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SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

PORT OF KALAMA and NORTHWEST
INNOVATION WORKS, KALAMA, LLC,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondent.

In the Matter of:

Shoreline Conditional Use Permit No. 1056

No. _____

**PORT OF KALAMA AND
NORTHWEST INNOVATION
WORKS, KALAMA, LLC'S
PETITION FOR REVIEW**

I. INTRODUCTION

The Port of Kalama (“Port”) and Northwest Innovation Works, Kalama, LLC (“NWIW”) hereby appeal the Department of Ecology’s (“Ecology”) revocation of Shoreline Conditional Use Permit (“SCUP”) No. 1056 (“Ecology Decision”), which is required for the construction and operation of the Kalama Manufacturing and Marine Export Facility (“KMMEF” or “Project”), and the adequacy of Ecology’s Second Supplemental Environmental Impact Statement (“SSEIS”). The Ecology Decision and the SSEIS violate state law by illogically treating the Project’s global greenhouse gas (“GHG”) impacts as

1 harmful to the shoreline environment even though NWIW has committed to mitigate 100
2 percent of in-state GHG emissions and even though the two independent life cycle analyses¹
3 of the Project’s GHG impacts both determined that more GHGs will be emitted globally if
4 the Project is *not* built. The Ecology Decision should be set-aside and the Project should
5 proceed under its existing shoreline permits.

6 The KMMEF proposes to manufacture and export methanol for use in olefin
7 production in Asia. Olefins are needed to make common products—from polar fleece to
8 medical equipment—used every day by Washingtonians. From its inception, the Project
9 was designed to be a low-GHG source of methanol. NWIW proposed using an innovative
10 ultra-low emission, or “ULE”, technology which reduces facility emissions by 30 percent
11 as compared to traditional technologies. NWIW further demonstrated its commitment to
12 limit the climate change impacts from the Project by committing to mitigate *100 percent* of
13 the Project’s in-state GHG emissions. NWIW’s carbon commitment prioritizes mitigation
14 in southwest Washington where the KMMEF would operate and in communities
15 disproportionately impacted by climate change.

16 But a Washington decision-maker need not take NWIW’s word for the sufficiency
17 of its mitigation program in addressing the Project’s GHG emissions. Following a 2017
18 Shorelines Hearings Board (“SHB”) decision, the Project has *twice* undergone a searching
19 analysis of its global GHG impacts—from natural gas wellheads in British Columbia and
20 Alberta through olefin production in Asia; first by Cowlitz County (“County”) and the Port
21 as SEPA Co-Lead Agencies and then by Ecology. Ecology’s SSEIS substantially replicates
22 the range of analyses presented in the County and Port’s Supplemental Environmental
23 Impact Statement (“SEIS”) but Ecology’s document adopts the highest assumptions on the
24

25 ¹ There are two lifecycle analyses of Project-related GHG emissions. See Kalama Manufacturing & Marine
Export Facility Supplemental Environmental Impact Statement (SEIS) (2019) and Ecology’s SSEIS (2020).

1 Project’s potential GHG impacts as its base case. Ecology also— on its own and without
2 authority under SEPA— recasts the Project as selling almost half of its methanol as fuel
3 even though Project contracts prohibit fuel as an end use. Yet, even under these outcome-
4 driven assumptions, the economists who drafted the SSEIS still concluded that under a
5 range of sensitivities, global GHG emissions from the methanol sector will be less if the
6 Project is constructed than if it is not because KMMEF methanol would be a lower cost,
7 lower carbon alternative.

8 In the SSEIS and the Ecology Decision, Ecology discounts this displacement
9 analysis as speculative. If the analysis is speculative, Ecology should never have wasted
10 taxpayer money completing it at a time when our state’s budget is in crisis. But beyond the
11 waste and Ecology turning a blind eye to its experts, the Ecology Decision—while
12 successfully eliminating jobs in economically distressed southwest Washington—does
13 nothing to limit climate change-related harm to the shoreline. This is neither beneficial to
14 Washington shorelines nor a lawful application of the Shoreline Management Act (“SMA”),
15 chapter 90.58 RCW, and SEPA. The Ecology Decision must accordingly be set aside.

16 II. PETITIONERS:

17 A. The Name and Address of Petitioner Port of Kalama.

18 **Port of Kalama**
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20 110 West Marine Drive
21 Kalama, WA 98625

22 B. The Name and Address of Petitioner Northwest Innovation Works, Kalama, LLC.

23 **Northwest Innovation Works, Kalama, LLC**
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III. PETITIONER’S ATTORNEYS:

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V. DECISION APPEALED:

Petitioners hereby request review of the Ecology Decision on SCUP No. 1056.² A copy of Ecology’s Decision is attached hereto as Exhibit A of this petition. The Port and NWIW’s existing SCUP No. 1056, previously approved by Ecology, is attached as Exhibit B of this petition.

VI. SHORT STATEMENT OF GROUNDS FOR APPEAL:

A. Ecology lacks the authority to revoke the Port and NWIW’s existing SCUP under chapter 90.58 RCW and chapter 173-27 WAC.

1. Ecology lacks the authority to revoke the Port and NWIW’s existing SCUP because there has been no material change to the Project since Ecology approved SCUP No. 1056 and deemed Condition 4 adequate to mitigate for the Project’s GHG impacts, *except for* NWIW’s commitment to mitigate 100 percent of in-state emissions from Project construction and operations, and because the Final SSEIS prepared by Ecology continues to demonstrate a net global GHG emission benefit from the Project.

B. Ecology’s denial of SCUP No. 1056 violates the SMA, chapter 90.58 RCW.

1. Ecology unlawfully applied the SCUP criteria found in WAC 173-27-160 to GHG impacts from development occurring outside jurisdictional shorelines of the State (Ecology Decision section A reasons are not supported by the law or the facts).

2. Ecology unlawfully denied a shoreline use that is fully consistent with and expressly permitted to be located in the Urban shoreline environment and the “Heavy

² The shoreline permits for this Project have a long history before the SHB, including in SHB No. 17-010 and SHB No. 17-011 (consolidated into SHB No. 17-010c), SHB No. 19-011, and now this petition.

1 Industrial” comprehensive plan land use designation for the majority of the Project site.
2 (Ecology Decision, section B is not supported by the law or the facts).

3 3. Ecology wrongfully concluded that the Project is inconsistent with the SMA’s
4 policies based on an allegation that the Project will have significant adverse impacts to the
5 shoreline environment, which ignores the displacement analysis, NWIW’s commitment to
6 fully mitigate for the approximately 100 percent of in-state GHG emissions related to the
7 Project, and the limits of climate science (Ecology Decision sections A and C are not
8 supported by the law or the facts). This includes, but is not limited to, the following legal
9 and factual errors:
10

11 a) Ecology erroneously ignored substantial record evidence that the Project will
12 decrease alleged Project-related shoreline environmental impacts where two
13 independent analyses (including one by Ecology’s own consultants)
14 concluded that under a range of sensitivities, globally, the Project would
15 displace the use of other higher cost and more GHG-intensive sources of
16 methanol, thereby *reducing* global GHG emissions from the methanol sector
17 as compared to the no action alternative.
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19 b) Ecology wrongfully assessed the Project’s potential shoreline impacts based
20 on *global* Project-related GHG emissions (all of which cumulatively
21 contribute to global warming), but then dismissed the adequacy of NWIW’s
22 voluntary GHG mitigation program based on whether or not the mitigation
23 will occur in Washington State in spite of Ecology’s vetting and revising the
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1 program proposal during the SSEIS process, ostensibly to thoroughly
2 address Ecology's concerns.

