

EXHIBIT A

The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

LIGHTHOUSE RESOURCES INC.;
LIGHTHOUSE PRODUCTS, LLC; LHR
INFRASTRUCTURE, LLC; LHR COAL,
LLC; and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Plaintiffs,

vs.

JAY INSLEE, in his official capacity as
Governor of the State of Washington;
MAIA BELLON, in her official capacity as
Director of the Washington Department of
Ecology; and HILARY S. FRANZ, in her
official capacity as Commissioner of Public
Lands,

Defendants.

No.: 3:18-CV-05005-RJB

**BRIEF OF AMICUS CURIAE
COWLITZ COUNTY IN
OPPOSITION OF DEFENDANTS'
MOTION TO DISMISS AND
MOTION FOR ABSTENTION**

I. INTRODUCTION

Defendants' rendition of the underlying facts of proceedings involving Amicus Curiae County comport with County's position in these proceeding by stating "[p]laintiffs (hereinafter Millennium) seek to build a coal export terminal in Longview, Washington." Dkt# 20, ¶ I, 1 at 2-3. Thereafter, Defendants' and County's factual understandings diverge. Defendants' statements that "[m]ultiple state and local decision-makers have denied necessary approvals for

1 the project for various reasons, including inability to meet the requirements of state and federal
 2 law...and the existence of several significant adverse environmental impacts that would result
 3 from the project” is accurate only in part. As set forth in its SHB Petition (Exhibit 1, County’s
 4 **Petition for Review**, p.3 21-26, p.4 1-5), County concluded the Examiner’s denials were:

5 . . . an unlawful and unjust application of the facts and evidence submitted at hearing on
 6 the Application, and unlawful and unjust application of the Cowlitz County Shoreline
 7 Master Program (“SMP”) and the Shoreline Management Act (“SMA”). The Decision
 8 was unlawful and unjust because it contains a clearly erroneous application of the State
 9 Environmental Policy Act (“SEPA”) and SMA and implementing regulations, fails to
 10 analyze the Application for consistency with the SMP, is outside of the scope of
 11 authority provided in the SMA, fails to fully consider and evaluate the facts and
 evidence presented at hearing, and is arbitrary and capricious. Finally, Petitioner is
 aggrieved by the Decision of the Hearing Examiner which conflicts with Petitioner’s
 interpretations and applications of its shoreline permitting and its SMP, and which
 misapplies and erroneously applies Petitioner’s interpretation and application of SEPA.

12 See also, the statements in County’s **Joinder of Summary Judgment Motion**:

13 County staff of the Department of Building and Planning is tasked with evaluating a
 14 [Shoreline Substantial Development Permit] SSDP and [Conditional Use Permit] CUP
 15 proposal under [Cowlitz County Code] CCC 19.20.020, and the Director, specifically, is
 16 tasked under local code with “determin[ing] whether the information submitted meets
 the requirements of WAC 173-27-180, Application requirements for substantial
 development, conditional use, or variance permit, RCW 90.58.140 . . .”. As addressed in
 the attached Staff Report, Exhibit County-1, County staff and the department Director
 expressly and specifically reviewed the proposal under the County’s Shoreline Master
 Program (SMP).

19 [Exhibit 2, County’s **Joinder**, ¶2 (“The Hearing Examiner Failed to Analyze...”), p.3 3-9].

20 And finally, see County’s **Response to Ecology’s Motion for Summary Judgment**:

21 As set forth in the attached Declaration of Elaine Placido, the County would challenge
 22 Ecology’s interpretation of the FEIS and staff presentation of the SMP...Although
 23 Ecology willingly conceded that the “ . . . [F]EIS is not on trial . . . “ [fn omitted], it
 24 nevertheless reconstituted and restated the content of that document (see, Wolfman Dec,
 cited in Ecology’s Motion) in such harsh contrast to the plain wording of the document,
 and the interpretations and understandings of its co-lead agency in its staff report (see,
 Placido Dec., at 3-5) so as to place the FEIS before this Board to adjudicate a
 25 divergence in wording, interpretations and understandings of the FEIS as it applied to
 the Hearing Examiner’s decision, and Issues 1-9 of the Board’s Prehearing Order.

[Exhibit 3, County's **Response**, ¶1 ("Challenged Representations and Mischaracterizations Renders Arguments Presented by Ecology Inadequate for Summary Judgment."), p.2 16-22, p.3. 1-6]. In sum, the County as a "local decision maker" has consistently argued that its 'local discretion' was disregarded by the Hearing Examiner, based in part on representations and mischaracterizations of the state agencies, that were then carried over before the Shorelines Hearings Board. While Defendants have alleged a "false narrative" by the Plaintiffs in furtherance of their arguments (Dkt# 20, at 9), similar assertions were previously raised by the County in state proceedings regarding Ecology. See, above and Exhibit 3.

II. IDENTITY AND INTEREST IN AMICUS CURIAE

Cowlitz County is a political subdivision of the State of Washington, possessing those powers expressly conferred by the state constitution and state statutes, or reasonably or necessarily implied from such authority. *State ex rel. Taylor v. Superior Court*, 2 Wn.2d 575, 98 P.2d 985 (1940); AGO 1996 No. 17. County possesses statutory authority over land use development approvals within its jurisdictional boundaries under Washington State's Shorelines Management Act (SMA) and State Environmental Policy Act (SEPA), Chs. 90.58 and 43.21C RCW, respectively. In Washington, where state statutes and administrative regulations, or portions thereof, provide for a "general grant" of authority or a general "statutory direction", respectively, on counties, "unaccompanied by definite directions as to how the power is to be exercised, [this] implies the right and duty on the part of individual [county] officials to employ the means and methods necessary to comply with statutory requirements." *Smith v. Greene*, 88 Wn.2d 363, 372, 545 P.2d 550 (1976). In the context of these proceedings, the application of authority by county officials under state laws and regulations is colloquially and commonly, and hereunder referred to as 'local discretion'.

As previously addressed by the County, as recognized (and unopposed) before the Shorelines Hearings Board (SHB) proceedings on these matters, the County was and is a proper

1 party to separately challenge the final decision of an independent Hearing Examiner¹ and
 2 defend County's legislative and administrative, interpretations and applications of its laws and
 3 permitting.² See, Cowlitz County Code 2.05 (Hearing Examiner):

4 **CCC 2.05.060 – Reconsideration and appeal**

5 *A. Any aggrieved person or agency who disagrees with the decision of the Examiner may*
 6 *make a written request for reconsideration...****

7 *C. Except as otherwise provided, an Examiner's decision shall be final and conclusive, and*
 8 *may be reviewable [under any code, statute or regulation], as shall thereto be applicable.*
 9 *(Emphasis added).*

10 Also noteworthy is that Defendants, in their Motion (Dkt# 20 at 12, 14, 21, 25, FN6, 31),
 11 represent the local Shorelines decisions solely as “the County’s denial”—treating County’s
 12 separate Petition and challenges of these denials as a Soviet-era ‘unperson’.³ While Defendants
 13 “do not concede” (Dkt# 20 at 25, FN6) that Plaintiffs can address these denials (and decline to
 14 argue they cannot) without ‘the County’ as a necessary party⁴, Defendants fail to factually
 15 address their representations of ‘the denial’.

