

BEFORE THE COWLITZ COUNTY HEARINGS EXAMINER

IN RE THE MATTER OF MILLENNIUM) File No. 12-04-0375
BULK TERMINALS - LONGVIEW,) SHORELINE PERMIT APPLICATION
LLC COAL EXPORT FACILITY) NO. 17-0992
APPLICANT:)
MILLENNIUM BULK TERMINALS -) FINDINGS OF FACT, CONCLUSIONS
LONGVIEW, LLC) OF LAW AND DECISION DENYING
PERMITS

APPLICANT: Millennium Bulk Terminals - Longview, LLC ("Applicant")

REPRESENTATIVE: Jon K. Sitkin
Chmelik Sitkin & Davis, P.S.
1500 Railroad Avenue
Bellevue, Washington 98225

Craig S. Trueblood
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Seattle, Washington 98104

COUNTY STAFF: Elaine Placido, Director of Community Development
Ron Melin, Senior Environmental Planner
207 4th Avenue N.
Kelso, Washington 98626

REPRESENTATIVE: Douglas Jensen
Cowlitz County Prosecutor's Office
First Floor, 312 S.W. 1st Avenue
Kelso, Washington 98626

INTERESTED PARTIES: Columbia Riverkeeper, Friends of the Columbia Gorge,
Climate Solutions, Sierra Club, Washington Environmental
Council, Greenpeace USA, Association of Northwest Steelheaders,
Northern Plains Resource Council, Oregon Physicians for Social
Responsibility, Washington Physicians for Social Responsibility,
and Western Organization of Resource and Councils (collectively
"Riverkeeper")

1 REPRESENTATIVE: Kristen Boyles
2 Earthjustice
3 705 Second Avenue, Suite 203
4 Seattle, Washington 98104

5 SUMMARY OF REQUEST: The Applicant seeks a Shoreline Substantial Development Permit
6 and a Shoreline Conditional Use Permit to construct Stage 1 improvements for a coal export
7 facility near Longview and along the Columbia River, an urban shoreline of statewide
8 significance.

9 LOCATION OF PROPOSAL: The Project is located at 4029 Industrial Way, Longview,
10 Washington, within the Northwest and Northeast Quarters of Sections 35 and 36, Township 8
11 North, Range 3 West, W.M., and the Southwest and Southeast Quarters of Sections 25 and 26,
12 Township 8 North, Range 3 West, W.M., at approximately Columbia River Mile 63, within
13 Parcel Nos. 619530400, 61950, 61953, WDNR Aquatic Lands Lease No. 20-B09222, and BPA
14 Parcels 61954 and 6195303.

15 PROJECT DESCRIPTION: See below

16 SUMMARY OF DECISION:

17 1. In advance of this hearing Cowlitz County (the "County") and the Department of
18 Ecology ("Ecology"), as co-lead agencies, issued a Final Environmental Impact Statement (the
19 "FEIS") to inform this decision making process. The FEIS concludes that the Project has nine
20 unavoidable, significant adverse impacts. Importantly, neither the Applicant or any other party
21 has appealed the FEIS. For the purpose of this hearing its findings and conclusions are
22 unchallenged.

23 By Decision dated September 26, 2017, Ecology denied the Applicant a Section 401
24 Water Quality Certification, in part, under its substantive SEPA authority, concluding that the
25 Project had nine unavoidable significant environmental impacts as identified in the FEIS, and
that these impacts could not be reasonably mitigated. I concur with Ecology that the Project has
unavoidable, significant environmental impacts that cannot be reasonably mitigated, and
therefore deny the Applicant's requested Shoreline Substantial Development Permit and
Shoreline Conditional Use Permit under Cowlitz County's substantive SEPA authority.

1 Although I reach the same conclusion as Ecology I do so through a different analysis.
2 Ecology reached its Decision by examining the FEIS and concluding that the listed unavoidable
3 and significant adverse impacts could not be mitigated. I question whether this approach
4 provided the Applicant with an opportunity to offer evidence of possible, reasonable mitigation.
5 Therefore, in this hearing the County and the Applicant have been given the opportunity to
6 propose reasonable mitigation. Nonetheless, by the conclusion of the hearing the parties had
7 failed to do so. As the unchallenged FEIS concludes that the Project has many unavoidable,
8 significant adverse impacts, and as the parties have failed to provide reasonable mitigation, the
9 Shoreline Permits must be denied.

10 In its Decision Ecology did not address the impacts from Greenhouse Gas (GHG)
11 emissions. This was due to the belief that the Applicant was proposing to mitigate 100% of net
12 GHG emissions. During the hearing the Applicant clarified that it is not proposing to mitigate
13 the Project's net GHG impacts as calculated in the FEIS. The FEIS concludes that if the net
14 GHG emissions are not fully mitigated they become a tenth unavoidable, significant adverse
15 impact.

16 In summary, I conclude that the Applicant has failed to reasonably mitigate the ten
17 unavoidable, significant adverse impacts identified in the FEIS, and the Shoreline Permits must
18 be denied under substantive SEPA authority.

