



STATE OF WASHINGTON
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

*Mailing Address: PO Box 40903, Olympia, WA 98504-0903 •
Physical Address: 1111 Israel Rd SW, Suite 301, Tumwater, WA 98501 •*

April 20, 2018

Sent by Email and US Mail

Jonathan K. Sitkin
Chmelik Sitkin & Davis
1500 Railroad Ave
Bellingham WA 98225

Bart J. Freedman
Endre Szalay
Francesca Eick
Jim Lynch
Kari Vander Stoep
Danny Kelly-Stallings
K&L Gates LLP
925 Fourth Ave Ste 2900
Seattle WA 98104

Craig Trueblood
Ankur Tohan
K&L Gates, LLP
925 Fourth Ave Ste 2900
Seattle WA 98104

Kristen L. Boyles
Jan E. Hasselman
Marisa C. Ordonia
Earthjustice
705 Second Ave Ste 203
Seattle WA 98104

Douglas E. Jensen
Cowlitz County Prosecuting Attorney
312 SW 1st Ave, First Floor
Kelso WA 98626

Thomas Young
Sonia Wolfman
Assistant Attorney General
Ecology Division
PO Box 40117
Olympia WA 98504-0117

Beth S. Ginsberg
Stoel Rives LLP
600 University St Ste 3600
Seattle WA 98101

Mark C. Scheibmeir
Cowlitz County Hearing Examiner
299 NW Center St
PO Box 939
Chehalis WA 98532

Re: **SHB No. 17-017c**
MILLENNIUM BULK TERMINALS, LLC and COWLITZ COUNTY v.
COWLITZ COUNTY HEARING EXAMINER and STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY
WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS,
FRIENDS OF THE COLUMBIA GORGE, SIERRA CLUB, AND COLUMBIA
RIVERKEEPER, and BNSF RAILWAY COMPANY (Intervenors)

Dear Parties:

Enclosed is an Order on Motions and Dissent in the above referenced matter.



SHB Case No 17-017c
April 20, 2018
Page 2

If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,



Joan M. Marchioro, Presiding

JMM/le/S17-017c
Encl.

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.
DATED 4/20/18, at Tumwater, WA.



1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 MILLENNIUM BULK TERMINALS
4 LONGVIEW, LLC, and COWLITZ
5 COUNTY,

6 Petitioners,

7 and

8 BNSF RAILWAY COMPANY,

9 Petitioner-Intervenor,

10 v.

11 COWLITZ COUNTY HEARING
12 EXAMINER and STATE OF
13 WASHINGTON, DEPARTMENT OF
14 ECOLOGY,

15 Respondents,

16 And

17 WASHINGTON ENVIRONMENTAL
18 COUNCIL, CLIMATE SOLUTIONS,
19 FRIENDS OF THE COLUMBIA GORGE,
20 SIERRA CLUB, and COLUMBIA
21 RIVERKEEPER,

Respondent-Intervenor.

SHB No. 17-017c

ORDER ON MOTIONS

18 **INTRODUCTION**

19 Millennium Bulk Terminals-Longview, LLC (Millennium) filed a petition with the
20 Shorelines Hearings Board (Board) requesting review of the Cowlitz County Hearing
21

1 Examiner's Findings of Fact, Conclusions of Law, and Decision Denying Permits, File No. 12-
2 04-0375, Shoreline Permit Application No. 17-0992 (Hearing Examiner Decision). Cowlitz
3 County separately petitioned the Board for review of the Hearing Examiner Decision. The
4 matters were consolidated for hearing. Washington Environmental Council, Climate Solutions,
5 Friends of the Columbia Gorge, Sierra Club and Columbia Riverkeeper (WEC) were granted
6 intervention as respondents. BNSF Railway Company (BNSF) was granted intervention as a
7 petitioner. Separate motions for summary judgment were filed by Millennium, Ecology, and
8 WEC.

9 The Board considering this matter was comprised of Board Chair Joan M. Marchioro,
10 Presiding, and Members Kay M. Brown, Neil L. Wise, Grant Beck, Allen Estep and Keith
11 Goehner. Attorneys Craig S. Trueblood, Ankur K. Tohan and Jonathan K. Sitkin represented
12 Millennium. Chief Civil Deputy Douglas E. Jensen represented Cowlitz County. Senior
13 Counsel Thomas J. Young and Assistant Attorney General Sonia A. Wolfman represented
14 Ecology. Attorneys Kristen L. Boyles, Jan E. Hasselman and Marisa C. Ordonia represented
15 Intervenors WEC. Attorneys James M. Lynch, Kari L. Vander Stoep and Daniel C. Kelly-
16 Stallings represented Intervenor BNSF.

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

- 18 1. Petitioner Millennium Bulk Terminals-Longview, LLC's Motion for Summary
19 Judgment and Request for Remand;
- 20 2. Declaration of Craig Trueblood In Support of Petitioner Millennium Bulk
21 Terminals-Longview, LLC's Motion for Summary Judgment and Request for
Remand, with Exhibits A-D;

- 1 3. Washington Environmental Council *et al.* Motion for Summary Judgment;
- 2 4. Declaration of Kristen L. Boyles Re: Exhibits to WEC Motion for Summary
3 Judgment, with Exhibits A-J;
- 4 5. Cowlitz County's Joinder of Petitioner Millennium Bulk Terminals-Longview,
5 LLC's Motion for Summary Judgment and Request for Remand;
- 6 6. Declaration of Elaine Placido In Support of County's Joinder of Motion for
7 Summary Judgment and Request for Remand (Placido Decl (1/25/18)), with
8 Exhibit C-1;
- 9 7. Respondent State of Washington, Department of Ecology's Motion for Summary
10 Judgment, with Appendix A;
- 11 8. Declaration of Sonia A. Wolfman In Support of Department of Ecology's
12 Motion for Summary Judgment, with Exhibits A-F;
- 13 9. Declaration of Rebecca Rothwell In Support of Department of Ecology's Motion
14 for Summary Judgment, with Exhibit A;
- 15 10. WEC Opposition to Millennium Motion for Summary Judgment and Remand;
- 16 11. Second Declaration of Kristen L. Boyles, with Exhibits K-l;
- 17 12. Respondent Department of Ecology's Response to Petitioner Millennium Bulk
18 Terminals-Longview, LLC's Motion for Summary Judgment and Request for
19 Remand;
- 20 13. Declaration of Thomas J. Young In Support of Ecology's Response to Petitioner
21 Millennium Bulk Terminals-Longview, LLC's Motion for Summary Judgment
 and Request for Remand, with Exhibits A-D;
14. Respondent Department of Ecology's Joinder In Intervenor-Respondents
 Washington Environmental Council. Et Al. Motion for Summary Judgment;
15. Cowlitz County's Response to WEC's Motion for Summary Judgment;
16. Petitioner Millennium Bulk Terminals-Longview, LLC's Opposition to
 Respondent Department of Ecology and Intervenor-Respondents Washington
 Environmental Council Et Al.'s Motions for Summary Judgment;

- 1 17. Declaration of Ankur K. Tohan In Opposition to Ecology and WEC's Motions
2 for Summary Judgment, with Exhibits A-K;
- 3 18. Cowlitz County's Response to Dept. of Ecology's Motion for Summary
4 Judgment;
- 5 19. Declaration of Elaine Placido In Support of County's Response to Motion for
6 Summary Judgment (Placido Decl. (2/8/18));
- 7 20. BNSF Railway Company's Joinder to Millennium Bulk Terminals-Longview's
8 Opposition to Ecology and WEC's Motions for Summary Judgment;
- 9 21. Reply In Support of Millennium Bulk Terminals-Longview, LLC's Motion for
10 Summary Judgment;
- 11 22. WEC Reply In Support of Motion for Summary Judgment;
- 12 23. Respondent State of Washington, Department of Ecology's Reply In Support of
13 Motion for Summary Judgment;
- 14 24. Second Declaration of Sonia A. Wolfman In Support of Ecology's Motion for
15 Summary Judgment, with Exhibit A; and
- 16 25. The Board's file in this matter.