16 For purposes of state court proceedings, the County regularly seeks to participate as a third-
 17 party in state proceedings where its authority, regulations and public interests are involved.
 18 *See, e.g., State v. Fitch*, Cowlitz Superior Court No. 17-1-00233-7 (spcl. appearance to quash

19 ¹ Dkt# 1-3; Mark C. Scheibmeir, Hearing Examiner, 299 N.W. Center St., Chehalis, Lewis County, WA.

20 ² See also, e.g., *City of Gig Harbor v. North Pacific Design, Inc.*, 149 Wn.App. 159, *rev.den.* 166 Wn.2d 1037
 21 (2009) (City appealed its Hearing Examiner approval (CUP); *In re King Cty Hrg Exmnr*, 135 Wn.App. 312 (Div 1,
 22 2006) (County wastewater division could challenge authority of County Hearing Examiner to conduct SEPA
 23 appeal of environmental group); *Palmer Coking Coal Co. v. City of Newcastle*, 2005 WL 583698 at *5, *rev. den.*
 24 156 Wn.2d 1002 (2006) (Developer argued City, and not Examiner issued final decision re: ‘vesting’). “In
 25 determining whether a land use decision is clearly erroneous, the reviewing court must [determine and defer to]
 26 the highest forum below that exercised fact-finding authority. In this case, that is the hearing examiner.”); *City of*
University Place v. McGuire, 102 Wn.App. 658 (2000) (City appealed the City Hearing Examiner's reversal of the
 City's administrative denial of a permit).

³ “World: Becoming an Unperson”. TIME Vol. 85, No. 4. Jan. 22, 1965. “Eight million Russians received a
 new ‘April 17’ in the mails last week, with a succinct instruction to insert it in their official Communist Party
 calendars for 1965. The new date was nothing like the old. Gone was the photo of the bald head, the round face
 unsmiling above the five medals, the six-line biography describing his rise to Chairman of the Council of
 Ministers and First Party Secretary. Even the fellow's inspirational quote on the back gave way to an anonymous
 poem praising party modesty. Thus, by having his birthday wiped from the state calendar, did Nikita Sergeevich
 Khrushchev become an ‘unperson’.”

⁴ See also, Dkt# 20 at 12: “While the County was not named as a defendant in the present case, Millennium
 seeks relief against it in the form of a declaration that its denial of the shoreline permits . . .”

subpoena on district court), and Silva v. Morton, Cowlitz Superior Court No. 16-2-01300-8 (limited appearance to oppose adjudication of septic system dispute without County health officer and department).

In order to fully represent the nature of its authority and ‘local discretion’ under discussion in these proceedings, regardless of the extent such representations may necessarily be in opposition with the Defendants representations and arguments in their Motion, the County has both a governance interest and a statutory interest in apprising the Court of such matters.

III. ARGUMENT

As previously noted, a federal District court benefits from accepting amicus briefs from non-parties “concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has ‘unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.’” *Skokomish Indian Tribe v. Goldmark*, 2013 WL 5720053, at *1 (W.D. Wash. 2013) (quoting *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)). The role of an amicus from an informative, non-party is to assist the Court “in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision.” *Newark Branch, N.A.A.C.P. v. Harrison*, 940 F.2d 792, 808 (3d Cir. 1991). In the present case, the Court must decide, in part, whether there is merit to the Defendants’ summary assertions that Plaintiffs allegations “rest[] on the false narrative” that state decision-makers are motivated by animus against coal” (Dkt# 20, at 9), while alluding to, but not factually vetting ‘the County’ as such decision-maker with such animus.

A. Disagreements Over the Draft and Final Environmental Impact Statements and Local and State Permit Reviews.

As discussed in Exhibit 3 to the *Declaration of Douglas Jensen in Support of Amicus Curiae*, County and the Plaintiffs’ state Department of Ecology (Ecology) served as co-lead

1 agencies under the State Environmental Policy Act, and jointly prepared and approved for
 2 issuance a Draft EIS (DEIS) on April 30, 2016. County and Ecology then jointly prepared and
 3 approved issuance of a Final EIS (FEIS) that included responses to each comment received on
 4 the Draft EIS to satisfactorily address all of the substantive responses and questions received.
 5 See, Dkt# 1, ¶72, FN7. Cowlitz County Code (CCC) required an appeal of the adequacy of the
 6 FEIS be filed by August 18, 2017, under CCC 19.11 (per Ch. 43.21C RCW). BNSF Railway
 7 Co. filed a precautionary appeal on May 12, 2017, but then withdrew its appeal on August 24th.
 8 MBT-L issued a Notice of Action under RCW 43.21C.080, which established a deadline for
 9 appealing the FEIS. No other FIES appeal was filed, which remained as jointly written and
 10 approved by County and Ecology. As set forth in Exhibit 1 to the *Declaration of Douglas*
 11 *Jensen in Support of Amicus Curiae*, at p.3, ¶6-b, 11-13, the County, separately approved a
 12 Critical Areas Permit (CAP) for coal terminal project on July 19, 2017. CAP was not appealed.

13 Despite being co-lead agencies in creating the DEIS and FEIS, and following Ecology's
 14 representations of those documents in state proceedings, County and Ecology now differently
 15 read the SEPA documents. Again, as discussed in Exhibit 3 to the *Declaration*, containing the
 16 statements of County's SEPA, 'responsible official', the County has challenged recent Ecology
 17 recitations of FIES contents and meanings in state proceedings. That County official has taken
 18 additional umbrage at Ecology's attempts to utilize a local, health assessment project associated
 19 with the coal terminal its castigation of the project under SEPA-EIS, even though the
 20 assessment project goals expressly state that it was to be uses as a broader, preliminary
 21 examination of area wide health and quality of life which could draw upon the FEIS
 22 information, but was not intended to supplant or expand upon the FEIS.

23 IV. CONCLUSION

24 Defendants have failed in their Motion to adequately discuss or to express the County's
 25 challenges and disagreements over the positions and actions of Ecology in local permitting. For
 26 these reasons, County believes there is an overriding public interest for the Court understanding

1 that there are countervailing facts and rejoinders brought forward in the County's Amicus
2 briefing, associated with the Plaintiffs' challenges and Defendants' responses, which are
3 relevant to this Court's review of Defendants' Motion.