3 4. Ecology unlawfully and erroneously applied the GHG reduction goals for state
4 agencies found in chapter 70A.45 RCW to the Project's life cycle GHG emissions (a scope
5 unmatched in the state's GHG inventories) as a basis for assessing environmental impacts
6 under the SMA.

7 5. Ecology correctly concluded that GHG impacts are capable of mitigation but
8 ignored substantial record evidence, including that the application of Ecology's Condition
9 4 and NWIW's mitigation of approximately 1 MMT of GHG emissions, that ensures the
10 Project in no way "impedes the state's ability to meet the emission reduction requirements
11 provided in RCW 70A.45."

12 6. Ecology unlawfully and erroneously concluded that the Project is inconsistent
13 with RCW 90.58.020, which provides that "[t]his policy is designed to insure the
14 development of these shorelines in a manner which . . . will promote and enhance the public
15 interest," for reasons including, but not limited to, the following:

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18 a) Washingtonians use and will continue to use methanol-derived products, and
19 the Final SSEIS confirmed that global demand for methanol-derived
20 products is growing. The Final SSEIS concludes that KMMEF-produced
21 methanol will provide significant GHG-reductions as compared to other
22 alternative sources (including coal and naphtha) and the no action
23 alternative. By denying this Project, Ecology has effectively exported
24 externalities associated with methanol production (including GHG
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1 emissions) to other states or parts of the world that have less stringent
2 regulatory oversight, giving rise to an increase in climate and climate justice
3 impacts elsewhere in the world.

4 b) Failing to recognize the significant employment and economic benefits to an
5 economically distressed part of the State. This Ecology Decision continues
6 a pattern of denying new industrial development and failing to consider
7 important public interest factors in developing living wage jobs and local
8 economic development opportunities in the shorelines of rural and
9 economically-depressed counties in Washington. The Ecology Decision
10 erroneously ignores the substantial record evidence that the public interest
11 would benefit from the proposed port industrial use on existing industrially-
12 designated properties (Ecology Decision sections A and D are not supported
13 by the law or the facts).

14 c) Ecology wrongfully based its SMA public interest evaluation on global
15 impacts—occurring far outside the state of Washington—whereas the
16 application of SMA policies only apply to the shorelines of the state of
17 Washington and to the Columbia River.

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20 **C. The Ecology Decision constitutes an unlawful shoreline moratorium.**

21 **D. The Ecology Decision is an unlawful amendment to the Cowlitz County**
22 **Shoreline Master Program.**

23 **E. The Ecology Decision is not supported by the environmental impact**
24 **statements that have been prepared for the Project under SEPA, including**
25 **the analysis and conclusions of Ecology’s own consultant team.**

1 1. The SSEIS conclusions ignored by Ecology include, but are not limited to, finding
2 that the KMMEF would result in a global decrease of GHG emissions compared to
3 methanol and olefin production without the Project and would slow the global increase in
4 emissions arising from methanol production and use over the life of the Project; and, the
5 proposed mitigation of 100 percent of in-state GHG emissions is feasible and capable of
6 being accomplished.

7 **F. Ecology’s SSEIS violates SEPA for reasons including, but not limited to,**
8 **the following:**

- 9 1. Unlawfully requiring a third environmental impact statement on the Project;
- 10 2. Engaging in unlawful speculation and re-writing the Project purpose by
11 asserting that 40 percent of all methanol produced from the Project will be used as fuel—
12 and not in olefins—which is, in fact, prohibited by relevant Project contract documents;
- 13 3. Erroneously concluding that the Project’s GHG emission impacts are significant
14 under chapter 43.21C RCW even though Ecology’s own Final SSEIS concludes that the
15 Project can and will mitigate 100 percent of the GHG emissions that will occur within the
16 State of Washington thereby exceeding Ecology’s previously imposed Condition 4, and the
17 displacement analysis (including a full range of sensitivities assessing Project impacts under
18 a range of assumptions) and concludes that the Project will provide millions of tonnes of
19 GHG emission reductions globally as compared to the no action alternative;
- 20 4. Violating the rule of reason by ignoring and dismissing as speculative its own
21 global GHG assessment of methanol markets that concludes under any reasonable scenario
22 the proposed Project will result in fewer global GHG emissions than would be the case if
23 the Project is not built; and
- 24 5. Failing to assess the significance of Project-related GHG impacts in the proper
25 context for life cycle emission analysis.

1 **G. The Ecology Decision is not authorized by substantive SEPA authority.**

2 1. The Ecology Decision lacks reference to an exercise of its substantive SEPA
3 authority pursuant to RCW 43.21C.060; however, to the extent that Ecology intends to
4 change course mid-stream and assert substantive SEPA authority, this authority is without
5 legal or factual basis here for reasons including, but not limited to, the following:

- 6 a) Ecology ignores the comparison between the no action alternative (other
7 sources of global methanol for olefin production if the Project is not built)
8 and the proposed action as required by WAC 197-11-440(5)(b)(iii); a project
9 that provides global GHG reduction benefits lacks significant adverse GHG
10 impacts and cannot be denied pursuant to RCW 43.21C.060.
- 11 b) Here, Ecology’s SEPA policies (WAC 173-802-110) do not provide
12 Ecology with substantive SEPA authority to deny this shoreline permit and
13 are void for vagueness. The exercise of substantive SEPA authority, based
14 on vague SEPA policies cannot be used to legislate project outcomes that
15 the state legislature has been unable to (or refused to) pass.
- 16 c) The Ecology Decision violates the requirement in WAC 197-11-660(1)(d)
17 which states that mitigation measures can only be imposed on an applicant
18 to the extent attributable to the identified adverse impacts of its proposal,
19 and the Ecology Decision fails to tie Project-related GHG emissions to actual
20 and foreseeable shoreline impacts in Cowlitz County.
- 21 d) Ecology’s rejection of mitigation that might occur outside of the state is
22 clearly erroneous because it fails to recognize the priority commitment to in-
23 state mitigation and fails to recognize that GHG mitigation can be effective
24 regardless of where it occurs.
- 25

1 **H. The Ecology Decision is not authorized under any other source of law or**
2 **authority.**

3 1. The Ecology Decision lacks reference to an exercise of authority outside of
4 chapter 90.58 RCW; however, to the extent that Ecology intends to change course mid-
5 stream and assert authority under a different law, including, but not limited to, chapter
6 70A.45 RCW and chapter 70A.15 RCW, this authority is without legal or factual basis.

7 **VII. STATEMENT OF FACTS TO SUPPORT**
8 **THE GROUNDS FOR APPEAL:**

9 A. In December 2015, the Port and NWIW applied for a shoreline substantial
10 development permit (“SSDP”) and a SCUP to construct a methanol manufacturing facility
11 and a new marine terminal on approximately 100 acres on the Columbia River at the Port’s
12 North Port site. The Project’s purpose is to manufacture methanol from natural gas, load
13 the methanol onto specially-designed methanol transport vessels at a new marine terminal,
14 and ship that methanol to Asia for the manufacture of olefins. Methanol—also known as
15 “wood alcohol”— is a basic building block of many consumer, commercial and industrial
16 products such as (medical equipment, fabrics, toys, and outdoor recreational gear). Every
17 day, Washington residents and families, businesses, industries and institutions, including
18 schools and hospitals, use many products made from olefins. There are no other methanol
19 or olefin manufacturing facilities in the state of Washington to meet this in-state demand.

