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2
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SHORELINES HEARINGS BOARD
FOR THE STATE OF WASHINGTON

COLUMBIA RIVERKEEPER, SIERRA CLUB,
and CENTER FOR BIOLOGICAL DIVERSITY,

Petitioners,

vs.

COWLITZ COUNTY, PORT OF KALAMA,
NORTHWEST INNOVATION WORKS –
KALAMA, LLC, and WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Respondents,

WASHINGTON PUBLIC PORTS
ASSOCIATION,

Intervenor,

PORT OF KALAMA,

Petitioners,

vs.

COWLITZ COUNTY and WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents,

COLUMBIA RIVERKEEPER, SIERRA CLUB,
CENTER FOR BIOLOGICAL DIVERSITY, and
WASHINGTON PUBLIC PORTS
ASSOCIATION,

Intervenors.

SHB No. 17-010c

PETITIONERS COLUMBIA
RIVERKEEPER ET AL. MOTION AND
MEMORANDUM FOR PARTIAL
SUMMARY JUDGMENT

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

MOTION FOR PARTIAL SUMMARY JUDGMENT..... 1

MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT 1

INTRODUCTION 1

FACTUAL BACKGROUND..... 3

PETITIONER STANDING 5

ARGUMENT 7

I. ECOLOGY’S RELIANCE ON BROADLY APPLICABLE PRESUMPTIONS
IN GUIDANCE TO FIND THE PROJECT’S GREENHOUSE GAS EMISSIONS
NOT SIGNIFICANT AND FAILURE TO MITIGATE ARE ARBITRARY AND
CONTRARY TO SEPA. (ISSUE 2)..... 8

 A. SEPA Requires Agencies to Engage in a Detailed Case by Case Inquiry and
 Allows for Mitigation or for Denial of Projects with Significant Adverse
 Effects.....8

 B. The Refinery Project Will Have Significant Adverse Effects Due to Its High
 Greenhouse Gas Emissions.....9

 C. Ecology and The County’s Reliance on Presumptions in Guidance to
 Conclude That the Refinery’s Greenhouse Gas Emissions Are Not Significant
 is Contrary to SEPA and Clearly Erroneous.....11

II. PORTIONS OF THE REFINERY FACILITY HAVE BEEN ALLOWED
WITHIN THE CONSERVANCY SHORELINE CONTRARY TO THE LAW
(ISSUE 4)..... 14

 A. Washington’s Shoreline Management Act and Implementing Regulations
 Prioritize State-Wide Interests and Natural Character and are Broadly
 Interpreted to Ensure Protection of Shorelines.15

 B. The County and Ecology Erred as a Matter of Law in Considering the
 Refinery as a Whole in Determining Its Character as Water-Dependent or
 Water-Related.....16

 1. Applicable laws require consideration and justification for each and
 every portion of a project that is placed within the shorelines area.16

 2. The County and the Hearing Examiner erred as a matter of law when
 they considered the Refinery “as a whole” and did not examine and
 justify each portion of the project placed within the protected
 shorelines.17

 C. Portions of The Refinery Project Placed Within the Protected Shoreline Are
 Neither Water-Dependent Nor Water-Related.....19

CONCLUSION..... 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF AUTHORITIES

Page(s)

Cases

Buechel v. Dep’t of Ecology,
125 Wn.2d 196, 884 P.2d 910 (1994).....15

Cascade Bicycle Club v. Puget Sound Regional Council,
175 Wn. App. 494, 306 P.3d 1031 (2013).....13

Cheney v. City of Mountlake Terrace,
87 Wn.2d 338, 552 P.3d 184 (1976).....8

City of Federal Way v. Town & Country Real Estate, LLC,
161 Wn. App. 17, 252 P.3d 382 (2011).....10

Engdahl v. City of Burien,
SHB No. 10-007, 7-8 (Order on Summary Judgment, July 16, 2010)5

Klickitat County Citizens Against Imported Waste v. Klickitat County,
122 Wn.2d 619, 860 P.2d 390 (1993).....8, 12

Magula v. Benton Franklin Title Co., Inc.,
131 Wn.2d 171, 930 P.2d 307 (1997).....7

Polygon Corp. v. City of Seattle,
90 Wn.2d 59, 578 P.2d 1309 (1978).....8, 9

Sammamish Homeowners v. City of Sammamish,
SHB No. 15-012c (Order on Granting Partial Summary Judgment to King
County, Sept. 14, 2016)7

SentinalC3, Inc. v. Hunt
181 Wn.2d 127, 331 P.3d P.3d 40 (2014).....7

The Log Foundation v. City of Seattle Dep’t of Planning and Dev.,
SHB No. 15-003c (Order on Motions for Partial Summary Judgment, Aug. 17,
2015)7

Victoria Tower P’ship v. City of Seattle,
59 Wn. App. 592, 800 P.2d 380 (1990).....8

Statutes

RCW 34.05.5305

RCW 43.21C.010.....8

1	RCW 43.21C.060.....	8
2	RCW 70.235.020	1
3	RCW 70.235.020(1)(a)	9
4	RCW 90.58.020	15
5	RCW 90.58.030(2)(d).....	15
6	RCW 90.58.030(2)(e)	15
7	RCW 90.58.100(5).....	17
8	RCW 90.58.140(1).....	16
9	RCW 90.58.140(2).....	16
10	RCW 90.58.140(10).....	17
11	Regulations	
12	WAC 173-26-020(39).....	16
13	WAC 173-26-020(43) (a)–(b).....	16
14	WAC 173-27-040(b).....	17
15	WAC 173-27-150.....	16
16	WAC 173-27-150(1).....	16
17	WAC 173-441.....	1
18	WAC 197-11-400.....	8
19	WAC 197-11-660.....	8
20	WAC 197-11-794.....	8
21		
22		
23		
24		
25		
26		
27		