17 The following issues, which were submitted by the parties and set out in the
18 Consolidation, Intervention and Prehearing Order, are the subject of the pending motions:

- 19 1. Did the Cowlitz Hearing Examiner unlawfully or fail to apply, or misinterpret
20 the County's Shoreline Master Program (SMP) and the Shoreline Management
21 Act (SMA)?
2. Did the Cowlitz Hearing Examiner misinterpret, misapply or fail to apply the
State Environmental Policy Act (SEPA) or County SEPA regulations and other
regulations?
3. Did the Cowlitz Hearing Examiner fail to analyze the Project as presented in the
applications and in light of substantial evidence and the County SMP?

1 4. Did the Cowlitz Hearing Examiner commit an error by imposing preconditions
2 from other permits and approvals outside of his scope of authority provided for
3 in the SMA, and that would be separately addressed in pending or subsequent
4 reviews?

5 5. Did the Hearing Examiner commit an error by interjecting areas of further
6 environmental study and imposing additional mitigation discussion despite the
7 lapse of jurisdiction for appeal of SEPA adequacy?

8 6. Is the Project consistent with the state SMA?

9 7. Is the Project consistent with the Cowlitz SMP?

10 8. Whether Millennium and Cowlitz County are barred from challenging the Final
11 Environmental Impact State Environmental Policy Act (FEIS) findings and
12 conclusions regarding the ten areas of significant, adverse, unmitigated impacts
13 cited in the Hearing Examiner decision?

14 9. Did the Hearing Examiner lawfully exercise substantive authority under the
15 SEPA, RCW 43.21C.060 and WAC 197-11-660(1), to deny the shoreline
16 permit?

17 9.a Does substantial evidence support the Hearing Examiner's conclusion
18 that the FEIS identified significant adverse impacts?

19 9.b Does substantial evidence support the Hearing Examiner's conclusion
20 that reasonable mitigation measures are insufficient to mitigate the
21 identified significant adverse impacts?

9.c Is the Hearing Examiner's denial of the shoreline permits based on
policies or rules that have been designated by the County as a basis for
the exercise of substantive authority, as required under WAC 197-11-
660(1)(a)?

Based on the record and evidence before the Board on the motions, the Board enters the
following decision:

BACKGROUND

1
2 Millennium proposes to construct and operate a coal export terminal (the Project) on an
3 existing industrial site in and adjacent to the Columbia River in Cowlitz County. The Project
4 would be developed on 190 acres primarily within a 540-acre site leased by Millennium. Coal
5 would be transported to the Project site by rail and stockpiled for eventual loading onto ocean-
6 going vessels for transport to Asia via the Columbia River and Pacific Ocean. The completed
7 Project would consist of “one operating rail track, eight rail tracks for storing up to eight unit
8 trains, rail car unloading facilities, a stockpile area for coal storage, conveyor and reclaiming
9 facilities, two new docks in the Columbia River (Docks 2 and 3), and shiploading facilities on
10 the two docks. Dredging of the Columbia River would be required to provide access to and
11 from the Columbia River navigation channel and for berthing at the two new docks.” Wolfman
12 Decl., Ex. A at FS-1.

13 Millennium intends to construct the Project in two stages. During Stage 1, Millennium
14 would construct the two docks, two stockpile pads, railcar unloading facilities, the operating rail
15 track and rail storage tracks, Project site area ground improvements, associated facilities and
16 infrastructure. Millennium would also conduct necessary dredging for the two docks. The
17 Project’s throughput capacity at the completion of Stage 1 would be 25 million metric tons of
18 coal per year (MMTPY). Stage 2 facilities, construction of which would begin at the
19 completion of Stage 1, would consist of “one additional shiploader on Dock 3, two additional
20 stockpile pads, conveyors, and equipment necessary to increase throughput by approximately 19
21 MMTYP[.]” Trueblood Decl., Ex. B at 7. The Project is intended to operate 24 hours per day,

1 seven days per week, and is designed for a minimum 30-year period of operation. Wolfman
2 Decl., Ex. A at FS-1.

3 Millennium determined that, in order for a coal export terminal to be economically
4 viable, it needed a throughput capacity of 40 to 50 MMTPY. Second Wolfman Decl., Ex. A at
5 3-1, D-5. At the completion of Stage 2, the Project will have a throughput capacity of up to 44
6 MMTPY. Trueblood Decl., Ex. B at 7. At full terminal operations, the Project would “bring
7 approximately 8 loaded unit trains each day carrying coal to the project area, send out
8 approximately 8 empty unit trains each day from the project area, and load an average of 70
9 vessels per month or 840 vessels per year, which would equal 1,680 vessel transits in the
10 Columbia River annually.” Wolfman Decl., Ex. A at FS-1.

11 Cowlitz County and Ecology served as co-lead agencies for environmental review of the
12 Project under the Washington State Environmental Policy Act (SEPA), ch. 43.21C RCW. On
13 September 9, 2013, Cowlitz County issued a revised Determination of Significance stating that
14 the Project was likely to result in significant adverse environmental impacts and that an
15 environmental impact statement (EIS) was required. Wolfman Decl., Ex. A at S-2. Cowlitz
16 County and Ecology elected to prepare a joint SEPA EIS. Trueblood Decl., Ex. B at 23.