19 2. The Applicant has the burden of proving that all of the requirements of the State
20 Shoreline Management Act (SMA) and the County's Shoreline Master Program (SMP) have
21 been satisfied. As a result of the unavoidable, significant adverse impacts identified in the FEIS,
22 the Applicant has failed to meet this burden.

23 3. There remain a number of unresolved issues which further prevent the Applicant
24 from meeting its burden of proving that the requirements of SMA and SMP have been met.

25 These include:

*Findings of Fact, Conclusions
of Law and Decision Denying
Permits - 3*

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1 The Project requires dredging to accommodate berthing of fully loaded Panamax-class ships,
2 resulting in dredging and disposal of up to 350,000 cubic yards of material from State-owned
3 aquatic lands.

4 The Project would be constructed in two stages over several years:

5 Stage 1 of the Project would consist of facilities necessary to unload coal from
6 trains, stockpile the coal onsite, and load coal into oceangoing vessels at Dock 2.
7 Two docks (Dock 2 and Dock 3) would be constructed along with one ship loader
8 and related conveyors on Dock 2, with berthing facilities only at Dock 3.
9 Onshore a stockpile area including two stockpile pads, railcar unloading facilities,
10 one operating rail track, up to eight rail storage tracks for train parking,
11 miscellaneous ground improvements, and associated facilities and infrastructure
12 would be built. Upon completion of Stage 1 the Project would have capacity for
13 handling 25 Million Metric Tons Per Year (MMTPY) of coal.

14 Stage 2 of the Project would consist of installation of ship loading and associated
15 equipment on Dock 3, two additional coal stockpile pads and necessary conveyors
16 and facilities for conveyance of coal from the collective coal pads to the two
17 docks. Construction of Stage 2 would be expected to commence once Stage 1 had
18 been completed, within approximately 3 to 5 years. Stage 2 would increase
19 export capacity to 44 MMTPY.

20 The Applicant is leasing 540 acres from the landowner, Northwest Alloys. Northwest
21 Alloys also has an existing Aquatics Lands Lease No. 20-B09222 from the Washington
22 Department of Natural Resources (DNR) through January 2038 for the adjacent tidelands where
23 the Project's docks are to be located. The 190-acre Project site has been separated from the
24 Applicant's remaining leased area through boundary line adjustment. The remaining land within
25 the Applicant's leased area is intended for other uses, including the continued operation of a bulk
product terminal at the existing Dock 1.

A more complete description of the Project can be found in the County Staff Report (the
"Staff Report") at pages 4-13, incorporated herein by reference.

1 Coal would be delivered to the Project site by rail. The Project anticipates receipt of coal
2 from two separate sources:

3 1. The primary source of coal would be the Powder River Basin in Montana and
4 Wyoming. Coal coming from this source would be delivered by dedicated "unit trains"
5 operating on BNSF lines. The coal trains would move west to Huntley, Montana then across
6 northern Idaho to Sandpoint, Idaho. From Sandpoint, trains would cross into Washington State
7 and travel through Spokane. Trains would then travel south to Pasco and then west along the
8 Washington side of the Columbia Gorge in close proximity to the Columbia River. The trains
9 would then travel through Vancouver and turn north, following the Interstate 5 corridor and the
10 Columbia River until reaching the Longview/Kelso area. Once unloaded at the Project site the
11 empty trains would continue north on the main BNSF line paralleling Interstate 5 and through
12 Olympia, Lacey, Tacoma and Auburn before turning east and travelling over the Cascade
13 Mountains at Stampede Pass. Return trains would then turn south through Yakima and return to
14 Pasco. From Pasco empty trains would follow the same route as loaded trains and travel through
15 Spokane and back to the Powder River Basin.

17 2. The secondary source of coal would come from the Uinta Basin in Utah and
18 Colorado as well as from the Powder River Basin. Coal from this area would be delivered on
19 Union Pacific (UP) unit trains. These trains would travel through Pocatello and Boise, Idaho and
20 then along the Oregon side of the Columbia Gorge to Portland. North of Portland UP trains
21 would operate on BNSF tracks, crossing the Columbia River into Vancouver and continuing on
22 the same main BNSF track used by the BNSF coal trains. Empty UP trains would return on the
23 same route as they came.
24
25

1 Coal from either source would be delivered by dedicated trains or "unit" trains consisting
2 of 4 locomotives and 125 coal cars with an approximate length of 1 1/3 miles. The Project
3 would result in 8 loaded unit trains and 8 empty unit trains per day, or 16 total unit trains per day.
4 Coal would be delivered 365 days per year resulting in over 23,000 locomotive trips annually (4
5 locomotives x 16 trains x 365 = 23,360 annual locomotive trips).