20 B. The 2015 Project application vested to the 1977 Cowlitz County Shoreline
21 Master Program. The Project is located in the Urban shoreline environment, where port
22 industrial uses and marine terminals are permitted outright.

23 C. None of the methanol manufacturing facilities and associated air emissions are
24 proposed to be located within the jurisdictional shoreline environment. The only elements
25 of the Project that are in the shoreline and trigger a SCUP are dredging for the new dock
berth and portions of the facility security fence, an infiltration pond, a first-flush pond, fire

1 suppression water storage, and a containment berm for the methanol storage tanks. The
2 Project also includes improvements to public recreational access at the north end of the site
3 and, for mitigation purposes, in-water placement of large woody debris and channel piling
4 mitigation. All of the facility’s manufacturing (GHG-emitting) sources are located outside
5 of the shoreline jurisdiction.

6 D. Ecology, the Port, and the County all agreed that the Port and the County are
7 appropriately the SEPA Co-Lead Agencies for the Project. In March 2016, the Port and the
8 County published a Draft Environmental Impact Statement (“DEIS”) that included an
9 evaluation of an alternative “ultra-low emission” technology (“ULE”) for the methanol
10 production that resulted in direct GHG emissions that were more than 30 percent lower than
11 the conventional “combined reforming” (“CR”) natural gas to methanol technology.

12 E. The DEIS followed the Ecology’s SEPA Greenhouse Gas Guidance. Ecology
13 provided comments on the DEIS but did not comment or object to the GHG analysis used
14 or the decision to rely on Ecology’s SEPA Greenhouse Gas Guidance. The Port and the
15 County responded to all comments on the DEIS and published a Final EIS (“FEIS”) in
16 September 2016.

17 F. After completion of the FEIS, the County approved the SSDP and the SCUP
18 with conditions. Ecology did not object to the SSDP and approved the SCUP by adding
19 one condition, Condition 4. Condition 4 applies Ecology’s GHG Clean Air Rule (“CAR”),
20 chapter 173-442 WAC, to the Project notwithstanding the fact that the Project would not
21 otherwise be subject to the CAR. The CAR—and by extension Condition 4—requires that
22 the Project report annual GHG emissions from the facility and reduce or mitigate for
23 Project-related GHG emissions at increasing levels over time. In issuing their approval,
24 Ecology determined that the imposition of Condition 4 was adequate to address the GHG
25 emissions from the Project under both the SMA and SEPA.

1 G. Other parties appealed the SSDP, the SCUP, and the FEIS to the SHB. *See*
2 *Columbia Riverkeepers v. Cowlitz Cty.*, SHB No. 17-10c (2017). After review by the SHB
3 and Cowlitz County Superior Court on appeal, the SSDP and SCUP remain in effect, but
4 the Port and the County were required to prepare a supplemental environmental impact
5 statement to more fully address GHG emissions, and then, based on that additional analysis,
6 to evaluate whether the existing shoreline permits should be modified or revoked.³

7 H. The Port and the County prepared the SEIS that contained the most
8 comprehensive life cycle analysis of GHG emissions—from wellhead through the
9 production of olefins in Asia—ever conducted in the state under SEPA. The SEIS evaluated
10 a wide range of assumptions and sensitivities regarding the possible range of GHG
11 emissions from upstream oil and gas wells and gas pipeline transmission, facility
12 construction and operations, marine vessel transport to Asia, and emissions from the
13 manufacture of olefins from the methanol.

14 I. The SEIS evaluated GHG emissions from alternative feedstocks used in olefin
15 manufacturing (including methanol derived from coal and naphtha, which is derived from
16 oil), even though the use of those alternative feedstocks were not SEPA alternatives for the
17 proposed Project at the Port of Kalama. The SEIS also evaluated an alternative end-use of
18 the methanol as a fuel in transportation, even though Project contract agreements prohibited
19 this end use. The Final SEIS fully responded to all comments and questions raised on the
20 Draft SEIS, including comments from Ecology.

21 J. The SEIS concluded that global demand for methanol is increasing and that
22 Kalama methanol is lower cost and has a smaller carbon footprint than alternatives on a
23 lifecycle GHG basis. The SEIS also concluded that global GHG emissions from the
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³ *See* Exhibit C (Cowlitz County Superior Court Order).
PORT OF KALAMA AND NORTHWEST INNOVATION
WORKS, KALAMA, LLC'S PETITION FOR REVIEW – 14
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1 manufacture of olefins would be less if methanol was produced by the Project as compared
2 to other means of manufacturing olefins.

3 K. Additionally, NWIW voluntarily committed to mitigate 100 percent of the
4 Project's direct and indirect in-state GHG emissions through a "Voluntary Mitigation
5 Program" described in Appendix C to the SEIS. This is one of the largest GHG mitigation
6 programs ever proposed in the state. Based on the displacement analysis and NWIW's
7 voluntary mitigation commitment, the SEPA Co-Lead Agencies concluded that the
8 Project's GHG impacts were less than significant under SEPA.

9 L. After completion of the Final SEIS, the County evaluated the additional GHG
10 analysis under the SMA and County's Shoreline Management Program and concluded that
11 no changes were required to either the SSDP or the SCUP, and that SCUP Condition 4,
12 together with the 100 percent mitigation of in-state GHG emissions and displacement
13 analysis, demonstrated SMA compliance. In short, there was no legal basis for revocation
14 or modification of SCUP No. 1056.

15 M. In May 2019, Governor Inslee reversed his prior support for the Project.
16 Governor Inslee also directed Ecology to continue conducting "a thorough and objective review
17 of proposed projects to ensure they meet the state's environmental standards." His
18 announcement provided no indication that he had reviewed the exhaustive analysis that had
19 already been completed by the Port and the County.

20 N. Apparently unsatisfied either with the facts or, more likely, the conclusions
21 drawn from those facts in the SEIS GHG analysis, Ecology refused to render a decision on
22 the existing SCUP within the 30-days required by statute, thereby effectively blocking any
23 ability to adjudicate the merits or adequacy of the analysis completed in the Final SEIS.
24 Instead, in October 2019, Ecology asked for additional information from the County.

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1 O. The County and NWIW both provided responses to Ecology’s request for
2 additional information in November 2019, describing in detail how and where in the SEIS
3 Ecology could find the information it was requesting. Refusing to accept the analysis and
4 answers provided, Ecology usurped the Port and County SEPA lead agency role and
5 initiated a third round of GHG impact analysis.

6 P. Ecology published the Draft SSEIS on the Project’s lifecycle GHG emissions in
7 September 2020. That document revisited and largely accepted the direct Project GHG
8 emissions that were evaluated in the prior SEIS. The Draft SSEIS included a revised
9 Voluntary Mitigation Program Framework, based on extensive and detailed review and
10 collaboration with Ecology, to address any departmental concerns with the proposal. The
11 Draft SSEIS concluded that “the total in state greenhouse gas (GHG) emissions that are
12 directly or indirectly attributable to the Northwest Innovation Works (NWIW) Kalama
13 methanol facility are . . . capable of being mitigated.” The Draft SSEIS also evaluated likely
14 GHG emissions associated with global methanol markets from other sources of methanol,
15 such as naphtha and coal, and concluded that the Project would result in a *global decrease*
16 in GHG emissions compared to methanol and olefin production without the Project.⁴
17 Despite the facts contained in the Draft SSEIS, including the commitment to mitigate 100
18 percent of the in-state emissions and their displacement analysis (including sensitivities),
19 Ecology concluded that the Project’s GHG emissions were “significant,” without imposing
20 conditions to mitigate significance or explaining why zero net in-state GHG emissions after
21 mitigation or global GHG benefits as compared to the no action alternative resulted in a
22 determination of significance under any SEPA standard.