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

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

8 Wolfman Decl., Ex. A at S-41; *see also* S-41-44, S46-60.

9 The Project requires several local, state and federal authorizations to proceed. *Id.* at S-
10 43-44. Pertinent permits from Cowlitz County include a Critical Areas Permit, Shoreline
11 Substantial Development Permit (SSDP) and Shoreline Conditional Use Permit (SCUP).
12 Authorizations from Ecology include an SCUP and Clean Water Act Section 401 Certification.
13 Millennium must also obtain a Clean Water Act Section 404 Permit from the U.S. Army Corps
14 of Engineers. *Id.*

15 On July 19, 2017, Cowlitz County issued Millennium a Critical Areas Permit for the
16 Project. Tohan Decl., Ex. H; Wolfman Decl., Ex. H. Pursuant to RCW 43.21C.080,
17 Millennium issued a Notice of Action, which established August 18, 2017, as the deadline for
18 appealing the FEIS. Tohan Decl., Ex. K (Trans. p. 20); Placido Decl. (2/8/18) at ¶ 2. BNSF
19 filed “a precautionary appeal” of the FEIS on May 12, 2017, but subsequently withdrew its
20 appeal on August 24, 2017. Placido Decl. (2/8/18) at ¶ 2. As no other appeal was filed, “the
21 FEIS stands as jointly written and approved.” *Id.*

Millennium applied to Cowlitz County requesting a SSDP and SCUP for Stage 1 of the
Project. Cowlitz County’s Department of Building and Planning prepared a Staff Report
explaining its evaluation of the Project for consistency with the Shoreline Management Act

1 (SMA), Cowlitz County's Shoreline Management Master Program (County SMP), and existing
2 land uses in the Project area. Placido Decl. (1/25/18), Ex. C-1. The Staff Report utilized the
3 FEIS in its review of Millennium's shoreline permit application. The Staff Report described the
4 impacts caused by the Project during both Stage 1 and Stage 2. *See e.g., Id.* at 16-20 (noise,
5 dust). The Staff Report recommended approval of the SSDP and SCUP subject to 36
6 conditions. *Id.* at 75-79. In addition to analyzing aspects of the Project at full buildout, the
7 Staff Report proposed conditions applicable to both Stage 1 and Stage 2. *Id.* at 77-79. The
8 Staff Report concluded that the Project, if constructed consistent with those conditions, would
9 be consistent with the SMA, the County SMP and existing land uses. *Id.* at 75.

10 Pursuant to Cowlitz County Code (CCC), the Director of the Department of Building
11 and Planning transmitted Millennium's permit application and pertinent documents to the
12 Cowlitz County Hearing Examiner (Hearing Examiner) for action. CCC 19.20.050(A)(1).
13 Because the application involved a request for a SSDP and SCUP, the Hearing Examiner was
14 required to hold a public hearing prior to taking action. *Id.* The Hearing Examiner held a three-
15 day public hearing on Millennium's shoreline permit application on November 2, 3 and 6, 2017.
16 During the proceedings, the Hearing Examiner heard the testimony of witnesses and received
17 evidence into the record. Hearing Examiner Decision at 9-14.

18 The Hearing Examiner noted that Ecology had recently denied Millennium's request for
19 a Clean Water Act Section 401 Certification, based in part, on the agency's use of its SEPA
20 substantive authority. According to the Hearing Examiner, Ecology's decision was reached by
21 examining the FEIS and determining that the identified unavoidable and significant adverse

1 impacts could not be mitigated. The Hearing Examiner expressed concern that Ecology had not
2 provided Millennium with the opportunity to offer evidence of possible, reasonable mitigation.
3 To address this concern, during the public hearing the Hearing Examiner provided Cowlitz
4 County and Millennium with the opportunity to propose reasonable mitigation. Hearing
5 Examiner Decision at 2-3.

6 Elaine Placido, Director of the Department of Building and Planning, testified for
7 Cowlitz County and presented the County Staff Report. Tohan Decl., Ex. K (Trans. pp. 11-28).
8 Ms. Placido stated that the purpose of the public hearing was to address Millennium's request
9 for shoreline permits for Stage 1 of the Project. After describing the planned improvements,
10 Ms. Placido testified that Cowlitz County staff recommended approval of the shoreline permits
11 subject to the conditions set forth in the Staff Report. *Id.* (Trans. p. 28).

12 Millennium presented testimony from several witnesses. The witnesses included
13 representatives from Millennium, the company's environmental consultant, a representative
14 from BNSF and a representative from the Longview/Kelso Building Trades Association. At the
15 conclusion of Millennium's initial presentation, testimony was received from the public. This
16 included a presentation by counsel for the identified interested parties, and testimony by tribal
17 representatives, public officials, and members of the general public. *Id.* at 12.

18 Millennium was then provided with an opportunity to present responsive witnesses.
19 Millennium presented expert witness testimony on issues related to air quality, greenhouse gas
20 emissions, and coal dust. *Id.* at 13. Kristen Gaines, Millennium's Vice President of
21 Environmental Planning and Services, responded to questions asked by the Hearing Examiner

1 during the course of the proceedings. Ms. Gaines' responses were reduced to writing and
2 submitted as an exhibit. *Id.*; Tohan Decl., Ex. G. Millennium entered a number of exhibits into
3 the record, including several expert reports addressing Project impacts and Millennium's
4 proposed mitigation measures. *Id.* at 59-61.

5 At the close of testimony, the Hearing Examiner asked Cowlitz County whether it had
6 any changes or additions to its proposed conditions for Project approval. Cowlitz County
7 responded that it had no changes to the conditions set forth in the Staff Report. Hearing
8 Examiner Decision at 13.

9 The Hearing Examiner issued his decision on November 14, 2017. In the Findings of
10 Fact, the Hearing Examiner began by setting forth his factual findings related to SEPA. Those
11 Findings of Fact described each of the nine unavoidable, significant adverse environmental
12 impacts identified in the FEIS and the proposed mitigation measures. Hearing Examiner
13 Decision at 14-31. The Hearing Examiner also found that the Project's net greenhouse gas
14 emissions constituted an additional unavoidable, significant adverse environmental impact
15 because the mitigation described in the FEIS to address that impact was incorrect. The
16 proposed mitigation addressed only a fraction of the estimated greenhouse gas emissions
17 associated with the Project. *Id.* at 31-33.

18 The Hearing Examiner next made factual findings concerning the Project's compliance
19 with the SMA and County SMP. The Columbia River is a shoreline of statewide significance.
20 Under the SMA and County SMP, for shorelines of statewide significance preference shall be
21 given in the following order to uses which: "(1) recognize and protect the statewide interests

1 over local interest; (2) preserve the natural character of the shoreline; (3) result in long term
2 over short term benefit; (4) protect the resources and ecology of the shoreline; (5) increase
3 public access to publicly owned areas of the shoreline; and (6) increase recreational
4 opportunities for the public in the shoreline.” Hearing Examiner Decision at 33; *see also* RCW
5 90.58.020; County SMP at 2. Applying the use preferences to each of the Project’s impacts
6 described in the SEPA findings, the Hearing Examiner found that those impacts precluded a
7 conclusion that the Project met the applicable criterion. Hearing Examiner Decision at 33-35.

8 Finally, the Hearing Examiner made findings regarding unresolved issues: (1) the status
9 of other authorizations required for Millennium to construct docks and other improvements on
10 state-owned aquatic lands; (2) Millennium’s ability to conduct dredging on non-leased state-
11 owned aquatic lands; (3) Millennium’s ability to dispose of state-owned dredged materials; (4)
12 water availability; (5) anti-idling policies; (6) possible impacts from wake stranding; (7) state-
13 wide impacts from at-grade rail crossings; (8) the lease of property owned by the Bonneville
14 Power Administration; (9) further analysis of coal dust impacts on aquatic and tribal resources;
15 (10) impacts related to the repeal of the Clean Power Plan; and (11) Millennium’s compliance
16 with Ecology’s request for additional information. Hearing Examiner Decision at 35-49.