4 DATED this 6th day of April, 2018.

5 RYAN JURVAKAINEN, Prosecuting Attorney

6 /s/ Douglas E. Jensen

7 DOUGLAS E. JENSEN, WSBA #20127

8 Chief Civil Deputy-Attorney for County

9 Cowlitz County Prosecuting Attorney

10 Hall of Justice – Civil Division

312 SW 1st Avenue

Kelso, Washington 98626

11 Telephone 360-577-3080

12 Fax 360-414-9121

13 Email jensend@co.cowlitz.wa.us

The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

LIGHTHOUSE RESOURCES INC.;
LIGHTHOUSE PRODUCTS, LLC; LHR
INFRASTRUCTURE, LLC; LHR COAL,
LLC; and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Plaintiffs,

vs.

JAY INSLEE, in his official capacity as
Governor of the State of Washington;
MAIA BELLON, in her official capacity as
Director of the Washington Department of
Ecology; and HILARY S. FRANZ, in her
official capacity as Commissioner of Public
Lands,

Defendants.

No.: 3:18-CV-05005-RJB

DECLARATION OF DOUGLAS
JENSEN IN SUPPORT OF
COUNTY'S AMICUS CURIAE
BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION FOR
PARTIAL DISMISSAL AND
MOTION FOR ABSTENTION

I, DOUGLAS JENSEN, declare under penalty of perjury the following is true and correct:

1. I am now and was at all times material herein a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, competent to make this Declaration, and have personal knowledge of the facts and documents referenced in this Declaration.

2. I am of the attorneys for in the above-captioned case. Amicus Curiae Cowlitz County,

*1 - Declaration of Douglas Jensen, RE: County's
Amicus Curiae Brief-(3:18-cv-05005-RJB)*

COWLITZ COUNTY PROSECUTING ATTORNEY
Hall of Justice – Civil Division
312 SW 1st Avenue
Kelso, Washington 98626
(360) 577-3080 FAX (360) 414-9121

1 Washington (“County”) in the above-captioned matter.

2 3. Attached as Exhibit 1 to this Declaration is a true and correct copy of County’s **Petition**
3 **for Review** (*without attached exhibits*), dated December 7, 2017, filed with the Shorelines
4 Hearing Board (SHB), and captioned *COWLITZ COUNTY vs. COWLITZ COUNTY HEARING*
5 *EXAMINER, the Local Government entity with administrative jurisdiction in the matter of*
6 *Shoreline Permit Application No. 17-0992, and MILLENNIUM BULK TERMINALS-*
7 *LONGVIEW, LLC and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY*, SHB No.
8 17-018. The County’s Petition was consolidated by SHB as *Millennium Bulk Terminals-*
9 *Longview et al. v. Cowlitz Cty Hrg Examiner, et al.*, under SHB No. 17-017c, with the separate
10 filing in SHB No. 17-017 of Millennium Bulk Terminals-Longview, LLC (Plaintiff in the
11 present case),

12 4. Attached as Exhibit 2 to this Declaration is a true and correct copy of County’s **Joinder**
13 **of Millennium Bulk Terminals-Longview, LLC’s Motion for Summary Judgment and**
14 **Request for Remand**, (*without attached Declaration or exhibit*), filed on January 26, 2018,
15 under SHB No. 17-017c

16 5. Attached as Exhibit 3 to this Declaration is a true and correct copy of County’s
17 **Response to Dept. of Ecology’s Motion for Summary Judgment and Declaration of Elaine**
18 **Placido in Support of County’s Response**, filed on February 9, 2018, in SHB No. 17-017c.

19 DATED this 6th day of April, 2018, in Kelso, Washington.

20
21 /s/ Douglas E. Jensen
22 DOUGLAS E. JENSEN, WSBA #20127
23 Chief Civil Deputy-Attorney for County
24 Cowlitz County Prosecuting Attorney
25
26

EXHIBIT 1

BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

COWLITZ COUNTY, a political subdivision
of the state of Washington,

Petitioner,

v.

COWLITZ COUNTY HEARING EXAMINER,
the Local Government entity with administrative
jurisdiction in the matter of Shoreline Permit
Application No. 17-0992,

and

MILLENNIUM BULK TERMINALS-
LONGVIEW, LLC and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

No.

PETITION FOR REVIEW

Pursuant to RCW 90.58, WAC 173-27 and WAC 461-08, Cowlitz County ("Petitioner" and
"County") submits the following Petition for Review of action by the Cowlitz County Hearing
Examiner in the matter of Shoreline Permit Application No. 17-0992.

1. Name and Address of Petitioner. Petitioner is Cowlitz County, mailing address:

Cowlitz County
c/o Elaine Placido, Dir.
Department of Building & Planning
207 4th Ave N
Kelso, WA 98626
(360) 577-3052

Petitioner's Representative:

Douglas E. Jensen
Chief Civil Deputy
Cowlitz County Prosecutor
312 SW 1st Ave
Kelso, WA 98626
jensend@co.cowlitz.wa.us

2. Identification of Parties and Agencies. The name and address:

Applicant:

Millennium Bulk Terminals – Longview, LLC
4029 Industrial Way
P.O. Box 2098
Longview, WA 98623

Applicant's Representative:

| | |
|-----------------------------------|----------------------|
| Craig S. Trueblood | Jonathan K. Sitkin |
| Ankur Tohan | CHMELIK SITKIN PS |
| K&L GATES LLP | 1500 Railroad Ave. |
| 925 4 th Ave, Ste 2900 | Bellingham, WA 98225 |
| Seattle, WA 98104 | |

Permitting Entity/Authority:

Mark C. Scheibmeir
Cowlitz County Hearing Examiner
299 NW Center St
P.O. Box 939
Chehalis, WA 98532
(360) 748-3386

Attorney General:

Washington State Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

Department:

Washington State Department of Ecology

Physical address –

300 Desmond Dr SE
Lacey, WA 98503

Mailing address –

P.O. Box 47600
Olympia, WA 98504-7600

1 **3. Additional Interested Parties to Hearing Examiner Decision. Name and address:**

2 **Columbia Riverkeeper**, and Friends of the Columbia Gorge, Climate Solutions,
3 Sierra Club, Washington Environmental Council, Greenpeace USA, Association
4 of Northwest Steelheaders, Northern Plains Resource Council, Oregon
 Physicians for Social Responsibility, and Western Organization of Resource and
 Councils, collectively joined as “Columbia Riverkeeper” or “Riverkeeper”

5 Columbia Riverkeeper.
6 c/o Earthjustice
7 Janette Brimmer
 705 Second Ave Ste 203
 Seattle, WA 98104
 (360) 343-7340

8
9 **4. Identification of Application Decision on Appeal.** Petitioner seeks review of the
10 Cowlitz County Hearing Examiner “Findings of Fact, Conclusions of Law and Decision
11 Denying Permits (“Decision”) entered on November 14, 2017, denying Shoreline Permit
12 Application No. 17-0992 (“Application”), filed by the applicant, Millennium Bulk Terminals –
13 Longview, LLC (“MBTL”) in 2012. The Cowlitz County Hearing Examiner is the local
14 government entity with administrative jurisdiction in the matter of Shoreline Permit
15 Application No. 17-0992, pursuant to Chs. 2.05 and 19.20 of the Cowlitz County Code. A true
16 copy of the Hearing Examiner Decision is attached hereto as Exhibit - 1, and incorporated
17 herein. In accordance with WAC 461-08-305, the date of filing was November 20, 2017, upon
18 receipt by the Department of Ecology (“Ecology”). A true copy of acknowledgement of
19 receipt is attached hereto as Exhibit – 2.

