IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

MILLENNIUM BULK TERMINALS LONGVIEW, LLC, Plaintiff, v. WASHINGTON STATE DEPARTMENT OF ECOLOGY, and MAIA BELLON, Ecology Director, Defendants.	Case No. PETITION FOR REVIEW, COMPLAINT AND REQUEST FOR JURY TRIAL

I. INTRODUCTION

1. The U.S. and Washington State Constitutions guarantee all citizens the right to expect that their government will treat them fairly and in accordance with "the rule of law." Our society "is governed by rules, not individuals," and all property owners are entitled to have permit applications processed by neutral and objective decision-makers.

2. Millennium Bulk Terminals Longview, LLC ("Millennium" or the "Company") was denied that basic right. Millennium applied to the Washington State Department of Ecology ("Ecology") for a certification to construct and operate a Coal Export Terminal ("CET" or "Project") under Clean Water Act ("CWA") section 401, 33 U.S.C. § 1341. Admittedly, coal (as a commodity) is out of political favor with some in Washington State, including Washington's Governor, who has banked his political career on fighting climate change, and an Ecology

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Director who has publicly disparaged Millennium's proposal to export coal to the Far East and who continues to lobby against the Project. Although Millennium was entitled to the same fair and equitable treatment as any applicant, Ecology, under the direction of Director Maia Bellon, provided Millennium with a unique and unfair process, driven by political considerations. After running Millennium through regulatory hoops for many years, Ecology suddenly denied Millennium's certification application "with prejudice" (something that it has never done before) and did so (1) by invoking improper criteria under the State Environmental Policy Act ("SEPA"); and (2) without any *notice* to Millennium of Ecology's intent to apply SEPA or *opportunity* for Millennium to provide mitigation addressing Ecology's SEPA concerns.

3. Millennium brings this case to challenge the legally improper and unconstitutional manner in which Director Bellon and her Department treated Millennium's application for a CWA section 401 certification, a key state approval necessary for Project authorization.

4. Rather than applying its standard procedure for handling CWA section 401 applications, Director Bellon instructed Ecology staff to depart from decades of agency practice and to treat Millennium's certification application in a uniquely unfavorable and punitive manner.

5. Instead of answering the single question that Congress authorized Ecology to answer under CWA section 401—whether discharges caused by the construction and operation of Millennium's proposed Project would violate applicable state water quality standards—Ecology decided for the first time in its history to answer a different question altogether. Ecology decided instead to use SEPA to deny the certification "with prejudice" to, in effect, veto the Project using non-water-quality factors that are prohibited from consideration under CWA section 401(a)(1).

6. Even more fundamentally, Ecology and its Director denied Millennium's water quality certification without providing Millennium with any notice of its intent to use SEPA to permanently deny the certification, much less any opportunity to discuss its findings or

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opportunities for mitigation.

7. Ecology spent $15 million of Millennium's money and six long years in producing a 13,600-page Environmental Impact Statement ("EIS"), which unequivocally concluded that the Project would result in no significant environmental effect on water quality, fish, wetlands or aquatic resources, and that any potential impacts could be fully mitigated. But rather than relying on those water quality findings to answer the water quality compliance question posed by CWA section 401, Ecology used conclusions from the EIS about air emissions from trains, other interstate rail induced effects, and effects from increased vessel traffic on the Columbia River to summarily deny the certification.

8. Instead of giving Millennium the fundamental procedural and substantive process it was due, Ecology cherry-picked non-water-quality effects found in the EIS as a pretext to veto the water quality certification—and the Project—altogether. Ecology vetoed the Project even though it is well established in this state that SEPA may not be used "to block the construction of projects, merely because they are unpopular." *Parkridge v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359, 366 (1978).

9. Millennium now petitions this Court under the State Administrative Procedure Act ("APA"), RCW 34.05, to review and invalidate Ecology's Denial Order (also referred to herein as the "Denial"), which is attached hereto as Exhibit A. (In the Matter of Denying Section 401 Water Quality Certification, Order #15417- Corps Reference #NWS-2010-1225 (Sept. 26, 2017).) Millennium also petitions this Court to review a decision by the Pollution Control Hearings Board ("Board") improperly upholding that Denial, attached hereto as Exhibit B. (PCHB No. 17-090, Order On Summary Judgment.)

10. Millennium also petitions the Court to declare and adjudge under 42 U.S.C. § 1983 and RCW 64.40 that Ecology and Director Bellon violated state and federal law and the U.S. and Washington State Constitutions by intentionally misapplying the CWA and SEPA to deprive Millennium of its rights, privileges and immunities. Congress cabined Ecology's

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discretion under section 401(a)(1) to deny a certification—much less deny one "with prejudice"—by requiring Ecology to consider only those factors explicitly enumerated under CWA section 401(a)(1) in deciding whether to certify a project. Instead of applying those statutorily prescriptive factors as it has uniformly done throughout its 45-year history, Ecology here decided instead to "color outside the lines" by using SEPA to deny Millennium's water quality certification. Ecology decided to use SEPA in this manner even though water quality certifications are themselves exempt from SEPA through a rule promulgated by Ecology under WAC 197-11-800(a).

11. Even more egregiously, Ecology used this *sui generis* process without providing the Company notice of its intent to use SEPA in the CWA process, or any opportunity to demonstrate that the alleged unavoidable and significant adverse impacts identified in Ecology's EIS could be mitigated.

12. Through this action, Millennium asks this Court to redress the injuries Millennium has suffered as a result of Defendants' animus towards the Project and their intent to deprive Millennium of its most fundamental rights implicit in the concept of "ordered liberty." *Maytown Sand & Gravel, LLC v. Thurston County*, No. 94452-1 (en banc) (Wash. Sup. Ct., Aug. 9, 2018). Millennium asks this Court to award it declaratory and injunctive relief under 42 U.S.C. § 1983, as well as damages under RCW 64.40, as a result of the injuries it has sustained through Ecology and Director Bellon's actions.

II. PARTIES

13. Defendant Maia D. Bellon is the Director of Ecology and, as such, signed and adopted the Denial. Her office is located at Ecology headquarters, 300 Desmond Drive SE, Lacey, Washington 98503. This action is brought against Director Bellon in her official capacity. Her verified Twitter account is @maiabellon.

14. Defendant Ecology is an administrative agency of the State of Washington that is charged, among other things, with section 401 certification decisions under the federal and state

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CWA. Ecology was the agency responsible for drafting and issuing the Denial. Ecology's mailing address is P.O. Box 47600, Olympia, Washington 98504-7600, and its headquarters are located at 300 Desmond Drive SE, Lacey, Washington 98503. Ecology's verified Twitter account is @EcologyWA.

III. JURISDICTION

15. This Court has jurisdiction under RCW 43.21B.180, RCW 34.05.570(4), RCW 64.40, and 42 U.S.C. § 1983.

IV. VENUE

16. Venue is proper in this Court under RCW 4.12.020(b) because the causes of action identified below, or some part thereof, arose in Cowlitz County. Venue is also appropriate in this Court under RCW 34.05.514(1)(b) and (c). Millennium's principal place of business is Longview, Washington, and the property affected by the Denial and leased by Millennium is located in Cowlitz County.

V. EXHAUSTION OF ADMINISTRATIVE PROCEDURES

17. Millennium originally filed suit in this Court on October 24, 2017 challenging Ecology's Denial Order. This Court dismissed Millennium's suit on March 3, 2018, concluding that Millennium was required to exhaust, but had not exhausted, its administrative remedies.

18. Accordingly, Millennium pursued its administrative challenge to Ecology's Denial Order before the Board, which entered an order on August 15, 2018, granting Ecology summary judgment and dismissing Millennium's appeal. Millennium has timely satisfied the requirement to appeal from the Board's decision within 30 days of its entry under RCW 34.05.

19. The Board found that Ecology acted exclusively under SEPA, RCW 43.21C.060, in denying Millennium a water quality certification *with prejudice.* The Board determined (based on sworn testimony from Ecology that the agency did not rely on CWA section 401 in denying the certification *with prejudice*), that it was not necessary to address section III of Ecology's Denial Order. That part of the Denial Order listed the information that Ecology

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alleged was missing from Millennium's application, yet was allegedly necessary for certification. The Board improperly concluded that Ecology had the authority to deny Millennium's certification on the basis of SEPA alone—and non-water-quality effects found in the EIS—although CWA section 401 makes no mention of SEPA, and authorizes a denial based only on the explicit statutory water quality factors prescribed under 33 U.S.C. § 1341(a)(1).

20. The Board also incorrectly determined that although water quality certifications are SEPA-exempt, Ecology nonetheless had the authority to deny the certification with prejudice under RCW 43.21C.060. In so ruling, the Board disregarded the statutory bar against using SEPA to deny an action that was not required to undergo SEPA review in the first place. RCW 43.21C.110(1)(b).

VI. BACKGROUND

The CET Project Is Situated Near Existing Interstate Transportation Corridors

21. Millennium proposes to construct a CET at river mile 63 on the lower Columbia River in Longview, Washington.

22. The CET would be developed on 190 acres (the project area) on a 540-acre site that is leased by Millennium from Northwest Alloys ("NWA"), a wholly owned subsidiary of ALCOA, Inc. The lease was purchased in January 2011 because of its location on the river and its access to the Federal Navigation Channel, which has just been deepened by three feet to accommodate the type of deeper-draft vessels that the Company's customers plan to use. The CET would receive coal arriving over existing interstate rail lines, primarily from the Powder River and the Uinta Basins. The CET would transfer the coal to Panamax-sized vessels, which would, in turn, navigate down-river and across the Columbia River Bar and the Pacific Ocean to customers primarily in Japan and South Korea, as well as other countries in the Far East.

23. Congress appropriated hundreds of millions of dollars under the Water Resource Development Act of 1999 to improve navigation on the lower Columbia. The deepening project was explicitly aimed at attracting the type of operation that Millennium proposes to construct.

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24. The States of Washington and Oregon strongly supported the navigation improvement project, as did a group of local sponsor ports in both states, including the Ports of Longview, Kalama, Woodland, Vancouver, St. Helens and Portland. The sponsor ports committed millions of dollars in local funds and professional resources to see the deepening project through, understanding that a deeper channel would attract to their ports and communities the type of job-creating operation that Millennium proposes to build.

25. The navigation deepening project has led to an infusion of capital on the lower Columbia River at the Ports of Longview, Kalama and Vancouver. In Cowlitz County alone, those capital projects include the $230 million Export Grain Terminal at the Port of Longview, the $100 million expansion of Temco Grain Terminal, and the $7 million investment in rail infrastructure upgrades at the Port of Kalama. Channel deepening has allowed these public and private ports to respond to growing demand from the Pacific Rim and to effectively compete for Asian trade, as evidenced by the fact that the Port of Kalama and Northwest Innovation Works plan to invest more than $2 billion in the hopes of building a new methanol plant just upstream from where Millennium plans to build the CET. *See* https://nwinnovationworks.com/project/.

The CET Is a Typical Port Project

26. Millennium is one of the entities that plans to utilize the deepened Columbia River channel by building two new docks with ship loaders, and dredging in associated berthing areas on the river. As is typical for port projects, the Company proposes to also include rail car unloading facilities, and operating rail track, rail storage tracks, stockpile areas and conveyors—standard infrastructure for bulk product terminals on the lower Columbia.

27. The proposed CET site was specifically selected not only because it provided direct access to a deepened federal navigation channel, but because it is also proximate to existing interstate rail lines with existing capacity. Both BNSF and Union Pacific rail companies operate rail cargo service from the Powder River Basin across multiple states, including Washington, to the Pacific Ocean. Access to Cowlitz County's industrial waterfront, including

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the Port of Longview, Weyerhaeuser, Kapstone and other industries, as well as the proposed CET, occurs through operation of a short line run by the Longview Switching Company.

28. Millennium proposes to create suitable berthing areas by using standard dredging techniques. It also proposes to use standard pile driving and pile removal techniques commonly used on the lower Columbia and expressly approved by the National Marine Fisheries Service to protect water quality, listed species under the Endangered Species Act, and biota.

The CET Will Create Jobs and Tax Revenues for Cowlitz County

29. Longview has an unemployment rate that is significantly higher than the nation's and the state's. Longview is located within Cowlitz County. Cowlitz County's unemployment rate has stubbornly remained several points above Puget Sound unemployment rates, long after the Great Recession recovery most West Coast communities have experienced.

30. During construction, the CET will result in the direct creation of 1,350 jobs and the indirect creation of 1,300 jobs in Cowlitz County and the surrounding region, and will generate about $70 million in wages in Cowlitz County and the surrounding region.. Following construction, the CET will result in the creation of 135 direct and 165 indirect jobs, resulting in about $16 million annually in wages in Cowlitz County and the surrounding region.

31. The CET will also result in tax revenues to Cowlitz County and the State. The County will receive a one-time construction sales tax benefit of $5.87 million, representing a 5% increase to the 2012 Cowlitz County revenue of $107.8 million. It will also receive an annual average of $1.65 million in tax revenues from the ongoing operation of the CET, which equates to a 30-year present value of over $32 million. The State is estimated to receive over $37 million in state tax revenue from the construction of the CET and an average annual amount of $2.18 million from site operations, which equates to a 30-year present value of $41.77 million.

Ecology's SEPA Process and Findings

32. Millennium submitted a Joint Aquatic Resources Permit Application ("JARPA") to the U.S. Army Corps of Engineers ("Corps") and Ecology on February 23, 2012. The JARPA

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requested that the Corps issue Millennium a joint CWA section 404 permit to dredge and fill wetlands, and section 10 authorization to construct docks under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

33. Millennium also requested that Ecology issue a CWA section 401 water quality certification for construction. Under CWA section 401, states are given authority to determine whether discharges associated with a project requiring a Corps permit will comply with applicable water quality standards. Obtaining that state certification is a necessary condition precedent to obtaining a federal permit from the Corps to dredge and fill wetlands.

34. Because it has authority to review and either approve or disapprove any shoreline conditional use permit issued by Cowlitz County for dredging, Ecology conducted a six-year SEPA EIS process that culminated in a Draft EIS on April 29, 2016, and a Final EIS (or "FEIS") that exceeded 13,600 pages on April 28, 2017. That in-depth EIS contains numerous scientific and technical evaluations of potential environmental effects, including in-depth water quality analyses. The appeal period for the Final EIS passed without challenge by any Project opponent.

35. The EIS expressly and unambiguously found that the CET will not result in significant adverse effects on water quality, aquatic life and designated uses, and that any effects it would generate in these areas can be fully mitigated. *See* http://millenniumbulkeiswa.gov/sepa-eishtml (Vol III.B., SEPA Water Quality Technical Report). With respect to water quality, the EIS concluded that:

- the Project would result in no unavoidable and significant adverse impacts on fish (SEPA FEIS at 4.7-41);
- "the construction activities associated with the proposed activity would not be expected to cause a measurable effect on water clarity, water quality, or biological indicators or affect designated uses" (SEPA FEIS at 4.5-19);
- as to the impacts on water quality from in- and over-water work, "no long-term changes in the baseline conditions in the study area would be expected to occur"

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(SEPA FEIS at 4.5-23); and

- effects associated with coal dust and contamination from coal runoff "would not be measurable," and any change in water quality resulting from those activities are "not anticipated to increase turbidity or water temperature or affect marine organism functions" (SEPA FEIS at 4.5-25).

