

1
2
3
4
5
6
7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 MILLENNIUM BULK TERMINALS -
9 LONGVIEW, LLC, a Delaware limited
liability corporation,

10 Plaintiff,

11 v.

12 WASHINGTON DEPARTMENT OF
13 ECOLOGY, an agency of the State of
Washington,

14 Defendant.
15

Case No.

COMPLAINT FOR VIOLATION OF THE
PUBLIC RECORDS ACT

16 Plaintiff Millennium Bulk Terminals – Longview, LLC ("MBT-Longview")
17 brings this action for enforcement of RCW 42.56 ("Public Records Act") and the laws of the
18 State of Washington, and alleges as follows:

19 **I. INTRODUCTION**

20 The Washington Legislature and the Supreme Court have made it clear and
21 unequivocal: "Responses to requests for public records shall be made promptly by agencies
22" RCW 42.56.520. Additionally, where the Public Records Act is violated, trial courts must
23 award penalties . . . The Public Records Act is a forceful reminder that agencies remain
24 accountable to the people of the State of Washington...." *Yousoufian v. Office of Ron Sims*,
25 168 Wn.2d 444, 465-66 (2010). Administrative inconvenience or difficulty does not excuse
26 strict compliance with the Public Records Act. *Zink v. City of Mesa*, 140 Wn. App. 328, 337

1 (2007). "It is therefore imperative that government agencies timely comply with the mandates of
2 the [Public Records Act]." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d
3 89, 100 (2005). MBT-Longview brings this suit because its narrowly focused records requests
4 have not been responded to in a reasonable and timely manner.

5 **II. PARTIES**

6 1. MBT-Longview is a Delaware limited liability company. MBT-Longview
7 operates a bulk materials port on the Columbia River in Cowlitz County, Washington. MBT-
8 Longview is committed to the environmental cleanup and redevelopment of this site into a
9 vibrant, world-class port facility that will create family wage jobs and help keep Longview and
10 Cowlitz County working.

11 2. Washington Department of Ecology ("Ecology") is an agency of the State
12 of Washington.

13 **III. JURISDICTION AND VENUE**

14 3. The court has original jurisdiction over the subject matter of this action
15 pursuant to RCW 2.08.010 and RCW 42.56.550.

16 4. Venue is proper in this court because it is believed this is the county where
17 the requested documents are maintained.

18 **IV. FACTUAL BACKGROUND**

19 5. MBT-Longview is seeking to develop a world-class export facility at its
20 site on the Columbia River. As part of that, MBT-Longview is seeking to construct and operate
21 a coal export terminal ("Proposed Project").

22 6. On April 28, 2017, Ecology and Cowlitz County (the co-lead agencies)
23 issued the Final Environmental Impact Statement ("FEIS") for the Proposed Project.

24 7. MBT-Longview sought to obtain the records that Ecology and its
25 consultants reviewed and relied upon for the findings and conclusions in the FEIS. The records
26

1 sought by MBT-Longview should have been readily available to Ecology and its consultants
2 because the FEIS had just been completed.

3 8. Specifically, MBT-Longview, through its attorney Jon Sitkin, issued,
4 among other, the following public records request to Ecology:

5 A. PDTS #40713, dated May 17, 2017;

6 B. PDTS #41839, dated May 22, 2017;

7 C. PDTS #42368, dated July 7, 2017;

8 D. PDTS #42527, dated July 27, 2017, and clarified July 28, 2017.

9 9. Each of the requests was intentionally narrowly focused on specific
10 records. The records sought were known to be or believed to be in the immediate possession of
11 Ecology or Ecology's consultants. It was expected that a reasonably timely response to the
12 requests would be completed within two weeks.

13 10. Ecology has failed to provide "reasonable" estimates of the time Ecology
14 required to respond and failed to produce the requested records "promptly." For instance, PDTS
15 #41839 was issued on May 22, 2017. Nearly seven months later, Ecology has still not produced
16 all of the requested documents. Nor, has Ecology identified the scope of the documents that
17 have not yet been produced or provided any sort of estimate of when all responsive documents
18 will be produced. Consequently, nearly seven months later, MBT-Longview still has not seen
19 the records Ecology relied upon for the FEIS and has been given no indication when it will be
20 provided all of the documents.

21 11. It is also evident from the documents that have been produced that
22 Ecology has not produced all responsive documents that are in its possession, custody, or
23 control.