20 **5. Statement of Grounds of Petitioner for Appeal.**

21 The Decision of the Hearing Examiner constitutes an unlawful and unjust application of the
22 facts and evidence submitted at hearing on the Application, and unlawful and unjust application
23 of the Cowlitz County Shoreline Master Program (“SMP”) and the Shoreline Management Act
24 (“SMA”). The Decision was unlawful and unjust because it contains a clearly erroneous
25 application of the State Environmental Policy Act (“SEPA”) and SMA and implementing
26 regulations, fails to analyze the Application for consistency with the SMP, is outside of the

1 scope of authority provided in the SMA, fails to fully consider and evaluate the facts and
 2 evidence presented at hearing, and is arbitrary and capricious. Finally, Petitioner is aggrieved
 3 by the Decision of the Hearing Examiner which conflicts with Petitioner's interpretations and
 4 applications of its shoreline permitting and its SMP, and which misapplies and erroneously
 5 applies Petitioner's interpretation and application of SEPA.

6 **6. Statement in Support of Grounds of Petitioner for Appeal**

7 a. In 2012, MBTL submitted the named-application for a Shoreline Substantial
 8 Development Permit to construct and operate a Coal Export Terminal ("Project") and a
 9 Shoreline Conditional Use Permit for dredging associated the Project.

10 b. A Final EIS ("FEIS") was issued by co-lead agencies, County and the Washington State
 11 Department of Ecology ("Ecology"), for the Project on April 28, 2017. The FEIS was not
 12 appealed. A Critical Areas Permit ("CAP") was issued by the County for the Project on July
 13 19, 2017. The CAP was not appealed.

14 c. The Project is to be located at a former heavy industrial property of Reynolds Metals at
 15 4029 Industrial Way, Longview in Cowlitz County, Washington ("Site").

16 d. The Site is designated as "urban shoreline environment" under the SMP, with access to
 17 interstate railway and a navigable Columbia River. The SMP allows for industrial uses as
 18 proposed in the above-cited permits applied for within this urban shoreline designation.

19 e. The Project is a water-related, industrial use allowed within this shoreline designation.

20 f. No improvements to the interstate railway system are necessary under the above-cited
 21 permits as applied for the Project, contrary to the findings and conclusions in the Decision.

22 g. No improvements to the Columbia River Navigation Channel ("Channel") are necessary
 23 under the above-cited permits as applied for the Project, contrary to the findings and
 24 conclusions in the Decision.

25 h. Dredging of berth areas and an approach channel are necessary for the Project under the
 26 above-cited permits as applied for to access the Channel. Dredging will occur within

designated urban shoreline, will not interfere with normal public use of this shoreline, is not detrimental to the public interest and will not adversely affect the shoreline environment.

7. Request for Relief.

County requests this Board find unlawful and unjust and set aside the Decision of the Hearing Examiner, and that the Board grant the above-cited permits as applied for the Project, with such conditions and such other relief as determined reasonable, fair and just by the Board.

Respectfully submitted this 7th day of December, 2017.

RYAN JURVAKAINEN, Prosecuting Attorney

/s/ Douglas E. Jensen

DOUGLAS E. JENSEN, WSBA #20127
Chief Civil Deputy- Attorney for County

DECLARATION OF SERVICE

I, NICK LITTLE, do certify and declare as follows:

1. I am a competent person over the age of 18 years, and not a party to this action.
2. I am an employee of petitioner Cowlitz County and caused true and correct copies of:
 - a) County's Petition for Review and Declaration of Service,

to be delivered to the following parties and entities per WAC 461-08-355, on the date below:

Shorelines Hearings Board
Environmental and Land Use Hearings Office
1111 Israel Rd. SW, Suite 301
Tumwater, WA 98501
pchb-shbappeals@luho.wa.gov

By messenger delivery

By Email

Cowlitz County Hearing Examiner
Mark C. Scheibmeir
P.O. Box 939
Chehalis, WA 98532

By First Class mail

Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

By First Class mail

5 - COUNTY'S PETITION FOR REVIEW

COWLITZ COUNTY PROSECUTING ATTORNEY
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312 SW 1st Avenue
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Washington State Office of Attorney General
PO Box 40100
Olympia, WA 98504-0100
Millennium Bulk Terminals – Longview, LLC
P.O. Box 2098
Longview, WA 98623

By First Class mail

By First Class mail

K&L GATES LLP
Craig S. Trueblood
Ankur Tohan
925 4th Ave, Ste 2900
Seattle, WA 98104

By First Class mail

CHMELIK SITKIN PS
Jonathan K. Sitkin
1500 Railroad Ave.
Bellingham, WA 98225

By First Class mail

Columbia Riverkeeper, et al.
Janette Brimmer
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104

By First Class mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Kelso WA on the 7th day of December, 2017.

/s/ Nick Little
NICK LITTLE

EXHIBIT 2

BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

MILLENNIUM BULK TERMINALS —
LONGVIEW, LLC,

Petitioner,

v.

COWLITZ COUNTY, WASHINGTON
DEPARTMENT OF ECOLOGY, ET AL.,

Respondents.

SHB No. 17- 017c

**COWLITZ COUNTY'S
JOINDER OF PETITIONER
MILLENNIUM BULK
TERMINALS-LONGVIEW'S
MOTION FOR SUMMARY
JUDGMENT AND REQUEST
FOR REMAND**

COWLITZ COUNTY, a political
subdivision of the state of Washington,

Petitioner,

COWLITZ COUNTY HEARING
EXAMINER, the Local Government entity
with administrative jurisdiction in the matter
of Shoreline Permit Application No. 17-
0992,

and

MILLENNIUM BULK TERMINALS-
LONGVIEW, LLC and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

1 - COWLITZ COUNTY'S JOINDER OF MBTL'S
MOTION FOR SUMMARY JUDGMENT AND
REQUEST FOR REMAND

COWLITZ COUNTY PROSECUTING ATTORNEY
Hall of Justice
312 SW 1st Avenue
Kelso, Washington 98626
(360) 577-3080 FAX (360) 414-9121

COMES NOW, petitioner Cowlitz County (County), and hereby motions the Shorelines Hearings Board (Board) pursuant to WAC 461-08-300(2) and Civil Rule 56 for summary judgment and remand, in response to and joinder of the Motion for Summary Judgment and Request for Remand (Motion), the declaration and exhibits thereto filed by petitioner Millennium Bulk Terminals-Longview (MBTL). For purposes of the County's joinder and for judicial economy, County adopts and incorporates the contents of MBTL's Motion as its own.¹

I. SUPPLEMENTAL ARGUMENT

For purposes of this filing and with the County having adopted and incorporated the Motion of petitioner MBTL on file with the Board, the County would further supplement the content and arguments of said Motion with the following:

1. The Hearing Examiner Failed to Consider the Proposal Before Him.

As argued by MBTL, the Hearing Examiner (Examiner) was presented with a proposal and staff review of 'Stage 1' permitting. As set forth in the Declaration of Elaine Placido, the project in two distinct phases and that a second Shoreline Substantial Development permit application could be submitted and separately reviewed by the County. Further, as noted within the Staff Report, attached to the Declaration as 'Exhibit County-1', the County addressed Stage 1 of the proposal in its reviews and recommendations. Nevertheless, without misdirection or prompting of either the applicant or the County, the Examiner strayed far-afield of the proposal and local agency review and into impacts and mitigations which were not proffered before the Examiner—at least not by the applicant or the local agency.