1 **MOTION FOR PARTIAL SUMMARY JUDGMENT**

2 Petitioners Columbia Riverkeeper, Sierra Club, and Center for Biological
3 Diversity (collectively “Riverkeeper”) move for partial summary judgment in Case No. 17-010c,
4 Issues No. 2 and 4. Riverkeeper’s motion is based upon and supported by the Memorandum
5 herein, and the declarations and exhibits submitted with this Motion and Memorandum.
6

7 **MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT**

8 **INTRODUCTION**

9 Estuarine and coastal ecosystems are some of the most heavily used and severely
10 threatened natural ecosystems in the world. Human activities have caused intense and increasing
11 deterioration of these ecosystems, which subsequently reduces fishery stock and nursery habitat,
12 and decreases filtering and detoxification services provided by suspension feeders, submerged
13 vegetation, and wetlands. The loss of biodiversity, ecosystem functions, and coastal vegetation
14 in these environments contributes to biological invasions, declining water quality, and fewer
15 coastal protections from flooding and storm events. Edward B. Barbier et al., *The value of*
16 *estuarine and coastal ecosystem services*, 81.2 Ecological Monographs, 169 (2011).

17 At least one threat to Washington shorelines threatens all human and natural
18 systems: climate change. The scientific consensus is that greenhouse gas emissions, such as
19 carbon dioxide and methane, from numerous human activities, large and small, are warming the
20 climate and leading to changes in temperature, heat waves, storm events, sea level rise, increased
21 incidence of wildfires, and are affecting water availability and drought. Guillaume S. Mauger,
22 et. al., Climate Impacts Group, University of Washington, *State of Knowledge: Climate Change*
23 *in Puget Sound*, ES-1-5 (2015). Washington has long acknowledged the threat of climate change
24 and the need to reduce greenhouse gas pollutants, *see, e.g.*, RCW 70.235.020 (2008 legislative
25 goals for the reduction of greenhouse gas emissions).¹ *See also* WAC 173-441 (requiring

26 ¹ Through legislation (RCW 70.235.020), Washington has set one of its greenhouse gas emission
27 reduction goals to reduce emissions to 1990 levels by 2020.

1 monitoring, reporting of greenhouse gas emissions). Washington holds itself out as a leader in
2 its commitment to address the deleterious effects of climate change, including by controlling and
3 reducing the greenhouse gas emissions that are causing and contributing to climate change. *See,*
4 *e.g.,* Governor’s website regarding Energy and the Environment at
5 <http://www.governor.wa.gov/issues/issues/energy-environment>.

6 If constructed, the Kalama methanol refinery (the “Refinery”) proposed by
7 Respondents Northwest Innovation Works - Kalama (“NWIW”) and the Port of Kalama (“the
8 Port”) will be the largest methanol refinery in the world. The Refinery proposes to manufacture
9 methanol for use in plastics. It would use between 270,000 and 320,000 dekatherms of natural
10 gas per day as feedstock for its methanol production and as fuel for the gas-fired electric
11 generating unit that would supply some of the Refinery’s significant electricity demand. The
12 Refinery will be, by far, the largest single natural gas user in the state of Washington.

13 The Refinery will also intrude into and further industrialize the shoreline of the Columbia
14 River, a local, regional, and national resource and a national priority for watershed health and
15 salmon recovery. The lower Columbia River estuary provides vital habitat for anadromous
16 salmonids throughout the Columbia River basin and is designated as critical habitat for
17 seventeen species of fish listed under the Endangered Species Act. A number of recent studies
18 explain the importance of lower Columbia River shallow estuarine habitats in stabilizing
19 production of Columbia River salmon and steelhead.² The Refinery and the increased vessel
20 traffic associated with it will negatively affect the estuary.

21 Riverkeeper opposes the Shoreline Substantial Development and Shoreline Conditional
22 Use Permits (“Permits”) issued to the Refinery on a number of grounds related to the failure of
23 NWIW, the Port, and the permitting entities to adequately disclose, assess, and consider all
24 greenhouse gas emissions that the Refinery project will cause, contrary to the requirements and

25 ² *See, e.g.,* Daniel Bottom et al., *Estuarine habitat and juvenile salmon: current and historical*
26 *linkages in the lower Columbia River and estuary*, Final Report 2002-2008, NMFS (2011);
27 Weitekamp et al., *Seasonal and interannual variation in juvenile salmonids and associated fish*
assemblage in open water of the lower Columbia River estuary, 10 Fisheries Bulletin 4 (2012).

1 purpose of the State Environmental Policy Act (“SEPA”). Riverkeeper also opposes the minimal
2 (arguably nonexistent) mitigation requirements for the significant adverse environmental effects
3 from the project’s greenhouse gas emissions. Finally, Riverkeeper opposes the Permits as
4 allowing portions of the Refinery facility to be built within protected shoreline areas when those
5 portions of the Refinery are not water dependent or water related. This Motion for Partial
6 Summary Judgment addresses two of the issues raised by Riverkeeper in this appeal:

7
8 Issue 2 - Did Cowlitz County and Ecology erroneously rely on Ecology guidance
9 in not requiring mitigation of the Project’s greenhouse gas emissions?
10

11 Issue 4 - Did Cowlitz County and Ecology issue the Permits in violation of the
12 Shoreline Management Act (“SMA”), RCW 90.58, implementing regulations, and the
13 Cowlitz County Shoreline Management Master Program (“CCSMP”) by authorizing
14 portions of the Project that are not “water-related” or “water-dependent” to be considered
15 within the shoreline?
16

17 FACTUAL BACKGROUND

18 The Port and NWIW applied for Shoreline Substantial Development and Shoreline Conditional
19 Use Permits (“the Permits”) to construct the Kalama Manufacturing and Marine Export Facility
20 in Cowlitz County. The proposed project consists of a methanol manufacturing facility and a
21 marine terminal (collectively “the Refinery”). The Refinery will be located on the shoreline of
22 the Columbia River in Kalama, Washington. It will refine methanol from natural gas, use natural
23 gas as an energy source to operate the Refinery, and ship the methanol by marine vessel to Asia
24 where it will be used to manufacture plastics. Final Environmental Impact Statement (“FEIS”) at
25 1-2 and 1-3.³ The natural gas for the Refinery will arrive at the facility by pipeline. FEIS at 1-3.
26 The Refinery will use between 270,000 and 320,000 dekatherms of natural gas per day in the

27 ³ Consistent with the Board’s direction, excerpts of the voluminous FEIS are attached to
Brimmer Declaration, served and filed herewith.