The FEIS therefore concluded that "coal dust from operation of the Proposed Action is not expected to have a demonstrable effect on water quality." (*Id.*)

36. With respect to stormwater runoff, the FEIS concluded that "continued discharges at existing levels would not cause a measurable increase in chemical indicators in the Columbia River and would not cause a measurable impact on water quality or biological indicators or affect designated beneficial uses." (*Id.*).

37. The conclusions ultimately reached by the SEPA FEIS on water quality issues were

> Compliance with laws and implementation of the mitigation and design features would reduce impacts on surface waters and floodplains. There would be no unavoidable and significant adverse environmental impacts on surface waters and floodplains.

(SEPA FEIS at 4.2-21.)

38. Although the EIS made other favorable findings outside the water quality context, some of those findings, including those related to greenhouse gas ("GHG") emissions, were struck from and not included in the Final EIS Summary. Ecology's third party consultants concluded that the Project would actually *reduce* the overall amount of GHGs produced, due in large part to fewer GHG emissions from domestic mines as compared to foreign mines, but Ecology eliminated that discussion from the executive summary of the Final EIS, the condensed 60-page version of the 13,600-page final document used by Ecology for public relations, media, and political purposes.

39. The Final EIS also included scientifically flawed findings concerning diesel emissions from trains transiting through Longview. The findings used risk factors designed for

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stationary—not mobile—sources. Those findings led Ecology to improperly draw cancer risk conclusions for the Highlands community in Longview that were wildly skewed, and allowed Ecology to incorrectly determine that these train induced effects could not be mitigated.

Ecology's Protracted Certification Process

40. While the EIS was being prepared, the Company withdrew its JARPA and corresponding certification request. These withdrawals were made at the Corps' request to allow the federal agency more time to complete its regulatory process. The Company waited until the EISs prepared by both Ecology and the Corps under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and SEPA were sufficiently complete to refile its applications. It also did this to trigger the one-year statutory clock required for states to complete their certification process under section 401(a)(1). Accordingly, Millennium submitted a new permit application and water quality certification request to both the Corps and Ecology on July 18, 2016.

41. Knowing full well that its certification decision had to be completed before July 18, 2017 (one year after receipt of the certification request), and except for a brief communication and information exchange with Millennium in November-December 2016, Ecology had little to no contact with Millennium on its certification request until mid-May 2017. Ecology remained uncommunicative during this period. At no time between July 18, 2016—the date Millennium filed its certification application—and May 2017 did Ecology communicate to the Company that its application was inadequate.

42. After convening several conference calls and meetings in May and June, Ecology requested the Company in June 2017 to once again withdraw its certification request to provide the agency with "more time to complete its review." Although the Corps has asserted that the one-year statute of limitations period for completing a CWA section 401 certification process was triggered on September 30, 2016—the date the Corps issued its public notice and request for comments on its Draft NEPA EIS—Ecology was concerned that the limitations period under

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section 401(a)(1) could be construed to end one year from the date Ecology received the request for certification, which was July 18, 2016.

43. Millennium was promised a certification decision by September 30, 2017. Accordingly, at Ecology's specific request, and to facilitate a decision by September 30, 2017 (as promised), the Company withdrew and resubmitted its request for CWA section 401 certification on June 22, 2017. The Company was led to believe that Ecology was busy processing its application and seriously reviewing its water quality information to meet its September 30, 2017 deadline.

44. In support of its section 401 certification application and in response to oral requests from Ecology, Millennium provided Ecology a Reasonable Assurance Plan ("RAP") on August 7, 2017. That RAP included complete information on discharges associated with construction and operation of the future CET. First, it contained an evaluation of the existing on-site treatment facility's capabilities to meet water quality standards. Second, the RAP included information and data on the pollutants likely to be discharged from on-site coal management activities, as well as stormwater and wastewater management activities that Millennium proposed to implement to meet water quality standards.

45. The RAP demonstrated in detail that the information submitted by the Company was sufficient to provide Ecology with the "reasonable assurance" it needed to certify the Project under section 401. It further explained that the agency did not need the functional equivalent of an engineering report otherwise required for an NPDES permit because state law allows Ecology to rely on its future ability to use its separate NPDES permitting process for that purpose. The information submitted by the Company was exactly the type of information and level of detail that Ecology customarily requires for certification purposes.

46. On August 31, 2017, Ecology's section 401 certification lead visited the site and acknowledged that she had not reviewed the RAP. She nonetheless orally suggested that additional information would likely be necessary for Ecology to certify the Project. Ecology's

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certification lead also stated that if she received the additional information by September 20, 2017, that would allow her to evaluate the information and issue the certification by September 30, 2017.

47. Accordingly, on or about September 8, 2017, Ecology convened a call with Millennium representatives to orally request additional information about the quantity and quality of its future wastewater discharges. Ecology staff promised to provide that request in writing, but that writing never materialized. At that time, Ecology's section 401 lead demanded the type of information otherwise necessary to obtain an NPDES permit, including a complete NPDES permit application and engineering report. Had the Company been aware that Ecology would demand this unprecedented level of information to complete the certification process, it would have begun that process a year prior.

48. Public records requests later revealed that Ecology had, as early as January 2017, internally discussed whether Millennium should submit an NPDES permit application prior to Ecology's consideration of Millennium's section 401 certification application, but the first time Ecology mentioned this request to Millennium was 22 days before Ecology was scheduled to make its decision.

49. Attempting to hit Ecology's constantly moving target, Millennium submitted a subsequent information package that Ecology orally requested be received on September 20, 2017, which included an updated RAP. That package also included an expanded discussion of the pollutants that would be discharged, additional details on the known and available treatment systems that would be employed on-site, best management practices associated with construction and ongoing operations, and a discussion of the Tier II anti-degradation evaluation otherwise necessary for issuance of an NPDES permit.

50. The Company also included robust information on the constituents of the coal that would be handled at the facility. It provided Ecology an evaluation of other analogous NPDES permits around the country and in Washington State involving coal handling/export terminals—

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including specific information on the technology and water quality-based treatment those facilities have been required to employ—and the quality and quantity of coal-related wastewater and stormwater discharged at those similarly-constituted facilities.

51. In fact, the Company provided Ecology with information that Ecology already had on coal-related surface water discharges from the operation of the Centralia, Washington Trans Alta coal-fired power plant. Less than one year before the Denial was issued (in October 2016), Ecology reissued an NPDES permit to that coal-fired power plant. That permit addressed runoff from a coal stockpile that is comparable in size and composition to what is proposed by Millennium. That facility was implementing a treatment system approved by Ecology, which was the same treatment system that Millennium was proposing to install at the CET.

52. Ecology therefore knew exactly what it takes to ensure that runoff from a coal stockpile of the magnitude Millennium proposed would meet water quality standards. Indeed, there was nothing materially different, complicated, or mysterious about the Company's proposal.

53. Nonetheless, on September 26, 2017, Ecology denied Millennium's CWA section 401 certification with prejudice. The Denial was issued just four business days after receiving the mountain of enhanced and expanded water quality data, engineering submittals and related information that Ecology had orally requested and that Millennium had previously submitted on September 20, 2017.

54. Despite previously promising Millennium a letter identifying all outstanding information missing from its application, at no time prior to the Denial did Ecology ever provide the Company with a written communication articulating what information Millennium needed to supply for Ecology to complete the section 401 certification review process.

Ecology Engaged in a Duplicitous Decision-Making Process to Deny the Certification

55. Unbeknownst to Millennium, while Ecology certification staffers were working with Millennium to obtain and review the necessary information to support a CWA section 401

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certification, Ecology officials at the highest levels, including Director Bellon herself, were meeting with Governor Inslee to discuss the Millennium Project and a means to bring the entire certification process to an abrupt and final stop.

56. Although Ecology certification staff had requested that Millennium submit a host of additional technical information for agency review by September 20, 2017, senior Ecology officials had predetermined to deny the certification "*without prejudice*" by September 6th or 7th, in order to give agency staff sufficient time to review the voluminous information it had requested and was in the process of receiving from Millennium. On or about September 7th, Ecology senior officials sent Governor Inslee a copy of a decision denying the certification "without prejudice" under CWA section 401, requesting an "OK" for the decision to be sent to Millennium by certified mail later that day. For reasons that continue to elude Millennium, that all-but-final letter (which included a certified mail number) was never sent.

57. Instead, sometime between a briefing with the Governor on September 7th and a follow-up meeting between Director Bellon, senior agency officials, and the Governor on September 14, 2017, it was decided that Ecology would—for the very first time in agency history—use SEPA to deny a section 401 water quality certification, and to deny it "with prejudice."

58. Public records requests and discovery in the Board proceedings below revealed that Director Bellon made her SEPA decision in the absence of any known written evaluation of the propriety of her decision, or any sort of decision-making record, other than the Denial Order itself. Director Bellon made her SEPA decision while her water quality staff were otherwise engaged with Millennium in collecting, developing and evaluating water quality information. Director Bellon made her SEPA decision while her staff were going through the motions in requesting more and more information from Millennium under the pretense of making a "reasonable assurance" determination under 40 C.F.R. § 121.2(a) and the CWA.

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59. The outcome of Ecology's decision was predetermined and not based on reason or evidence; indeed, Ecology made its determination before it received the massive amount of scientifically technical information it requested.

60. Defendants never informed Millennium that they intended to use SEPA substantive authority to deny the section 401 certification.

61. Defendants did not consider the possibility that Millennium could have mitigated the adverse effects discussed in the Denial Order, and did not provide Millennium with the opportunity to discuss appropriate mitigation.

62. While Millennium had no idea that Ecology would use its so-called SEPA substantive authority to deny the certification outright, Millennium fully expected to have just that sort of frank mitigation discussion for future permitting decisions. Millennium based that expectation on the plain language of the EIS itself, which explicitly stated that the EIS was not a decision to approve or deny a proposal (EIS at S-2). Millennium also based its expectation on the fact that the EIS did not conclude that reasonable mitigation measures were insufficient to mitigate the identified impacts. In the absence of that regulatory finding, Millennium understood that potential mitigation measures were ripe for discussion. Instead of making the finding required under RCW 43.21C.060 to deny the proposal, the EIS found that Millennium's proposed mitigation measures would reduce (but not "completely eliminate") significant adverse impacts, and that "unavoidable and significant adverse environmental impacts could [not would] remain." (EIS at S-41.)

63. The EIS itself expressly disavowed being a permitting "decision" document. Given the speculative and inconclusive nature of the penultimate EIS conclusion, together with the document's explicit disavowal of being a permitting "decision-document," Millennium had no idea and received no prior notice that Ecology would subsequently use those same inconclusive findings as the sole basis to deny its CWA section 401 certification "with prejudice," especially since those findings were based on "indirect effects" from trains and

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vessels that are associated with all port projects of this nature on the lower Columbia.

64. To the contrary, Millennium's conversations with staff at the Governor's office and with Ecology management at the highest levels led Millennium to believe subsequent mitigation conversations would be forthcoming in accordance with normal permit and environmental review processes.

65. Moreover, based on Ecology's past practice, Millennium was led to believe that Ecology would certainly afford it an opportunity to sit down and discuss appropriate mitigation after EIS publication but before Ecology finalized its permitting decisions, because that was both Ecology and standard agency practice.

66. Although Millennium's conversations with Ecology officials and staff in the Governor's office led Millennium to decide not to challenge the EIS—which Millennium knew to be biased and fundamentally flawed in respects outside the water quality context—it made this decision believing that it would be better served by meeting with Ecology to begin a series of mitigation discussions prior to final Ecology permit decisions. The alternative was years of litigation that, if successful, would only lead to another remand and years of additional process. That alternative was no alternative at all.

67. Millennium had serious concerns with Ecology's EIS decision to evaluate human health effects from diesel train emissions using a stationary source standard and a host of unrealistic assumptions. Rather than engage in protracted litigation on the basis of that finding, Millennium planned to persuade the agency to use more appropriate risk factors associated with mobile source emissions in subsequent mitigation discussions.

68. But Millennium never got that opportunity. Instead, Ecology used that scientifically flawed diesel emission and human health impact finding, among others, to summarily veto Millennium's Project. Ecology used that flawed metric despite acknowledging in the EIS itself that such use overestimated the actual risk to the surrounding area.

69. Similarly, Millennium had planned to work with Ecology to discuss ways in

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which it could mitigate the alleged impact of train emissions, for example by providing mitigation for homeowners. Mitigation measures of that type (e.g., in-home filtration systems), or others more directly involving the trains themselves, could have addressed Ecology's diesel train emissions concerns, which were used instead as a pretext to deny the certification.

70. At the time Millennium made a decision not to challenge the EIS, it had absolutely no notice whatsoever that Ecology was planning to invoke SEPA substantive authority to deny the water quality certification with prejudice on the basis of non-water-quality factors, because Ecology had never before used SEPA in that manner.

71. Millennium's decision not to appeal the EIS was also based on its numerous and unequivocally favorable water quality findings.

72. In short, the SEPA and CWA "process" used by Defendants to deny Millennium a CWA section 401 certification was fraudulent, denying Millennium the fundamental administrative due process that the Company was due as a measure of "ordered liberty."

Ecology Misused Its Authority Due to Its Anti-Coal Animus

73. This was the first time in Ecology's history that it decided to deny a CWA section 401 certification *with prejudice* based on SEPA findings it made concerning interstate rail capacity, train traffic (and its attendant effect on vehicular traffic), train emissions, vibrations and noise, and train safety. All of these putative effects are an inevitable result of every cargo transportation infrastructure project on the lower Columbia or anywhere else. Yet Ecology singled out Millennium for special and punitive treatment.

74. Due to its animus towards the particular commodity that Millennium proposes to handle on-site, and trans-ship to Asia, Defendants invented special rules and a unique and unprecedented process for the evaluation of Millennium's section 401 certification application. The U.S. and Washington State Constitutions prohibit this "class of one" approach.

75. Defendants' anti-coal and anti-Millennium animus is long-standing and derives from Governor Inslee himself, who in a speech to the City Club in February of 2013, declared

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that if Millennium's Project were approved, Washington State would be unrecognizable within the lives of our children and our children's children due to climate change. During his first press conference as Governor, Inslee discussed his concerns about the "ramifications" of "burn[ing] the enormous amounts of Powder River Basin coal that are exported through our ports." He called permitting those exports "the largest decision we will be making as a state . . . certainly during my lifetime and nothing comes close to it."[1] Because of the Governor's interest in the Project, Director Bellon briefed the Governor on a regular and frequent basis about Millennium's application and Ecology's administrative process.

76. In June 2016, following publication of the State's Draft EIS, Bellon reiterated the State of Washington's goal of being a national and global leader in opposing the use of carbon-based fuels, and argued that if Washington, Oregon, and California show leadership, then "others will fall in line."