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25 ⁴ Ecology, Kalama Manufacturing and Marine Export Facility Draft Second SEIS (Sept. 2020), at 107,
available at <https://fortress.wa.gov/ecy/publications/documents/2006011.pdf>.

1 Q. Without any substantial change or revision to any of the analysis conducted in
2 the Draft SSEIS, and without explanation, Ecology strategically modified some of the
3 conclusions in the Final SSEIS, with neither the benefit of the public or the Project
4 proponent's review and comment. Ecology's actions prevented comments on critical
5 SSEIS foundations and conclusions, including the dismissal of the entire global market
6 displacement analysis as "speculative," the assertion that the 100 percent mitigation
7 commitments were not guaranteed to occur within the State of Washington, and the
8 improper declaration that the Project global life cycle GHG emissions would be
9 "significant" when compared against other existing emitters' direct, in-state emissions.
10 This "apples to oranges" comparison was not explained and was clearly made to achieve
11 political objectives.

12 R. Ecology denied SCUP No. 1056 by letter decision on January 19, 2021, citing
13 inconsistencies with the policies of the SMA and Cowlitz County Shoreline Master Program
14 as the bases for its denial.

15 **VIII. STATEMENT OF RELIEF REQUESTED:**


16 Petitioners request the following relief:

- 17 1. An order finding the Ecology Decision denying SCUP No. 1056 unlawful
18 and affirming the existing SCUP issued by the County and Ecology in 2017.
 - 19 2. An order further finding the Ecology's conclusions regarding the
20 significance of the GHG emissions contained in Ecology's Final SSEIS
21 violate SEPA.
 - 22 3. Any other relief as the Shorelines Hearings Board may find just and
23 equitable.
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Respectfully submitted this 9th day of February, 2021.

VAN NESS FELDMAN LLP

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*Attorneys for Northwest Innovation
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As per email authorization

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CERTIFICATE OF SERVICE

I, Donna Hammonds, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein:

That I, as a Legal Assistant in the office of Van Ness Feldman LLP, caused true and correct copies of the following documents to be delivered as set forth:

1. Port of Kalama and Northwest Innovation Works, Kalama, LLC’s Petition for Review;

2. Certificate of Service;

and that on February 9, 2021, I addressed said documents and deposited them for delivery as follows:

Shorelines Hearings Board
Clerk of the Board
Environmental and Land Use Hearings Office
4224 6th Ave. SE, Building 2
P.O. Box 40903
Olympia, WA 98504-0903

- By First Class Mail
 - By Legal Messenger
 - By Fax
 - By E-mail
- pchb-shbappeals@eluh0.wa.gov

Cowlitz County Prosecuting Attorney
Douglas E. Jensen, Chief Civil Deputy
Prosecuting Attorney
Ryan Jurvakainen, Prosecuting Attorney
312 SW First Avenue, Room 105
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Department of Ecology
Shoreline Appeals Coordinator
Perry Lund
300 Desmond Drive, Lacey
P.O. Box 47690
Olympia, WA 98504-7690

- By First Class Mail
 - By E-mail
- plun461@ecy.wa.gov

1 **Washington State Attorney General**
Ecology Division
2 Thomas J. Young, Senior Counsel
Emily C. Nelson, Assistant Attorney General
3 629 Woodland Square Loop SE, Lacey
PO Box 40117
4 Olympia, WA 98504-0117

By First Class Mail
 By Legal Messenger
 By E-Mail
thomas.young@atg.wa.gov
emily.nelson@atg.wa.gov

5 **Representatives for Columbia Riverkeeper,**
Sierra Club and Center for Biological
6 **Diversity**
Kristen L. Boyles
7 Jeanette K. Brimmer
Paulo Palugod
8 Earthjustice
9 705 Second Avenue, Suite 203
Seattle, WA 98104

By First Class Mail
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 By E-Mail
kboyles@earthjustice.org
jbrimmer@earthjustice.org
ppalugod@earthjustice.org

10 **Representatives for Washington Public Ports**
11 **Association**
Jonathan K. Sitkin
12 Frank J. Chmelik
Chmelik Sitkin & Davis PS
13 1500 Railroad Avenue
Bellingham, WA 98225

By First Class Mail
 By Legal Messenger
 By E-Mail
jsitkin@chmelik.com
fchmelik@chmelik.com

15 I hereby certify that I have this day served the foregoing document upon all parties
16 of record in this proceeding, by authorized method of service pursuant to WAC 463-30-
17 120(3) and (4).

18 EXECUTED at Seattle, Washington on this 9th day of February 2021.

19 Donna Hammonds
20 Donna Hammonds, Declarant

EXHIBIT A



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000

711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

January 19, 2021

Mark Wilson
Port of Kalama
110 West Marine Drive
Kalama, WA 98625

Murray Godley
Northwest Innovation Works, LLC
110 West Marine Drive
Kalama, WA 98625

Re: Cowlitz County Permit #SL 16-0975
Port of Kalama and Northwest Innovation Works - Applicants
Shoreline Conditional Use Permit (CUP) #1056

Dear Mark Wilson and Murray Godley:

On March 20, 2017, the Department of Ecology (Ecology) received the Cowlitz County (County) decisions on your permits to construct and operate a marine export facility (Project) used to manufacture and export methanol. Ecology previously issued a shoreline conditional use permit (CUP) for the Project on June 8, 2017. The Shorelines Hearings Board (Board) reversed the CUP and a shoreline substantial development permit (SDP) issued by the County, concluding that the Final Environmental Impact Statement (FEIS) was inadequate under the State Environmental Policy Act (SEPA). The Port and the County appealed that decision to Cowlitz County Superior Court. The superior court affirmed the Board's determination that the FEIS was inadequate. The court remanded to the County to complete a supplemental EIS and directed the County and Ecology to "review the SEIS and determine whether, or not, the permits must be modified, conditioned, or denied based on the analysis in that document."

On August 30, 2019, the County and Port issued a Final Supplemental Environmental Impact Statement (2019 Supplemental EIS). On September 11, 2019, Ecology received a letter from the County in which the County concluded that no further County action or decision was warranted on the CUP to construct and operate a marine facility to manufacture and export methanol at the Port of Kalama (Port). The County based this conclusion on its determination that the 2019

Supplemental EIS “did not identify new shoreline impacts or materially change the County’s analysis of the Project’s impacts under the County’s Shoreline Master Program or SEPA.”

Ecology submitted detailed comments on the draft 2019 Supplemental EIS that identified various deficiencies in the greenhouse gas analysis. Ecology then met with the Port, County, and Northwest Innovation Works (NWIW) five times over the next eight months to discuss these comments. However, the 2019 Supplemental EIS did not address most of Ecology’s comments on the draft document. After receiving the County’s September 11, 2019, letter, Ecology requested additional information to address its comments so the department could render a decision on the CUP. The County’s response to Ecology’s request still did not address those comments.