1 manufacturing process, making it the largest such facility in the world. FEIS at 1-7. The marine
2 portion of the Refinery, such as the vessel dock, cranes, and equipment associated with loading
3 marine vessels, is, of course, situated in the river and in the shoreline. Revised Site Map,
4 Brimmer Decl. Ex. D. Other non-marine portions of the Refinery will also be placed within the
5 protected shoreline zone, including stormwater infiltration, fire water, and first flush ponds, a
6 spill containment berm (and spill containment area), and fencing surrounding these things and
7 the Refinery site. *Id.*

8 The application for the Refinery triggered SEPA obligations to evaluate potential
9 significant environmental impacts though an environmental impact statement. Cowlitz County
10 and the Port were co-lead agencies in preparing and overseeing SEPA compliance, the Port being
11 both a permit applicant and oversight agency for review of the Port's permit application under
12 SEPA. The County and the Port issued a Final Environmental Impact Statement on September
13 30, 2016.

14 The FEIS evaluates two technology options for producing methanol from natural gas: the
15 Ultra-Low Emissions ("ULE") Alternative and the Combined Reformer ("CR") Alternative.
16 FEIS at 1-5 and 1-12. Both alternatives would require substantial electricity and natural gas for
17 methanol production. The ULE Alternative requires less natural gas but more electricity than the
18 CR Alternative. FEIS at 1-5. The Cowlitz County Public Utility District does not have the
19 capacity to supply all the electricity needs for the ULE Alternative, so in order to accommodate
20 the ULE Alternative, NWIW will need to build an on-site, natural gas-fired power generator to
21 provide power for the Refinery. *Id.* The ULE Alternative "is estimated to result in direct
22 emissions of approximately 976,000 tonnes of GHGs annually from methanol production and
23 on-site power generation." *Id.* The CR Alternative "is estimated to result in direct emissions of
24 approximately 1.4 million tonnes of [greenhouse gases] GHGs annually and 133,000 tonnes of
25 GHGs annual from purchased power." FEIS 1-12. Assuming purchased power comes from an
26 average of northwest power sources, generation of purchased power would emit 266,000 tonnes
27

1 of greenhouse gases annually.⁴ FEIS 1-12.

2 The FEIS relies on Guidance from Ecology to conclude that there are no significant
3 impacts from greenhouse gas emissions emitted or caused by the Refinery. FEIS 4-10-11; 4-26.

4 The FEIS states that choosing the ULE Alternative over the CR Alternative constitutes
5 “mitigation” of greenhouse gas emissions under SEPA and therefore, the “proposed project
6 would not result in unavoidable significant adverse impacts” and “there would be no significant
7 adverse impacts associated with the proposed project.” FEIS 4-16; 4-26. As a result, the FEIS
8 does not contemplate mitigation of greenhouse gas emissions beyond the choice of the ULE
9 refining process from the alternatives considered. The Cowlitz County Hearing Examiner
10 approved the Permits on March 8, 2017, *see Corrected Findings of Fact, Conclusions of Law*
11 *and Decision* (“Hearing Examiner”), and the Washington State Department of Ecology approved
12 the Permits on June 8, 2017.

13 PETITIONER STANDING

14 The Petitioner groups have standing to bring this matter before the Board.⁵ Each of the
15 Petitioners has organizational and associational standing. Each organization’s mission includes
16 extensive work on matters directly related to the Refinery and this case, including battling the
17 effects of climate change and increases in greenhouse gas emissions that will contribute to and
18 worsen the effects of climate change, and on protecting and preserving natural resources
19 including the Columbia River, its shorelines, and the species dependent on the River. *See, e.g.*,
20 Declarations of Miles Johnson, Columbia Riverkeeper, David Noah Greenwald and Lori Ann
21 Burd, Center for Biological Diversity, and Stephanie Hillman, Sierra Club. Columbia
22

23 ⁴ The greenhouse gas estimates in the FEIS do not fully include or quantify greenhouse gases
24 emitted in the course of transportation (so called downstream effects). The FEIS acknowledges
25 that transportation of methanol beyond Washington boundaries will result in additional
26 greenhouse gas emissions. FEIS 4-20. Nor does the FEIS include or quantify greenhouse gas
27 emissions that will be caused or induced by the Refinery such as the increase in natural gas use
(so called upstream effects.)

⁵ *See* requirements set forth in RCW 34.05.530. *See also Engdahl v. City of Burien*, SHB No. 10-007, 7-8 (Order on Summary Judgment, July 16, 2010) and citations therein.

1 Riverkeeper and the Center for Biological Diversity have devoted significant resources and its
2 members have expended tremendous effort in fighting the numerous fossil fuel export and
3 transportation proposals on the Columbia River in recent years and the negative effects on the
4 river and climate therefrom. Johnson Decl. at 4-5; Greenwald Decl. 4-7. Those efforts are
5 directly affected by the proposed project, with increased shipping and significant increases in
6 greenhouse gas emissions, on the banks of the Columbia River. Johnson Decl. at 6-9; Greenwald
7 Decl. at 9-11, 14. The Refinery will increase natural gas use and attendant emissions in the state
8 making it that much more difficult to achieve reduction targets and making it less likely that the
9 groups' work trying to reduce the effect of climate change on the river environment will be
10 successful. *See* Johnson Decl. at 6-10; Greenwald Decl. at 9-11. Columbia Riverkeeper and the
11 Center for Biological Diversity's missions are to protect species and their habitat in the
12 Columbia River and its shorelines and estuary; the large new vessel dock and associated facilities
13 along with the increase in marine traffic will negatively affect the missions of these groups and
14 their ability to protection species such as listed salmon. Johnson, Greenwald and Burd decl.
15 generally.