6 All coal trains would arrive at Longview/Kelso at the "Longview Junction Yard". Trains
7 would be diverted off of the BNSF main line and onto the "BNSF Spur". The BNSF Spur travels
8 across the Cowlitz River and into the Longview industrial area. Coal trains would then continue
9 on a second spur known as the "Reynolds Lead" through Longview until reaching the Project
10 site.
11

12 Coal would be unloaded and sent by conveyor to large storage pads. Additional
13 conveyance systems would convey the coal to the docks for loading onto ocean-going vessels for
14 shipment to Pacific markets. Coal would be loaded onto vessels in the "Handymax" and
15 "Panamax" sizes. These are deep draft vessels having capacities of up to 100,000 tons. The
16 Project anticipates loading 70 vessels per month, or 840 vessels per year. This equates to 1,680
17 vessel "transits" of the Columbia River annually.

18 Construction of the Project would result in the permanent loss of 24.10 acres of wetlands.
19 In addition, construction and operations would have shoreline, overwater, underwater, and
20 dredging impacts affecting aquatic resources. To mitigate these impacts, the Applicant
21 submitted a Conceptual Mitigation Plan (the "Mitigation Plan") which evaluates fish and wildlife
22 habitat impacts, discusses onsite construction impacts and minimization measures, and proposes
23 fish and wildlife habitat mitigation. The Mitigation Plan proposes to create an off-channel
24
25

1 slough feature as aquatic mitigation and also proposes off-site wetlands mitigation. The FEIS
2 concludes that as a result of the Mitigation Plan, there will be no adverse impacts to wetlands.
3 On July 19, 2017, the County approved a Critical Areas Permit No. 17-06-3166 requiring
4 compliance with the Mitigation Plan. The Critical Areas Permit was not appealed.

5 Acting as co-lead agencies, on April 29, 2016, the County and Ecology published a Draft
6 Environmental Impact Statement (DEIS) for review and comment. Several hundred thousand
7 comments were received. On April 28, 2017, the co-lead agencies issued their Final
8 Environmental Impact Statement (FEIS). The FEIS has not been appealed by any party and its
9 findings and conclusions come to the Hearing Examiner unchallenged. The FEIS concludes that
10 the Project will have ten unavoidable, significant adverse impacts: to noise; increased risk of
11 cancer; traffic; community resources; cultural resources; rail capacity; rail safety; vessel
12 transportation; tribal resources; and Greenhouse Gas emissions.
13

14 There are several ongoing, related matters occurring with respect to the Project:

15 • On January 5, 2017, the Washington Department of Natural Resources (DNR)
16 denied the Applicant's request to sublease the aquatic lands under lease to Northwest Alloys.
17 This denial was appealed by the Applicant to the Cowlitz County Superior Court. On October
18 27, 2017, the Cowlitz County Superior Court orally ruled that DNR's denial was arbitrary and
19 capricious, but the court did not find that the Applicant was entitled to a sublease. Rather, the
20 court directed the parties to engage in further negotiations to determine if a sublease could be
21 agreed upon.
22

23 • On July 19, 2017, the County issued its Critical Areas Permit approving the
24 Mitigation Plan. The permit was not appealed.
25

1 Washington Physicians for Social Responsibility and Western Organization of Resource and
2 Councils (collectively "Riverkeeper"). These interested parties were represented by legal
3 counsel, allowed to make opening and closing presentations and given the opportunity to cross-
4 examine other parties' expert witnesses.

5 Also prior to the public hearing I undertook an independent site examination. This
6 included an examination of the site, the surrounding properties and the surrounding area.

7
8 The public hearing commenced at 9:00 a.m. on November 2, 2017 at the Cowlitz County
9 Expo Center in Longview. The public hearing continued for three days with testimony ending at
10 noon on Monday, November 6. The hearing was held open to the end of Monday, November 6,
11 to allow for additional written public comment. The hearing formally concluded at 5:00 p.m. on
12 Monday, November 6.

13 In advance of the public hearing a Pretrial Order was entered to assist in hearing
14 procedures. The Order established an identification system for exhibits including an exhibit
15 prefix to identify the presenting party. County exhibits bear the prefix "C" and begin with
16 exhibit C-1. The Applicant's exhibits bear the prefix "A" and begin with exhibit A-26.
17 Riverkeeper exhibits bear the prefix "I" and begin with exhibit I-101. Exhibits presented by the
18 public bear the prefix "P" and begin with exhibit P-126. A complete list of all exhibits is
19 attached to this decision.
20

21 Some of the core documents include:

22	C-1	County Staff Report to the Hearing Examiner.
23	C-7	Final EIS.
24	A-64	Applicant's Revised Comments to Proposed Permit Conditions.

1 I-102 Ecology Decision denying Section 401 Clean Water Certification.

2 I-104 DNR Memorandum of Decision.

3 These core documents may be referred to by their title rather than their exhibit number
4 (for example, the "Staff Report", the "FEIS", the "Applicant's Response", the "Ecology Decision"
5 and the "Memorandum of Decision").