In light of this, on November 22, 2019, Ecology determined that a Second Supplemental Environmental Impact Statement (Second SEIS) was required to adequately identify and analyze the greenhouse gas emissions and impacts for the CUP to construct and operate the Project. The Second SEIS would correct the deficiencies identified but not addressed in the 2019 Supplemental EIS so that Ecology could determine whether the CUP should be approved, modified, conditioned, or denied under the Shoreline Management Act (SMA), as required by the July 12, 2018, Cowlitz County Superior Court Order. Ecology prepared the Second SEIS as provided in WAC 197-11-600(3).

On December 21, 2020, Ecology issued the Final Second Supplemental Environmental Impact Statement (Final Second SEIS). The analysis in the Final Second SEIS identifies significant environmental impacts from upstream emissions; emissions produced by the facility; downstream emissions from transporting the methanol to its intended destination in China; and, emissions associated with the final end use of the product. Ecology’s decision is based on the results of this analysis.

By law, Ecology must review all CUPs for compliance with the following:

- 1) The Shoreline Management Act (RCW 90.58)
- 2) Ecology’s Conditional Use Permit approval criteria (WAC 173-27-160)
- 3) The Cowlitz County Shoreline Master Program (1977)

After reviewing CUPs for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove them.

Our decision on your CUP: Ecology disapproves your CUP for the following reasons:

- A. Inconsistency with the policies of the Shoreline Management Act, as provided in RCW 90.58.020. WAC 173-27-160(1)(a).
 1. The Project would increase greenhouse gas emissions within the state of Washington by approximately one million metric tons (MMT) annually. Extracting, processing, and

transporting the natural gas used to make the methanol would likely produce higher emissions than previous estimates. Combined, those emissions would increase the Project's overall greenhouse gas emissions to between 4.17 and 6.20 MMT annually, with average annual emissions totaling 4.8 MMT. *See* Final Second SEIS at Table 3.5-13.

2. In 2020, the Legislature enacted new statewide greenhouse gas limits provided in RCW 70A.45. These new limits are significantly more stringent than the limits in place in 2017, and provide that greenhouse gases in the state must be reduced overall to 5 MMT by 2050 in order to address the threats posed by climate change. *See* Final Second SEIS at 33-34.
3. In setting these new limits, the Legislature specifically found that avoiding global warming, which has serious health and ecological impacts in the state of Washington, is only possible "if greenhouse gas emissions start to decline precipitously, and as soon as possible." The Legislature thus identified a need for Washington to take "immediate and aggressive action to reduce greenhouse gas emissions." Laws of 2020, ch. 79, § 1.
4. The Legislature also found that "the longer we delay in taking definitive action to reduce greenhouse gas emissions, the greater the threat posed by climate change to current and future generations, and the more costly it will be to protect and maintain our communities against the impacts of climate change." Laws of 2020, ch. 79, § 1.
5. The Final Second SEIS concludes that the average annual greenhouse gas emissions attributable to the Project will be 4.8 MMT, and that these emissions constitute a significant environmental impact. Final Second SEIS at Figure 3.5-9, 101-102. The Project's annual greenhouse gas emissions occurring within the boundaries of the state of Washington will total approximately 1 MMT, and the life of the Project is expected to be 40 years. *See* Final Second SEIS at Table 3.5-14. Thus, this Project would constitute approximately 20 percent of the state's entire 2050 carbon budget, which is 5 MMT. *See* RCW 70A.45.020(1)(a)(iv).
6. Both the Final Second SEIS and 2019 Supplemental EIS recognize that anthropogenic greenhouse gas emissions cause climate change. *See* Final Second SEIS at 30; 2019 Supplemental EIS at 3-2. The Final Second SEIS identifies the following greenhouse gas impacts specific to the shorelines of the Pacific Northwest:
 - a. Changes in salmon migration and reproduction;
 - b. Coastal changes, such as increased coastal erosion and beach loss due to rising sea levels, increased landslides due to increased winter rainfall, permanent inundation in some areas, and increased coastal flooding due to sea level rise and increased winter stream flow; and,
 - c. Human and environmental health impacts resulting from these changes, including loss of biodiversity.
7. In 2018, the Intergovernmental Panel on Climate Change released a Special Report on the impacts of global warming of 1.5 degrees Celsius above pre-industrial levels. That same

year, the U.S. Global Change Research Program published the Fourth National Climate Assessment, identifying a number of specific climate change impacts that will occur, and are already occurring, in the Northwest. *See* Final Second SEIS at 105. Together, these reports affirm that avoiding global warming of 1.5 degrees Celsius will only be possible if urgent, immediate action is taken to significantly reduce greenhouse gas emissions.

8. The quantity of the Project's emissions and the length of time those emissions would occur will impede the state's ability to meet the emission reduction requirements provided in RCW 70A.45, and would therefore exacerbate climate change impacts to shorelines in the state.
9. The Final Second SEIS also included a market analysis that considered whether methanol from this proposal would displace other methanol. That analysis concluded that this proposal would increase greenhouse gas emissions, but potentially at a lower rate than if methanol were produced through other means. Specifically, the Final Second SEIS compared emissions from this Project to potential future emissions from coal-based or other nonrenewable natural gas-based methanol production. The Final Second SEIS recognized the uncertainty inherent in trying to predict how markets will behave decades into the future, and how future policy decisions might impact those markets. Due to this uncertainty, the market analysis did not alter Ecology's determination that greenhouse gas emissions associated with this Project are significant.
10. Project proponent NWIW proposed a voluntary framework to mitigate for 100 percent of the direct and indirect in-state greenhouse gas emissions on an annual basis for the life of the Project. *See* Appendix D, Final Second SEIS. The Final Second SEIS concludes that the Project's greenhouse gas emissions would still be deemed significant, even if in-state emissions are mitigated. In-state emissions of approximately 1 MMT annually represent less than a quarter of the Project's total annual greenhouse gas emissions of 4.8 MMT.
11. The mitigation framework proposed by the Project proponent gives a preference to but does not require that mitigation occur in state. Due to a cost cap incorporated into the mitigation framework, coupled with competition for in-state mitigation projects and a limited supply of feasible mitigation opportunities, it is likely that a substantial portion of the mitigation would occur out of state. If so, in-state emissions from this proposal would make it nearly impossible for the state to meet its 2050 greenhouse gas limit of 5 MMT.
12. For the above reasons, Ecology has determined that the Project is inconsistent with the following policies of the Shoreline Management Act, as provided in RCW 90.58.020:
 - a. "This policy is designed to insure the development of these shorelines in a manner which... will promote and enhance the public interest." RCW 90.58.020.
 - b. "This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life...." RCW 90.58.020.

B. Inconsistency with the Cowlitz County Shoreline Master Program (SMP) policies related to shorelines of statewide significance. WAC 173-27-160(1)(a).

1. The Project would be located on the Columbia River, which the Shoreline Management Act and the Cowlitz County SMP identify as a shoreline of statewide significance. RCW 90.58.030(2)(f)(v)(A); SMP at 68. The Shoreline Management Act provides “that the interest of all of the people shall be paramount in the management of shorelines of statewide significance.” RCW 90.58.020. The Cowlitz County SMP provides that shorelines of statewide significance:

are considered as deserving of consideration beyond that ascribed to other water bodies. Since these specified shorelines are major resources from which all people in the state derive benefit, we must:

...

- 2) Preserve the natural character of the shoreline.
- 3) Address uses which result in a long-term over short-term benefit.
- 4) Protect the resources and ecology of the shorelines.

...

SMP at 2.

