as re-submitted at that time.