16 Moreover, the individual members of the Petitioner groups will be injured by the
17 approval of this large new Refinery both as a huge new source of greenhouse gas pollution and
18 as a project built within the protected shoreline. Burd Decl. at 8-9, 11; Flynn Decl. at 8-11 and
19 Greenwald Decl. generally. Members of the groups live, work, and/or recreate on or near the
20 Columbia River, making use of the river itself, and its shorelines. *See* Greenwald Decl. at 4;
21 Burd Decl. at 5-7, 10; Flynn Decl. at 3 et seq.; Anderson Decl. at 5. Some members fish in the
22 river. Johnson Decl. at 10; Flynn Decl. at 4-6. Some members will be directly affected by the
23 increase in vessel traffic caused by the Refinery and will be affected by the increase in air
24 pollutants. Greenwald Decl. at 14; Flynn Decl. at 8; Anderson Decl. at 6-7. All will be affected
25 by the impacts already being felt from climate change and those effects will only worsen with the
26 increase (as opposed to the state-acknowledged need for **decreases**) in greenhouse gas pollution
27

1 from the Refinery. *See* declarations generally. This one project will cause a 1 percent increase
2 to total state of Washington greenhouse gas emissions, using the applicant’s own estimates,
3 adding to the negative effects of climate change already felt by the members of the Riverkeeper
4 groups.

5 These injuries can be redressed, in whole or in part, by a decision from the Board
6 requiring complete disclosure and analysis of greenhouse gas emissions from and attributable to
7 the Refinery, by requiring additional mitigation (or requiring the permitting agencies to consider
8 additional mitigation) of greenhouse gas emissions attributable to the Refinery, and by requiring
9 removal from the protected shoreline area of all non-water-related and non-water-dependent
10 portions of the Refinery. Johnson Decl. at 11; Greenwald Decl. at 17; Burd Decl. at 12; Flynn
11 Decl. at 12.

12 ARGUMENT

13 Riverkeeper is entitled to summary judgment on the two issues identified above as each
14 issue requires resolution only of a question of law and there is no genuine issue of material fact.
15 *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307, 313 (1997)). *See*
16 *also, The Log Foundation v. City of Seattle Dep’t of Planning and Dev.*, SHB No. 15-003c
17 (Order on Motions for Partial Summary Judgment, Aug. 17, 2015) (citing *Jacobsen v. State*, 89
18 Wn.2d 104, 108, 569 P.2d 1152 (1977)). A material fact is one affecting the outcome under the
19 governing law. *Id.* (citing *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992)). “Bare
20 assertions concerning alleged genuine material issues do not constitute facts sufficient to defeat a
21 summary judgment motion.” *Sammamish Homeowners v. City of Sammamish*, SHB No. 15-
22 012c (Order on Granting Partial Summary Judgment to King County, Sept. 14, 2016) (citing
23 *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014)).

1 I. ECOLOGY’S RELIANCE ON BROADLY APPLICABLE PRESUMPTIONS IN
2 GUIDANCE TO FIND THE PROJECT’S GREENHOUSE GAS EMISSIONS NOT
3 SIGNIFICANT AND FAILURE TO MITIGATE ARE ARBITRARY AND
4 CONTRARY TO SEPA. (ISSUE 2).

5 A. SEPA Requires Agencies to Engage in a Detailed Case by Case Inquiry and
6 Allows for Mitigation or for Denial of Projects with Significant Adverse Effects.

7 SEPA “sets forth a state policy of protection, restoration and enhancement of the
8 environment.” *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 63, 578 P.2d 1309, 1312 (1978);
9 RCW 43.21C.010. SEPA’s policies and goals overlay and add to existing authorizations of all
10 branches of state and local government. RCW 43.21C.060. The purpose of an environmental
11 impact statement (“EIS”) is to ensure that SEPA’s policies are an integral part of the ongoing
12 programs and actions of state and local government such that the EIS is actually used by, and
13 informs the decision of, those government agencies. WAC 197-11-400.

14 SEPA confers on agencies the ability to condition or deny projects that will have
15 significant adverse impacts on the environment. *Polygon Corp.*, 90 Wn.2d at 67. An agency
16 may impose mitigation measures that are “reasonable and capable of being accomplished” and
17 may deny a proposal upon a finding that it would result in identified significant adverse impacts
18 and reasonable mitigation measures are insufficient to mitigate the identified impact. *Id.*; WAC
19 197-11-660. “The primary function of an EIS is to identify adverse impacts to enable the
20 decision-maker to ascertain whether they require either mitigation or denial of the proposal.”
21 *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380, 385 (1990).

22 The test for significance of an environmental impact under SEPA is “a reasonable
23 likelihood of more than a moderate adverse impact on environmental quality,” and the inquiry
24 “involves context and intensity and does not lend itself to a formula or quantifiable test.” WAC
25 197-11-794. In furtherance of that analysis, the adequacy of an EIS and an agency’s
26 determination regarding significant environmental effect based on that EIS is “best determined
27 ‘on a case-by-case basis guided by all of the policy and factual considerations reasonably related
to SEPA’s terse directives’.” *Klickitat County Citizens Against Imported Waste v. Klickitat
County*, 122 Wn.2d 619, 633, 860 P.2d 390, 398-99 (1993) (citations omitted); *Cheney v. City of*

1 *Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.3d 184, 188-89 (1976). Those factors are to be
2 considered in light of the policy in SEPA of maintenance, enhancement and restoration of the
3 environment. *Polygon Corp.* 90 Wn.2d at 70.

4 Judicial review of the adequacy of an EIS and conclusions reached as to environmental
5 effects based on the EIS is under the clearly erroneous standard, which is “broader than that
6 under the arbitrary and capricious test” to “ensure[] that permit issuance will not lie solely within
7 the subjective discretion of the decision maker.” *Id.* at 67. The clearly erroneous test applies “in
8 light of the public policy contained in the legislation authorizing the decision” and the decision is
9 clearly erroneous only when the reviewer—here, the Shorelines Hearings Board—is left with the
10 definite and firm conviction that a mistake has been committed.” *Id.* at 69.