17 In the analysis portion of the Decision, the Hearing Examiner first stated that, because
18 the FEIS was not appealed, its findings and conclusions are unchallenged for purposes of the
19 hearing. Considering the testimony presented by Millennium’s expert witnesses, the Hearing
20 Examiner stated that their opinions were in conflict with the FEIS. As the FEIS was not
21 appealed, the Hearing Examiner concluded that the testimony “was largely irrelevant to the

1 issue of whether the ten unavoidable, significant adverse environmental impacts identified in
2 the FEIS can be reasonably mitigated.” *Id.* at 49.

3 The Hearing Examiner determined that the conditions proposed in the Staff Report,
4 which remained unchanged at the conclusion of the hearing, failed to reasonably mitigate those
5 impacts. Because Millennium’s position on mitigation was “nearly identical” to the County’s,
6 the Hearing examiner concluded that “neither the County nor [Millennium] propose reasonable
7 mitigation for any of the unavoidable, significant adverse impacts identified in the FEIS.” *Id.* at
8 50. The Hearing Examiner then described the deficiencies in the mitigation proposed to address
9 those impacts. *Id.* at 50-51.

10 The Hearing Examiner addressed the application of SEPA substantive authority.
11 Cowlitz County adopted rules concerning the integration of SEPA policies and procedures into
12 programs within the County’s jurisdiction. CCC 19.11.010(A). Under those rules, Cowlitz
13 County has the authority to condition or deny a proposal if such decision is based on policies
14 identified and incorporated into regulations, plans, or codes designated as possible grounds for
15 the exercise of substantive authority under SEPA. CCC 19.11.110(A). After setting out the
16 policy basis adopted by Cowlitz County for the exercise of SEPA substantive authority, former
17 CCC 119.11.110(B)(1) and (2),¹ the Hearing Examiner found that the failure to reasonably
18 mitigate the unavoidable, significant adverse environmental impacts identified in the FEIS
19 conflicted with practically all of those policies. Based on that finding, the Hearing Examiner

20 _____
21 ¹ On February 13, 2018, the Cowlitz County Board of Commissioners amended CCC 19.11.110, deleting the
policies for the exercise of SEPA substantive authority that formed the basis of the Hearing Examiner’s use of
substantive SEPA authority.

1 determined that the shoreline permits must be denied under Cowlitz County's SEPA substantive
2 authority. Hearing Examiner Decision at 51-52. The Hearing Examiner concluded that "[t]he
3 Project, as conditioned, fails to reasonably mitigate the ten unavoidable, significant adverse
4 environmental impacts identified in the FEIS[,]" and as a result, "the Project has not satisfied
5 the environmental standards found in [former] CCC 19.11.110(b)(1), or in CCC
6 19.11.110(b)(2)." *Id.* at 56.

7 Turning to the SMA and County SMP, the Hearing Examiner noted that Millennium
8 bore the burden of proving that all of the requirements of the SMA and County SMP have been
9 met for issuance of the requested shoreline permits. The Hearing Examiner concluded that
10 Millennium did not meet its burden as it failed to reasonably mitigate the ten unavoidable,
11 significant adverse environmental impacts identified in the FEIS. *Id.* at 52. Addressing the use
12 preferences applicable to shorelines of statewide significance, RCW 90.58.020, the Hearing
13 Examiner determined that "[t]he Project, as conditioned, does not recognize and protect the
14 statewide interest over local interest[;] . . . does not result in long term over short term benefit[;
15 and] . . . does not protect the resources and ecology of the shoreline." *Id.* at 56. The Hearing
16 Examiner thus concluded that the Project, as conditioned, was not consistent with the policies of
17 the SMP and was not consistent with the County SMP. *Id.*

18 Finally, the Hearing Examiner summarized the "unresolved issues" described in the
19 Findings of Fact and concluded that those matters further precluded Millennium from carrying
20 its burden to prove that all requirements of the SMA and County SMP have been met. *Id.* at 52.
21 Based on the Findings of Fact and Conclusions of Law, the Hearing Examiner denied

1 Millennium's request for a SSDP and SCUP for Stage 1 of its proposed coal export terminal.

2 *Id.* at 56.

3 Millennium filed a timely petition for review and requested that the Board reverse the
4 Hearing Examiner Decision and issue an order granting the shoreline permits subject to
5 appropriate conditions. Cowlitz County separately petitioned the Board for review of the
6 Hearing Examiner Decision and requested that the Board grant similar relief.

7 ANALYSIS

8 A. Standards of Review

9 Summary judgment is a procedure available to avoid unnecessary trials where there is
10 no genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667,
11 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if
12 only questions of law remain for resolution, and neither party contests the facts relevant to a
13 legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
14 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

15 The party moving for summary judgment must show there are no genuine issues of
16 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
17 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
18 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
19 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
20 then the nonmoving party must present evidence demonstrating that material facts are in
21 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

1 Bare assertions concerning alleged genuine material issues do not constitute facts sufficient to
2 defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40
3 (2014). When determining whether an issue of material fact exists, all facts and inferences are
4 construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45
5 P.3d 1068 (2002). The Board will enter summary judgment for a non-moving party under
6 appropriate circumstances. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842
7 P.2d 470 (1992).

8 Unless otherwise required by law, the Board's scope and standard of review shall be de
9 novo. WAC 461-08-500(1). SEPA does not prescribe the scope or standard of review on
10 appeal. Deferring to case law, the Board reviews the exercise of SEPA substantive authority to
11 condition or deny a proposal under the "clearly erroneous" standard of review. *Polygon Corp.*
12 *v. Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *McQuarrie v. Seattle*, SHB No, 08-033
13 (Findings of Fact, Conclusions of Law, and Order, Aug. 5, 2009) ("review of an agency's
14 exercise of substantive SEPA authority (i.e. the content of agency action, such as mitigation or
15 conditions) is also under the clearly erroneous standard"). Under this standard, the Board "does
16 not substitute its judgment for that of the administrative body and may find the decision clearly
17 erroneous only when it is left with the definite and firm conviction that a mistake has been
18 committed." *Polygon*, 90 Wn.2d at 69 (*quoting Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461
19 P.2d 531 (1969)) (internal quotations omitted). To properly employ the clearly erroneous
20 standard of review to the exercise of SEPA substantive authority, where there has been an open
21 record hearing below and there is an unchallenged FEIS which identifies significant adverse

1 unmitigated environmental impacts, the Board concludes that the appropriate scope of review is
2 limited to the record created during that hearing.² *Cf. Cook v. Clallam County*, 27 Wn. App.
3 410, 413, 618 P.2d 1030 (1980) (because issue on appeal was whether environmental
4 documents identified specific adverse environmental impacts, trial court erred in conducting
5 new trial; environmental documents were the proper evidence to use to evaluate local
6 government's permit denial).

7 A shoreline permit for a proposed development is reviewed for consistency with the
8 SMA and the applicable SMP. WAC 461-08-505. The consistency of the shoreline permit with
9 SMA and SMP is considered de novo and no particular deference is accorded the decision of the
10 local government. *Buechel v. Department of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910
11 (1994).