/ / /

/ / /

¹ As observed by the Board in its December 8, 2017 joinder of SHB Nos. 17-017 and -018 proceedings, and thereafter and expressly within its *Consolidation...and Prehearing Order*, the parties, issues, and subject matter of these cases are so closely related and aligned that a comprehensive merger will serve to expedite proceedings and advance judicial efficiency, without prejudice to the parties.

1 **2. The Hearing Examiner Failed to Analyze Whether the Permit Applications**
 2 **Complied with SMA or SMP Criteria.**

3 County staff of the Department of Building and Planning is tasked with evaluating a
 4 SSDP and CUP proposal under CCC 19.20.020, and the Director, specifically, is tasked under
 5 local code with “determin[ing] whether the information submitted meets the requirements of
 6 WAC 173-27-180, Application requirements for substantial development, conditional use, or
 7 variance permit, RCW 90.58.140 . . .”. As addressed in the attached Staff Report, Exhibit
 8 County-1, County staff and the department Director expressly and specifically reviewed the
 9 proposal under the County’s Shoreline Master Program (SMP), namely:

10 **2.5 Shoreline Master Program (SMP) and Shoreline Management Act (SMA):**

11 The shoreline application is vested under the 1977 Shoreline Management Master
 12 Program (SMP). All proposed developments in or adjacent to state shorelines must be
 13 consistent with the goals, policies, and regulations of the SMP and the SMA (RCW
 14 90.58) . . .

15 *The Proposed Action would result in development within the shoreline area regulated*
 16 *by the County’s SMP. It designates the shoreline environment at the project area as*
 17 *urban, which includes areas suitable for intensive recreation, residential, industrial,*
 18 *and commercial development. The Proposed Action would be consistent with the*
 19 *objective of the urban designation. Furthermore, ports and water-related industries,*
 20 *such as the Proposed Action, are permitted uses on urban shorelines per the SMP.*
 21 *(Exhibit C-7, FEIS, page 3.1-16)*
 22 *[Staff Report, p. 24]*

23 The Hearing Examiner, in compounding his aforementioned, spontaneous disregard of project
 24 phasing, conducted no discernable analyses or review utilizing the County’s SMP, and crafted
 25 his decision without any discernable consideration or application of the County’s SMP. A
 26 development consistent with local SMP regulations creates a presumption that such use is
 27 consistent with “the overarching policies of the SMA”. *Valero Logistics Operation, LP v. City*
 28 *of Tacoma*, SHB No. 06-001, COL VI (2006). See also, *Roller v. Pierce County*, SHB No. 06-
 29 016, CL 11 (2006); and *Ackerson v. King County*, SHB No. 95-26 (March 19, 1996)(CL VII).

Review by this Board requires evaluation of whether the proposal complies with both the SMA and local SMP. WAC 461-080505(1)(c); WAC 173-27-150. To that end, the Board gives substantial weight to the local government's interpretation of its own master program and related shoreline polices, as relevant and important considerations in any appeal. *The Puyallup Tribe of Indians v. City of Tacoma*, SHB No. 16-002, COL (2016). By (at best) marginalizing any presentation, discussion, inquiry, review, consideration, application or decision making involving the County's SMP, the Hearing Examiner also marginalized the interests and ability of the Board to accord substantial weight to the interpretations and applications of County staff and their department Director to the County SMP.

II. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Board grant the Motion, and reverse and remand to the Hearing Examiner as more fully set forth in the Motion.

RESPECTFULLY SUBMITTED this 26th day of January, 2018.

RYAN JURVAKAINEN, Prosecuting Attorney

D.E. Jensen

DOUGLAS E. JENSEN, WSBA #20127
Chief Civil Deputy Prosecuting Attorney
jensend@co.cowlitz.wa.us

| | |
|---|---------------------------|
| STATE OF WASHINGTON) COUNTY OF COWLITZ) ss. | DECLARATION OF SERVICE |
| The undersigned, being first duly sworn on oath, states that on the 26th day of January, 2018, affiant emailed and deposited into interoffice mail for posting in the mails of the United States of America a properly stamped and addressed envelope to the Shorelines Hearings Board, and emailed to counsels of record a copy of the accompanying document(s): | |
| 1. County's Joinder of MBTL's Motion | |
| I CERTIFY under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. | |
| DATED at Kelso, Washington, this 26 th day of January, 2018. | |
| <i>D.E. Jensen</i> _____ Douglas E. Jensen | |

4 - COWLITZ COUNTY'S JOINDER OF MBTL'S
MOTION FOR SUMMARY JUDGMENT AND
REQUEST FOR REMAND

COWLITZ COUNTY PROSECUTING ATTORNEY
Hall of Justice
312 SW 1st Avenue
Kelso, Washington 98626
(360) 577-3080 FAX (360) 414-9121

EXHIBIT 3

BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

MILLENNIUM BULK TERMINALS —
LONGVIEW, LLC,

Petitioner,

v.

COWLITZ COUNTY, WASHINGTON
DEPARTMENT OF ECOLOGY, ET AL.,

Respondents.

SHB No. 17- 017c

**COWLITZ COUNTY'S
RESPONSE TO DEPT. OF
ECOLOGY'S MOTION FOR
SUMMARY JUDGMENT**

COWLITZ COUNTY, a political
subdivision of the state of Washington,

Petitioner,

COWLITZ COUNTY HEARING
EXAMINER, the Local Government entity
with administrative jurisdiction in the matter
of Shoreline Permit Application No. 17-
0992,

and

MILLENNIUM BULK TERMINALS-
LONGVIEW, LLC and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

1 - COWLITZ COUNTY'S RESPONSE TO
ECOLOGY'S MOTION FOR SUMMARY
JUDGMENT AND REQUEST FOR REMAND

COWLITZ COUNTY PROSECUTING ATTORNEY
Hall of Justice
312 SW 1st Avenue
Kelso, Washington 98626
(360) 577-3080 FAX (360) 414-9121

COMES NOW, petitioner Cowlitz County (County), and hereby responds to the State of Washington, Department of Ecology's (Ecology's) Motion for Summary Judgment (Motion) with joinder of the Response to Motion for Summary Judgment (Response), the declarations and exhibits thereto filed by petitioner Millennium Bulk Terminals-Longview (MBTL). For purposes of the County's joinder and for judicial economy, County adopts and incorporates the contents of MBTL's Response to Ecology as its own.¹ Notably, arguments of Ecology in its Motion and arguments of the Washington Environmental Council (WEC) within its Motion for Summary Judgment have considerable overlap. For purposes of its Response to Ecology's Motion, the County would incorporate its Response to WEC's Motion for Summary Judgment.