2. For the reasons identified in Section A above, Ecology has determined that the Project is inconsistent with the above referenced policies of the Cowlitz County SMP because it will directly contribute to and exacerbate climate change impacts that will alter the natural character of and damage the shorelines of the Columbia River.

C. Failure to demonstrate that the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located. WAC 173-27-160(1)(d).

1. For the reasons identified in Section A above, Ecology has determined that the Project proponents have not demonstrated that the Project will not cause significant adverse effects to the shoreline of the Columbia River. Therefore, conditional use permit criterion WAC 173-27-160(1)(d) has not been met.

D. Failure to demonstrate that the public interest suffers no substantial detrimental effect. WAC 173-27-160(1)(e).

1. The Final Second SEIS demonstrated that the Project’s greenhouse gas emissions are significant, and will exacerbate the impacts of climate change we are already experiencing in the state of Washington, as well as on the shorelines and waters of the state. 2019 Supplemental EIS at 3-2 to 3-4; Final Second SEIS at 30-34, 101-103.
2. The Legislature has specifically found that avoiding global warming, which has serious health and ecological impacts in the state of Washington, is only possible if greenhouse gas

emissions start to decline precipitously and as soon as possible through immediate and aggressive action. Laws of 2020, ch. 79, § 1.

3. The Legislature has also found that the longer our state delays in taking definitive action to reduce greenhouse gases, the greater the threat posed by climate change to current and future generations, and the more costly it will be to protect our communities from the impacts of climate change. Laws of 2020, ch. 79, § 1.
4. Accordingly, the Legislature intends for the state to limit and reduce emissions of greenhouse gases over the next 30 years. *See* Final Second SEIS at 33-34.
5. The quantity of the Project's emissions and the length of time those emissions would occur will significantly impede the state's ability to meet the emissions limits provided in RCW 70A.45.
6. As such, and for the reasons identified in Section A above, Ecology has determined that the Project proponents have not demonstrated that the public interest will suffer no substantial detrimental effect as result of the granting of a conditional use permit. Therefore, conditional use permit criterion WAC 173-27-160(1)(e) has not been met.
7. In addition, a federal court recently vacated two permits issued by the Army Corps of Engineers under the Clean Water Act and Rivers and Harbors Act, finding that the Project did not meet the "public interest" assessment required by those statutes for three reasons: (1) the Corps improperly relied on uncertain global benefits of the Project without assessing global detriments; (2) the Corps failed to consider the need for expansion of a regional gas pipeline as a reasonably foreseeable future action; and, (3) the Corps failed to properly consider recreational impacts near the site due to air quality concerns. In regards to the first reason, Ecology's Final Second SEIS demonstrates that the Project will have significant impacts in the form of in-state, upstream, and downstream emissions. The second and third reasons demonstrate that there are substantial unanswered questions in regards to this proposal's impact to the public interest.

What Happens Next?

Ecology's decision is appealable to the state Shorelines Hearings Board within 21 days from January 19, 2021, the "date of filing." This waiting period allows anyone who disagrees with any aspect of this permit, to appeal the decision to the state Shorelines Hearings Board.

If you want to appeal this decision, you can find appeal instructions (Chapter 461-08 WAC) on the Shorelines Hearings Board website at <http://www.eluho.wa.gov>. They are also posted on the website of the Washington State Legislature at:
<http://apps.leg.wa.gov/wac/default.aspx?cite=461-08>

Port of Kalama
Northwest Innovation Works, LLC
January 19, 2021
Page 7

If you have any questions, please contact Rich Doenges at (360) 407-6307 or rich.doenges@ecy.wa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura Watson', written in a cursive style.

Laura Watson
Director

By certified mail 9489 0090 0027 6094 0256 59 (Port of Kalama)
By certified mail 9489 0090 0027 6094 0256 66 (Northwest Innovation Works, LLC)
By certified mail 9489 0090 0027 6094 0256 73 (Cowlitz County)

cc: Brian Carrico, Berger ABAM
Ron Melin, Cowlitz County
Emily C. Nelson, Assistant Attorney General
Rich Doenges, Ecology
Perry Lund, Ecology

EXHIBIT B



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

June 8, 2017

Port of Kalama
Attn: Tabitha Reeder
110 West Marine Drive
Kalama, WA 98625

Northwest Innovation Works, LLC
Attn: Murray Godley
110 West Marine Drive
Kalama, WA 98625

Re: Cowlitz County Permit #SL 16-0975
Port of Kalama and Northwest Innovation Works - Applicants
SIMULTANEOUS FILING OF
Approved Shoreline Substantial Development Permit (SDP) #3253
Approved Shoreline Conditional Use Permit (CUP) #1056

Dear Ms. Reeder and Mr. Godley:

On March 20, 2017, the Department of Ecology received the Cowlitz County decisions on your permits to construct and operate a marine export facility used to manufacture and export methanol.

Your approved SDP and CUP have been filed with Ecology.

By law, Ecology must review SDPs and CUPs for compliance with:

- The Shoreline Management Act (Chapter 90.58 RCW)
- Ecology's SDP approval criteria (WAC 173-27-150)
- Ecology's CUP approval criteria (WAC 173-27-170)
- The Cowlitz County Local Shoreline Master Program

Local governments, after reviewing SDPs for compliance, are required to submit them to Ecology. Your approved SDP has been received by Ecology.

After reviewing CUPs for compliance, Ecology must decide whether to approve, approve with conditions, or disapprove them.



Our Decision on your CUP: Ecology approves your CUP, provided your project complies with the conditions required by Cowlitz County and the following Ecology conditions:

1. The applicants shall revise the Updated Mitigation Plan, dated September 2016, according to the following requirements:
 - a. A section shall be added that describes the areas of riparian and wetland buffer impacts.
 - b. The riparian and wetland buffer enhancement areas shall be protected from human intrusion and damage by the installation of split-rail fencing, signs, a dense hedgerow, or the like. Such protection shall be maintained in good condition for the life of the project.
 - c. The riparian habitat buffer and wetland buffer mitigation areas shall be monitored and maintained for ten years.
 - d. Performance standards shall be added to Table 2 for years 5, 7, and 10, and shall address the following:
 - i. minimum percent cover of native plants, with at least 75 percent cover by year 10; and,
 - ii. 20 percent maximum cover of invasive plants for each monitoring year.
 - e. The row in Table 1 for *Salix lasiandra* shall have missing information added, and the total number of plants shall be corrected.
 - f. Mitigation planting, initial weed control work, and perimeter protection per condition 1.b shall be done concurrently with riparian and wetland buffer impacts, and planting shall be completed no later than one year from the start of the impacts.
 - g. The as-built report shall be submitted to Ecology, in addition to the other entities listed under Performance Standard 5 of the Updated Mitigation Plan, within 90 days of completion of mitigation planting.
 - h. As required by condition 12 of the Cowlitz County Hearing Examiner's *Order Granting Petitions for Reconsideration*, dated March 8, 2017, the applicants shall add a section describing the 90-95-acre area identified in Exhibit K-67. This section shall incorporate by reference the Technical Memorandum prepared by BergerABAM, dated January 30, 2017, with the subject "Kalama Manufacturing and Marine Export Facility – Supplemental Shoreline and Habitat Preservation." The section shall also include the actual total acreage of the area to be preserved, legal description(s), tax parcel number(s), and site map.
 - i. The 90-95-acre area described in condition 1.h above shall be permanently protected from development. The applicants shall record a conservation covenant (a recommended template is enclosed), a copy of this permit, and the site map required by condition 1.h, with the Cowlitz County Auditor's Office. The documents must be submitted to Ecology for review and approval prior to recording, and prior to beginning any work associated with this permit.
 - j. Section 11 of the Updated Mitigation Plan, which is the Long-Term Management Plan, shall be revised to be consistent with condition 11.C of the *Order Granting*

Petitions for Reconsideration, dated March 8, 2017, regarding the engineered log jams.