12 **B. Parties' Motions For Summary Judgment**

13 Contending that the Hearing Examiner Decision is fundamentally flawed, Millennium
14 moved for summary judgment on Issues 1-4. Millennium asserts that the Hearing Examiner
15 erred by (1) considering the entire project, not just Stage 1 as was the subject of its shoreline
16 permit applications; (2) failing to review the applications for consistency with the SMA and
17 County SMP; (3) misapplying SEPA; and (4) wrongly concluding that the shoreline permits

18 ² In *McQuarrie v. City of Seattle*, the Board permitted the admission of evidence on appeal; however, there had not
19 been a hearing at the local level allowing the parties to establish a record regarding the local government's
20 threshold SEPA decision. *See McQuarrie v. City of Seattle*, SHB No. 08-033 (Order on Summary Judgment, April
21 27, 2009)(Noting that because there had been no hearing at the local level to provide the parties with an
opportunity to establish a record, the clearly erroneous standard did not preclude the Board's consideration of
evidence not considered by the City.); *see also Luce v. City of Snoqualmie*, SHB No. 00-034 (Final Findings of
Fact, Conclusions of Law and Order, Aug. 27, 2001)(allowing consideration of evidence not reviewed by the local
government where there was no open record at the local level).

1 could be denied because there are a number of Project authorizations required from other
2 agencies that are outstanding. Millennium requests that the Board reverse the Hearing
3 Examiner Decision and remand the shoreline permit applications to Cowlitz County with
4 instructions.³

5 WEC and Ecology oppose Millennium's motion for summary judgment and remand,
6 asserting that the Hearing Examiner did not commit error in his analysis of the Project or in his
7 exercise of substantive SEPA authority to deny the shoreline permits. WEC and Ecology
8 separately seek summary judgment on Issues 1, 2, 5, 6, 7, 8 and 9, contending that the Hearing
9 Examiner Decision complied with applicable SEPA requirements and that the Project is
10 inconsistent with the SMA and County SMP. WEC and Ecology request that the Board uphold
11 the Hearing Examiner Decision and dismiss the petitions for review.

12 **1. Effect of Unchallenged FEIS (Issue 8)**

13 SEPA requires an EIS only for "major actions having a probable significant, adverse
14 environmental impact." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137
15 (2002); RCW 43.21C.031(1). "The primary function of an EIS is to identify adverse impacts to
16

17 ³ If remanded, Millennium requests that the Board "instruct the County to take evidence regarding Stage 1, the
18 subject of the permit applications, and fully apply the Cowlitz SMP as well as the SMA to the permit applications
19 to determine whether Stage 1 is consistent with the SMP and the SMA. If the County determines that Stage 1 is
20 consistent with the SMP and SMA, then it should also determine whether the County should exercise SEPA
21 substantive authority considering all of the evidence regarding Stage 1 impacts and potential mitigation."
Millennium Motion for Summary Judgment and Request for Remand at 16. It is unclear if Millennium is
requesting that the Board remand the matter for further proceedings before the Hearing Examiner or to Cowlitz
County staff to issue a new staff report. In addition, Millennium's proposed remand instruction that additional
evidence be taken appears to contradict the company's assertions that "[b]efore the Hearing Examiner,
[Millennium] offered extensive evidence that pertained specifically to the Stage 1 proposal at issue" and "presented
substantial evidence of both the impacts on, and reasonable mitigation for, the nine resource areas identified in the
EIS." Millennium Opp. to Summ. J. at 7, 21.

1 enable the decisionmaker to ascertain whether they require either mitigation or denial of the
2 proposal.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380
3 (1990); WAC 197-11-400(2) (“An EIS shall provide impartial discussion of significant
4 environmental impacts and shall inform decision makers and the public of reasonable
5 alternatives, including mitigation, that would avoid or minimize adverse impacts or enhance
6 environmental quality.”) The purpose of an EIS is to provide decision makers with “sufficient
7 information to make a reasoned decision.” *Citizens Alliance To Protect Wetlands v. City of*
8 *Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).

9 Acting as co-lead agencies, Cowlitz County and Ecology determined that the Project
10 was likely to result in significant adverse impacts on the environment and, therefore, required
11 the preparation of an EIS. Wolfman Decl., Ex. A at S-2. The FEIS for the Project was issued
12 on April 28, 2017. Millennium elected to publish a Notice of Action under RCW 43.21C.080,
13 which established August 18, 2017, as the deadline for filing an appeal challenging the
14 adequacy of the FEIS.⁴ Tohan Decl., Ex. K (Trans. p. 20); Placido Decl. (2/8/18) at ¶ 2. The
15 FEIS for the Project was not appealed.

16 Issue 8 asks whether Millennium or Cowlitz County can challenge the FEIS’s findings
17 and conclusions concerning the ten areas of significant, adverse, unmitigated environmental
18 impacts cited in the Hearing Examiner Decision. WEC and Ecology contend that, because the
19

20 ⁴ An appeal of an EIS can be procedural or substantive. According to Ecology’s SEPA Handbook: “Procedural
21 appeals include the appeal of a threshold determination . . . and of the adequacy of a final [EIS]. Substantive
appeals are challenges of an agency’s use (or failure to use) SEPA substantive authority to condition or deny a
proposal.” State Environmental Policy Act Handbook, Washington State Department of Ecology, Publication #
98-114 (2003) at 109 (emphasis omitted).

1 FEIS was not appealed, Millennium and Cowlitz County are barred from collaterally attacking
2 its findings or presenting new information to counter those findings. As the adequacy of the
3 FEIS was not challenged, WEC and Ecology assert that the findings in the FEIS are binding or
4 verities in this proceeding. WEC Mot. for Summ. J. at 20-21; Ecology Mot. for Summ. J. at 18-
5 19.

6 Millennium responds that it is not challenging the adequacy of the FEIS.⁵ Rather, its
7 appeal is substantive as it is challenging the Hearing Examiner's decision to deny the shoreline
8 permits based on SEPA. Arguing that WEC and Ecology overstate the effect of an
9 unchallenged FEIS, Millennium asserts that the Board can consider evidence in addition to the
10 FEIS in deciding the appeal. Millennium Opp. to Summ. J. at 17-21.

11 EIS adequacy refers to the legal sufficiency of the environmental data contained in the
12 impact statement.⁶ *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122
13 Wn.2d 619, 633, 860 P.2d 390, 398-99 (1993), amended, 866 P.2d 1256 (Wash. 1994)(citing R.

15
16 ⁵ Cowlitz County joined and adopted Millennium's motion for summary judgment and Millennium's opposition to
17 WEC's and Ecology's summary judgment motions, and provided additional arguments. Unless referring to
18 Cowlitz County's additional contentions, the Board will refer to the arguments as being advanced by Millennium.
19 ⁶ The adequacy of an EIS is tested under the "rule of reason." *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609,
20 614-15, 744 P.2d 1101 (1987); *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344-45, 552 P.2d 184 (1976). As
21 the Court in *Klickitat County Citizens* explained:

In order for an EIS to be adequate under this rule, the EIS must present decisionmakers with
a "reasonably thorough discussion of the significant aspects of the probable environmental
consequences" of the agency's decision. The rule of reason is "in large part a broad, flexible
cost-effectiveness standard," in which the adequacy of an EIS is best determined "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, 122 Wn.2d at 633 (internal citations omitted). When reviewing an EIS, the Legislature
has directed that the decision of the agency regarding the adequacy of an EIS is to be "accorded substantial
weight." RCW 43.21C.090.