I. SUPPLEMENTAL ARGUMENT

For purposes of this filing and with the County having adopted and incorporated the Response of petitioner MBTL and County's Response to WEC, both on file with the Board, the County would further supplement this Response with the following:

1. Challenged Representations and Mischaracterizations Renders Arguments Presented by Ecology Inadequate for Summary Judgment.

As set forth in the attached Declaration of Elaine Placido, the County would challenge Ecology's interpretation of the FEIS and staff presentation of the SMP. Facts and evidence, and reasonable inferences to be drawn from such facts and evidence in summary judgment, are to be viewed in the light most favorable to the nonmoving party. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Summary judgment is not proper where contradictory facts and evidence exist on more than mere collateral matters. *Morinaga v. Vue*, 85 Wn.App. 822, 828, 935 P.2d 637 (1997). Although Ecology willingly conceded that the

¹ See, December 8, 2017 joinder of SHB Nos. 17-017 and -018 proceedings, and *Consolidation...and Prehearing Order*, the parties, issues, and subject matter of these cases are so closely related and aligned that a comprehensive merger will serve to expedite proceedings and advance judicial efficiency, without prejudice to the parties.

“ . . . [F]EIS is not on trial . . . ”², it nevertheless reconstituted and restated the content of that document (*see*, Wolfman Dec, cited in Ecology’s Motion) in such harsh contrast to the plain wording of the document, and the interpretations and understandings of its co-lead agency in its staff report (*see*, Placido Dec., at 3-5) so as to place the FEIS before this Board to adjudicate a divergence in wording, interpretations and understandings of the FEIS as it applied to the Hearing Examiner’s decision, and Issues 1-9 of the Board’s Prehearing Order.

2. Ecology Failed to Meet its Initial Burden Under Summary Judgment the Project is Inconsistent with SMA and SMP

Ecology argued for summary judgment on Issues 1, 6, and 7 as to inconsistency of the project with the SMA and SMP, but then failed to sustain its evidentiary and factual burden for purposes of its argument. *See, Herman v. Safeco Ins. Co. of Am.*, 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001) (“speculation” and “argumentative assertions” by moving party are insufficient to survive summary judgment). Summary judgment before the ELUHO is “subject to a burden shifting scheme” which first requires the moving party submit “adequate affidavits” to support its motion. *MYTAN v. Martin*, PCHB No. 11-135 (2013) at 5, citing *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601 (2009). It is not sufficient merely to parrot the decision of the Hearing Examiner or offer a conclusory Declaration (Rothwell Decl.) in support which amounts to unsupported opinion.³ Further, Ecology is estopped from efforts to meet its original burden of proof through supplementation in any Reply. *See, e.g., Dixon, et al., v. Ecology.*, PCHB Nos. 05-030, -059 (2005) at p.1:

² *Ecology’s Motion*, p. 6, ln.9

³ The *Declaration of Rothwell* consists of only declarative, conclusory and generalized ‘determinations’, bereft of factual support or methodology as would allow the County to respond with other than an ‘we have determined you’re wrong’. *See, Declaration* :

I determined that the project is inconsistent with multiple SMP and SMA criteria. Specifically, the project is inconsistent with eight of the SMP’s goals, 12 objectives, four policies, and five regulations. In addition, I was unable to determine the project’s consistency with 11 other SMP goals, objectives, policies, and regulations. I also determined that the project is inconsistent with seven elements of the conditional use criteria (this includes sub-criteria to conditional use criterion #1), six of the SMA’s policies for shorelines of statewide significance, and the general policy of RCW 98.50.020 to promote and enhance the public interest.

3 - COWLITZ COUNTY’S RESPONSE TO
ECOLOGY’S MOTION FOR SUMMARY
JUDGMENT AND REQUEST FOR REMAND

COWLITZ COUNTY PROSECUTING ATTORNEY
Hall of Justice
312 SW 1st Avenue
Kelso, Washington 98626
(360) 577-3080 FAX (360) 414-9121

A reply brief is a defensive pleading and is not the appropriate forum for raising new legal arguments or factual matters. See Olympia Buildings and Construction Trades Council v. Ecology, PCHB 04-147 (Order on Stay Motion, February 10, 2005). . . [Reply cannot] raise new evidence to which Respondents have no opportunity to reply.

Accord, Oly. Bldg Trades Council v. Ecology, PCHB No. 04-147 (2004)(Reply stricken for improperly raising new issues and offering new evidence in support of original motion). The Board should prevent this Motion from procedurally devolving into ‘argument by ambush’.

Finally, as set forth in County’s own Motion for Summary Judgment and attached Ex. County-1 to first Declaration of Placido, County asserts that the Examiner did not adequately address or defer to County interpretations and application of its SMP.⁴ County would incorporate and reassert such argument and evidence in its Response.

II. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Board deny the Motion for Summary Judgment of Ecology.

RESPECTFULLY SUBMITTED this 9th day of February, 2018.

RYAN JURVAKAINEN, Prosecuting Attorney

D.E. Jensen

DOUGLAS E. JENSEN, WSBA #20127

Chief Civil Deputy Prosecuting Attorney

jensend@co.cowlitz.wa.us

| | |
|---|---------------------------|
| STATE OF WASHINGTON) COUNTY OF COWLITZ) ss. | DECLARATION OF SERVICE |
| The undersigned, being first duly sworn on oath, states that on the 9th day of February, 2018, affiant emailed and deposited into interoffice mail for posting in the mails of the United States of America a properly stamped and addressed envelope to the Shorelines Hearings Board, and emailed to counsels of record copies of accompanying document(s): | |
| 1. County’s Response to Ecology Motion for Summ. Jdgmnt. | |
| I CERTIFY under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. | |
| DATED at Kelso, Washington, this 9 th day of February, 2018. | |
| <i>D.E. Jensen</i> | |
| Douglas E. Jensen | |

⁴ *County Mtn. for Sum. Judgment* pp.3-5, & Ex. (1/26/18)

BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

MILLENNIUM BULK TERMINALS —
LONGVIEW, LLC,

Petitioner,

v.

COWLITZ COUNTY, WASHINGTON
DEPARTMENT OF ECOLOGY, ET AL.,

Respondents.