77. With these views in mind, and well before the EIS was finalized, Director Bellon instructed her public relations ("PR") staff to develop talking points singling out Millennium's Project as "the biggest coal project in North America," and as "not a simple project" because the commodity at issue was coal. Ecology's PR department (i) branded the Project as a wetlands destroyer, even though the wetlands were degraded and the agency had previously permitted other projects impacting the same or greater number of wetlands acres, and (ii) expressed undue concerns about contamination from a cleanup that Ecology itself was overseeing.

78. Both her PR department and Director Bellon herself took to Twitter to tweet negatively about the Project. Defendants did not even pretend to be even-handed, discussing only what they considered to be the negative findings in the EIS, and neglecting to discuss the many EIS findings of "no significant impact," much less opportunities for mitigation. Ecology's

[1] Jessica Goad, *Governor Inslee Calls Coal Exports "The Largest Decision We Will Be Making as a State from a Carbon Pollution Standpoint,"* THINKPROGRESS (Jan. 22, 2013, 7:56 PM), https://thinkprogress.org/governor-inslee-calls-coal-exports-the-largest-decision-we-will-be-making-as-a-state-from-a-carbon-9c73e7bal079/.

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tweets were part of a carefully calculated and purposeful PR strategy to malign the Project and foment public opposition.

79. In fact, after reviewing press reports following issuance of the EIS, Ecology staff sent a congratulatory email to themselves, exclaiming that "their social media strategy worked brilliantly."

80. Although she tweeted extensively about Millennium's Project and its certification request, Director Bellon did not tweet about any other certification decisions.

81. Director Bellon and Ecology also used Twitter to speculate about the new GHGs the EIS predicted would be emitted as a result of train and vessel transportation of the coal that Millennium proposes to trans-ship:

82. In tweeting about the Project, Director Bellon made no mention of the fact that the independent third party consultants hired to prepare the EIS concluded that Millennium's Project would actually *reduce* GHG emissions. Ecology went so far as to make sure that those findings did not get included in the Final EIS text.

83. Although Defendants have not discussed other water quality certification applications on Twitter, they have tweeted frequently about the Millennium Project:

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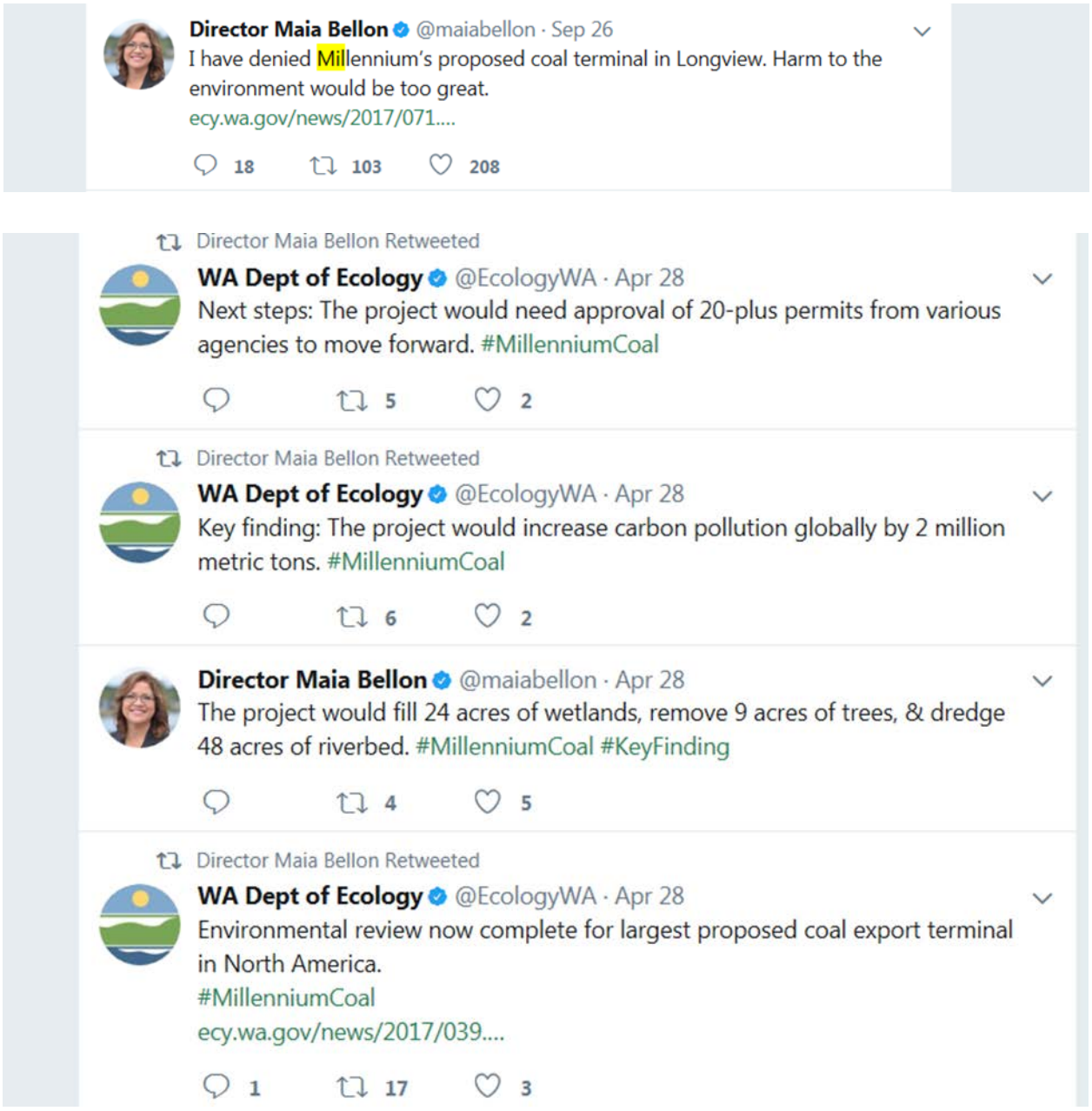

84. In addition, Director Bellon has "liked" responses to her tweet regarding the Denial, even those which profess to oppose the commodity that Millennium seeks to export:

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85. In contrast, Director Bellon did not "like" any tweets opposing or questioning the Denial.

86. During the six years it took Ecology to complete the EIS, Defendants got into the op-ed business to stir public opposition. Ecology subscribed to numerous newsletters and news alert services which identified each and every time Director Bellon, Millennium, the Project, and Ecology were mentioned in a news article. Whenever there was a positive story about the Project, Ecology responded with letters to the editor and its own op-eds maligning the Project. However, when Project opponents wrote op-eds denigrating the Project, Ecology staff circulated them internally and issued no external response.

87. During the comment period on the section 401 certification, Ecology offered to assist private interest groups opposing the Project in uploading their comments to Ecology's

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website. Ecology staff did not reach out to groups supporting the Project to do the same.

88. Defendants imposed rigorous and unprecedented controls totally preventing Millennium from engaging with the third party consultants hired to prepare the EIS. At the same time, Ecology worked behind the scenes to alter and omit favorable findings and conclusions contained in the consultants' original work product associated with diesel emissions, GHG emissions, and cancer risk from train traffic.

89. At or about the time that Ecology issued its Denial, Millennium and its outside consultants contacted Ecology staff on several occasions to inquire about air quality modeling and to request assistance in the Company's pursuit of other State issued permits. Individual Ecology staff communicated to Millennium that they were not sure whether Ecology could provide such regulatory assistance in light of the section 401 Denial.

90. Those telephone conversations and emails were promptly followed by a letter personally authored by Director Bellon, declaring that Ecology would no longer consider issuing any permits for the CET, and would no longer provide any regulatory assistance in connection with the vetoed CET Project. On October 23, 2017, Director Bellon personally sent a letter to Kristin Gaines, Millennium's Vice President for Environmental Affairs, concluding that in light of the section 401 certification Denial and the agency's SEPA findings, Ecology would likely be precluded from approving other applications. *See* Exhibit C, attached hereto. Director Bellon therefore decided that while "Ecology cannot prevent Millennium from future filings[,] Ecology staff will not be spending time on permit preparation related to Millennium's additional applications for the coal export terminal." Director Bellon concluded her extraordinary letter by demanding that all future questions regarding permit applications (or regulatory assistance of any kind associated with the CET) be directed to her attorney.

91. Director Bellon's bias is perhaps best laid bare in her most recent letter to Congress about the Project, where she claims that the Project will "devastate" the Columbia River and cause it "irreparable harm." Nothing in either the 13,600-page EIS or the CWA

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section 401 Denial supports such hyperbolic and scientifically baseless statements, even if Ecology's Denial contained equally false statements. *See* letter from Maia Bellon to Senator Barrasso dated August 15, 2018 (attached as Exhibit D).

92. Although Ecology assured the Board in the administrative appeal that it did not deny the certification *with prejudice* on the basis of water quality or CWA concerns, Director Bellon's recent letter to Senator Barrasso falsely and misleadingly declared that the denial was due to the fact that "Millennium failed to meet existing water quality standards." Ecology's Denial Order made no such finding, and its EIS made many findings to the contrary.

93. Millennium has been harmed by Ecology's actions and bias. It has suffered years of permitting delay and has spent tens of millions of dollars participating in the protracted administrative and appeals processes.

VII. CLAIMS FOR RELIEF

CLAIM I

Defendants' Denial Order Is Arbitrary, Capricious And Contrary To Law Under The APA

94. Millennium re-alleges and incorporates all prior allegations.

95. Under the Washington APA, RCW 34.05.570(3)(b), Washington courts are obligated to grant relief when an agency has acted in an unconstitutional manner or outside of its statutory authority or jurisdiction, engaged in an unlawful procedure, erroneously interpreted or applied the law, or otherwise been arbitrary and capricious. The Denial Order, as affirmed by the Board, should be invalidated on all of these grounds.

96. Within the CWA's comprehensive statutory scheme, Congress delineated a specific role for states. Section 401 of the CWA, 33 U.S.C. § 1341(a), provides that states have authority to grant or deny a water quality certification based solely on factors enumerated by the statute. The sole question for a state to consider in deciding whether to certify a project under CWA section 401 is whether the state has reasonable assurances that the potential discharge

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"will comply with the applicable provisions of 1311, 1312, 1313, 1316, and 1317." 33 U.S.C. § 1341. The enumerated CWA sections listed in section 401(a)(1) are exclusive and do not endow states with plenary power to deny water quality certifications on other grounds.

97. Defendants' Denial, on its face, applies criteria to the CWA certification that go beyond the criteria that CWA section 401(a)(1) allows Defendants to consider. Defendants based their Denial on SEPA, including "air quality," "impacts to vehicle traffic," "noise and vibration" that might expose "residences" to noise impacts, impacts to "social and community resources," "adverse effects on rail transportation," "rail safety," increased vessel traffic on the Columbia River, "cultural resources," "tribal resources," and "water rights." Defendants arbitrarily applied these impermissible criteria while ignoring the favorable findings in the EIS that the proposed Project would not result in any unavoidable, significant and adverse impacts to water quality, aquatic biota, fish, and wetlands.

98. Defendants' Denial is barred by 33 U.S.C. § 1341, because it is based on SEPA, not on the criteria set forth in CWA section 401, and is premised on impacts unrelated to water quality.

99. Defendants also violated the APA because their conduct constitutes an arbitrary departure from well-established past administrative practice. RCW 34.050.570(3)(c). Ecology applied a certification standard and process that it singularly developed for Millennium's CET. It demanded a level of information that no other project has been required to submit, moved the "goal posts" that Millennium was required to reach, and ultimately based its Denial on factors other than water quality considerations.

100. Ecology's customary practice, shared by every other state, has been to deny water quality certifications without prejudice in situations where the agency has not first issued the applicant a written letter indicating what was required, and what was missing, for the agency to make a certification decision. Because certification denials function in effect as project vetoes, state environmental agencies—including Ecology—typically afford applicants for this necessary

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state authorization a reasonable opportunity to provide additional information or make necessary changes before denying a water quality certification "with prejudice."

101. Ecology—as an administrative state agency—must review a certification request using its established practice, procedure and standards, and thus must be free from political considerations. It is required by law to provide Millennium the process it is due under the federal and state constitutions, and to treat Millennium as it would any other project certification applicant under CWA section 401.

102. Ecology has not, in the past 45 years, issued a denial with prejudice for a water quality certification application.

103. Ecology has not, in the past 45 years, used SEPA to deny a water quality certification.

104. Ecology has not issued any regulatory guidance, policy, or rule explaining the standards for denying a water quality certification application with prejudice.

105. Ecology has not developed any guidance or regulations on the use of SEPA to deny a water quality certification.

106. Unexplained agency action inconsistent with well-established practice is arbitrary. *FCC v. Fox Television Stations, Inc*., 567 U.S. 239 (2012).

107. Defendants used an unlawful procedure and unlawful decision-making process, failing to follow the prescriptions in CWA section 401(a)(1) and RCW 43.21C.110(1)(a).

108. Defendants impermissibly used SEPA to deny a SEPA-exempt action. Water quality certifications are exempt from SEPA under a regulation issued by Ecology. WAC 197-11-800(a). Actions that are categorically exempt under rules adopted by Ecology may not be conditioned or denied under SEPA. RCW 43.21C.110(1)(a).

109. Defendants improperly used the EIS as a decision-making document, even though the EIS explicitly stated that it could not be used as such.

110. Defendants used the EIS to deny the certification even though the EIS did not

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unequivocally conclude that the identified significant adverse effects could not be mitigated.

111. Defendants used the EIS to deny the certification in violation of RCW 43.21C.060 and WAC 197-11-660(f)(ii), which require the agency to determine that reasonable mitigation measures are insufficient to mitigate an identified impact. The EIS "talked around" but specifically did not conclude that reasonable mitigation measures would be insufficient to mitigate the significant adverse effects found in the EIS.

112. Director Bellon used her position of authority as a bully pulpit to foment and increase public opposition to the Project in a manner that was biased and inimical to what is expected of a public officer charged with enforcing the rule of law. A decision animated by bias is an arbitrary and capricious decision prohibited by the APA.

113. Defendants also denied the certification under SEPA without providing Millennium with any notice of their intent to do so, and without providing Millennium any opportunity to propose and negotiate reasonable mitigation. Ecology's actions deprived Millennium of its procedural and substantive due process rights guaranteed under both the U.S. and Washington State Constitutions.

114. For all these reasons, Defendants' actions should be set aside under RCW 34.05.570(c).

CLAIM II

Liability For Violation Of Constitutional Rights Under 42 U.S.C. § 1983

115. Millennium re-alleges and incorporates all prior allegations.

116. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

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117. The Denial Order violates rights secured by the Constitution and laws of the United States and State of Washington, and was issued by Director Bellon, who was acting under color of law.

118. Millennium has a cognizable property interest in its certification application. Millennium's section 401 certification application constitutes a protected property interest because there are articulable standards that constrain Ecology's decision-making process. Ecology's discretion to deny Millennium's section 401 certification is substantially limited by both CWA section 401(a)(1) and RCW 43.21C.110(1)(a).

119. Millennium has a cognizable property interest in an impartial review of its CWA section 401 application and in otherwise receiving the due process guaranteed under the laws of the United States and the State of Washington.