24 12. For instance, documents produced by Ecology show that Ecology deleted
25 from the FEIS critical findings from their hired expert that favored MBT-Longview when it
26

1 came to cancer rate increases. Ecology's expert, consistent with its conclusions in another FEIS
2 performed for Ecology on a different project, drafted the MBT-Longview FEIS to state:

3 There are no local or state regulations for diesel particulate matter emissions from
4 mobile sources. For this reason, the 10 in 1,000,000 increase in risk level is not a
5 threshold to determine significance of the impact.

6 13. The produced records show that an Ecology project manager revised the
7 text to strike the expert's opinion and replaced it with the following opposite conclusion:

8 While this regulation applies to stationary sources, not mobile sources such as
9 locomotives, the health impacts from increased risk are the same for stationary
10 and mobile sources. Therefore, an increased risk of 10 cancers per million is
11 considered a significant and adverse impact whether from a stationary or mobile
12 source.

13 14. However, no documents have been produced by Ecology to substantiate or
14 explain the use of the stationary standard for mobile sources. Nor, have any documents been
15 produced to explain why the expert's conclusion, which was presented by the third-party expert
16 in draft EIS form and was adopted by Ecology in an EIS for another project, was ignored in this
17 case.

18 15. Similarly, documents in response to the public records requests show that
19 Ecology's expert commented to Ecology that comparing train emissions to Cowlitz County
20 emissions is an erroneous approach:

21 This is not an apples to apples comparison. It compares a single facilities'
22 emissions with countywide emissions instead of those from a comparable
23 operation, almost always dwarfs the %. Recommend comparing with citywide
24 emissions (if such granular data exist), or leave it out as it is misleading.

25 16. Despite the expert's opinion that the comparison should be left out and that
26 the comparison was misleading, Ecology kept the comparison in the FEIS. However, again, no
27 documents have been produced by Ecology that discuss or explain the reason or basis for
28 disregarding their expert's opinion. Nor, have any documents been produced that would support
29 the use of the comparison.

1 17. Likewise, documents in response to the public records requests also show
2 that Ecology ignored their expert by choosing to misuse the greenhouse gas ("GHG") model in
3 the FEIS. In an August 10, 2016 e-mail, Ecology's expert stated that the GHG model could not
4 be used to recommend mitigation. Yet, in direct contradiction of their own expert, Ecology used
5 the results of the GHG model to recommend GHG mitigation in the FEIS. Again, no documents
6 have been produced that discuss or explain the basis for rejecting their expert's opinion. Nor,
7 have any documents been produced that would support the use of the GHG model to recommend
8 GHG mitigation.

9 18. Moreover, Ecology has yet to produce modeling data to back up their
10 GHG calculations so that MBT-Longview can replicate or verify the modeling results. In
11 addition, although Ecology has provided some diesel particulate matter ("DPM") model results,
12 Ecology has yet to produce the DPM model data that would allow MBT-Longview to
13 independently determine how many locomotives were figured into the cancer risk analysis. The
14 GHG modeling and DPM modeling were performed under contract to Cowlitz County as
15 technical support for the EIS. It is data that is typically provided as backup or reference data for
16 an EIS and should therefore be readily available to Ecology. However, nearly seven months
17 after the request for DPM model results and nearly five months after the request for the GHG
18 model data, this data has still not been produced to MBT-Longview.

19 **V. CAUSE OF ACTION: WASHINGTON PUBLIC RECORDS ACT**

20 19. MBT-Longview realleges the above paragraphs as though set forth here in
21 full.

22 20. Ecology is an "agency" as defined in the Public Records Act.

23 21. The documents requested by MBT-Longview are identifiable "public
24 records" within the meaning of the Public Records Act.

22. Ecology has not provided a reasonable estimate of the time required to respond to MBT-Longview's requests for records, and Ecology has not responded to such requests in a reasonable amount of time.

23. On information and belief, Ecology has violated the Public Records Act by withholding records that are not exempt from public disclosure or which should have been redacted rather than withheld in their entirety.

VI. PRAYER FOR RELIEF

Wherefore, MBT-Longview prays for relief as follows:

1. An order directing Ecology to produce all of the documents requested by MBT-Longview;

2. That MBT-Longview be awarded the maximum statutory per diem damages for willful violation of the Public Records Act;

3. For reasonable attorney fees and costs, pursuant to the Public Records Act;

and,

4. For such other and further relief that the court deems appropriate.

DATED this 4th day of December, 2017.

MILLER NASH GRAHAM & DUNN LLP

/s/ Joseph Vance, P.C.

Joseph Vance, P.C.

WSB No. 25531

joseph.vance@millernash.com

360.699.4771

Attorneys for Plaintiff
Millennium Bulk Terminals -
Longview, LLC