6 Cowlitz County appears through its Director of Community Development, Elaine
7 Placido, and its Senior Environmental Planner, Ron Melin. The County is represented by
8 Douglas Jensen of the Cowlitz County Prosecuting Attorney's Office. The Applicant is
9 represented by Craig Trueblood and Jon Sitkin. Riverkeeper is represented by Kristen Boyles.
10 Several hundred interested individuals were present at various times during the three-day
11 hearing.

12 The public hearing commenced with the testimony of Elaine Placido from County Staff.
13 Ms. Placido explained that the purpose of the hearing was to consider shoreline permits for Stage
14 1 of the Project, and she provided an overview of the Project's planned improvements. Ms.
15 Placido noted that the Project site has a zoning designation of MH (Heavy Industrial), and that
16 the Project is an allowed use in this zoning district. She added that the Project is vested under
17 the County's 1976 Comprehensive Plan (a new Plan has recently been approved) and that the
18 County finds the Project to be consistent with the applicable Comprehensive Plan. Ms. Placido
19 also confirmed that the Project is vested under the County's 1977 Shoreline Master Program
20 (SMP). County Staff finds the Project to be consistent with the SMP and that it satisfies all of
21 the requirements of the SMP and the Shoreline Management Act (SMA). County Staff
22 recommends approval of the Project subject to the 36 conditions found at the conclusion of the
23 Staff Report.

1 Following Ms. Placido's testimony the Applicant's counsel, Craig Trueblood, made a
2 brief opening presentation. Mr. Trueblood then presented the testimony of the Applicant's
3 representatives, Kristen Gaines and Trevor Simmons; the Applicant's Environmental Consultant,
4 Glenn Grette; a representative from BNSF, Dava Kaitala; the Director of the Cowlitz County
5 Economic Development Council, Ted Sprague; and Mike Bridge, representative for the
6 Longview/Kelso Building Trades Associations. Most of these witnesses testified both orally and
7 by written testimony presented in advance of the public hearing.
8

9 At the conclusion of the Applicant's presentation the public testimony commenced.
10 Kristen Boyles, counsel for Riverkeeper, was allowed to make an opening presentation.
11 Pursuant to the Pretrial Order tribal representatives were given the first opportunity to testify,
12 followed by public officials and then members of the general public. Representatives of the
13 Cowlitz Tribe were not available on Thursday and were instead allowed to give testimony on
14 Friday and again on Monday. A few public officials testified followed by testimony from
15 members of the general public during the remainder of Wednesday. Those giving testimony
16 from prepared written statements were encouraged to have their written statements identified as
17 exhibits. During the course of the day written comments, both from those giving testimony and
18 others, were submitted and identified as public exhibits.
19

20 The hearing resumed at 9:00 a.m. on Friday, November 3, with continued public
21 testimony. Three representatives from the Cowlitz Tribe were allowed to testify. Public
22 testimony continued until mid-afternoon by which time all members of the public asking to
23 testify had been given the opportunity.
24
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1 The hearing resumed on Monday, November 6 at 9:00 a.m. to hear from the Applicant's
2 responsive witnesses. Chip Halpert and Robert Scofield testified on air quality issues; David
3 Hauri testified on coal dust related issues; Peter Bennett, the Applicant's Vice President of
4 Business Development for Bulk Products, testified on business operations; Julie Carey and Mary
5 Hess testified on issues relating to air quality and Greenhouse Gas emissions; and the Applicant's
6 Representative, Kristen Gaines, responded to various questions asked by the Hearing Examiner
7 during the course of the hearing. These responses were reduced to writing and submitted as
8 Exhibit A-65. Ms. Gaines also testified regarding the Applicant's revised position on proposed
9 conditions of Project approval. This testimony was also reduced to writing and submitted as
10 Exhibit A-64. The Applicant also submitted the supplemental testimony of Dava Kaitala,
11 representative for BNSF (Exhibit A-66). The County had no additional witnesses and all
12 testimony was completed by noon on Monday, November 6 but members of the public were
13 given until 5:00 p.m. to present additional written comment.

14
15 At the conclusion of testimony, the County was asked if it had any changes or additions
16 to its proposed conditions for Project approval. The County replied that it is standing on the
17 conditions contained in the Staff Report. The Applicant's revised response to these proposed
18 conditions is found in Exhibit A-64, with additional comment found in Exhibit A-65.

19
20 None of the parties requested an opportunity to submit written post-hearing comments or
21 briefing. The hearing was therefore deemed closed as of 5:00 p.m. on Monday, November 6.

22 During the course of the hearing, there were no proposed changes to the Project. The
23 Applicant did, however, submit new information on the issue of "wake stranding" of fish,
24 including a proposed Mitigation Plan which has recently been presented to the National Marine
25

1 Fisheries Services (NMFS) (Exhibit A-60). These and other materials relating to wake stranding
2 will be discussed more fully in the Findings of Fact.

3 Based upon the Staff Report, the FEIS and related materials, the testimony and exhibits
4 presented by the Applicant and all other testimony, the Hearing Examiner makes the following:

5 **FINDINGS OF FACT**

6 **1. General Findings of Fact.**

7 1.1 Any Findings of Fact contained in the foregoing Background Section are
8 hereby incorporated as the Hearing Examiner's Findings of Fact.