120. Millennium's Project has garnered both intense political opposition and significant public support. Some of the opposition has resulted from Director Bellon's and Ecology's public lobbying through social media, public speeches, and Congressional testimony. The intense political opposition to the Project, and both the Governor's and the Director's personal animus towards coal and Millennium's Project, directly influenced Director Bellon's decision to deny the certification *with prejudice*. As a result, Millennium did not receive an impartial review of its CWA section 401 application.

121. The right to an impartial decision maker is a right implicit in the concept of ordered liberty. *Maytown Sand & Gravel LLC v. Thurston County* (Wash. Sup. Ct. 2018). Director Bellon was not an impartial decision maker.

122. Director Bellon and her PR staff engaged in a social media strategy that singled out and maligned the Project.

123. Ecology and Director Bellon prevented Millennium from working with the agency's third party consultants, while altering and omitting favorable findings and conclusions contained in the consultants' original work product.

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124. Director Bellon then had her staff pretend to work with Millennium to gather water quality information to make a "reasonable assurance determination" under 40 C.F.R. § 121.2(a), while she worked behind the scenes with her senior officers and with the Governor's office, to permanently deny the certification under SEPA.

125. Director Bellon ordered her staff to issue the Denial Order even though Ecology had never before: (a) denied a water quality certification "with prejudice"; (b) denied a water quality certification using SEPA; (c) denied a water quality certification using non-water-quality effects found in an EIS; or (d) vetoed a project using SEPA without providing the applicant notice of its intent to do so, and an opportunity to be heard on the applicant's willingness and ability to provide mitigation.

126. After issuing the Denial Order, Director Bellon demonstrated further bias by writing to demand that the Company not seek any further assistance from her staff in pursuing its constitutionally protected right to apply for permits from other agencies. Director Bellon declared that "Ecology staff will not be spending time on permit preparation related to Millennium's additional applications for the coal export terminal," and directed all future questions to her attorney.

127. More recently, Director Bellon provided Congress with testimony about Millennium's Project, grossly distorting the conclusions found in Ecology's EIS. Director Bellon falsely and misleadingly told Congress that she denied the certification because her agency found that the Project would not meet applicable water quality standards, while the Denial Order made no such determination. Indeed, her staff and her attorneys assured the Board that Ecology's decision to deny the certification with prejudice was unrelated to the water quality considerations identified in section III of the Denial Order, and was made instead exclusively under SEPA.

128. Ecology's and Director Bellon's actions "shock[] the conscience and interfere[] with rights that are implicit in the concept of ordered liberty." *Maytown Sand & Gravel.* Because

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decisions like this one (which was made in a climate of intense political pressure) are more susceptible to an abuse of authority, they "require[] a higher degree of judicial scrutiny than is normally appropriate for administrative action." *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309, 1315 (1978).

129. For all these reasons, Ecology's Denial constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

CLAIM III

Millennium Is Entitled To Relief Under RCW 64.40

130. Millennium re-alleges and incorporates all prior allegations.

131. This claim has been brought within the 30-day statute of limitations provided under RCW 64.40.030.

132. Ecology's actions were arbitrary and capricious, and exceeded lawful authority.

133. Millennium has a property interest in real property in the State of Washington. The Company sought a governmental approval required from Ecology before it could improve and put its real property to use, and that certification was denied "with prejudice."

134. Ecology's decision limits the use of Millennium's property in excess of lawful authority. Without Ecology's CWA section 401 certification, Millennium is precluded from obtaining necessary federal permits, and prohibited from constructing or operating its proposed CET.

135. Ecology knew or should have known that its actions were unlawful and exceeded the extent of its authority under CWA section 401(a)(1) and RCW 43.21C.110(1)(a), and were unconstitutional.

136. Millennium has incurred damages as a result of the improper certification denial, including costs associated with the ensuing permitting delay. Millennium has also incurred attorneys' fees and associated litigation costs as a result of Ecology's improper certification denial and is entitled to reimbursement under RCW 64.40.030.

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VIII. PRAYER FOR RELIEF

WHEREFORE, Millennium requests that the Court:

A. Enter a declaratory judgment reaffirming and declaring that:

1. Defendants unlawfully applied SEPA to a CWA section 401 certification decision and exceeded their authority under the CWA and SEPA;

2. Defendants violated the Washington APA;

3. Defendants acted unlawfully and violated Millennium's due process and equal protection rights;

4. Defendants' Denial is a product of biased and prejudiced decision-making;

5. Defendants have waived their certification rights under CWA section 401.

B. Enjoin:

1. Defendants from denying Millennium's certification request with prejudice;

2. Defendants from using SEPA substantive authority to deny Millennium's CWA section 401 certification;

3. Defendants from continuing to delay issuance of the certification if the Denial is remanded for continued considerations;

4. Defendants from refusing to process CET permit applications and from refusing to provide the regulatory assistance routinely afforded all permit applicants.

C. Award it damages and attorneys' fees and costs as authorized under RCW 64.40 and 42 U.S.C. § 1988(b).

D. And award such other and further relief as this Court deems just and proper.

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DATED: September 5, 2018.

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EXHIBIT A

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

September 26, 2017

Millennium Bulk Terminals-Longview, LLC
ATTN: Ms. Kristin Gaines
4029 Industrial Way
Longview, WA 98632

RE: Section 401 Water Quality Certification Denial (Order No. 15417) for Corps Public Notice No. **2010-1225** Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

Dear Ms. Gaines:

The Washington State Department of Ecology (Ecology) has reached a decision on the Millennium Bulk Terminals-Longview request for a Section 401 Water Quality Certification for the proposed coal export terminal near Longview. After careful evaluation of the application and the final State Environmental Policy Act environmental impact statement, Ecology is denying the Section 401 Water Quality Certification with prejudice.

The attached Order describes the specific considerations and determinations made by Ecology in support of this decision to deny the Certification with prejudice. Your right to appeal this decision is described in the enclosed denial Order.

Sincerely,

Maia D. Bellon
Director

Enclosure

By certified mail [91 7199 9991 7034 8935 6995]

cc: Muffy Walker, U.S. Army Corps of Engineers
Danette Guy, U.S. Army Corps of Engineers
Glenn Grette, Grette Associates, LLC

IN THE MATTER OF DENYING SECTION 401 WATER QUALITY CERTIFICATION TO Millennium Bulk Terminals-Longview, LLC in accordance with 33 U.S.C. §1341 (FWPCA § 401), RCW 90.48.260, RCW 43.21C.060, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC	))))))))	**ORDER # 15417** **Corps Reference #NWS-2010-1225** Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

TO: Millennium Bulk Terminals-Longview, LLC
Attention: Ms. Kristin Gaines
4029 Industrial Way
Longview, Washington 98632

On February 23, 2012, Millennium Bulk Terminals-Longview, LLC (Millennium) submitted a Joint Aquatic Resources Permit Application (JARPA) to the Department of Ecology (Ecology) requesting a Section 401 Water Quality Certification to construct a coal export terminal in Longview, Washington. Then on January 28, 2013, Millennium sent a letter to the U.S. Army Corps of Engineers (Corps) and Ecology in which Millennium withdrew the request for the Section 401 Certification. Millennium stated that it would submit a new request when the Environmental Impact Statement (EIS) process concluded. In addition, on February 6, 2013, Millennium submitted an Ecology Water Quality Certification Processing Request form stating that it wished to withdraw its request and would resubmit near the end of the EIS process.

On July 18, 2016, Millennium submitted a new JARPA and request for Section 401 Water Quality Certification. A notice regarding this request was distributed as part of a Corps joint public notice on September 30, 2016. On June 22, 2017, Ecology received a withdrawal/reapply form from Millennium, which triggered another public notice that was issued on June 27, 2017.

Millennium proposes to construct and operate a coal export terminal (Project) in and adjacent to the Columbia River (at approximately river mile 63) that would transfer up to a nominal 44 million metric tons per year (MMTPY) of coal from trains to ocean-going vessels. The completed coal export terminal would cover approximately 190 acres of the approximately 540-acre property. The Project would consist of two docks, ship loading systems, stockpiles and equipment, rail car unloading facilities, an operating rail track, rail storage tracks to park up to eight trains, associated facilities, conveyors, and necessary dredging. The Project would be constructed in two stages over several years.

- Stage 1 of the Project would consist of facilities to unload coal from trains, stockpile the coal on site, and load coal into ocean-going vessels at one of the two new docks. During Stage 1, Millennium would construct two docks (Dock 2 and 3), one ship loader and related conveyors on Dock 2, berthing facilities on Dock 3, a stockpile area including two stockpile pads, railcar unloading facilities, one operating rail track, up to eight rail storage tracks for train parking, Project site

ground improvements, and associated facilities and infrastructure. Once Stage 1 is completed, the Project would be capable of a throughput capacity of a nominal 25 MMTPY.

- During Stage 2, MBTL would construct an additional ship loader on Dock 3, two additional stockpile pads, conveyors, and equipment necessary to increase throughput by approximately 19 MMTPY, to a total nominal throughput of 44 MMTPY.

The main elements of Stage 1 development would include:

- Rail bed.
- Rail loop with arrival and departure tracks to include one operating track (turn around track) and eight rail storage tracks.
- One tandem rotary unloader (capable of unloading two rail cars) for operations, and one tandem rapid discharge unloader to be used during startup and maintenance.
- Two coal stockpile pads, Pads A and B.
- Two rail-mounted luffing/slewing stackers and associated facilities for Pads A and B.
- Two rail-mounted bucket-wheel reclaimers and associated facilities for Pads A and B.
- Two shipping docks (Dock 2 and Dock 3), with one ship loader and associated facilities on Dock 2.
- Conveyors, transfer stations, and surge bin from the stockpile pads to the ship loading facilities.
- In-bound and out-bound coal sampling stations.
- Support structures, electrical transformers, switchgear and equipment buildings, and process control systems.
- Upland facilities, including roadways, service buildings, water management facilities, utility infrastructure, and other ancillary facilities.

The main elements of Stage 2 development would include:

- Associated conveyors and transfer stations to the stockpile Pads C and D from the rail receiving station.
- Two additional coal stockpile pads, Pads C and D.
- Two additional rail-mounted luffing/slewing stackers and associated facilities.
- Two additional rail-mounted bucket-wheel reclaimers and associated facilities.
- One additional ship loader and associated facilities on Dock 3.
- Conveyors, transfer stations, and surge bins from stockpile Pads C and D to the ship loading facilities.

The Project proposes impacting over 32 acres of wetlands (24 acres of which will be new impacts) and almost 6 acres of ditches. To offset these impacts Millennium has proposed to

construct a wetland mitigation site that encompasses approximately 100 acres. The Project will also have 4.83 acres of new overwater coverage, and includes constructing an off-channel slough mitigation site to address those impacts.

I. AUTHORITIES

In exercising its authority under 33 U.S.C. § 1341, RCW 43.21C.060, and RCW 90.48.260, Ecology has examined this application pursuant to the following:

1. Conformance with applicable water quality-based, technology-based, and toxic or pre-treatment effluent limitations as provided under 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306, and 307).

2. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. § 1313 and by Chapter 90.48 RCW, and with other applicable state laws.

3. Conformance with the provision of using all known, available, and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

4. Conformance with applicable State Environmental Policy Act (SEPA) policies under RCW 43.21C.060 and WAC 173-802-110.

Pursuant to the foregoing authorities and in accordance with 33 U.S.C. § 1341, RCW 90.48.260, RCW 43.21C.060, Chapter 173-200 WAC, Chapter 173-201A WAC, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC, as more fully explained below, Ecology is denying the Millennium Bulk Terminals-Longview request for Section 401 Water Quality Certification with prejudice.

II. STATE ENVIRONMENTAL POLICY ACT (SEPA)

The Final Environmental Impact Statement (FEIS) issued by Cowlitz County and Ecology on April 28, 2017, identified nine areas of unavoidable and significant adverse impacts that would result from the construction and operations of the Project. As analyzed in the FEIS, the detrimental environmental consequences related to these impacts cannot be reasonably mitigated. Further, the adverse impacts to the built and natural environments conflict with Ecology's SEPA policies found in WAC 173-802-110. These policies state:

> (1)(a) The overriding policy of the department of ecology is to avoid or mitigate adverse environmental impacts which may result from the department's decisions.
>
> (b) The department of ecology shall use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(i) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(ii) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(iii) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(iv) Preserve important historic, cultural, and natural aspects of our national heritage;

(v) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(vi) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(vii) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The department recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(d) The department shall ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.

A. Significant Unavoidable Adverse Impacts

1. Air Quality. The FEIS found a significant increase in cancer risk for areas along rail lines and around the Project site in Cowlitz County where diesel emissions primarily from trains would increase. The study found that residents in some areas in Cowlitz County, including those living in portions of the Highlands neighborhood, would experience an increase in cancer risk rate up to 30 cancers per million. These levels of increased risk exceed the approvability criteria in WAC 173-460-090 for new sources that emit toxic air pollutants. Although WAC 173-460 only applies to stationary sources, the health risks from mobile sources in this case, primarily locomotives, would be considered significant using the same approvability criteria. Thus, the FEIS concluded the emission of diesel particulate primarily from train locomotives would be a significant unavoidable adverse impact. As the FEIS explained, this impact could be mitigated, but not eliminated, by use of cleaner burning Tier 4 locomotives. However, use of such locomotives is outside the control of Millennium and may not

occur for decades because use of older locomotives is currently allowed under federal law. Other mitigation measures identified in the FEIS related to air quality, such as use of best management practices and compliance with permits, would not reduce diesel emissions from Project related locomotives.

The increased cancer risk associated with the Project is a significant adverse unmitigated impact that is inconsistent with the following substantive SEPA policies in WAC 173-82-110:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

2. Vehicle Transportation. The FEIS found that there would be significant unavoidable adverse impacts to vehicle traffic from the proposed action when the Project reaches full operation in 2028 due to vehicle delays caused by increased train traffic that would block rail crossings in Cowlitz County. With current track infrastructure on the Reynolds Lead and BNSF Railway (BNSF) spur, Project-related trains in 2028 would increase the total gate downtime by over 130 minutes during an average day at the six crossings listed below. Project-related trains would cause these crossings to operate at Level of Service E or F[1] if one Project-related train traveled during peak traffic hours through the following crossings:

- Project area access opposite 38th Avenue
- Weyerhaeuser access opposite Washington Way
- Industrial Way
- Oregon Way
- California Way
- 3rd Avenue

[1] "Level of Service" is a report card rating based on the delay experienced by vehicles at an intersection or railroad crossing. Level of Service A, B, and C indicate conditions where traffic moves without substantial delays. Level of Service D and E represent progressively worse operating conditions. Level of Service F represents conditions where average vehicle delay has become excessive and demand has exceeded capacity.