1 Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14(a)(i)
2 (4th ed. 1993)). The adequacy of the FEIS was not appealed.

3 The Board concludes that the FEIS's determination of adverse environmental impacts
4 associated with the Project and their significance cannot be challenged in this proceeding. As
5 Ms. Placido, Cowlitz County's Director of the Department of Building and Planning, stated,
6 "the FEIS stands as jointly written and approved." Placido Decl. (2/8/18) at ¶ 2. As discussed
7 below, the Hearing Examiner's use of the FEIS can be challenged in addressing whether the
8 exercise of SEPA substantive authority was clearly erroneous.

9 **2. Consideration of the Entire project (Issue 3)**

10 In its applications to Cowlitz County, Millennium requested shoreline permits for Stage
11 1 of the Project. Millennium asserts that the Hearing Examiner committed legal error in
12 denying the applications based on the environmental impacts of the Project in its entirety.
13 Millennium argues that under WAC 197-11-400(4), not only was the Hearing Examiner
14 required to use the FEIS in rendering his decision, he was also required to consider "other
15 relevant materials and considerations." Millennium contends that the Hearing Examiner
16 rejected evidence presented at the hearing that would have assisted him in understanding the
17 difference between Stage 1 and Stage 2 impacts and mitigation. According to Millennium, the
18 FEIS is not determinative and it was clearly erroneous for the Hearing Examiner to disregard
19 other evidence such as its application, the County staff report and testimony provided at the
20 public hearing. Finally, Millennium states that the Board has acknowledged that a project can
21 be advanced in phases when SEPA has been performed on the entire project. Millennium

1 argues its Project fits that scenario and, contrary to the assertions by WEC and Ecology, it has
2 not sought to improperly piecemeal the Project. Millennium Mot. for Summ. J. at 8-9; Reply at
3 3-9.

4 In response, WEC and Ecology argue that the Hearing Examiner correctly considered
5 the entire Project and its impacts when exercising SEPA substantive authority. Because the two
6 stages of the Project are related to and dependent upon one another, WEC and Ecology assert
7 that they must be considered as a whole. WEC and Ecology contend that Millennium's attempt
8 to obtain shoreline permits for only a portion of the Project violates the prohibitions in the SMA
9 and in SEPA on piecemealing project review. WEC Resp. to Summ. J. at 4-10; Ecology Resp.
10 to Summ. J. at 6-11.

11 The Board concludes that the Hearing Examiner's consideration of the Project as a
12 whole was not clearly erroneous. The FEIS, which recognized that the Project was divided into
13 two stages, analyzed the environmental impacts of the Project at full build out. Wolfman Decl.,
14 Ex. A at S-4 (Proposed Action is the construction and operation of a coal export terminal) and
15 S-8 (construction and operation would consist of two stages; for FEIS analysis, Proposed Action
16 assumed fully operational by 2028). Based on that analysis, the FEIS identified potential
17 impacts requiring mitigation, proposed applicant mitigation measure(s), and unavoidable and
18 significant adverse environmental impacts. *Id.* at S-46-S-60. Cowlitz County staff utilized the
19 FEIS in their review of Millennium's shoreline permit applications. While acknowledging that
20 the Project was divided into two stages and Millennium was seeking shoreline permits for Stage
21 1, the Staff Report relied on the FEIS's evaluation of the Project in its entirety. The Staff

1 Report quoted at length from sections of the FEIS's analysis of Project impacts at full
2 operations and recommended permit conditions drawn from the FEIS applicable to both Stage 1
3 and Stage 2.⁷ Wolfman Decl., Ex. F.

4 Like County staff, the Hearing Examiner recognized that Millennium was seeking
5 shoreline permits for Stage 1. Hearing Examiner Decision at 4. Similarly, the Hearing
6 Examiner also used the FEIS to evaluate the environmental impacts of the Project as a whole.
7 The record does not support Millennium's contention that the Hearing Examiner rejected
8 evidence regarding Stage 1 impacts and mitigation.⁸ Millennium cites to no evidence excluded
9 by the Hearing Examiner. Nor does Millennium claim it was precluded from presenting
10 testimony at the public hearing. While Millennium may dispute the weight the Hearing
11 Examiner accorded its evidence, based on the record presented, the Board is not left with the
12 definite and firm conviction that Hearing Examiner committed a mistake when he considered
13 the Project as a whole.

14 3. Application of SEPA Substantive Authority (Issues 2 and 9)

15 As stated above, the purpose of an EIS is to provide decision makers with "sufficient
16 information to make a reasoned decision." *Citizens Alliance*, 126 Wn.2d at 362. Issuance of an

17 ⁷ For example, with respect to noise impacts, the Staff Report evaluated the Project's rail operations at full coal
18 export terminal operations (adding 16 trains per day on the Reynolds lead and BNSF Spur). The evaluation
19 included impact analysis drawn from the FEIS and recommended conditions based on the FEIS's mitigation
20 measures that applied to the Project at full operation. Wolfman Decl., Ex. F at 17-18. *See also, e.g.*, Conditions 17
21 and 18 (applies to all Project stages).

⁸ The Hearing Examiner provided Cowlitz County and Millennium the opportunity to propose reasonable
mitigation. Hearing Examiner Decision at 3. Millennium presented numerous exhibits and the testimony of
several expert witnesses. *Id.* at 12-13, Applicant Exhibit List (appended to Hearing Examiner Decision). Prior to
the close of the record below, Millennium submitted a table summarizing its responses, including its proposed
mitigation, to 19 areas of questions the Hearing Examiner posed to Ms. Placido during the public hearing. Tohan
Decl., Ex. G.

1 EIS does not approve or deny a project. Rather, the EIS accompanies a proposal through the
2 existing agency review process so that agency officials can use the document when making
3 permitting decisions. RCW 43.21C.030(2)(d). “Any governmental action may be conditioned
4 or denied” based on the adverse environmental impacts disclosed in an EIS. RCW 43.21C.060;
5 WAC 197-11-66; *Polygon*, 90 Wn.2d at 64 (“SEPA confers substantive authority to the
6 deciding agency to act on the basis of the impacts disclosed”).

7 The policies and goals of SEPA are supplementary to the existing authority of all
8 branches of government. RCW 43.21C.060. SEPA serves as an “overlay” on existing
9 authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65.
10 Pursuant to the SMA and Cowlitz County Code, the County has authority to issue or deny
11 shoreline permits. RCW 90.58.050, .140; CCC 19.20. Using SEPA substantive authority, a
12 local government may deny a permit even if it meets all of the requirements for approval under
13 permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc. v. City of Bellevue*, 106 Wn.2d
14 47, 53, 720 P.2d 782 (1986) (“under [SEPA], a municipality has the discretion to deny an
15 application for a building permit because of adverse environmental impacts even if the
16 application meets all other requirements and conditions for issuance”).