9 **FINDINGS RELATED TO SEPA**

10 **2. Findings of Fact Relating to Noise Impacts.**

11 2.1 The Project's noise impacts are discussed in Section 5.5 of the FEIS. As
12 noted in the Background Section, loaded coal trains arriving at the Longview Junction Yard in
13 Kelso would transfer onto the BNSF spur, taking them across the Cowlitz River and into the
14 Longview industrial area. Coal trains would then transfer onto the Reynolds Lead which runs
15 through the Longview industrial area until reaching the Project site. Empty trains would reverse
16 this route back along the Reynolds Lead and BNSF spur to the BNSF mainline at the Longview
17 Junction Yard.

18 2.2 A map depicting the location of the BNSF spur and the Reynolds Lead is
19 found at Figure 2-2 of the FEIS.

20 2.3 The Reynolds Lead has four public at-grade crossings. These are located
21 at Third Avenue, California Way, Oregon Way and Industrial Way in Longview and identified in
22 Figure 2-2 in the FEIS.
23
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1 2.4 The Project would result in 16 unit trains (8 loaded, 8 empty) traveling
2 through the public at-grade crossings along the Reynolds Lead.

3 2.5 Per Federal Railroad Administration (FRA) regulations, Project-related
4 trains would be required to sound their horns for public safety at the public at-grade crossings
5 along the Reynolds Lead.

6 2.6 The FEIS finds that the required use of train horns at public at-grade
7 crossings along the Reynolds Lead will expose 60 residences to a severe noise impact and an
8 additional 229 residences to a moderate noise impact.

9 2.7 Proposed transportation improvements would eliminate the public at-grade
10 crossings at Oregon Way and Industrial Way. If constructed, these improvements will eliminate
11 the noise impacts at these locations but similar improvements are not currently planned at the
12 public at-grade crossings at Third Avenue or California Way.

13 2.8 If the public at-grade crossings at Industrial Way and Oregon Way are
14 eliminated the number of residences suffering severe or moderate noise impacts will be reduced
15 but 10 residences will continue to be exposed to severe noise impact and 42 residences will
16 continue to be exposed to moderate noise impact due to the use of train horns at the Third
17 Avenue and California Way crossings.

18 2.9 The FEIS finds that the implementation of Quiet Zones at these at-grade
19 crossings would eliminate the Project's noise impacts. But without the implementation of Quiet
20 Zones the resulting train noise would be an unavoidable and significant adverse environmental
21 impact.
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1 2.10 A Quiet Zone is a public at-grade crossing where additional safety
2 precautions have been constructed, reducing the federal requirements for trains to sound their
3 horns when approaching the crossing. Quiet Zones are subject to Federal Railroad
4 Administration approval.

5 2.11 The County does not propose the installation of necessary Quiet Zones as
6 a condition of Project approval. The County proposes the following two conditions instead:
7

8 "**Condition 25.** To address moderate and severe noise impacts along the
9 Reynolds Lead due to rail traffic, (e.g. horn blowing) before beginning full
10 operations, the Applicant shall coordinate with the Director of Cowlitz
11 County Building and Planning, the City of Longview, Longview
12 Switching Company, and the affected community to inform interested
13 parties on the Federal Railroad Administration process to implement a
14 Quiet Zone that will include the Third Avenue and California Avenue
15 crossings. Public outreach on the Quiet Zone process must include low
16 income and minority populations. The Applicant shall assist interested
17 parties in the preparation and submission of a Quiet Zone application to
18 the Federal Railroad Administration. If the Quiet Zone is approval, the
19 Applicant shall fund the Quiet Zone improvements, which could include
20 electronics, barricades and crossing gates.

21 "**Condition 26.** If a Quiet Zone for the Reynolds Lead is not
22 implemented, the Applicant shall fund the Sound Reduction Study to
23 identify ways to mitigate the moderate and severe impacts from train noise
24 from proposed action-related trains along the Reynolds Lead. The study
25 methods shall be discussed with the Director of Cowlitz County Building
and Planning and the Washington State Department of Health for
approval."

26 2.12 With minor adjustment the Applicant concurs with the County's proposed
27 conditions to address train noise impacts. (Exhibit A-64) Further explanation of the Applicant's
28 position is found in Exhibit A-65.

29 3. **Findings Relating to Air Quality Impacts Including Increased Risk of
30 Cancer.**

31 3.1 The FEIS analyzes the Project's air quality impacts in Section 5.6.

1 3.2 The FEIS finds that the Project will result in increased inhalation cancer
2 risk related to diesel particulate matter emissions from all operation sources (terminal, rail and
3 vessel) in the Project area, the Kelso/Longview area, and County-wide. The FEIS finds:

4 • Near the Project site there is an increased risk of ten cancers per million
5 extending across the Columbia River approximately 1.3 miles southwest of the Project area and
6 approximately .1 miles northeast of the Project area, and across Industrial Way near the
7 northwest boundary of the Project area.