Millennium and BNSF may make track improvements to the Reynolds Lead and BNSF spur that would allow trains to travel faster through these intersections and thereby reduce gate downtimes. However, even with these planned track improvements to the Reynolds Lead and BNSF Spur, the Project at full build out in 2028 would still adversely impact and add delays at four crossings, and cause the following crossings to operate at Level of Service E or F if two proposed Project-related trains traveled through them during peak traffic hours:

- Project area access opposite 38th Ave
- Weyerhaeuser access opposite Washington Way
- 3rd Avenue
- Dike Road

On the BNSF main line in Cowlitz County, the increased Project-related trains at full build out in 2028 could adversely impact vehicle transportation at two crossings during peak traffic hours. The following crossings would operate Level of Service E if two Project-related trains travel during the peak hours:

- Mill Street
- South River Road

Delay of emergency vehicles at rail crossing would also increase because of additional Project-related trains.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these impacts. These measures include funding crossing gates at the intersection of Industrial Way, holding safety review meetings, and notifying agencies about increases in operations on the Reynolds Lead. However, these measures will not reduce or eliminate the vehicle delays identified in the FEIS. Vehicle delays could be reduced by further improvements to rail and road infrastructure, however, it is currently unknown when or if such improvements would occur. Therefore, when the Millennium Project is at full operation in 2028, unavoidable and significant adverse impacts would occur on vehicle transportation at certain crossings in Cowlitz County including delays of emergency vehicles. This impact is inconsistent with the following substantive SEPA policies:

- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.

- Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

3. Noise and Vibration. The FEIS found that there would be significant unavoidable adverse impacts to residences near four public at-grade crossings along the Reynolds Lead and BNSF spur from train-related noise. Train-related noise levels would increase from train operations and locomotive horn sounding intended for public safety.

Residences near the at-grade crossings at 3rd Avenue, California Way, Oregon Way, and Industrial Way would experience increased daily noise levels that would exceed applicable noise criteria per Federal Transportation Administration/Federal Rail Administration guidance.

Approximately 229 residences would be exposed to moderate noise impacts, and approximately 60 residences would be exposed to severe noise impacts. Although these impacts would be reduced near the Industrial Way and Oregon Way crossings if a grade-separated intersection is constructed there as currently proposed, the proposal has not yet received permits and its completion date is unknown.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these train-related noise impacts. These measures include funding two "quiet crossings" at Oregon Way and Industrial Way grade crossings by installing crossing gates, barricades, and additional electronics. This proposed "quiet crossing" is not the same as a Quiet Zone, which requires the approval of the Federal Railroad Administration. The reduction of noise pollution from the proposed "quiet crossing" is unknown because Millennium trains may still be required to sound their horns at the intersections. Other measures include requiring Millennium to work with the City of Longview, Cowlitz County, Longview Switching Company, the affected community, and other applicable parties to apply for and implement a Quiet Zone that would include the 3rd Avenue and California Avenue crossings. However, as a Quiet Zone requires the approval of the Federal Railroad Administration, it is beyond the control of Millennium and it is unknown if it will ever be implemented. Consequently, Quiet Zones are not considered an applicable mitigation measure.

The FEIS states that, if the Quiet Zone is not implemented, Millennium would fund a sound-reduction study to identify ways to mitigate the moderate and severe impacts from train noise. However, it is unknown who would fund, implement, and maintain recommendations to mitigate moderate and severe noise impacts identified in the sound noise reduction study. The study itself does not mitigate the impacts. The Project's significant adverse impacts from noise are inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.

- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

4. **Social and Community Resources.** The FEIS found that social and community resources would be significantly and adversely impacted by increased noise, vehicle delays, and air pollution. Impacts from the construction and operation of the Project would impact minority and low-income populations by causing disproportionately high and adverse effects. Impacts from noise, vehicle delay, and diesel particulate matter inhalation risk would affect the Highlands neighborhood, a minority and low-income neighborhood adjacent to the Reynolds Lead in Longview, Washington.

a. Adverse Health Impact from Increased Cancer Risk Rate: Project-related trains and other operations would increase diesel particulate pollution along the Reynolds Lead, BNSF Spur, and BNSF mainline in Cowlitz County at levels that would result in increased cancer risk rates. The modeled cancer risk rate in the FEIS found a majority of the Highlands neighborhood would experience an increased cancer risk rate, varying from 3% to 10%. Use of Tier 4 locomotives, which produce less diesel pollution, by BNSF would reduce but not eliminate diesel particulate matter emissions and the associated potential cancer risk in the Highlands neighborhood. However, requiring Tier 4 locomotives is outside the control of Millennium and may not occur for decades. Therefore, the Project's disproportionately high adverse effects related to increased cancer risk rates from diesel particulate matter inhalation on minority and low-income populations would be unavoidable.

b. Adverse Noise Impact: The Project would add 16 trains per day on the Reynolds Lead and increase average daily noise levels, which would exceed applicable criteria for noise impacts and cause moderate to severe impact to 289 residences in the Highlands neighborhood. Approval, funding, and construction of Quiet Zones for four highway and rail intersections would reduce noise levels. However, there is no sponsor(s) identified to apply for, fund, and maintain Quiet Zones that would reduce noise levels at the four rail crossings. Quiet Zones are outside the control of Millennium and require approval from the Federal Railroad Administration. Therefore, Project-related trains would cause significant adverse unavoidable impacts to portions of the Highlands neighborhood and cause a disproportionately high adverse effect on minority and low-income populations.

c. Adverse Vehicle Traffic Impact: Project-related trains would increase vehicle delays at highway and rail intersections within the Highlands

neighborhood. With the current track infrastructure on the Reynolds Lead, a Millennium-related train traveling during the peak traffic hours would result in a vehicle-delay impact at four public at-grade crossings in or near the Highlands neighborhood by 2028. This would constitute a disproportionately high adverse effect on minority and low-income populations. If planned improvements to the Reynolds Lead are made, the adverse impacts related to vehicle delay could be reduced but not eliminated. However, rail improvements have not received permits and their completion is unknown. Therefore, Millennium's disproportionately high adverse effects to vehicle traffic on minority and low-income populations would be unavoidable.

5. **Rail Transportation.** The FEIS found that the Project would cause significant adverse effects on rail transportation that cannot be mitigated. At full build out of the Project, 16 trains a day (8 loaded and 8 empty) would be added to existing rail traffic. Three segments on the BNSF main line routes in Washington (Idaho/Washington State Line–Spokane, Spokane–Pasco, and Pasco–Vancouver) are projected to exceed capacity with the current projected baseline rail traffic in 2028. Adding the 16 additional Millennium-related trains would contribute to these three segments exceeding capacity by 2028, based on the analysis in the FEIS and assuming existing infrastructure. As described in the FEIS, Millennium would mitigate some of the impacts by notifying BNSF and Union Pacific (UP) about upcoming increases in operations at the Millennium site. This proposed mitigation measure is informational and does not commit BNSF or UP to take action to increase capacity.

BNSF and UP could make necessary investments or operating changes to accommodate the rail traffic growth, but it is unknown when these actions would be taken or permitted. Improving rail infrastructure is outside the control of Millennium and cannot be guaranteed. Under current conditions Millennium-related trains would contribute to these capacity exceedances at three rail segments on the main line and could result in an unavoidable and significant adverse impact on rail transportation, including delays and congestion.

This impact is inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

6. Rail Safety. The FEIS found that Millennium-related trains would increase the train accident rate by 22 percent along the rail routes in Cowlitz County and Washington. As described in the FEIS, Millennium would notify BNSF and UP about upcoming increases in operations at the Millennium site. However, this notification measure does not commit BNSF or UP to take action or make changes that would reduce accident rates.

To reduce some of the impacts to rail safety, the Longview Switching Yard, BNSF, and UP could improve rail safety through investments or operational changes, but it is unknown when or whether those actions would be taken or permitted. Improving rail infrastructure to increase rail safety is outside the control of Millennium and cannot be guaranteed. Therefore, the 22 percent increase to the rail accident rate over baseline conditions attributable to Millennium would result in unavoidable and significant adverse impacts on rail safety.

This impact is inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

7. Vessel Transportation. The FEIS found that the Project would have significant adverse effects on vessel transportation that cannot be mitigated. Millennium would add 1,680 ship transits to the current 4,440 ship transits on the Columbia River per year, for a total of 6,120 at full build out. Thus, the Project would be responsible for over one quarter of the traffic in the Columbia River.

Based on marine accident transportation modeling, the FEIS found the increased vessel traffic would increase the frequency of incidents such as collisions, groundings, and fires by approximately 2.8 incidents per year. While the chance that an incident would result in serious damage or spill is low, if a spill were to happen, the impacts to the environment and people would be significant and unavoidable.

An increase in vessels calling at the proposed new docks increases the risk of vessel-related emergencies, such as fire or vessel allision. An increase in vessels calling at the new docks also increases risk of spills from refueling ships at berth, although Millennium has stated there would be no refueling at the new docks. The FEIS proposes a mitigation measure that if refueling at the docks were to start, the company would notify Cowlitz County and Ecology. Another mitigation measure in the FEIS involves Millennium's attending at least one Lower Columbia Harbor Safety Committee meeting per year.

Although these proposed mitigation measures would support communication and awareness, they would not reduce environmental harm or the impact of an incident.

If a Millennium-related vessel incident such as a collision or allision were to occur, impacts could be adverse and significant, depending on the nature and location of the incident, the weather conditions at the time, and whether any oil were discharged. Although the likelihood of a serious Millennium-related vessel incident is low, the consequences would be severe and there are no mitigation measures that can completely eliminate the possibility of an incident or the resulting impacts. *See* WAC 197-11-794(2) (an impact may be significant if its chance of occurrence is not great but the resulting environmental impact would be severe if it occurred).

This adverse impact is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

8. Cultural Resources. The FEIS found that construction of the coal export terminal would demolish the Reynolds Metals Reduction Plant Historic District, which would be an unavoidable and significant adverse environmental impact. Construction of the Project would demolish 30 of the 39 identified resources that contribute to the historical significance of the Historic District. The anticipated adverse impacts on these resources would diminish the integrity of design, setting, materials, workmanship, feeling, and association that make the Historic District eligible for listing in the National Register of Historic Places.

A Memorandum of Agreement is currently being negotiated among the Corps, Cowlitz County, the Washington Department of Archaeologic and Historic Preservation, the City of Longview, the Bonneville Power Administration, the National Park Service, potentially affected Native American tribes, and Millennium in a separate federal process. The Memorandum may resolve this impact in compliance with Section 106 of the National Historic Preservation Act of 1966. However, there is no indication when or if this Memorandum will be signed by all parties. Without the Memorandum, the impacts to the Reynolds Metal Reduction Plant Historic District are considered adverse, significant, and unavoidable.

Demolition of historic properties without mitigation is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Preserve important historic, cultural, and natural aspects of our national heritage.

9. Tribal Resources. The FEIS found that construction and operation of the Millennium coal export terminal could result in unavoidable indirect impacts on tribal resources. Tribal resources refer to tribal fishing and gathering practices and treaty rights. These resources may include plants or fish used for commercial, subsistence, and ceremonial purposes.

Construction activities such as building new docks, river bottom dredging, and pile driving would cause physical and behavioral responses in fish that could result in injury, and would affect aquatic habitat. Fish stranding associated with wakes from the additional 1,680 vessel trips per year would also cause injury. Eulachon would potentially be impacted by the initial and maintenance sediment dredging.

Fugitive coal dust particles generated by the Millennium operations and additional trains would enter the aquatic environment through movement of coal into and around the Project area and during rail transport. Fugitive coal dust and potential spills would increase suspended solids in the Columbia River.

These impacts could reduce the number of fish surviving to adulthood and returning to Zone 6 of the Columbia River, and could affect the number of fish available for harvest by Native American Tribes.

The increase in 16 additional Millennium-related trains per day travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes would restrict access to 20 tribal fishing sites set aside by the U.S. Congress above Bonneville Dam in the Columbia River. There are additional access sites that are not mapped that would also be impacted.

To reduce impacts to tribal resources from construction, Millennium could be required to minimize underwater noise during pile driving, conduct advance underwater surveys for eulachon prior to in-water work, and conduct fish monitoring prior and during dredging.

These mitigation steps are inadequate because although noise impacts from construction would be reduced, they would not be eliminated, and fish behavior could be altered and affect the number of fish available for harvest by Native American Tribes.

Improving rail infrastructure for access to tribal fishing sites along the Columbia River above Bonneville Dam is outside the control of Millennium. The additional Project-related trains travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes could restrict access to tribal fishing areas in the

Columbia River. Because other factors besides rail operations affect fishing opportunities, such as number of fishers, fish distribution, and the timing and duration of fish migration periods, the extent to which Project-related rail operations would affect tribal fishing is difficult to quantify. However, SEPA policies state that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." Consistent with this policy, Ecology concludes that Millennium at full operations would result in unavoidable significant adverse impacts to tribal resources.

Impacts to tribal resources are inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Preserve important historic, cultural, and natural aspects of our national heritage.
- The department shall ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.

III. SECTION 401 WATER QUALITY CERTIFICATION

Pursuant to Section 401 of the Clean Water Act, in order for Ecology to issue a water quality certification it must have reasonable assurance that the Project as proposed will meet applicable water quality standards and other appropriate requirements of state law. Consequently, an applicant must submit adequate information regarding a project for agency review before Ecology can determine compliance with the state water quality standards and other applicable regulations. Millennium's current application and supplemental documents fails to demonstrate reasonable assurance in the following areas:

A. Wetlands Impacts and Mitigation

The Project would impact (fill) 32.31 acres of wetlands, 8.1 acres of which occurred prior to Millennium's tenancy of the site, and 0.11 of which would be impacted at the mitigation site. The impacts include 28.32 acres of Category III wetlands and 3.99 acres of Category IV wetlands. For the reasons stated below, Millennium failed to demonstrate that the impacts and mitigation associated with the wetlands within the Project area will comply with Washington State water quality standards. Thus, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

1. **Mitigation Plan.** The draft wetland mitigation plan is inadequate and does not demonstrate that the proposed mitigation will offset the Project's wetland impacts. Millennium submitted a conceptual mitigation plan to Ecology on June 8, 2017 (*Millennium Coal Export Terminal, Longview, Washington Coal Export Terminal including Docks 2 and 3 and Associated Trestle Conceptual Mitigation Plan—Wetlands and Aquatic Habitat*, dated May 25, 2017). In response to Ecology's questions,

Millennium submitted additional information on September 20, 2017. However, the submitted information continues to be deficient because it lacks an adequate credit/debit analysis, a boundary verification, and adequate hydrologic information regarding the mitigation site.

2. **Wetland Boundaries at the Impact Site.** Millennium has not demonstrated that the boundaries of the wetlands to be impacted have been verified by the Corps. There is no jurisdictional determination (JD) from the Corps stating whether the wetlands are waters of the United States or whether the Corps agrees with the boundaries as shown in the delineation report (Millennium Coal Export Terminal, Longview, Washington, Coal Export Terminal Wetland and Stormwater Ditch Delineation Report – Parcel 619530400, dated September 1, 2014). Millennium's application therefore does not adequately quantify the extent of the wetland impacts and does not adequately demonstrate that the proposed mitigation will offset those impacts.