17 The denial of a proposal must be predicated “upon policies identified by the appropriate
18 governmental authority and incorporated into regulations, plans, or codes which are formally
19 designated by the agency” or appropriate legislative body. RCW 43.21C.060; WAC 197-11-
20 660(1)(a). In order to deny a proposal under SEPA, a decision maker must find that
21

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

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

10 Cowlitz County adopted bases for the exercise of substantive authority under SEPA as
11 part of the County Code. Pertinent sections of the Cowlitz County Code provided:

12 1. Cowlitz County shall use all practicable means, consistent with other
13 essential considerations of state policy, to improve and coordinate plans,
14 functions, programs and resources to the end that the state and its citizens
15 may:

16 a. Fulfill the responsibilities of each generation as
17 trustee of the environment for succeeding generations;

18 b. Assure for all people of Cowlitz County safe, healthful,
19 productive, and aesthetically and culturally pleasing
20 surroundings;

21 c. Attain the widest range of beneficial use of the
environment without degradation, risk to health or safety,
or other undesirable and unintended consequences;

d. Preserve important historic, cultural, and natural aspects
of our national heritage;

e. Maintain, whenever possible, an environment which
supports diversity and variety of individual choice;

1 f. Achieve a balance between population and resource use
2 which will permit high standards of living and a wide
3 sharing of life's amenities;

3 g. Enhance the quality of renewable resources and
4 approach the maximum attainable recycling of depletable
5 resources.

5 2. Cowlitz County recognizes that each person has a fundamental and
6 inalienable right to a healthful environment and that each person has a
7 responsibility to contribute to the preservation and enhancement of the
8 environment.

7 Former CCC 19.11.110(B)(1), (2).

8 Millennium asserts that the Hearing Examiner failed to conduct the necessary analysis to
9 use substantive SEPA authority to deny the shoreline permits. Citing *Cougar Mountain*, 111
10 Wn.2d at 755, Millennium argues that in order to invoke substantive SEPA authority the
11 Hearing Examiner was required to first analyze the Project, as set forth in the shoreline permit
12 applications, for compliance with the SMA and County SMP. The Hearing Examiner was then
13 required to consider the impacts of the Project and evaluate what mitigation measures, if
14 necessary, were appropriate and capable of being accomplished. Millennium contends that the
15 Hearing Examiner did not follow this process; rather he bypassed the SMA and County SMP
16 and relied on the FEIS's impact analysis of the entire Project. As a result, the Hearing
17 Examiner erred in concluding that SEPA required him to deny the shoreline permits in light of
18 the Project's overall impacts and the County's SEPA policies. Millennium Mot. for Summ. J. at
19 9-15; Reply at 9-12, Opp. to Summ. J. at 21-27.

1 Millennium also contends that there are material issues of fact in dispute regarding the
2 Hearing Examiner's denial of the shoreline permits on SEPA substantive grounds. Citing to
3 evidence offered at the public hearing, Millennium asserts that it "presented substantial
4 evidence of both the impacts on, and reasonable mitigation for, the nine resource areas
5 identified in the EIS." Millennium argues that due to these factual disputes, WEC and Ecology
6 are not entitled to summary judgment on Issues 2 and 9. Millennium Opp. to Summ. J. at 6-11,
7 24-27.

8 WEC and Ecology argue that there is no requirement that the Hearing Examiner begin
9 his analysis by reviewing the permit applications for consistency with the SMA and County
10 SMP. WEC and Ecology assert that *Cougar Mountain* does not mandate a particular order of
11 review. As the courts recognized in *Polygon* and *West Main*, a permit can be denied under
12 substantive SEPA even if it meets all permit criteria. WEC and Ecology contend that in this
13 case, unlike King County in *Cougar Mountain*, the Hearing Examiner properly complied with
14 the procedural requirements for the exercise of substantive SEPA by (1) providing a lengthy
15 description of significant, adverse environmental impacts identified in the FEIS; (2) explaining
16 why the conditions proposed in the Staff Report and by Millennium do not reasonably mitigate
17 Project impacts; and (3) identifying the provisions of Cowlitz County's SEPA policies upon
18 which he based his decision. WEC Mot. For Summ J. at 21-24; Summ. J. Reply at 11-13;
19 Ecology Mot. for Summ. J. at 19-25; Summ. J. Reply at 18-23.

20 WEC and Ecology reject Millennium's claim that there are material issues of fact in
21 dispute. They assert that this argument is part of Millennium's attempt to collaterally attack the

1 unappealed FEIS. According to WEC and Ecology, there is no factual or legal dispute that the
2 Hearing Examiner properly invoked SEPA substantive authority to deny the shoreline permits.
3 Because the Hearing Examiner's reliance on the unchallenged findings in the FEIS in exercising
4 substantive SEPA authority was not clearly erroneous, WEC and Ecology contend that the
5 Board should grant summary judgment in their favor on Issues 2 and 9. WEC Summ. J. Reply
6 at 7-10; Ecology Reply at 8-9.

7 There is no legal requirement that the Hearing Examiner begin his analysis of the
8 shoreline permit applications by first considering their consistency with the SMA and County
9 SMP. SEPA substantive authority stands separate and apart from the requirements of other
10 permitting schemes. Courts have held that SEPA substantive authority can be used to deny a
11 proposal independent of the permit being sought, even if the proposal meets all other
12 requirements and conditions for the underlying permits. *West Main*, 106 Wn.2d at 53;
13 *Donwood v. Spokane Cy.*, 90 Wn. App. 389, 398, 957 P.2d 775 (1998). The Board concludes
14 that the Hearing Examiner did not commit error by initially evaluating the Project under SEPA.

15 The Board further concludes that the Hearing Examiner fully complied with SEPA's
16 procedural requirements in exercising SEPA substantive authority to deny the shoreline permits.
17 To deny the Project using substantive SEPA authority, the Hearing Examiner had to find that
18 (1) the Project is likely to result in significant adverse environmental impacts identified in the
19 FEIS and (2) reasonable mitigation measures were insufficient to mitigate those impacts. RCW
20 43.21C.060; WAC 197-11-660(1)(f). The Hearing Examiner was also required to cite Cowlitz
21 County's SEPA policy that served as the basis for the denial. WAC 197-11-660(1)(b). The

1 Board concludes that the Hearing Examiner sufficiently documented compliance with these
2 requirements.

3 In his decision, the Hearing Examiner described in detail the ten unavoidable, significant
4 adverse environmental impacts documented in the FEIS. Hearing Examiner Decision at 14-33.
5 Turning to mitigation, the Hearing Examiner found that the conditions proposed in the Staff
6 Report did not reasonably mitigate the identified impacts. *Id.* at 50. As the mitigation proposed
7 by Millennium was “nearly identical to the County’s,” the Hearing Examiner concluded that
8 “neither the County nor [Millennium] propose reasonable mitigation for any of the unavoidable,
9 significant adverse environmental impacts identified in the FEIS.” *Id.* The Hearing Examiner
10 identified specific shortcomings he found in the proposed mitigation. *Id.* at 50-51. Lastly, the
11 Hearing Examiner cited to and quoted sections of Cowlitz County’s Code governing the use of
12 substantive SEPA authority. *Id.* at 51-52 (quoting Former CCC 19.11.110(b); *see supra* at 25-
13 26. The Hearing Examiner concluded that the failure to reasonably mitigate the ten
14 unavoidable, significant adverse environmental impacts conflicted with “virtually every one of
15 the County’s environmental policies” he cited. *Id.* at 52. Accordingly, the Hearing Examiner
16 denied the requested shoreline permits under Cowlitz County’s substantive SEPA authority.