11 B. The Refinery Project Will Have Significant Adverse Effects Due to Its High
12 Greenhouse Gas Emissions.

13 The threat of climate change has spurred Washington’s commitment to greenhouse gas
14 reduction. Washington has sought to meet the challenge of climate change with a variety of
15 statutory and regulatory actions to reduce our reliance on fossil fuels and promote conservation
16 and alternatives. Washington adopted greenhouse gas reduction standards via legislation in
17 2008. *See* RCW 70.235.020(1)(a). The statute establishes that by 2020, emissions shall be
18 reduced to 1990 levels. By 2035, greenhouse gas emissions are to be 25 percent below 1990
19 levels, and by 2050, they are to be 50 percent below 1990 levels. The legislature has consistently
20 reinforced its intent to address greenhouse gas impacts on Washington’s climate and economy,
21 for example by: a) adopting a clean car standard that will reduce greenhouse gas emissions from
22 mobile sources; b) dramatically increasing efficiency requirements for buildings; c) requiring all
23 state agencies to inventory and reduce emissions; d) creating tax and other financial incentives to
24 support low-carbon alternative energy sources; and e) requiring new power plants to mitigate 20
25 percent of lifetime greenhouse gas emissions from the power plant. These legislative actions
26 have been supplemented by a number of Executive Orders promoting reduction of greenhouse
27

1 gas emissions and increasing the availability of energy alternatives.⁶

2 The Refinery, in its operation alone, will emit a tremendous volume of greenhouse gas
3 pollution. The process of manufacturing methanol is resource intensive; the FEIS estimates that
4 the Refinery (even as allegedly mitigated) will result in over 1 million tonnes of greenhouse
5 gases annually just from the activities on site. FEIS at 1-12, 4-18.⁷ The Cowlitz County Hearing
6 Examiner found that the amount of greenhouse gas pollutants emitted just from onsite operations
7 from this single source, will increase the *entire State's* total emission of greenhouse gas
8 pollutants by more than 1 percent. Hearing Examiner at 40. Plainly, this magnitude of
9 greenhouse gas pollutants from a single new and additive fossil fuel source is significant. *See*
10 *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 55, 252 P.3d 382,
11 401 (2011) (rejecting argument that contributions of 0.05 percent and 0.12 percent of an impact
12 would be insignificant for SEPA purposes and finding that the context and intensity of the
13 impacts must also be considered).

14 Not only is the volume of greenhouse gas emissions of great concern, but the context of
15 the State's greenhouse gas reduction goals makes the additive nature of the emissions significant.
16 The Refinery is a fossil fuel based industry both in the natural gas feedstock it has chosen for the
17 product it will manufacture, and in the nonrenewable energy power source it chooses to power
18 the facility. FEIS 1-5, 1-7, and 2-52. The Refinery is a new source of greenhouse gas pollutants
19 for the State and indeed the region. It is additive at a time when the state is less than three years
20 from having to fulfill its commitment to reduce greenhouse gas pollution to 1990 levels, not add
21 to them. Both in terms of the volume of natural gas required for the Refinery to operate, and in

22 _____
23 ⁶ See Department of Ecology's "Reducing Carbon Pollution" website, available at
http://www.ecy.wa.gov/climatechange/ghg_reducing.htm.

24 ⁷ The estimated amount of greenhouse gas emissions in the FEIS are extremely conservative.
25 First, the emissions from the processes chosen are very conservative and likely under-count
26 emissions on site. Second, the FEIS includes none of the emissions that will be caused and
27 induced by the Refinery, for example, the production and transportation of natural gas for the
Refinery and overseas transport to and from the Refinery after methanol production. While the
extent of greenhouse gas emissions overall will be an issue at trial, for the purposes of this
Motion, Riverkeeper uses only the conservative estimates in the FEIS.

1 the amount of greenhouse gases emitted from operation, the magnitude and intensity of the
2 greenhouse gas emissions from the Refinery are significant.⁸ Given the context and intensity of
3 the operation of the project, the Port, the County, and Ecology were required under SEPA to
4 analyze and consider whether the project has significant adverse impacts, and analyze and
5 consider whether mitigation of the significant increase in greenhouse gas pollutants, or denial of
6 the proposed project was required.

7 C. Ecology and The County’s Reliance on Presumptions in Guidance to Conclude
8 That the Refinery’s Greenhouse Gas Emissions Are Not Significant is Contrary to
9 SEPA and Clearly Erroneous.

9 The FEIS and Ecology’s approvals are flawed in finding that the Refinery has no
10 significant adverse impacts with the sole stated reason being reliance on Ecology’s internal
11 document titled “Guidance for Ecology: Including Greenhouse Gas Emissions in SEPA
12 Reviews.” Brimmer Decl. Exh. B (“Ecology Guidance”).⁹ The FEIS analyzed the ULE
13 Alternative and the CR Alternative to process natural gas into methanol. Both the CR and ULE
14 Alternatives for processing natural gas into methanol generate large emissions of greenhouse gas
15 pollutants. FEIS at 4-19. As part of the analysis, the FEIS compares the emissions from the two
16 alternatives. FEIS at 4-17-19. The FEIS presumes the ULE Alternative will be chosen and
17 claims “mitigation” of greenhouse gases because the chosen ULE refining process generates less
18 greenhouse gas emissions than the alternative refining process—the CR Alternative—that was
19 also explored. FEIS at 1-12. The FEIS then uses the Guidance to conclude “[t]he ULE
20 technology itself would be a mitigation measure (if the ULE Alternative is selected)” because
21 “[u]nder Ecology’s SEPA guidance for GHG emissions, the ULE alternative will not be
22 considered to have a significant impact for GHG emissions because the ULE technology will
23 reduce GHG emissions by more than 11 percent from the CR Alternative.” FEIS 4-26. Because

24 ⁸ And again, for the purposes of this motion, Riverkeeper relies solely on the emissions estimates
25 by the Refinery proponents, which do not include many up and downstream greenhouse gas
26 emissions, also an issue in the appeal.