3. **Credit-Debit Analysis.** This analysis is needed to determine whether proposed mitigation would adequately offset the Project's wetland impacts. It is especially important for a project of this scale, and where the impacted wetlands were rated using what is now an outdated version of the wetland rating system. The credit-debit analysis Millennium submitted to Ecology on September 20, 2017, did not include scoring forms for any of the wetlands to be impacted. Without these forms, Ecology cannot evaluate the credit-debit analysis. Millennium has not provided a complete analysis to Ecology, thereby failing to demonstrate that the proposed mitigation would be adequate.

4. **Hydrologic and Soil Investigations.** The conceptual mitigation plan states that: "The nature of this surface water will be further investigated as part of planned hydrologic investigations to support final Site design." The plan further states that "hydrologic data are being collected." The plan also states that: "Additional, site-specific soil investigations are planned at the Mitigation Site to inform final mitigation design." Millennium has not provided the results of these hydrologic and soil analyses to Ecology. In its September 20, 2017, responses to Ecology's questions about the proposed mitigation site, Millennium stated that it is still in the process of collecting hydrologic and soil data and that it will submit a technical report once compilation of the data has been completed. Because Millennium has not submitted detailed information supported by data about the hydrologic and soil conditions at the proposed mitigation site, Millennium has not demonstrated that the site is suitable and can provide adequate mitigation.

B. Stormwater and Wastewater

Sufficiently detailed information and analyses necessary to understand, evaluate, and condition wastewater and stormwater discharges are needed to assure compliance with Washington State water quality. Without complete information such as that noted below, Ecology does not have reasonable assurance that the Project will meet water quality standards.

1. Wastewater Characterization. Wastewater characterization information is necessary for Ecology to evaluate the impact of discharges from the Project on the receiving water (surface water, ground water, and sediments) and to determine the need for effluent limits, monitoring requirements, and other special conditions to ensure that the Project will meet state water quality standards. This information is typically required in an application for a National Pollutant Discharge Elimination System (NPDES) permit (WAC 173-220-040 and 40 C.F.R. § 122.21).

In response to Ecology's requests, Millennium submitted additional information on September 20, 2017. However, the submittals still do not provide detailed information to adequately characterize process wastewater and stormwater that will be generated at the site, including:

- Sources of wastewater (points of generation).
- Estimated wastewater volumes.
- Estimated pollutant concentrations.

2. All Known, Available and Reasonable Methods of Prevention, Control and Treatment (AKART) and Engineering Reports. AKART is required by three state statutes dealing with water pollution and water resources (Chapter 90.48 RCW, Chapter 90.52 RCW, and Chapter 90.54 RCW) and the state NPDES regulations that implement these laws (WAC 173-220). These laws and regulations state that in order to ensure the purity of all waters of the state and regardless of the quality of the waters of the state, discharges must be treated with all known, available, and reasonable methods of prevention, control, and treatment.

Chapter 173-240 WAC requires submittal of engineering reports and plans for new and modified industrial wastewater conveyance, discharge, and treatment facilities. Industrial wastewater includes contaminated stormwater. Ecology uses the information in the engineering report to determine whether AKART is being met and to ensure that effluent from the Project will meet applicable effluent limitations to protect aquatic life.

Millennium's submittals, including the submittal of September 20, 2017, did not provide sufficient information to determine whether AKART will be met for both process wastewater and stormwater generated from the Project. The following is a list of information deficiencies:

- The current AKART analysis does not address the wastewater generated during construction and operation of the Project (i.e., the current AKART analysis addresses only existing Millennium operations).
- Specific best management practices (BMPs) for stormwater management on site, at and near rail lines, and for rail car unloading were not provided.
- Engineering reports were not submitted for the following:

- Stormwater collection and treatment facilities (including dock and trestle).
- The new wastewater treatment system.
- Any proposed modifications to the existing wastewater treatment system.
- Changes to hydraulic loading through the existing wastewater treatment system and through the conveyance and outfall structures.

3. **Mixing Zone.** Ecology may authorize a mixing zone to meet water quality criteria once it has been determined that AKART has been met (WAC 173-201A-400). Water quality criteria must be met at the edge of a mixing zone boundary. Ecology uses the dilution factors determined for each mixing zone in analyzing the potential for violation of water quality standards and to derive effluent limitations as necessary.

Millennium's submittals did not provide updated mixing zone information, which Ecology would need in order to determine potential to violate water quality standards. Missing information includes a new mixing zone analysis to evaluate changes in dilution factors due to changes in the final effluent at Outfall 002A and updated receiving water information.

4. **Construction.** Contaminated stormwater and ground water will be generated during construction of the Project. Ecology needs sufficient information to evaluate the impact of construction activities and the discharges from these activities on waters of the state. This is information that is necessary for reasonable assurance and to demonstrate AKART as discussed above.

Millennium's submittals provided very little information concerning the unique construction of the Project. Missing information includes the following:

- How compaction of soils will potentially impact groundwater and surface water.
- Specific construction BMPs.
- Construction stormwater and groundwater characterization information, including estimated volumes and pollutant concentrations.
- Whether construction wastewater will be adequately treated.

5. **Antidegradation.** The Clean Water Act requires that state water quality standards protect existing uses by establishing the maximum levels of pollutants allowed in state waters. The antidegradation process helps prevent unnecessary lowering of water quality. Washington State's antidegradation policy follows the federal regulation guidance and has three tiers of protection. Tier II (WAC 173-201A-320) is used to ensure that waters of a higher quality than water quality criteria are not degraded unless such lowering of water quality is necessary and in the overriding public interest. A Tier

II analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body.

Millennium's submittals did not include a detailed Tier II analysis for process wastewater and stormwater to determine whether the Project has the potential to cause measurable degradation at the edge of the chronic mixing zone.

Ecology notified Millennium during various meetings, conference calls, and site visits during 2017 (June 8, June 19, June 28, August 16, August 29, and September 8, 2017) that detailed information regarding the stormwater and process wastewater would need to be submitted to Ecology in order to provide reasonable assurance that the discharges from the Project would meet state water quality standards.

C. Water Rights

The Millennium proposal includes operational descriptions for ongoing reuse of stormwater for industrial dust control. If stormwater is collected and reused for a beneficial use, a water right permit would be required in accordance with Chapter 90.03 RCW.

The Millennium property formerly supported the Reynolds aluminum smelter. During the operations as an aluminum smelter, Reynolds had three water right claims and six water right certificates with a combined total annual quantity (Qa) of 31,367 acre-feet per year at a withdrawal rate of 23,150 gallons per minute (Qi). The Reynolds smelter closed in 2000.

These claims and certificates are now owned by Northwest Alloys, who purchased the property from Reynolds in the early 2000s. No information has been provided to Ecology that documents continued beneficial use of water since about the early 2000s.

In December 2016, Ecology met with Millennium and requested records and other relevant information to document what the current and recent water uses have been on the Millennium property. To date, Millennium has not provided this information. If these water rights have been partially or fully relinquished, Millennium would need to apply for and obtain the necessary water rights to legally put water to beneficial use at the Project site for its proposed operations.

As of September 26, 2017, no information has been provided by Millennium to Ecology in order to quantify the extent and validity (or continued beneficial use) of the existing water rights that are appurtenant to the property, and no water right application(s) have been received by Ecology requesting any new use of water or change in beneficial use(s) of water.

Without a water right, Ecology does not have reasonable assurance that Millennium will be able to legally carry out its proposal.

D. Toxics Cleanup

The proposed location for the Project is the former Reynolds Metals aluminum smelter site. This is a Model Toxics Control Act cleanup site. The principal contaminants are fluoride, polycyclic aromatic hydrocarbons (PAHs), cyanide, and total petroleum hydrocarbons (TPHs). Millennium and Northwest Alloys (a subsidiary of Alcoa) are potentially liable persons (PLPs) for the site. Alcoa owns the property. Millennium leases the property from Alcoa. The PLPs have been working to define the extent of the contamination at the site and evaluate the potential cleanup alternatives. Public notice of a draft cleanup action plan outlining the proposed cleanup was issued in March 2016. Ecology has been working with the PLPs to provide additional sampling along the Columbia River to address comments received on the draft cleanup action plan. To date, the cleanup action plan and consent decree have not been finalized.

Portions of the Project's infrastructure are located on contaminated soil and a historic landfill at the site. The majority of the site contains contaminated ground water. Proposed construction and operation of the Project would likely alter the migration of contaminated ground water at the site. The ballast that will be used during construction could force ground water to the surface with potential for discharge to the Columbia River.

Millennium's submittals do not provide sufficient information to evaluate the impact of the potential discharge of contaminated stormwater and ground water during the construction and operation of the Project. As a result, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

YOUR RIGHT TO APPEAL

You have a right to appeal this Denial Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Denial Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do all of the following within 30 days of the date of receipt of this Order:

- File your appeal and a copy of this Denial Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Denial Order on Ecology in paper form—by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

ADDRESS AND LOCATION INFORMATION

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503 **Pollution Control Hearings Board** 1111 Israel RD SW, Suite 301 Tumwater, WA 98501	**Department of Ecology** Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608 **Pollution Control Hearings Board** PO Box 40903 Olympia, WA 98504-0903

Maia D Bellon, Director
Department of Ecology

9/26/17
Date

EXHIBIT B

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS, FRIENDS OF THE COLUMBIA GORGE, SIERRA CLUB, and COLUMBIA RIVERKEEPER, Intervenor-Respondents.	PCHB No. 17-090 ORDER ON SUMMARY JUDGMENT

INTRODUCTION

Millennium Bulk Terminals-Longview, LLC (Millennium) filed a Notice of Appeal seeking review of the Department of Ecology's (Ecology) denial of a Clean Water Act (CWA) Section 401 Certification (401 Certification) for Millennium's proposed coal export terminal. Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club and Columbia Riverkeeper (WEC) were granted intervention as respondents. Millennium, Ecology, and WEC filed separate motions for summary judgment. BNSF Railway Company was granted leave to file an *amicus curiae* brief in support of Millennium.

The Board considering this matter was comprised of Board Chair Joan M. Marchioro, Presiding, and Members Kay M. Brown and Neil L. Wise. Attorneys Beth S. Ginsberg and Jason T. Morgan represented Millennium. Senior Counsel Thomas J. Young and Assistant Attorney General Sonia A. Wolfman represented Ecology. Kristen L. Boyles, Marisa C. Ordonia and Jan E. Hasselman represented Intervenor-Respondents WEC.

In rendering its decision, the Board considered the following submittals:

1. Millennium's Motion for Summary Judgment on Issues 3-10 and 12;

2. Declaration of Beth Ginsberg In Support of Millennium's Motion for Summary Judgment, with Exhibits A-C;

3. Respondent Department of Ecology's Response to Millennium's Motion for Summary Judgment on Issues 3-10 and 12;

4. State of Washington, Department of Ecology's Motion for Partial Summary Judgment on Legal Issue 2;

5. Declaration of Thomas J. Young In Support of Ecology's Response to Millennium's Motion for Summary Judgment on Issues 3-10 and 12 and In Support of Ecology's Motion for Summary Judgment on Issue 2, with Exhibits A-G;

6. Declaration of Loree' Randall In Support of Ecology's Response to Millennium's Motion for Summary Judgment on Issues 3-10 and 12 and In Support of Ecology's Motion for Summary Judgment on Issue 2, with Exhibits A-E;

7. Washington Environmental Council *et al.* Opposition to Millennium Motion for Summary Judgment on Issues 3-10 and 12 and Cross-Motion for Summary Judgment on All Remaining Issues;

8. Declaration of Marisa Ordonia In Support of Washington Environmental Council *et al.* Opposition to Millennium Motion for Summary Judgment on Issues 3-10 and 12 and Cross-Motion for Summary Judgment on All Remaining Issues, with Exhibits A-G;

9. Millennium's Reply In Support of Its Motion for Summary Judgment on Issues 3-10 and 12;

10. Second Declaration of Beth Ginsberg In Support of Millennium's Motion for Summary Judgment on Issues 3-10 and 12, with Exhibits A-B;

11. Millennium Bulk Terminals-Longview's Opposition to Ecology's Motion for Summary Judgment on Issues No. 2;

12. Declaration of Kristin Gaines, with Exhibits A-D;

13. Declaration of Nicole LaFranchise;

14. Declaration of Glenn Grette;

15. Declaration of Jason T. Morgan in Opposition to Department of Ecology's Motion for Summary Judgment on Issue No. 2, with Exhibits A-F;

16. BNSF Railway Company's *Amicus Curiae* Brief In Support of Millennium Bulk Terminals Longview, LLC's Motion for Summary Judgment and In Opposition to Department of Ecology's Motion for Partial Summary Judgment;

17. Respondent Department of Ecology's Response to BNSF Railway Company's Amicus Curiae Brief;

18. State of Washington, Department of Ecology's Reply In Support of Motion for Partial Summary Judgment on Legal Issue 2;

19. Declaration of Sally Toteff In Support of Department of Ecology's Reply to Millennium's Response to Ecology's Motion for Summary Judgment on Issue 2;

20. Second Declaration of Loree' Randall In Support of Ecology's Motion for partial Summary Judgment on Legal Issue 2, with Exhibit A;

21. Declaration of Rebecca Rothwell, with Exhibit A;

22. Declaration of James DeMay;

23. WEC *et al.* Reply In Support of Cross-Motion for Summary Judgment;

24. Millennium Bulk Terminals-Longview, LLC's Sur-Reply In Opposition to Ecology's Motion for Summary Judgment on Issue 2; and

25. The Board's file in this matter.

The parties' motions address the following legal issues from the Prehearing Order previously entered by the Board:[1]

2. Whether there is reasonable assurance that the construction and operation of Millennium's proposed project will meet applicable water quality standards pursuant to 40 C.F.R. §121.2(a)?

3. Whether Ecology's Denial is *ultra vires* because it is based on concerns that are not related to water quality?

4. Whether Ecology's Denial is arbitrary, capricious, contrary to law and unsupported by substantial evidence?

5. Whether Ecology's application of RCW 43.21C.060 to support the Denial is overbroad?

6. Whether Ecology's application of RCW 43.21C.060 to support the denial is preempted by 33 U.S.C. §1341?

7. Whether Ecology's was precluded from denying the certification based on RCW 43.21C.060 when water quality certifications are exempt from SEPA pursuant to WAC 197-11-800(9)?

8. Whether Ecology waived its certification rights under 33 U.S.C. §1341?

9. Did Ecology have substantive authority under the State Environmental Policy Act (SEPA), RCW 43.21C.060, to deny the section 401 certification with prejudice, regardless of whether such authority existed under section 401?

[1] The Board previously granted summary judgment on Issue 1, concluding that it had jurisdiction to hear the appeal of the denial of a Clean Water Act Section 401 water quality certification under RCW 43.21B.110. *Millennium Bulk Terminals-Longview, LLC v. Ecology*, PCHB No. 17-090 (Order Granting Motion for Partial Summary Judgment on Legal Issue 1, Feb. 27, 2018).

10. Was Ecology authorized by the terms of section 401 to use its substantive SEPA authority to deny the section 401 certification?

10.1 Is Ecology's supplemental authority under SEPA (RCW 43.21C.060) an "other appropriate requirement of state law," under the Clean Water Act, section 401(d)?