17 Finally, there are no material issues of fact in dispute that preclude the granting of
18 summary judgment. As explained above, to determine whether the Hearing Examiner’s
19 exercise of SEPA substantive authority was clearly erroneous, the Board reviews the record
20 created at the open record hearing below. The Board will not substitute its judgment for that of
21 the Hearing Examiner. Because it is not left with the definite and firm conviction that a mistake

1 has been committed, the Board concludes that the Hearing Examiner's decision to deny the
2 shoreline permits under Cowlitz County's substantive SEPA authority was not clearly
3 erroneous.

4 **4. SMA/SMP Compliance and Other Issues (Issues 1, 4, 5, 6, and 7)**

5 The remaining issues ask whether the shoreline permit applications are consistent with
6 the SMA and County SMP, and whether the Hearing Examiner erred in concluding that there
7 was insufficient information concerning other approvals required for the Project to proceed.
8 Because the Board concludes that the Hearing Examiner's exercise of SEPA substantive
9 authority to deny the shoreline permits was not clearly erroneous, it need not reach Issues 1, 4,
10 5, 6 and 7.

ORDER

The Board GRANTS Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra Club, Columbia Riverkeeper's and the State of Washington, Department of Ecology's Motions for Summary Judgment on Issues 2, 3, 8, and 9 and AFFIRMS the Cowlitz County Hearing Examiner's denial of the shoreline permits requested by Millennium Bulk Terminals-Longview, LLC.

SO ORDERED this 20 day of April, 2018.


SHORELINES HEARINGS BOARD




JOAN M. MARCHIORO, Board Chair



KAY M. BROWN, Member



NEIL L. WISE, Member



ALLEN ESTEP, Member

See Dissent

GRANT BECK, Member



KEITH GOEHNER, Member

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 MILLENNIUM BULK TERMINALS
4 LONGVIEW, LLC, and COWLITZ
5 COUNTY,

6 Petitioners,

7 and

8 BNSF RAILWAY COMPANY,

9 Petitioner-Intervenor,

10 v.

11 COWLITZ COUNTY HEARING
12 EXAMINER and STATE OF
13 WASHINGTON, DEPARTMENT OF
14 ECOLOGY,

15 Respondents,

16 And

17 WASHINGTON ENVIRONMENTAL
18 COUNCIL, CLIMATE SOLUTIONS,
19 FRIENDS OF THE COLUMBIA GORGE,
20 SIERRA CLUB, and COLUMBIA
21 RIVERKEEPER,

Respondent-Intervenor.

SHB No. 17-017c

DISSENT

19 The Shorelines Hearings Board must review a local government's action to deny a
20 shoreline permit when the denial relies solely on the substantive authority of the State
21

1 Environmental Policy Act, de novo. I would deny the motions for summary judgement and
2 decide the merits of the Hearing Examiner's denial de novo. Thus, I respectfully dissent.

3 **BACKGROUND**

4 Before 1971, Washington State did not require cities and counties to plan for growth nor
5 establish regulations that protected environmental resources. Many, if not most, local
6 jurisdictions at that time did not adopt zoning regulations or environmental protection standards.

7 The Shoreline Management Act of 1971 changed the regulatory landscape and required
8 local jurisdictions to protect the shoreline environment in a manner consistent with statewide
9 polices. The Legislature addressed the lack of clear local and judicial processes for adjudicating
10 land use and environmental permit disputes in the 1970s through the creation of the Shoreline
11 Hearings Board, a body with expertise in the implementation of the Shoreline Management Act
12 through local Shoreline Master Programs, to adjudicate permit disputes.

13 The State Environmental Policy Act (SEPA) of 1971 provided broad authority to
14 decision makers to condition or deny permits based on their environmental impacts, beyond
15 local land use and environmental regulations. The use of the substantive authority of the State
16 Environmental Policy Act is an important tool to allow decision makers to address impacts not
17 addressed by land use or environmental regulations.

18 The planning and regulatory system in Washington State changed dramatically when the
19 legislature adopted the Growth Management Act, a series of state statutes first adopted in 1990.
20 The Growth Management Act requires all cities and counties to protect environmentally
21 sensitive areas through local critical areas regulations and requires the largest and fastest

1 growing counties and the cities therein to carefully plan and provide for growth, and requires
2 that development regulations implement the plans.

3 The Regulatory Reform Act of 1995 further refined the permitting scheme created by
4 the Growth Management Act. Regulatory reform included the Land Use Petition Act, which
5 provides clear standards for the review and appeal procedures of most land use and
6 environmental permitting decisions, but not shoreline permits.

7 The Shoreline Hearings Board, created in the early 1970s, has and continues to struggle
8 with the overlap between Growth Management and Shoreline Management and specifically
9 how to deal with those permits and decisions that fall under both the Growth Management Act
10 and Shoreline Management Act regulatory systems.

11 ANALYSIS

12 The majority confuses its role in this case as to the Hearing Examiners use of
13 substantive SEPA authority to deny a shoreline permit. The permit under appeal is a shoreline
14 substantial development permit denied by the Cowlitz County Hearing Examiner based solely
15 on significant environmental impacts identified in the Final Environmental Impact Statement.

16 The majority relies on *McQuarrie* to conclude that the Shoreline Hearings Board stands
17 in the place of the Court when reviewing a local government's use of SEPA's substantive
18 authority and that the appropriate standard of review is "clearly erroneous". In some situations,
19 this is correct, including the situation presented to the Board in *McQuarrie*.

20 The Board in *McQuarrie* concluded that in the situation where a local SEPA
21 Responsible Official uses substantive authority to condition a Determination of Non-

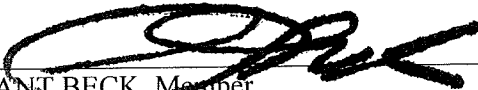
1 Significance, which is then appealed to the Board along with a shoreline substantial
2 development permit, the appropriate standard of review is “clearly erroneous”. Since the Board
3 in *McQuarrie* was acting on a SEPA appeal of the DNS, it was acting in the same capacity as
4 the Court in *Polygon*.

5 The Shorelines Hearings Board has never faced the situation found in *Millennium* where
6 1) the underlying environmental document is not under appeal; and 2) the local decision maker
7 used SEPA’s substantive authority directly to deny a shoreline substantial development permit.

8 The majority correctly notes that, unless otherwise required by law, the Board’s scope
9 and standard of review shall be de novo. WAC 461-08-500(1). The majority also correctly
10 notes that SEPA does not prescribe the scope or standard of review on appeal. Since there has
11 been no SEPA appeal in this case however, the Board’s scope and standard must be de novo. It
12 is incumbent upon the Shoreline Hearings Board, as the decision maker for the shoreline
13 substantial development permit, to conduct its normal de novo review

14 SO ORDERED this 20 day of April, 2018.

15 **SHORELINES HEARINGS BOARD**

16 
17 _____
18 GRANT BECK, Member