27 ⁹ By virtue of being an internal guidance document, the Guidance has not gone through a public
rulemaking process, although Ecology appears to apply it here in a general and formulaic way
similar to a rule.

1 the FEIS, relying on Ecology’s Guidance document, determined that simply choosing one
2 manufacturing alternative over another would result in 11 percent fewer greenhouse gas
3 emissions from the Refinery than another alternative, regardless of the total volume, the
4 discussion of the significant aspects of the probable environmental consequences were cut short,
5 to the extent they occurred at all.

6 The presumption regarding effects and failure to engage in actual mitigation analysis by
7 relying on Ecology’s Guidance is inadequate and contrary to law on its face. “In order for an
8 EIS to be adequate under [the rule of reason], the EIS must present decision-makers with a
9 ‘reasonably thorough discussion of the significant aspects of the probable environmental
10 consequences’ of the agency’s decision.” *Klickitat County*, 122 Wn.2d at 633, 860 P.2d at 398-
11 399 (internal citations omitted). “[T]he adequacy of an EIS is best determined ‘on a case-by-
12 case basis guided by all of the policy and factual considerations reasonably related to SEPA’s
13 terse directives.’” *Id.* Application of the Guidance here avoids case-specific, reasonably
14 thorough analysis, or even discussion of this enormous new fossil fuel refinery and its enormous
15 greenhouse gas emissions and in doing so also avoids mitigation obligations.

16 Ecology’s Guidance describes its purpose as “assist[ing] Ecology staff in determining
17 which projects should be evaluated for greenhouse gas emissions and how to evaluate those
18 emissions under SEPA.” Ecology Guidance at 1. The Guidance acknowledges that climate
19 change impacts due to “new” emissions should be analyzed and considered in SEPA documents.
20 Ecology Guidance at 1. But despite SEPA rules that significance should involve context and
21 intensity and not a generic formula, the Guidance explicitly allows Ecology to apply a
22 presumption through a generic formula for avoiding significant analysis and mitigation
23 regardless of the source, intensity, location, size or type of project that is causing or emitting
24 greenhouse gas pollution. The Guidance simply declares that large, new sources of greenhouse
25 gas pollutants are “not significant for greenhouse gas emissions and thus no further mitigation
26 for greenhouse gas emissions will be necessary” if the proposal will emit more than 25,000
27

1 metric tons a year “and has incorporated mitigation measures to reduce emissions by
2 approximately 11 percent below what its emission would have been without those mitigation
3 measures,” again, regardless of the type, size, or intensity of the source of its emissions. Ecology
4 Guidance at 6-7.

5 The Guidance’s failure is three-fold: it fails to provide a rational basis for accepting an 11
6 percent reduction as a mitigation measure; it fails to require independent mitigation analyses due
7 to the presumption of non-significance as long as an arbitrary reduction requirement is met; and
8 it substitutes compliance with arbitrary and formulaic guidance for compliance with SEPA
9 requirements for case-by-case consideration and analysis of the actual environmental impact of
10 the project and any need for mitigation or denial.

11 Not only is application of a percentage reduction approach contrary to SEPA’s case-by-
12 case analysis requirements on its face, the Washington Court of Appeals has already rejected a
13 similar percentage-based approach to greenhouse gas mitigation requirements. The Court of
14 Appeals rejected the argument in favor of simple pro rata percentage reductions for meeting and
15 analyzing greenhouse gas emissions in *Cascade Bicycle Club v. Puget Sound Regional Council*,
16 175 Wn. App. 494, 306 P.3d 1031 (2013). In that case, the petitioners challenged a
17 transportation plan that failed to meet statutory greenhouse gas reduction requirements and
18 argued *for* pro rata share reductions in greenhouse gas emission for each county’s transportation
19 plan. *Id.* at 503. The court found that the argument “proceeds from a faulty premise” and
20 analogized the pro rata reduction to incongruent budget reductions: “this premise would require
21 accomplishing a 15 percent budget reduction only by paying 15 percent less for each item
22 included in the budget. This ignores the possibility of eliminating some items from the budget
23 or, alternatively, reducing the cost of some by more than 15 percent and others by less”; that is,
24 the court recognized the need for case-by-case assessment of environmental effects that could
25 incorporate options such as the state entirely eliminating some sources of greenhouse gas
26 pollutants. *Id.* at 504.

1 The percentage reduction used to avoid mitigation here it is arbitrary in the same way the
2 formula in *Cascade Bicycle Club* was in that it fails to recognize that the baseline emissions of
3 greenhouse gases could be at any amount, rendering the 11 percent reduction also arbitrary.¹⁰
4 Indeed, this ignores the entire purpose of greenhouse gas reduction goals requiring reduction of
5 *existing* emissions to 1990 levels. In applying Ecology’s Guidance to automatically presume that
6 greenhouse gas emission impacts are not significant (even with a large new source in a fossil fuel
7 industry), the Port, County, and Ecology foreclose proper, case-by-case analysis of the
8 magnitude, type, and intensity of the greenhouse gas pollutants from the Refinery and in turn
9 foreclose and avoid the discussion of whether the significant adverse impacts require mitigation
10 or denial because of it. Compliance with SEPA requires more. On its face, this violates the very
11 purpose and intent of SEPA and violates basic SEPA requirements.

12 Riverkeeper requests an order from the Shorelines Hearings Board reversing the finding
13 of no significant environmental impact and for an order directing the Port and County to properly
14 assess the environmental impacts of the Refinery’s greenhouse gas emissions under SEPA’s
15 case-by-case requirements that include disclosure and analysis of the type, magnitude and
16 intensity of the environmental effects of the Refinery without the application of the arbitrary and
17 improper methodology.