- k. Any other sections of the mitigation plan that would be affected by the requirements above (e.g., monitoring methods), shall be revised accordingly.

Once the revisions listed above have been made, the applicants shall submit to Ecology a revised mitigation plan, with the date of the revised version shown on the cover page, for approval prior to beginning any work associated with this permit. Once Ecology has approved the mitigation plan, we will notify you of this approval, and that final version of the mitigation plan will become the mitigation plan with which you are required to comply.

2. On-site dredge disposal must meet the following criteria, which are stated in criterion 2(c) of the specific use criteria in the Rural District for Landfill and Dredging in the Cowlitz County Shoreline Master Program:
 - a. Dredge spoils disposal sites shall be completely enclosed by dikes of sufficient capacity to allow for the settling of sediment before entrapped water leaves the diked area. The outside face of the dikes shall be sloped at 1-1/2 to 1 (horizontal to vertical) or flatter and seeded with grass or otherwise protected to prevent erosion. Outlet structures in dikes shall be placed so that water discharged within the dikes will take the longest possible time to reach the outlet and shall be designed so that only the clearest water is allowed to return to the receiving waters.
3. The public access area located at the end of Tradewinds Road, and at the north end of the project site, shall be protected and remain open for access for the life of the project through a deed restriction or other appropriate document. The Port of Kalama will submit to Ecology the proposed deed restriction or similar document for Ecology's review and approval prior to recording, and prior to beginning any work associated with this permit.
4. Northwest Innovation Works (NWIW) is required to mitigate for greenhouse gas emissions covered under Chapter 173-441 WAC originating from its facility. This mitigation requirement is to be met by demonstrating achievement or acquisition of greenhouse gas emission reductions on an annual basis as follows:
 - a. For any year that the facility has been assigned an emission reduction pathway under the Clean Air Rule (Chapter 173-442 WAC), an approved compliance report submitted at the end of the applicable Clean Air Rule compliance period will satisfy the mitigation requirement for that year.

- b. For any year that the facility has not been assigned an emission reduction pathway under, or is not subject to, the Clean Air Rule, the mitigation requirement for that year:
- i. Is an amount of greenhouse gas emission reductions (metric tons of carbon dioxide equivalent) equal to the product of the following three factors:
 1. A cumulative rolling average of the total greenhouse gas emissions reported from the facility in accordance with Chapter 173-441 WAC, with the cumulative average beginning in the first full year of operation and turning into a five-year rolling average in the fifth year.
 2. An emission reduction factor of one and seven-tenths percent (1.7%).
 3. The number of years from the first calendar year of operations at NWTW with emissions reported under Chapter 173-441 WAC to the year in which the emission reduction requirement is being calculated, or to the year 2035, whichever is less.
 - ii. Can be met in two ways:
 1. Demonstration that some or all of the mitigation requirement is achieved through reductions in greenhouse gas emissions at the facility if the greenhouse gas emissions reported for the applicable year in accordance with Chapter 173-441 WAC are lower than the rolling average calculated in (b)(i)(1) above.
 2. Acquisition of qualifying emission reductions through the purchase of carbon credits or by investing in or facilitating the creation of emission reduction projects in accordance with a mitigation plan approved by Ecology.

NWTW is to provide an annual report, due by December 31 of the year following the emissions year, to Ecology describing the manner in which the mitigation requirement is met. If NWTW is complying with this mitigation requirement using the method in (4)(a) above, then the compliance report specified in WAC 173-442-210 will meet this requirement.

Please note that other federal, state, and local permits may be required in addition to these shoreline permits.

What Happens Next?

Before you begin activities authorized by this permit, the law requires you wait at least 21 days from June 7, 2017, the "date of filing." This waiting period allows anyone (including you) who disagrees with any aspect of this permit to appeal the decision to the state Shorelines Hearings Board.

Port of Kalama
Northwest Innovation Works, LLC
June 8, 2017
Page 5

You must wait for the conclusion of an appeal before you can begin the activities authorized by this permit.

We recommend contacting the Shorelines Hearings Board at (360) 664-9160 before beginning permit activities to ensure that no appeal has been filed. Information on appeals is also posted at http://www.eluho.wa.gov/Decision/Search_Cases. Select "Shorelines Hearings Board" from the drop down menu labeled "Board" and enter "Search." The most current appeal will appear on top.

If **you** want to appeal this decision, you can find appeal instructions (Chapter 461-08 WAC) at the Shorelines Hearings Board website above. They are also posted on the website of the Washington State Legislature at: <http://apps.leg.wa.gov/wac/>.

If you have any questions about this letter, please contact me at (360) 407-7260 or perry.lund@ecy.wa.gov or Rebecca Rothwell at (360) 407-7273 or rebecca.rothwell@ecy.wa.gov.

Sincerely,



Perry J Lund, Unit Manager
Shorelands and Environmental Assistance Program
Southwest Regional Office

Enclosure: Conservation Covenant Template

By Certified Mail 91 7199 9991 7036 9330 2719 (Port of Kalama)

By Certified Mail 91 7199 9991 7036 9330 2726 (Northwest Innovation Works, LLC)

cc: Elaine Placido, Cowlitz County
Ron Melin, Cowlitz County
Brian Carrico, Berger ABAM
Emily Nelson, Assistant Attorney General
Neil Caudill, Ecology

EXHIBIT C

FILED
SUPERIOR COURT

'18 JUL 12 P3 57

COWLITZ CO. CLERK
STACI L. MYRLEBUST

BY _____ *[Signature]*

17-2-01269-08
OR
Order
3464029



a

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

PORT OF KALAMA,

Petitioner,

v.

STATE OF WASHINGTON, SHORELINES
HEARING BOARD,

and

COLUMBIA RIVERKEEPER, SIERRA CLUB,
CENTER FOR BIOLOGICAL DIVERSITY,
COWLITZ COUNTY, NORTHWEST
INNOVATION WORKS – KALAMA LLC,
WASHINGTON PUBLIC PORTS
ASSOCIATION, and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY.

Respondents.

Case No. 17-2-01269-08

~~PROPOSED~~ ORDER AFFIRMING IN
PART AND REVERSING IN PART THE
SHORELINES HEARINGS BOARD
ORDER DATED SEPTEMBER 15, 2017

THIS MATTER came before the Court on Petitioners Port of Kalama (“the Port”) and Cowlitz County’s (“the County’s”) Consolidated Appeal. After considering the pleadings filed in this action, all relevant materials and briefing, as well as oral argument presented, the Court AFFIRMS IN PART and REVERSES IN PART the Order of the Shorelines Hearings Board (the “Board”).