8 • In the Kelso/Longview area there is an increased risk of ten cancers per
9 million for most of Longview south of Ocean Beach Highway, as well as a portion of Kelso
10 along the I-5 corridor. There is an increased risk of thirty cancers per million along the Reynolds
11 Lead a width of 3,000 feet and extending to the Highlands neighborhood. There is an increased
12 risk of fifty cancers per million along the Reynolds Lead a width of 1,000 feet bordering the
13 Highlands neighborhood.

14 • In Cowlitz County there is an increased risk of ten cancers per million
15 along the BNSF mainline a width of 2 miles throughout all of the County. There is an increased
16 risk of thirty cancers per million along the BNSF mainline a width of 1/2 mile through the entire
17 County.
18

19 3.3 The FEIS concludes that these increased risks of cancer are an
20 unavoidable and significant adverse impact.
21

22 3.4 The FEIS finds that the increased risk of cancer could be mitigated by use
23 of the newest generation of low-emission train locomotives, referred to as "Tier 4" locomotives,
24 first introduced in 2015. Unless Tier 4 locomotives are utilized the increased risk of cancer
25 cannot be mitigated.

1 3.5 The County does not propose any condition to mitigate the increased risk
2 of cancer.

3 3.6 The BNSF representative, Dava Kaitala, testified that 40% of its current
4 locomotive fleet has been purchased within the last ten years.

5 3.7 Ms. Kaitala also testified that perhaps 8% of BNSF's current locomotive
6 fleet consists of Tier 4 locomotives, or older locomotives retrofitted to Tier 4 emission standards.

7 3.8 By supplemental written testimony Dava Kaitala testifies that of BNSF's
8 current fleet of 8,640 locomotives, 275, or 3.1%, are Tier 4 compliant and an additional 275, or
9 an additional 3.1%, are "Tier 4 credit" locomotives. In other words, the current BNSF
10 locomotive fleet includes 550 Tier 4 or Tier 4 credit locomotives, or 6.2% of the fleet. (Exhibit
11 A-66)
12

13 3.9 BNSF declares that "a condition requiring a use of a particular type of
14 locomotive (Tier 4) to serve this Project would be an impermissible local regulation of freight
15 rail transportation, and would be preempted by federal law." (Exhibit A-66)

16 3.10 BNSF anticipates that the replacement or retrofitting of its locomotive
17 fleet to Tier 4 status will be achieved by the year 2040. (Testimony of Kaitala)

18 **4. Findings Relating to Vehicle Transportation.**

19 4.1 The FEIS discusses the Project's traffic impacts in Section 5.3.

20 4.2 Under current track conditions along the Reynolds Lead, a Project-related
21 train will take between 8 and 10 minutes to pass through each of the four public at-grade
22 crossings. Collectively, the 16 daily trains would increase the total gate down time along the
23 Reynolds Lead by over 130 minutes at each crossing during an average day.
24
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1 4.3 At current train speeds, and assuming one Project train traveling along the
2 Reynolds Lead during the peak traffic hour, the Project would result in the Level of Service
3 (LOS) at the four public at-grade crossings along the Reynolds Lead, as well as at two private at-
4 grade crossings, to fall to unacceptable levels of either "E" or "F".

5 4.4 Similarly, and assuming one Project train traveling along the Reynolds
6 Lead during the peak traffic hour, blocked traffic would result in unacceptable queuing lengths at
7 several of these at-grade crossings.

8 4.5 Because vehicle delays will increase, emergency vehicle delays will also
9 increase. During a 24-hour period, Project-related trains would increase the probability of
10 emergency response vehicles being delayed by up to 10% at crossings along the Reynolds Lead.

11 4.6 Proposed improvements at the Industrial Way and Oregon Way crossings,
12 previously referred to in Finding of Fact 2.7, would eliminate LOS deficiencies, queuing
13 problems and emergency vehicle delays at these intersections but would not mitigate traffic
14 impacts at the California Avenue and Third Avenue rail crossings.

15 4.7 The FEIS concludes that these traffic impacts are an unavoidable and
16 significant adverse impact.

17 4.8 The FEIS further concludes that these significant traffic impacts can be
18 mitigated if all necessary track improvements to the Reynolds Lead are implemented, allowing
19 an increase in train speed from 10 to 25 miles per hour. Increased train speed would
20 significantly decrease the length of gate down time at each crossing. The only rail crossing to
21 still have an unacceptable LOS would be a private crossing at 38th Avenue. All of the public at-
22 grade crossings along the Reynolds Lead would have LOS of "D" or better and all queuing
23 lengths would be acceptable.
24
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1 4.9 The FEIS concludes that the Project's traffic impacts cannot be reasonably
2 mitigated unless all necessary track improvements to the Reynolds Lead are made prior to
3 Project operations.