10.2 Was Ecology's use of substantive SEPA authority to deny the certification authorized by section 401 of the Clean Water Act, when the exercise of that authority was based, in part, on impacts related to water quality?

11. Is Millennium barred from challenging the Final Environmental Impact Statement's findings and conclusions regarding the nine areas of significant, adverse, unmitigated impacts cited in Ecology's section 401 denial?

12. Did Ecology have authority to deny the section 401 water quality certification "with prejudice" upon concluding that Millennium failed to demonstrate reasonable assurance, or was Ecology required to deny the section 401 certification "without prejudice"?

On May 31, 2018, the parties presented oral argument on the motions. Based on its review of the record and foregoing pleadings, and the arguments of the parties, the Board enters the following decision:

BACKGROUND

Millennium proposes to construct and operate a coal export terminal (the Project) on an existing industrial site in and adjacent to the Columbia River in Cowlitz County. The Project would be developed on 190 acres primarily within a 540-acre site leased by Millennium. Coal would be transported to the Project site by rail and stockpiled for eventual loading onto ocean-going vessels for transport to Asia via the Columbia River and Pacific Ocean. The completed Project would consist of "one operating rail track, eight rail tracks for storing rail cars, rail car unloading facilities, a stockyard for coal storage, and conveyor and reclaiming facilities. The

terminal would include two new docks (Docks 2 and 3) in the Columbia River, and shiploading facilities on the two docks. Dredging would be required to provide access to and from the Columbia River navigation channel (navigation channel) and for berthing at Docks 2 and 3." Young Decl., Ex. A at S-1.

Millennium intends to construct the Project in two stages. During Stage 1, Millennium would construct the two docks, two stockpile pads, railcar unloading facilities, the operating rail track and rail storage tracks, Project site area ground improvements, associated facilities and infrastructure. The Project's throughput capacity at the completion of Stage 1 would be 25 million metric tons of coal per year (MMTPY). Stage 2 facilities, construction of which would begin at the completion of Stage 1, consist of one additional ship loader on Dock 3, two additional stockpile pads, conveyors, and equipment necessary to increase throughput to 44 MMTPY. Young Decl., Ex. A at S-20-22.

The Project will impact more than 32 acres of wetlands and approximately six acres of ditches. Millennium proposes to mitigate for these impacts through the construction of a wetland mitigation site of approximately 100 acres. The Project will create new overwater coverage totaling 4.83 acres, the impacts of which will be addressed through the construction of an off-channel mitigation site. Ginsberg Decl., Ex. A at 3-4.

The Project is intended to operate 24 hours per day, seven days per week, and is designed for a minimum 30-year period of operation. Young Decl., Ex. A at S-8. The Project also requires the dredging of approximately 500,000 cubic yards of sediment from the Columbia River in order to provide site access from the river's navigation channel and berthing at Docks 2

and 3. *Id.*, Ex. A at 2-17. At full terminal operations, the Project would "bring approximately 8 loaded unit trains each day carrying coal to the project area, send out approximately 8 empty unit trains each day from the project area, and load an average of 70 vessels per month or 840 vessels per year, which would equal 1,680 vessel transits in the Columbia River annually." *Id.*, Ex. A at S-8.

Cowlitz County and Ecology served as co-lead agencies for environmental review of the Project under the Washington State Environmental Policy Act (SEPA), ch. 43.21C RCW. On September 9, 2013, Cowlitz County issued a revised Determination of Significance stating that the Project was likely to result in significant adverse environmental impacts and that an environmental impact statement (EIS) was required. Cowlitz County and Ecology elected to prepare a joint SEPA EIS. Young Decl., Ex. A at S-2.

On April 28, 2017, Cowlitz County and Ecology issued the final EIS (FEIS) for the Project. The FEIS identified unavoidable and significant adverse environmental impacts associated with construction and operation of the Project, as well as proposed mitigation measures. With respect to the significant adverse environmental impacts and mitigation, the FEIS stated:

> If the proposed mitigation measures were implemented, they would reduce but not completely eliminate significant adverse environmental impacts resulting from construction and operation of the [Project]. Unavoidable and significant adverse environmental impacts could remain for nine environmental resource areas: social and community resources; cultural resources; tribal resources; rail transportation; rail safety; vehicle transportation; vessel transportation; noise and vibration; and air quality.

Young Decl., Ex. A at S-41; *see also* S-41-44, S-46-60. The FEIS was not appealed.

In order to construct the project, Millennium must obtain a CWA Section 401 water quality certification from Ecology. 33 U.S.C. §§ 1341. Millennium submitted a Joint Aquatic Resources Permit Application requesting a Section 401 water quality certification from Ecology. On September 26, 2017, Ecology issued Order # 15417 denying Millennium's request for a Section 401 water quality certification with prejudice. Ecology denied the 401 Certification on two bases: (1) the Project's significant, unavoidable adverse impacts identified in the FEIS conflicted with Ecology's SEPA policies in WAC 173-802-110; and (2) Ecology did not have reasonable assurance that the Project as proposed would meet applicable water quality standards and other appropriate requirements of state law. Ginsberg Decl., Ex. A. Millennium timely appealed Ecology's decision.

ANALYSIS

A. Summary Judgment Standard

Summary judgment is a procedure available to avoid unnecessary trials where there is no genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a

summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the nonmoving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare assertions concerning alleged genuine material issues do not constitute facts sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). When determining whether an issue of material fact exists, all facts and inferences are construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The Board will enter summary judgment for a non-moving party under appropriate circumstances. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

The parties contend that there are no material issues in dispute and this matter is appropriate for summary judgment. The Board concurs.

B. Ecology can use substantive SEPA to deny 401 certification (Issues 3, 4, 5, 6, 7, 9 and 10)

Millennium challenges Ecology's use of substantive SEPA authority to deny the 401 Certification. Millennium asserts that, pursuant to WAC 197-11-800(9), its 401 Certification request for the Project is categorically exempt from the requirements of SEPA. Millennium also contends that Ecology's use of substantive SEPA authority to deny the 401 Certification exceeded the scope of the agency's authority under Section 401 of the CWA.

Ecology and WEC disagree. Citing WAC 197-11-305(1)(b), they argue that because segments of the Project are not SEPA exempt, the 401 Certification is likewise not exempt. Ecology and WEC assert that because SEPA is supplementary to all other existing authorizations, an agency can use its substantive SEPA authority to deny a permit even though all criteria for the permit have otherwise been met. Finally, Ecology and WEC argue that no provision of the CWA precludes Ecology's use of substantive SEPA authority when acting on a 401 certification request.

As discussed below, the Board agrees with Ecology and WEC. Under the facts of this case, the 401 Certification is not categorically exempt from SEPA. Nor does Section 401 of the CWA preclude Ecology's use of substantive SEPA in this instance. The Board concludes that Ecology's use of substantive SEPA authority to deny Millennium's 401 Certification request was not clearly erroneous. Therefore, the Board grants summary judgment to Ecology and WEC on Issues 3, 4, 5, 6, 7, 9, and 10.

1. SEPA

With the enactment of SEPA in 1971, the legislature sought to bring an environmental consciousness into government decision making. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 91, 392 P.3d 1025 (2017). The stated purposes of SEPA are

> (1) To declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and [to] stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

RCW 43.21C.010 (alteration in original). SEPA recognizes the broad policy "that each person has a fundamental and inalienable right to a healthful environment." RCW 43.21C.020(3). The primary focus of SEPA is on the decision making process. SEPA seeks to ensure that environmental values are given appropriate consideration. *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973); *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). SEPA imposes a duty on the government agency to assemble and review full environmental information before rendering a decision. *Davidson Series & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 634-35, 246 P.3d 822 (2011).

SEPA requires an EIS only for "major actions having a probable significant, adverse environmental impact." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137 (2002); RCW 43.21C.031(1). "The primary function of an EIS is to identify adverse impacts to enable the decisionmaker to ascertain whether they require either mitigation or denial of the proposal." *Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990); WAC 197-11-400(2) ("An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation, that would avoid or minimize adverse impacts or enhance environmental quality.") The purpose of an EIS is to provide decision makers with "sufficient information to make a reasoned decision." *Citizens Alliance To Protect Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).

Issuance of an EIS does not approve or deny a project. Rather, the EIS accompanies a proposal through the agency review process so that agency officials can use the document when making permitting decisions. RCW 43.21C.030(2)(d). "Any governmental action may be conditioned or denied" based on the adverse environmental impacts disclosed in an EIS. RCW 43.21C.060; WAC 197-11-660; *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 64, 578 P.2d 1309, 1312 (1978)("SEPA confers substantive authority to the deciding agency to act on the basis of the impacts disclosed"). The granting or denial of a Section 401 water quality certification is a governmental action within the meaning of RCW 43.21C.060. *See* WAC 197-11-704(2) ("actions" defined to include the licensing of a project). Ecology is the state agency authorized to issue or deny certifications under Section 401 of the CWA. RCW 90.48.260.

The policies and goals of SEPA are supplementary to "existing authorizations of all branches of government." RCW 43.21C.060. SEPA serves as an "overlay" on existing authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65. Using SEPA substantive authority, a decision maker may deny a permit even if it meets all of the requirements for approval under permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986) ("under [SEPA], a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance").

The denial of a proposal must be predicated "upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally

designated by the agency" or appropriate legislative body. RCW 43.21C.060; WAC 197-11-660(1)(a). In order to deny a proposal under SEPA, a decision maker must find that

> (1) The proposal would be likely to result in significant adverse environmental impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.

RCW 43.21C.060; WAC 197-11-660(1)(f). "The decision maker shall cite the agency SEPA policy that is the basis of any condition or denial under this chapter[.]" WAC 197-11-660(1)(b). Failure to sufficiently document compliance with these requirements can result in reversal of a SEPA-based denial.[2] *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 752-53, 765 P.2d 264 (1998).

2. Millennium's 401 Certification request not categorically exempt from SEPA

Certain actions are statutorily or administratively exempt from SEPA's threshold determination and EIS requirements. Statutory exemptions are set forth in chapter 43.21C RCW. As for administrative or categorical exemptions, the legislature directed Ecology to adopt rules identifying categories of governmental actions "not to be considered as potential major actions significantly affecting the quality of the environment." RCW 43.21B.110(1)(a). Additionally, "the rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review. An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter." *Id.*

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[2] Millennium does not claim that Ecology's 401 Certification decision failed to comply with the requirements of RCW 43.21C.060 or WAC 197-11-660(1).

Reviewing this provision, the court of appeals stated that its plain language directed Ecology "(1) to develop its own list of government-action categories that are not major actions affecting the quality of the environment ('administratively-created' categorical exemptions), and (2) to create a rule-based exception that governs when a proposal potentially falling under an otherwise exempt government-action category may nonetheless require environmental review." *Alpine Lakes Prot. Soc'y v. Dep't of Ecology*, 135 Wn. App. 376, 391, 144 P.3d 385 (2006).

Carrying out the legislative directive, Ecology adopted a number of categorical exemptions. *See* WAC 197-11-305, -800 to -890. The SEPA regulations define "categorical exemption" as "the type of action, specified in these rules, which does not significantly affect the environment [.]" WAC 197-11-720. One such categorical exemption is the granting or denial of a Section 401 water quality certification. WAC 197-11-800(9). Addressing the directive to create an exception to exemption, the SEPA rules provide in relevant part that a proposal is not categorically exempt if "(b) [T]he proposal is a segment of a proposal that includes: (i) [a] series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not[.]"[3] WAC 197-11-305(1)(b)(i). Under the SEPA regulations, "proposal" means "a proposed action. A proposal includes both actions and regulatory decisions of agencies as well as any actions proposed by applicants." WAC 197-11-784.

[3] Citing to WAC 197-11-305, the definition of "categorical exemption" states that the SEPA rules "provide for those circumstances in which a specific action that would fit within a categorical exemption shall not be considered categorically exempt [.]" WAC 197-11-720.

Millennium contends that its 401 Certification request is categorically exempt from SEPA. As such, pursuant to RCW 43.21C.110(1)(a) Ecology could not use substantive SEPA authority to deny the request. Millennium argues that by identifying a Section 401 water quality certification as an action categorically exempt from SEPA, Ecology determined that such action remains categorically exempt even if Millennium's proposal as a whole is subject to SEPA. According to Millennium, Ecology is incorrect in claiming that WAC 197-11-305(1)(b)(i) negates the categorical exemption status of its 401 Certification request. Millennium asserts that its reading of WAC 197-11-305(1)(b)(i) is supported by the court of appeals decision in *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 151 P.3d 1079 (2007).

Ecology and WEC argue that, under WAC 197-11-305(1)(b)(i), Millennium's 401 Certification request is not categorically exempt as it is part of a larger proposal where some actions are categorically exempt and others are not. They assert that this conclusion is consistent with Ecology's longstanding interpretation of its own regulation and, as such, it is entitled to deference. *See* Randall Decl., Ex. A at ¶ 4. Ecology and WEC contend that, because Millennium's 401 Certification request was not SEPA exempt, Ecology rightfully employed its SEPA substantive authority to deny 401 Certification for the Project. Finally, Ecology asserts that Millennium's reliance on *Clallam County Citizens* is misplaced as the court's reasoning in that case was unique and did not establish any binding precedent on this issue.

The Board concludes that Millennium's request for a 401 Certification is not categorically exempt from SEPA. The categorical exemption for Section 401 water quality

certifications does not apply to Millennium's 401 Certification request as it is undisputedly a segment of a proposal that includes "[a] series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not[.]" WAC 197-11-305(1)(b)(i); *Foster v. King County*, 83 Wn. App. 339, 348, 921 P.2d 552 (1996) (SEPA "categorical exemptions do not apply to actions that are a mixture of exempt and non-exempt activities").

This conclusion is consistent with Ecology's longstanding interpretation of its SEPA regulations. *See* Randall Decl., Ex. A at ¶ 4 (if project requires at least one SEPA non-exempt permit, Ecology requires compliance with SEPA for 401 certification). Ecology's interpretation of its own regulation is entitled to great weight, unless such interpretation conflicts with the statute's plain language. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004). The Board concludes that Ecology's interpretation does not conflict with RCW 43.21C.110, which specifically directs Ecology to develop a rule addressing those instances when an otherwise categorically exempt action would be subject to SEPA.

The Board disagrees with Millennium's assertion that *Clallam County Citizens* supports its position that WAC 197-11-305(1)(b)(i) does not apply. It is unclear precisely what proposal, if any, the Court of Appeals considered in its analysis when it summarily concluded that WAC 197-11-305(1)(b)(i) did not apply because the underlying action was categorically exempt from SEPA. *Id.* at 222. As a result, the decision in *Clallam County Citizens* lacks necessary clarity on the status of a SEPA categorical exemption in the context of a larger proposal. The Board does

not consider *Clallam County Citizens* to be helpful to its resolution of the categorical exemption issue raised in this case.