18 **II. PORTIONS OF THE REFINERY FACILITY HAVE BEEN ALLOWED WITHIN THE**
19 **CONSERVANCY SHORELINE CONTRARY TO THE LAW (ISSUE 4).**

20 A number of components of the Refinery will be built in or over the Columbia River and
21 in or over its Shorelines. Some of those components are the marine vessel dock, attendant
22 vessel-loading equipment, and the security for access to the dock. Those components are not at
23 issue here. Some portions of the Refinery unrelated to the dock and marine vessel loading are

24 ¹⁰ The application of Ecology Guidance in this case also tests the logical definition of mitigation.
25 Here, the “mitigation,” in addition to simply being a formulaic presumption divorced from
26 specific case-by-case inquiry and consideration, is also just the choice between two
27 manufacturing alternatives, both of which would create a huge increase in greenhouse gas
pollutants from a new fossil fuel industry. This begs the logical question of whether an applicant
can manufacture alternatives that would result in a desired 11 percent greenhouse gas reduction,
regardless of its actual impact, to avoid a significance analysis.

1 also in the shorelines area. Those include a tank spill containment berm, part of the area within
2 the berm, stormwater infiltration, fire water, and first flush ponds, and fencing around the
3 perimeter of the Refinery site. Hearing Examiner at 33-36 and Brimmer Decl. Ex. D. While
4 some portions of the Refinery and export terminal—like the dock—may belong in the shoreline
5 and be water-dependent, other portions of the facility—like the stormwater and first flush ponds
6 or the spill containment area—are neither water-related nor water-dependent and must be moved
7 out of the shoreline.

8 A. Washington’s Shoreline Management Act and Implementing Regulations
9 Prioritize State-Wide Interests and Natural Character and are Broadly Interpreted
10 to Ensure Protection of Shorelines.

11 The Washington legislature enacted the Shorelines Management Act (the “Shorelines
12 Act”) to protect Washington’s fragile shorelines from the mounting pressure of development and
13 to ensure coordination in their management. *Buechel v. Dep’t of Ecology*, 125 Wn. 2d 196, 203,
14 884 P.2d 910, 915 (1994). The legislature found that Washington’s shorelines are among the
15 state’s most valuable natural resources. RCW 90.58.020. Courts interpret the Shorelines Act
16 broadly to protect the state’s shorelines as fully as possible. *Buechel*, 125 Wn. 2d at 203, 884
17 P.2d at 915. For the purposes of the Shorelines Act, “Shorelands” refers to the area 200 feet
18 landward of the ordinary high water mark, RCW 90.58.030(2)(d), while “Shorelines” include
19 these lands, state waters, and the lands underlying them. RCW 90.58.030(2)(e). “All
20 development on the shorelines of this state . . . must conform to the [Shorelines Act].” *Buechel*,
21 125 Wn. 2d at 203, 884 P.2d at 915.

22 The law assigns priority protections for shorelands and shorelines, making protection of
23 state-wide, as opposed to local, interest of paramount importance. The law also assigns
24 preference for protection of the natural character of shorelines, long over short-term benefit, and
25 the protection of shoreline resources and ecology. RCW 90.58.020. Uses are preferred that are
26 consistent with control of pollution and prevention of damage to the natural environment, or
27 where the use is dependent upon use of the shoreline. *Id.* In limited instances where alteration is

1 allowed, it should, for industrial uses of the shoreline, be where the development is “*particularly*
2 dependent on location on or use of the shoreline.” *Id.* (emphasis added).

3 B. The County and Ecology Erred as a Matter of Law in Considering the Refinery as
4 a Whole in Determining Its Character as Water-Dependent or Water-Related.

5 I. *Applicable laws require consideration and justification for each and every*
6 *portion of a project that is placed within the shorelines area.*

7 The Shorelines Act and state and county regulations implementing the Act are clear that
8 for each portion of a project that is to be built within the 200-foot shoreline area, the project
9 proponent and permitting entity must demonstrate and justify each portion so placed as water-
10 dependent or at least water-related. A use or portion of a use is water-dependent when it “cannot
11 exist in a location that is not adjacent to the water,” and when it “is dependent on the water by
12 reason of the intrinsic nature of its operations.” WAC 173-26-020(39). A use or portion of a use
13 is water-related when it “is not intrinsically dependent on a waterfront location but [its]
14 economic viability is dependent upon” a shoreline location because the use or portion of use has
15 a “functional requirement for a water location” or the use or portion of use provides a “necessary
16 service supportive of the water-dependent uses” and the location makes the service less
17 expensive or more convenient to its customers. WAC 173-26-020(43) (a)–(b). Given these
18 descriptions, some care must be taken to ensure that the exceptions for shoreline development do
19 not consume the express legislative direction to allow development only when it is particularly
20 dependent on use of the shoreline.

21 Local governments may grant permits to build on a shoreline of statewide significance
22 *only* if the proposal meets both Shorelines Act requirements and applicable local program
23 requirements. RCW 90.58.140(1). Developments that require a substantial development permit,
24 RCW 90.58.140(1) and (2) and WAC 173-27-150, must be evaluated for consistency with: “(a)
25 the policies and procedures of the [shorelines] act; (b) the provisions of this regulation [i.e.,
26 WAC 173-27-150]; and (c) the applicable master program adopted or approved for the area”
27 WAC 173-27-150(1).

1 Cowlitz County implements the Shorelines Act through the 1977 Cowlitz County
2 Shoreline Master Program (the “County Program”). Brimmer Decl. Ex. E. Under limited
3 circumstances, local governments may allow deviations from some County Program
4 requirements through conditional use permits. RCW 90.58.140(10); WAC 173-27-040(b).
5 Conditional use permits are only allowed, however, under extraordinary circumstances and if the
6 public suffers no substantial detrimental effect. RCW 90.58.100(5). The County Program
7 delineates four shoreline management districts (or shoreline environmental designations),
8 including Conservancy Districts and Urban Districts. *See* County Program at 22. A
9 “Conservancy District” is the second most protective category in the County Program.
10 Conservancy Districts are “those areas which ... are not suitable for ... high density human use.”
11 *Id.* Industrial uses that are not water-related are, therefore, prohibited in Conservancy District
12 shorelines. County Program at 49. Water dependent or water-related uses may sometimes be
13 allowed in the Conservancy District, but only if properly conditioned and mitigated. *See also*
14 County Program at 31 (“Commercial and industrial uses are of such varied nature that many may
15 be considered a conditional use in any district and to be permitted must meet conditions....”).