4 4.10 The Staff Report does not require all track improvements to be made as a
5 condition of Project approval. Instead, County Staff proposes the following condition:

6 **"Condition 19.** To address vehicle delay impacts at grade crossings at
7 the Reynolds Lead and BNSF spur, the Applicant shall notify the Director
8 of Cowlitz County Building and Planning, City of Longview, Cowlitz Fire
9 District, City of Rainier (Oregon), Port of Longview, and Cowlitz-
10 Wahkiakum Counsel of Governments before each identified operational
11 stage (Stage 1A, Stage 1B, and Stage 2) that will change average daily rail
12 traffic on the Reynolds Lead and BNSF spur. The Applicant shall prepare
13 a memorandum to document the changes to average daily rail traffic. The
14 memorandum must be submitted to these agencies at least six months
15 before the change in average daily rail traffic."

16 4.11 The Applicant supports the County's proposed condition with minor
17 revision. (Exhibit A-64)

18 4.12 In its additional response (Exhibit A-65), the Applicant adds that it would
19 not object to a requirement that all rail improvements be made prior to construction of Stage 2.

20 **5. Findings Relating to Social and Community Resources.**

21 5.1 The FEIS, in Section 3.2, finds that there is a disproportionate percentage
22 of minority and low income populations living near the Reynolds Lead.

23 5.2 The FEIS concludes that the Project's noise impacts (Findings 2.1 through
24 2.12) will have a disproportionately high and adverse effect on minority and low
25 income populations. Implementation of Quiet Zones would eliminate this disproportionate
impact. Without implementation of Quiet Zones, the Project's disproportionate adverse effect on
minority and low income populations will be unavoidable and significant.

1 5.3 The FEIS concludes that the Project's traffic impacts (Findings 4.1
2 through 4.12) will have a disproportionately adverse effect on minority and low income
3 populations. Without necessary track improvements to the Reynolds Lead, the Project's
4 disproportionate traffic impacts on minority and low income populations will be unavoidable and
5 significant.

6 5.3 The increased risk of cancer resulting from the Project (Findings 3.1
7 through 3.10) will have a disproportionately adverse effect on minority and low income
8 populations. Use of Tier 4 locomotives would reduce but not eliminate this disproportionate
9 adverse effect, but otherwise this impact is unavoidable and significant.

11 **6. Findings Relating to Cultural Resources.**

12 6.1 The Project's impacts on cultural resources is discussed in Section 3.4 of
13 the FEIS.

14 6.2 The Project site was formerly used by the Reynolds Metal Company as an
15 aluminum plant. The former Reynolds facility was evaluated as a Historic District and
16 documented on a National Register of Historic Places (NRHP) nomination form as part of the
17 review undertaken by the Corps of Engineers. The former facility is officially referred to as the
18 "Reynolds Metals Reduction Plant Historic District" (the "Reynolds Historic District") and was
19 determined eligible for listing in the NRHP as a Historic District.

20 6.3 The Reynolds Historic District consists of 53 separate resources including
21 33 buildings, 12 structures and 8 landscape features. Of these 53 identified resources, 39 were
22 determined to contribute to the Reynolds Historic District's significance.
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1 6.4 Construction of the Project would demolish 30 of the 39 identified
2 resources contributing to its historical significance. The destruction of these resources would
3 diminish the importance of the remaining resources and the Reynolds Historic District would no
4 longer be eligible for listing in the NRHP.

5 6.5 The FEIS notes that impacts to the Reynolds Historic District are
6 attempting to be resolved through a "Memorandum of Agreement" currently being negotiated
7 among the Corps of Engineers, Cowlitz County, the Department of Archeology and Historical
8 Preservation (DAHP), the City of Longview, BPA, the National Park Service, potentially
9 affected Native American Tribes, and the Applicant.

10 6.6 The FEIS concludes that demolition of the Reynolds Historic District is an
11 unavoidable and significant adverse environmental impact, but that an approved Memorandum
12 of Agreement may resolve this impact.

13 6.7 The Staff Report does not propose any conditions of approval relating to
14 the Reynolds Historic District.

15 6.8 The Applicant's response (Exhibit A-65) states:

16 "The Memorandum of Agreement process has been ongoing since 2014.
17 Multiple drafts have been circulated to the parties and stipulations have
18 been agreed to. The document is in its final draft and is awaiting
19 finalization and signatures by the parties."

20 6.9 The Applicant objects to the imposition of a condition that would require formal
21 approval of a Memorandum of Agreement as a condition of permit approval. The Applicant
22 adds that approval of a Memorandum of Agreement will be required for federal permit approval
23 and it is therefore unnecessary to impose it as a condition for this permit. (Testimony of Gaines)

1 7. **Findings Relating to Statewide Rail Transportation.**

2 7.1 The FEIS analyzes the Project's impact on projected BNSF rail capacity in
3 the State of Washington in Section 5.1.

4 7.2 In Table 5.1-5 the FEIS examines the various segments of BNSF mainline;
5 their length; their available number of tracks (1 or 2); their projected capacity in 2028; and the
6 impact of the Project on their projected capacity.