3. CWA Section 401 does not preclude use of substantive SEPA

Millennium asserts that the plain language of CWA Section 401(a)(1), 33 U.S.C. § 1341(a)(1), precludes Ecology's use of substantive SEPA authority when reviewing a request for a Section 401 water quality certification. According to Millennium, under Section 401(a)(1) Ecology can only consider whether a discharge meets the applicable provisions of the CWA set forth in that section, all of which relate to water quality. 33 U.S.C. § 1341(a)(1) (citing sections 1311, 1312, 1313, 1316, and 1317). In support of this assertion, Millennium relies on *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986), where the Oregon court reversed the state's finding of non-compliance with land use regulations as the basis for denying a Section 401 water quality certification.

Millennium further asserts that Section 401(a) preempts Ecology's use of SEPA substantive authority to deny the 401 Certification. Millennium states that its use of the word "preempt" is intended to mean "to prevent from happening or taking place" and it is arguing that Ecology's denial was *ultra vires*, not that there is field or conflict preemption. Millennium Reply at 8. Millennium contends that Ecology acts under federal law when deciding whether to issue a Section 401 water quality certification and the agency "cannot use state law authority to expand the scope of federal certification requirements under 33 U.S.C. § 1341(a)." Millennium Mot. for S.J. at 13 (emphasis omitted). Millennium asserts that, by using substantive SEPA authority, Ecology is improperly attempting to graft an additional criterion into Section

401(a)(1). Millennium argues that the 401 Certification denial must be set aside as Ecology did not limit its denial to water quality effects of the discharge under the CWA sections identified in Section 401(a)(1).

Rejecting Millennium's reading of Section 401, Ecology argues that the text of the statute does not prescribe what the agency may consider when denying a Section 401 water quality certification. Ecology and WEC note that SEPA is supplementary to all other authorizations and assert that, in order for it not to apply to Section 401, it must be preempted. Millennium did not engage in a preemption analysis, choosing instead to simply cite the text of Section 401. Ecology and WEC contend that the CWA does not preempt SEPA and Ecology can use substantive SEPA to deny Millennium's 401 Certification request even if the Project meets all of the standards in Section 401.

Ecology and WEC assert that Millennium's reliance on *Arnold* is misplaced as Oregon does not have a statutory equivalent to SEPA. Ecology contends that, contrary to Millennium's assertion, the state Supreme Court's citation of *Arnold* in *Dep't of Ecology v. PUD No. 1 of Jefferson Cy.*, 121 Wn.2d 179, 849 P.2d 646 (1993) lends no support to its argument that Section 401 "supersedes" state law. Rather, the state Supreme Court cited *Arnold* only for the proposition that Section 401(d) provides a state with broad authority to condition a project. Ecology and WEC further contend that *Arnold* and other out-of-state cases cited by Millennium are inapplicable as they dealt with hydroelectric projects subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) and governed by the Federal Power Act. Unlike the CWA, the Federal Power Act preempts state and local law. According to Ecology and WEC,

absent preemption of SEPA by the CWA, Ecology was not precluded from using its SEPA substantive authority in denying Millennium's 401 Certification request.

The Board concludes that the text of CWA Section 401 does not preclude Ecology's use of substantive SEPA authority when acting on a Section 401 water quality certification request. As detailed above, SEPA's policies and goals are supplementary to "existing authorizations of all branches of government." RCW 43.21C.060. SEPA serves as an "overlay" on existing authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65. A decision maker can use SEPA substantive authority to deny a permit even if it meets all of the requirements for approval under permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). Pursuant to RCW 43.21C.060, "[a]ny governmental action may be conditioned or denied" under SEPA. *See* WAC 197-11-660; *Polygon*, 90 Wn.2d at 64. There is no dispute that the granting or denial of a Section 401 water quality certification constitutes a governmental action within the meaning of RCW 43.21C.060. *See* WAC 197-11-704(2). The Board concludes that Ecology lawfully employed its SEPA substantive authority to deny Millennium's 401 Certification request based on the significant adverse environmental impacts identified in the FEIS.

The Board further concludes that court's reasoning in *Arnold* does not apply to this case. Unlike Washington, Oregon does not have a statute comparable to SEPA. In addition, *Arnold* involved a FERC permit governed by the Federal Power Act, which preempts state and local laws. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181-82 (1946) (Federal Power Act establishes comprehensive federal scheme for regulating hydroelectric power projects on

navigable waters and thus preempts state law by occupying the field). Contrary to Millennium's claim, the text of Section 401 does not support the conclusion that Ecology is precluded from employing SEPA in the review of a Section 401 water quality certification request.

4. Ecology's denial of 401 Certification not clearly erroneous

Unless otherwise required by law, the Board's scope and standard of review shall be de novo. WAC 371-08-485(1). SEPA does not prescribe the scope or standard of review on appeal. Deferring to case law, the Board reviews the exercise of SEPA substantive authority to condition or deny a proposal under the "clearly erroneous" standard of review. *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *see also McQuarrie v. Seattle*, SHB No. 08-033 (Findings of Fact, Conclusions of Law, and Order, Aug. 5, 2009) ("review of an agency's exercise of substantive SEPA authority (i.e. the content of agency action, such as mitigation or conditions) is also under the clearly erroneous standard"). Under this standard, the Board "does not substitute its judgment for that of the administrative body and may find the decision clearly erroneous only when it is left with the definite and firm conviction that a mistake has been committed." *Polygon*, 90 Wn.2d at 69 (*quoting Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969)) (internal quotations omitted).

There are no material issues of fact in dispute that preclude the granting of summary judgment. In this case, Ecology relied on the unchallenged FEIS in exercising its SEPA substantive authority to deny the 401 Certification. Millennium does not dispute the factual findings in the FEIS. The Board will not substitute its judgment for that of Ecology when reviewing under a clearly erroneous standard of review. Based on the Board's review of the

FEIS, and the FEIS's conclusion that the Project will have unavoidable and significant adverse impacts, the Board is not left with the definite and firm conviction that Ecology made a mistake when it denied Millennium's request for a 401 Certification under the agency's substantive SEPA authority. The Board grants summary judgment to Ecology and WEC on Issues 3, 4, 5, 6, 7, 9 and 10 and dismisses Millennium's appeal.

C. Remaining Issues (Issues 2, 8, 11, and 12)

The remaining issues ask whether there was reasonable assurance that the Project would meet water quality standards, whether Ecology waived its certification rights under Section 401,[4] whether Ecology had authority to deny the 401 Certification with prejudice, and whether Millennium was barred from challenging the FEIS. Because the Board concludes that the 401 Certification is not exempt from SEPA and Section 401 of the CWA does not preclude Ecology's use of substantive SEPA to deny a certification request, it need not reach Issues 2, 8, 11, and 12.

[4] Section 401(a)(1) of the CWA provides that if a state certifying agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," the state agency waives its right to issue a certification. 33 U.S.C. § 1341(a)(1). Millennium asserted that, although Ecology acted on the certification request within the one year time period, Ecology's actions in denying certification were "tantamount to a refusal or failure to act in the manner contemplated by section 401, and the Board should declare and adjudge that Ecology has waived its opportunity to certify the project." Millennium Mot. for S.J. at 22. While the Board need not reach the issue, it does note that Section 401 by its unambiguous terms limits the finding of waiver to a determination of whether the certifying agency acted within the prescribed time period. There is no dispute that Ecology acted within one year of receiving Millennium's 401 Certification request. No legal basis exists for the Board to take the action advanced by Millennium.

ORDER

The Board GRANTS summary judgment to Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club and Columbia Riverkeeper, and the State of Washington, Department of Ecology on Issues 3, 4, 5, 6, 7, 9 and 10 and AFFIRMS the Department of Ecology's denial of the Clean Water Act Section 401 Certification requested by Millennium Bulk Terminals-Longview, LLC.

SO ORDERED this 15th day of August, 2018.

POLLUTION CONTROL HEARINGS BOARD

JOAN M. MARCHIORO, Presiding

KAY M. BROWN, Member

NEIL L. WISE, Member

EXHIBIT C

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

October 23, 2017

Kristin Gaines
Millennium Bulk Terminals – Longview
4029 Industrial Way
Longview, WA 98632

RE: Point of Contact for Communication between Millennium Bulk Terminals-Longview and Washington State Department of Ecology

Dear Ms. Gaines:

This letter responds to recent requests the Department of Ecology (Ecology) has received regarding technical assistance for additional permit applications for the Millennium Bulk Terminal–Longview (Millennium) proposed coal export terminal. One request came from Millennium's consultant at American Multinational Engineering Firm related to an air quality permit application, and the other request was from the Millennium team related to a National Pollutant Discharge Elimination System permit application.

As you know, on September 26, 2017, Ecology denied the Section 401 Water Quality Certification requested by Millennium. The denial of this permit was based on the Clean Water Act and the State Environmental Policy Act.

In considering future permit requests from Millennium for the proposed coal export terminal, Ecology would be required to follow all relevant underlying laws. Specifically, the State Environmental Policy Act would require consideration of the findings of the April 28, 2017, Final Environmental Impact Statement (EIS) prepared by Cowlitz County and Ecology. The EIS identified the following nine unavoidable, un-mitigatable and adverse impacts related to the Millennium proposal:

- Increases of train-related noise to residences near four public at-grade crossings along the Reynolds Lead and BNSF Railway spur.
- Vehicle delays caused by increased train traffic that would block rail crossings in Cowlitz County.
- An increase in cancer risk for areas along rail lines near the project site and in Cowlitz County from increased diesel emissions primarily from trains.

- Impacts to the Highlands neighborhood, a minority and low-income neighborhood adjacent to the Reynolds Lead in Longview, Washington from increases of noise, vehicle delays, and inhalation cancer risk from diesel particulate matter.
- Exceedances of rail line capacity at three rail segments on the main line from adding 16 trains a day to Washington rail traffic.
- An increase to the train accident rate by 22 percent along the rail routes in Cowlitz County and Washington from Millennium-related trains.
- Increases to vessel related emergencies and vessel accidents from Millennium-related vessels.
- Demolition of the Reynolds Metals Reduction Plant Historic District.
- Delayed access to 20 managed tribal fishing sites along the Columbia River from increased rail traffic, and impacts to tribal resources from the construction and operation of the proposed facility on aquatic resources.

Although Ecology cannot prevent Millennium from filing future permit applications for the proposed coal export terminal, these EIS findings likely preclude Ecology from approving such applications. Therefore, at this time, Ecology staff will not be spending time on permit preparation related to Millennium's additional applications for the coal export terminal.

If you have any questions regarding future permit applications, please direct those questions through your attorneys to Mr. Tom Young at the Washington Attorney General's Office. Additionally, Mr. Young will serve as Ecology's point of contact in regard to the legal challenge that Millennium has indicated it will file against Ecology, regarding the denial of the Section 401 Water Quality Certification.

Sincerely,

Maia D. Bellon
Director

cc: Tom Young, Attorney General's Office

EXHIBIT D

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
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August 15, 2018

The Honorable John Barrasso
Chairman, Senate Environment & Public Works Committee
307 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member, Senate Environment & Public Works Committee
513 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

The Washington State Department of Ecology has been falsely accused of denying a water quality permit to the Millennium project based on our agency's so-called philosophical opposition to the coal export terminal. This is frankly nonsense.

The facts of this denial are simple: Millennium failed to meet existing water quality standards and further failed to provide any mitigation plan for the areas the project would devastate—especially along the Columbia River. To approve this permit under the circumstances would not only have been irresponsible, it would have posed a serious health risk to impacted communities and the surrounding environment.

As you know, the Clean Water Act charges states with the authority and responsibility to protect water quality within their borders by issuing permits and licenses. In this case, as in all previous cases, the Department of Ecology acted within its legal responsibility and did its duty to apply the regulations and follow legal precedent in an evenhanded manner.

In the company's filings in its many legal challenges to the Department of Ecology's decision, Millennium has acknowledged the basis of the permit denial: At many stages, the applicant failed to provide reasonable assurance that the project would not cause irreparable harm to water quality. The company acknowledges these shortcomings, but claims for itself the right to ignore them. They simply resist playing by the same rules required of everyone else.

All you have to do is look at a list of the impacts from this project to understand its potential to damage Washington's water quality:

- Destroying 24 acres of wetlands and 26 acres of forested habitat.
- Dredging 41 acres of river bed.
- Driving 537 pilings into the river bed for over 2,000 feet of new docks, resulting in the loss of five acres of aquatic habitat.
- Increasing vessel traffic on the Columbia River by 25 percent – an additional 1,680 ship trips a year.

The sheer scale of the proposal poses obvious environmental challenges, regardless of the material being handled:

- 1.5 million tons of material stockpiled on site – picture an 85-foot-high pile of coal running the length of the National Mall, from the steps of the Capitol to the foot of the Lincoln Memorial.
- Contaminated stormwater running off those piles (in addition to the coal dust and spillage tied to moving material from rail to ship).
- Sixteen train trips a day, each over a mile long and pulled by four diesel locomotives.

In short, there are multiple, insolvable problems with the proposal. The company understood these problems when the Department of Ecology completed the environmental impact statement in partnership with Cowlitz County. Although the company did not challenge the findings of the environmental study, its leaders appear to believe that if they can only yell loudly enough, these environmental impacts will somehow disappear.

Though the Department of Ecology has been accused of being biased for its denial of this permit, it is not the first entity to reject a coal terminal in the Northwest. Two others have been proposed and rejected in recent years: One by the U.S. Army Corps of Engineers and one by the State of Oregon. Each of those proposed projects raised similar issues to this one.

We are confident in the work we have done to protect Washington waters from irreparable harm. The Columbia River is the beating heart of Washington State. It is our nation's fourth-largest river and home to endangered salmon. The health of this river is vital to our state's agricultural and manufacturing economies, central to our energy production, relied on by Washington's treaty tribes, and an irreplaceable link in the environment that Washingtonians treasure.

The Columbia River deserves the full protection of the law, and the Department of Ecology honored both the letter and the intent of the law in making our decision. The idea that the federal government can run roughshod over the decisions of those who know, live in, and love Washington is deeply troubling.

For more than a year, my agency has been falsely charged with every manner of malfeasance by the proponents of this project. Officials in states that would bristle at the hint of federal

oversight over their own decision-making have nevertheless felt empowered to second-guess every comma and semicolon in our filings. Again and again, they have grossly mischaracterized our decisions, impugned our motives and challenged longstanding legal precedents.

Many legal bodies have already examined our authority and our decision. All of them have affirmed our actions. The water quality certification itself is just one of 23 approvals needed from local, state and federal authorities. Department of Ecology is one of three independent government bodies that has rejected this proposal.

The company's appeal of the Department of Ecology's decision now appropriately rests with Washington State's Pollution Control Hearings Board, which has indicated that it will issue a summary judgment decision in the days ahead. We anticipate the pollution board's decision will validate ours.

A copy of the state's denial is enclosed for your reference. I hope this letter helps committee members understand the facts about the permit denial. I am proud of the effort that my agency dedicated to this project. And I will continue to defend our water quality decision every step of the way.

Thank you for your interest in this matter.

Sincerely,

Maia D. Bellon
Director

cc: Patty Murray, Senator
Maria Cantwell, Senator
Senate Environment & Public Works Committee Members