SHB No. 17- 017c

**DECLARATION OF ELAINE
PLACIDO IN SUPPORT OF
COUNTY'S RESPONSE TO
MOTION FOR SUMMARY
JUDGMENT**

COWLITZ COUNTY, a political
subdivision of the state of Washington,

Petitioner,

COWLITZ COUNTY HEARING
EXAMINER, the Local Government entity
with administrative jurisdiction in the matter
of Shoreline Permit Application No. 17-
0992,

and

MILLENNIUM BULK TERMINALS-
LONGVIEW, LLC and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

I, ELAINE PLACIDO, do certify and declare as follows:

DECLARATION OF ELAINE PLACIDO IN
SUPPORT OF COUNTY RESPONSE

1

COWLITZ COUNTY PROSECUTING ATTORNEY
Hall of Justice
312 SW 1st Avenue
Kelso, Washington 98626
(360) 577-3080 FAX (360) 414-9121

1. I am the Director of the Department of Building and Planning, Cowlitz County, Washington (County). I am over the age of 18 years and competent to testify in all respects, and I make this declaration from personal knowledge.

2. County and the state Department of Ecology (Ecology) served as co-lead agencies under the State Environmental Policy Act, and jointly prepared and approved for issuance a Draft EIS (DEIS) on April 30, 2016. County and Ecology then jointly prepared and approved issuance of a Final EIS (FEIS) that included responses to each comment received on the Draft EIS to satisfactorily address all of the substantive responses and questions received. The DEIS and FEIS were included as Exhibit 6 to the staff report, previously submitted as Exhibit County-1. Cowlitz County Code (CCC) required an appeal of the adequacy of the FEIS be filed by August 18, 2017. CCC 19.11 (per Ch. 43.21C RCW). BNSF Railway Co. filed a precautionary appeal on May 12, 2017, but then withdrew its appeal on August 24th. MBTL issued a Notice of Action under RCW 43.21C.080, which established a deadline for appealing the FEIS. No other appeal was filed, and the FEIS stands as jointly written and approved.



Cowlitz County
207 4th Avenue North
Kelso, WA 98626



Washington State Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

April 28, 2017

Dear Interested Parties, Jurisdictions, and Agencies:

Cowlitz County and the Washington State Department of Ecology (the co-lead agencies) are pleased to present the Final Environmental Impact Statement (Final EIS) for the proposed Millennium Bulk Terminals—Longview project. Millennium Bulk Terminals—Longview, LLC (the Applicant) is proposing to construct and operate a coal export terminal (Proposed Action) in Cowlitz County, Washington, along the Columbia River.

Under the Proposed Action, the Applicant would develop the coal export terminal on 190 acres (the project area) primarily within an existing 540-acre site that is currently leased by the Applicant. The coal export terminal would receive coal from the Powder River Basin in Montana and Wyoming and the Uinta Basin in Utah and Colorado via rail shipment. Coal would be unloaded from rail cars, stockpiled, and loaded by conveyor onto ocean-going vessels for export using two new docks located in the Columbia River. Once construction is complete, the Proposed Action could have a maximum annual throughput capacity of up to 44 million metric tons of coal per year.

The Final EIS has been prepared in accordance with the Washington State Environmental Policy Act (SEPA) and Cowlitz County Code. The purpose of the Final EIS is to evaluate the potential environmental impacts of constructing and operating the Proposed Action.

During the EIS scoping phase, the co-lead agencies identified areas of concern associated with the Proposed Action that were subsequently addressed in the Draft EIS. The co-lead agencies published the Draft EIS for review and comment on April 29, 2016. Comments on the Draft EIS were received April 29 through June 13, 2016. All comments received during the comment period were reviewed, compiled, and considered in the development of the Final EIS. The Final EIS reflects revisions and additional information in response to comments received on the Draft EIS. Responses to all comments on the Draft EIS are presented in the Final EIS.

The Final EIS evaluates the potential impacts from construction and operation of the Proposed Action, including potential impacts related to the rail and vessel transport of coal to and from the proposed export terminal. The Final EIS also evaluates the contribution of the Proposed Action to cumulative environmental impacts. In addition to the Proposed Action, the Final EIS evaluates a no-action alternative.

The following resource areas were evaluated in the Final EIS.

- | | |
|----------------------------------|-----------------------|
| Bulk Environment | |
| • Land and Shoreline Use | • Cultural Resources |
| • Social and Community Resources | • Tribal Resources |
| • Aesthetics, Light, and Glare | • Hazardous Materials |

Natural Environment

- Geology and Soils
- Surface Water and Floodplains
- Wetlands
- Groundwater
- Water Quality

Operations

- Rail Transportation
- Rail Safety
- Vehicle Transportation
- Vessel Transportation

- Vegetation
- Fish
- Wildlife
- Energy and Natural Resources

- Noise and Vibration
- Air Quality
- Coal Dust
- Greenhouse Gas Emissions and Climate Change

The Final EIS identifies proposed mitigation measures to address potentially significant adverse environmental impacts of the Proposed Action. In some cases, implementation of proposed mitigation measures would reduce but not completely eliminate the significant adverse impacts. These impacts are identified in the Final EIS as unavoidable and significant adverse environmental impacts. Potential unavoidable and significant adverse environmental impacts are identified for the following resource areas: social and community resources; cultural resources; tribal resources; rail transportation; rail safety; vehicle transportation; vessel transportation; noise and vibration; and air quality.

The Final EIS will be used by Cowlitz County, Washington State Department of Ecology, and other agencies to inform decision-making regarding permits for the Proposed Action. SEPA (WAC 197-11-460) requires agencies shall take no actions for 7 days after Final EIS issuance. All local, state, regional, and federal permits must be issued before the Proposed Action can begin. Construction of the Proposed Action could begin in 2018.

Questions about this Final EIS may be directed to:

Elaine Placido, DPA
Director, Building and Planning
Cowlitz County
207 4th Avenue North
Kelso, WA 98626
(360) 577-3052 (Ext. 6662)
PlacidoE@co.cowlitz.wa.us

Sally Toteff
Director, Southwest Regional Office
Washington State Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503
(360) 407-6307
sally.toteff@ecy.wa.gov

Thank you for your interest in the Millennium Bulk Terminals—Longview project environmental review process.

Sincerely,

Elaine Placido, Building and Planning Director, Cowlitz County

Date: 28 April 2017

Signature:

Sally Toteff, Southwest and Olympic Regional Director, Washington State Department of Ecology

Date: 28 April 2017

Signature:

DECLARATION OF ELAINE PLACIDO IN
SUPPORT OF COUNTY RESPONSE

2

COWLITZ COUNTY PROSECUTING ATTORNEY
Hall of Justice
312 SW 1st Avenue
Kelso, Washington 98626
(360) 577-3080 FAX (360) 414-9121

3. Ecology, in its Motion for Summary Judgement (Motion) at page 2 of 74, states that the “EIS concluded the project **would** have significant adverse effects on the environment and local community that cannot reasonably be mitigated” (*emphasis added*). This is a mischaracterization, inasmuch as the FEIS at S-41 actually stated there are proposed mitigation measures that would reduce impacts and suggesting only that “impacts **could** remain” (*emphasis added*). Such mitigation measures are summarized in Table S-2 of the FEIS, where it is indicated that impacts to Social and Community Resources, Rail Transportation, Rail Safety, and Noise and Vibration would be largely eliminated through implementation of the proposed mitigation measures and with infrastructure improvements to the delivery system (such as track improvements and the use of Tier 4 locomotives).