~~PROPOSED~~ ORDER AFFIRMING IN PART AND
REVERSING IN PART THE SHORELINES HEARINGS BOARD
ORDER DATED SEPTEMBER 15, 2017 - 1

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

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Scanned

BACKGROUND

I. THE SHORELINES HEARINGS BOARD

1
2
3 1. On June 29, 2017, Columbia Riverkeeper, Sierra Club, and Center for Biological
4 Diversity (collectively “Riverkeeper”) filed an appeal of the Shoreline Conditional Use Permit
5 and Shoreline Substantial Development Permit (“the Permits”) issued by the Department of
6 Ecology (“Ecology”) and the County to Northwest Innovation Works, Kalama – LLC
7 (“NWIW”) and the Port to construct the Kalama Methanol Manufacturing Facility (“Facility”).
8 After reviewing cross-motions for Partial Summary Judgment from Riverkeeper, the Port,
9 NWIW, and Ecology, the Board ruled on Summary Judgment in favor of Riverkeeper that the
10 Final Environmental Impact Statement (“FEIS”) for the Facility was inadequate under the State
11 Environmental Policy Act (“SEPA”) for failing to fully consider greenhouse gas emissions. AR
12 1734-37. The Board found that the FEIS relied on Ecology’s *Guidance for Ecology: Including*
13 *Greenhouse Gas Emissions in SEPA Reviews* (“Guidance”), and that the Guidance employed a
14 “weighty presumption and formulaic conclusion” that was contrary to SEPA. AR 1735. The
15 Board vacated the trial originally set for October 9-13, 2017, all remaining deadlines, and issued
16 an Order on Summary Judgment on September 15, 2017 that vacated the Permits. AR 1720.

17
18
19 2. The County moved the Board for Reconsideration and the Port filed a brief in
20 support of the County’s Motion. AR 1741, 1745. Finding that the County’s Motion met none of
21 the requirements the Board issued an Order Denying Motion for Reconsideration on October 23,
22 2017. AR 1770.

II. APPEAL TO THIS COURT

23
24 3. On November 20, 2017, the Port and the County each filed a Petition for Review
25 in this Court of the Board’s Order on Summary Judgment and its Order on Reconsideration.
26

1 Respondents Riverkeeper filed an Application For Direct Review by the Court of Appeals to the
2 Shorelines Hearings Board, which was denied. While the Application was pending the Port and
3 County moved for the appeals to be consolidated and the Court granted that motion on December
4 28, 2017.

5 4. Petitioners, the Port and the County, filed a Joint Opening Brief. Respondent
6 NWIW filed a response brief in support of the Port and County's Opening Brief. Respondent
7 Ecology filed a response brief taking no position on whether the Court should affirm or deny the
8 appeal and briefed the legal framework of relief sought by the Port and Ecology's responsibilities
9 under SEPA and the Shoreline Management Act ("SMA"). Riverkeeper filed a response brief in
10 opposition of the Port's Appeal. The Port and the County filed a Joint Reply and the Court heard
11 oral argument on May 8, 2018.
12

13 CONCLUSIONS OF LAW

14 5. Under SEPA government decision-makers are required to analyze and disclose
15 the environmental impacts of major proposed actions in an EIS. WAC 197-11-400. The
16 adequacy of an EIS is analyzed under the rule of reason, which requires a "reasonably thorough
17 discussion of the significant aspects of the project and the probable environmental
18 consequences." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.
19 2d 619, 633, 860 P.2d 390 (1993).
20

21 6. The FEIS for the Kalama Methanol Facility relied on Ecology's Guidance to
22 conclude that the greenhouse gas emissions caused by the Facility would not result in a
23 significant adverse environmental impact. The Court affirms the Board's Order on the grounds
24 that Ecology's Guidance on greenhouse gas emissions is best described as formulaic. The use of
25 the Guidance in the FEIS runs contrary to RCW 70.235.020, which sets targets for overall
26

1 reductions of greenhouse gas emissions in Washington State. *See Klickitat County*, 122 Wn.2d
2 at 633. This statutory policy is the mandate given by the Legislative and Executive Branches. I
3 affirm the Board and find there is no issue of material fact as to the adequacy of the discussion of
4 the impacts of greenhouse gases from this Facility in the context of all the policies available.
5 Washington's specific statutory policy has to be included in that discussion. I sustain the Board
6 to the extent it held that the FEIS must include a discussion of greenhouse gas emissions that
7 does not rely on the Guidance.

8 7. The Court makes no decision today on whether the future EIS must comply with
9 the discussion in footnote 3 of the Shoreline Hearings Board's Summary Judgment Order
10 because it is dicta and a broad new pronouncement. AR 1737. Because the Court upholds the
11 Board's holding that the FEIS was inadequate because it relied on Ecology's Guidance, the
12 Court does not reach the issue of what the analysis in any new SEPA analysis should look like.

13 8. On the issue of remedy, the Court holds that the Permits should not be vacated
14 and are remanded to the County and Ecology for additional review of greenhouse gas emissions
15 consistent with this Order. The Permits have already been the subject of a Cowlitz County
16 hearing where factual issues were decided and permits were granted. AR 11-122. Requiring
17 another County hearing on all factual issues would cause additional time delays and expense that
18 may not be necessary. The only issue the permitting agencies must address on remand is how
19 any new SEPA analysis of greenhouse gas emissions affects their decision-making under the
20 applicable statutes.

21 9. The EIS is also remanded to the County and the Port for further review of
22 greenhouse gas emissions consistent with this Order, which the County and the Port have
23 indicated will occur through a Supplemental EIS (SEIS) process. The SEIS must assess how the
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1 new greenhouse gas emission analysis impacts conclusions and decision-making under SEPA,
2 which may impact analysis beyond the FEIS's Ch. 4. Limitations on project construction prior
3 to the completion of additional SEPA and permit review are set forth under Ch. 90.58 RCW and
4 Ch. 43.21C RCW.

5 10. Once the SEIS is complete, the County and Ecology's scope of review, as
6 permitting agencies, is limited to determining whether, or not, the new analysis of greenhouse
7 gas emissions set forth in the SEIS affects the decision to issue, or conditions placed on, the
8 Permits. The permitting agencies must review the new SEIS, but that is the extent of their future
9 review.

10 11. Any appeal of the SEIS or future decisions on the Permits will be consolidated
11 with the remaining issues, if any, in SHB No. 17-010c.

12 12. On the issues of res judicata or issue preclusion before the Board, the Board never
13 reached the trial phase and did not make findings of fact. The Court is not making a finding of
14 res judicata or issue preclusion in terms of proceedings before the Board because they have not
15 yet had the full trial before the finder of fact.

17 ORDER


18 Based on the foregoing, it is hereby ORDERED that the FEIS for the Kalama Methanol
19 Manufacturing Facility is inadequate under SEPA and that an SEIS assessing greenhouse gas
20 impacts must be prepared.

21 It is further ORDERED that the Shoreline Conditional Use Permit and the Shoreline
22 Substantial Development Permits are not vacated, but that Cowlitz County and Ecology must
23 review the SEIS and determine whether, or not, the Permits must be modified, conditioned, or
24 denied based on the analysis in that document.

1 This matter is remanded back to the SEPA responsible officials for further action
2 consistent with this opinion. Limitations on project construction prior to the completion of
3 additional SEPA and permit review are set forth under Ch. 90.58 RCW and Ch. 43.21C RCW.
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6 IT IS SO ORDERED.

7 Entered this 12 day of July, 2018.
8

9 
10 Judge Waring,
11 Cowlitz County Superior Court

12 Presented by:

13
14 EARTHJUSTICE

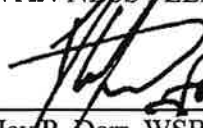
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[PROPOSED] ORDER AFFIRMING IN PART AND
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ORDER DATED SEPTEMBER 15, 2017 - 6

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26 [PROPOSED] ORDER AFFIRMING IN PART AND
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