16 2. *The County and the Hearing Examiner erred as a matter of law when they*
17 *considered the Refinery “as a whole” and did not examine and justify*
each portion of the project placed within the protected shorelines.

18 The County determined that the Refinery project as a whole was water-dependent and
19 water-related, and that a conditional use permit would be required to site the facility in the
20 shoreline location. County Shoreline Compliance Narrative at 4-6 (Brimmer Decl. Ex. F);
21 Hearing Examiner at 37 and ¶ 5.3 and 5.7.¹¹ The County Hearing Examiner, citing to the
22 County’s findings, also determined that infringement into the Conservancy District shorelines by
23 portions of the Project, like a spill containment area or stormwater infiltration ponds, was

24 _____
25 ¹¹ An additional example of the consideration by decision-makers of whether a portion of the use
26 is water-related concerns the Air Separation Unit. The Hearing Examiner specifically found the
27 Unit was *not* water-related but waived it off by also finding that the methanol production facility
as a whole is water-related so the Air Separation Unit could be allowed in the shorelines.
Hearing Examiner at 37.

1 acceptable because he found that the Refinery project as a whole was both water-dependent and
2 water-related. Hearing Examiner at 93-94. The Hearing Examiner also piggy-backed all pieces
3 of the Refinery when he concluded that those portions are supporting the manufacturing part of
4 the Refinery, which in turn is shipping the finished product through a marine terminal, and thus
5 they are water-dependent and water-related. Hearing Examiner at 93. Again, the County
6 Hearing Examiner makes his findings on the portions of the project, based on the purpose of the
7 entire project.

8 The justification for placing the spill containment area and berm, the first flush,
9 stormwater, fire water ponds, and perimeter fencing, all within the shorelines is an error of law,
10 contrary to the plain language of the Shorelines Act and applicable state and county regulations,
11 which require that each portion of a project—rather than the project as a whole—proposed to be
12 put in the shorelines area be justified as water-dependent or water-related. The language of the
13 County Hearing Examiner’s decision and the County’s recommendations show that these
14 decision-makers regarded the components of the project in the shorelines as necessary only
15 because they were part of the larger whole—both in specific findings, e.g. Hearing Examiner at
16 ¶¶ 5.3 and 5.7, and in the minimal justification for the specific portions: the County Hearing
17 Examiner simply pointed to the fact that the Refinery was going to ship its product by marine
18 vessel, so the whole facility was both water-dependent and water-related. *E.g.* Hearing
19 Examiner at 37. This simply reads the “portion of use” requirements out of the law and cannot
20 stand.

21 Moreover, the County cannot have it both ways. If the components of the project are
22 inseparable and must be considered as a whole, then the County is effectively allowing
23 placement of an entire methanol manufacturing facility, a significant industrial use, in the
24 Conservancy District shoreline. Nowhere has this been justified. While the shipping terminal is
25 water-dependent, the manufacture of methanol and all its attendant components plainly is not.
26 Methanol product can be produced well away from protected shorelines and then piped or
27

1 otherwise transported to a dock, similar to other proposals and administrative decisions for
2 liquefied natural gas (“LNG”). For example, processing facilities were located upland from
3 product supply pipelines and shipping terminals in wetland area in a FERC decision regarding
4 the Freeport LNG development in Texas and the Cove Point project in Maryland. 148 FERC ¶
5 61,076, Docket Nos. CP12-509-000; CP 12-29-000, 22 (July 30, 2014) and FERC, *Envtl.*
6 *Assessment for the Cove Point Liquefaction Project*, FERC Docket No. CP13-113-000,
7 20140515-4002 FERC PDF (May 15, 2014).¹² If the Refinery components are not separable
8 from each other, then the County has failed to properly analyze and justify placement of the
9 Refinery, as a whole, in the shorelines. Given that there is nothing about a methanol refinery
10 itself that is water-related or dependent, the County cannot justify the placement.

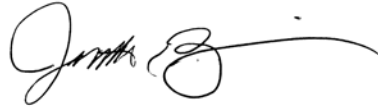
11 Alternatively, if, as Riverkeeper argues, the statute and regulations require assessment of
12 each portion of the Refinery Project, the County must consider, analyze, and justify each portion
13 of the project—here the first flush, stormwater, and fire water ponds, the spill containment area
14 and berm, and perimeter fencing—as water-dependent or water-related in order to place those
15 individual components in the Conservancy District shorelines. The County has not done so and
16 as demonstrated below, it cannot.

17 C. Portions of The Refinery Project Placed Within the Protected Shoreline Are
18 Neither Water-Dependent nor Water-Related.

19 The southern portion of the project is located in the Urban District, and the northern
20 portion is located in the more-protective Conservancy District. Shoreline Compliance Narrative
21 at 4. The County allowed non-water-related structures in the Conservancy District Shoreline.
22 Shoreline Compliance Narrative at 5. The County and the Hearing Examiner justified allowing
23 structures such as the spill containment berm and stormwater infiltration pond to encroach on the

24 ¹² Similarly, an administrative hearings decision on an LNG Project in Oregon concluded that
25 liquefaction and storage facility as part of an export terminal in Warrenton, Oregon, need not be
26 sited in wetlands along the Columbia, but instead should be located in uplands and connected to
27 the terminal by pipeline. *In the matter of Type III Application for Oregon ONG Bidirectional*
Terminal, Final Order, CUP 14-3, CAR 14-1, CUP 14-4 & CAR 14-2, pp. 30-31 (Warrenton
Land Use Hearings Officer, Mar. 6, 2016).

1 Respectfully submitted August 7, 2017.

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