4. Ecology’s assertion in its Motion that there are no proposed mitigation measures to eliminate vehicles delays (Ecology at pg. 7(2)) is yet another mischaracterization, and in direct contradiction to the FEIS at S-56 and at 5.3-45-46, wherein the FEIS expressly stated “[w]ith current track infrastructure . . . and one Proposed Action train travels during the peak hour”, and while there could be significant impacts, that multiple voluntary and applicant mitigation measures could address such impacts. The FEIS further noted that additional mitigation would come from a long-planned, and ongoing grade-separated crossing improvements at Oregon Way and Industrial Way and SR432/SR433 by the Washington State Dept. of Transportation (WSDOT) (<https://www.wsdot.wa.gov/Projects/SR432/sr433intersectionimprove/default.htm>), with project completion scheduled for 2024.

5. Ecology’s statements regarding ‘Noise and Vibration’ (Motion at 7(3)) contain more mischaracterizations of the FEIS, by asserting: “Millennium volunteered to fund what they call ‘quiet crossings’: at two of the four at-grade crossings. However, the level of noise reduction from ‘quiet crossings’ is unknown because the trains may still be required to sound their horns.” In reality, the FEIS at 5.5-26 describes, “all noise impacts from Proposed Action

1 related rail traffic within the immediate vicinity of the crossings at Oregon Way and Industrial
 2 Way. . . **would not** occur” (*emphasis added*) if the grade separated crossings are “constructed
 3 before 2028.” (See, WSDOT, above) Further, the mitigation discussion at FEIS 5.5-32-33
 4 makes this unambiguously clear with the statement that “horn sounding could be eliminated by
 5 establishing a Quiet Zone, which includes enhanced safety measures at at-grade crossings, such
 6 that the use of train horns would not be required” – mischaracterized and omitted by Ecology.

7 6. Mirroring current events in our nation’s Capital, Ecology then ‘cherry picked’ the
 8 facts and conclusion of the FEIS for its presentation of the coal dust analysis found in chapter
 9 5.7 of the FEIS. While Ecology correctly asserts that the total suspended particulate emission
 10 rates of 14.6 tons per year of coal dust, it chose to redact and omit critical contextual and
 11 qualifying information found on that same page. By example, FEIS at 5.7-5 clearly stated:

12 . . . the modeling was completed for the deposition of the coal particles and a more
 13 conservative assumption about the effectiveness of full enclosures and spray/fogging for
 14 conveyors. A 95% reduction effectiveness was assumed for the enclosed conveyor and
 spray/fogging systems, which is consistent with the permit from the Oregon Department of
 Environmental Quality (2013). . .

15 This modeling, which properly considered the project design components of full enclosures
 16 and spray/fogging, resulted in projected impacts that are summarized on 5.7-27 having a much
 17 less ‘dramatic’ result than was clarion’d by Ecology, namely: maximum monthly deposition at
 18 the project area boundary would be 0.40g/m2/month (or approximately 0.014 ounces per
 19 square meter per month); along the Reynolds Lead and BNSF mainline in Cowlitz County, the
 20 maximum coal dust deposition would be 2.3 to 2.2g/m2/month; along the BNSF mainline in
 21 the Gorge, maximum deposition would be 2.6g/m2/month; and along the BNSF mainline
 22 outside of Cowlitz County and the Gorge the maximum deposition would be 0.88g/m2/month.
 23 The FEIS also clearly states . . . once more, contrary to mischaracterization by Ecology . . .
 24 “this impact **is not** considered significant” (5.7-28) (*emphasis added*) and “Compliance with
 25 laws and implementation of the mitigation measures described . . . would reduce impacts
 26

1 related to coal dust. There *would be no* unavoidable and significant environmental impacts
 2 from coal dust” (5.7-30) (*emphasis added*).

3 7. As to a different argument of Ecology, indirect impacts that are not eliminated,
 4 including impacts to Cultural Resources and Tribal Resources, are under the purview of NEPA
 5 and federal reviews, and would have been fully analyzed if a NEPA FEIS, MOA under Section
 6 106 and other federal consultations had been contemporaneously completed. FEIS Section 3.5,
 7 Tribal Resources, included statements in section 3.5.8, as follows:

8 Because other factors besides rail operations affect fishing opportunities, such as the
 9 number of fishers, fish distribution, timing, and duration of fish migration periods and
 10 seasons, the extent to which rail operations related to the Proposed Action would affect
 tribal fishing is difficult to quantify. Making a determination of significance related to
 treaty reserved rights is not part of this EIS. (3.5-20).

11 8. And finally, the Draft MBTL Longview Health Impact Assessment (HIA) is
 12 mischaracterized by Ecology to further its arguments. The draft was released on December 20,
 13 2017, for the Steering Committee, and for public and agency review. This HIA did/does not
 14 (and was not intended to) independently verify the non-appealed findings or conclusions of the
 15 FEIS. Rather the joint-agency, FEIS findings were to be a starting point from which to further
 16 describe health impacts related to four, ‘thematic’ areas of interest of the Steering Committee.
 17 See, draft HIA-FAQ, published at <http://www.co.cowlitz.wa.us/DocumentCenter/View/13410>:

18 **4. Why is the HIA being prepared for the MBTL project?**

19 During the public scoping process for the MBTL EISs, questions regarding project impacts on
 20 health and quality of life arose. On June 10, 2015, Cowlitz County Building and Planning
 21 Department staff met with representatives from Cowlitz County Health and Human Services
 22 Department and the Washington State Department of Health. The agencies agreed that an HIA
 would be a useful tool to better understand the health effects of the MBTL project. The HIA
 process is in addition to the federal and state environmental processes currently underway. The
 Applicant agreed to fund the HIA process, even though it is not legally required for the
 permitting process.

23 **5. How does the HIA compare to the SEPA EIS?**

24 The SEPA EIS is required by law and analyzes potential impacts the MBTL project would have on
 25 environmental resources. The HIA evaluates effects the MBTL project would have on human
 26 health and quality of life in adjacent communities. Some analyses from the SEPA EIS may be
 used to inform the HIA—for example, by providing information about air quality, noise and
 vibration, and rail safety.

1 In sum, the HIA did/does not independently verify, support or contradict any of the methods,
2 sources or findings of the FEIS. Further, the HIA is in draft, subject to revision and calls for
3 further analyses, and not to be considered a 'final', material document in these proceedings.

4 I declare under penalty of perjury under the laws of the State of Washington that for
5 foregoing is true and correct.

6 Signed in Kelso, WA this 8th day of February, 2018.

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9 Elaine Placido, Department Director
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