7 7.3 The FEIS finds that the BNSF segment from the Idaho border to Spokane,
8 having a length of 18.6 miles and 2 current tracks, has a projected capacity of 106 trains per day
9 in 2028. With inclusion of the Project's trains, this segment of the BNSF mainline is projected to
10 be 46 trains over its daily capacity by 2028.

11 7.4 The FEIS finds that the BNSF segment between Spokane and Pasco,
12 having a length of 145.5 miles and 1 current track, has a projected capacity of 56 trains per day
13 in 2028. With inclusion of the Project's trains, this segment of the BNSF mainline is projected to
14 be 34 trains over its daily capacity by 2028.

15 7.5 The FEIS finds that the BNSF segment from Pasco to Vancouver, having
16 a length of 221.4 miles and 1 current track, has a projected capacity of 48 trains per day in 2028.
17 With inclusion of the Project's trains, this segment of the BNSF mainline is projected to be 15
18 trains over its daily capacity by 2028.

19 7.6 The FEIS finds that the BNSF segments from Vancouver to Longview,
20 and from Longview to Auburn, are projected to be at capacity with the inclusion of the Project's
21 trains.
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1 7.7 The FEIS anticipates that BNSF will make necessary investments or
2 operating changes to accommodate rail traffic growth, but it is unclear when these necessary
3 improvements can be taken or permitted. If all necessary improvements to increase capacity are
4 not made the Project will contribute to these capacity exceedances and will result in an
5 unavoidable and significant adverse impact on rail transportation.

6 7.8 The Staff Report does not include any condition that would require Project
7 trains to operate only on segments of BNSF line having adequate capacity. Instead, the Staff
8 Report proposes the following condition:
9

10 **"Condition 18.** To allow for adequate planning to address proposed
11 action-related trains contributing to segments exceeding capacity on
12 mainline routes in Washington State, the Applicant shall notify BNSF and
13 UP before each identified operational stage (Stage 1A, Stage 1B, and
14 Stage 2) begins that will change average daily rail traffic on mainline
15 routes in Washington State. The Applicant shall prepare a report that
16 documents the notification of BNSF and UP and tracks changes to average
17 daily rail traffic. The report must be submitted to BNSF, UP, Washington
18 State Department of Transportation, Utilities Transportation Commission,
19 and the Director of Cowlitz County Building and Planning at least 6
20 months before the change in average daily rail traffic."

21 7.9 The Applicant concurs with the County's proposed condition with minor
22 revisions. (Exhibit A-64)

23 7.10 The Applicant's Response (A-65) adds:

24 "Millennium does not control the railroad and how they manage
25 capacity. . . . Neither the County nor the Applicant would be able to
determine whether the rail lines were at capacity. Dava Kaitala testified
that the railroad continuously makes improvements to maintain or expand
capacity."

 7.11 In her supplemental written testimony the BNSF representative, Dava
Kaitala, adds:

1 "Recent investments in infrastructure in the Pacific Northwest and system
2 wide . . . demonstrate BNSF's continuing commitment to making needed
3 capacity upgrades. As a result, it is not necessary to condition coal
4 deliveries to the Project or lines being upgraded to a capacity set by the
5 State of Washington and Cowlitz County." (Exhibit A-66 at Page 9)

6 **8. Findings Related to Rail Safety.**

7 8.1 The FEIS discusses the Project's impacts on rail safety in Section 5.2.

8 8.2 Assuming that track improvements are made to the BNSF spur and
9 Reynolds Lead (Finding 4.8), the Project is likely to result in an accident on this rail segment
10 involving a fully loaded unit train once every 4 years, and an accident involving an empty train
11 once every 4 years. Collectively, with all track improvements having been made there is a 50%
12 chance of a Project-related train accident on the BNSF spur or Reynolds Lead each year.

13 8.3 If track improvements are not made the FEIS predicts that the number of
14 Project-related train accidents on the BNSF spur or Reynolds Lead would be approximately 1.5
15 to 3 times higher, or up to 1.5 accidents per year.

16 8.4 The FEIS predicts that the addition of Project trains would increase
17 statewide rail accidents by 11.38 accidents per year. This is a 22% increase in rail accidents.

18 8.5 The FEIS finds that the increase in rail line accidents is, at least in part, the
19 product of insufficient rail line capacity as discussed in the previous section of Findings.

20 8.6 The FEIS concludes that the Project would increase the potential for train
21 accidents in both Cowlitz County and across the State of Washington. The rail line operators
22 could improve rail safety through investments or operational changes but it is unknown when or
23 if these actions will be taken or permitted. Therefore, the FEIS concludes that Project-related
24 trains could result in an unavoidable and significant adverse impact on rail safety.

1 8.7 The responses of the County, the Applicant and BNSF are the same as
2 their responses to the rail capacity issued discussed above.

3 9. **Findings Relating to Vessel Transportation.**

4 9.1 The FEIS discusses the Project's impacts on vessel transportation in
5 Section 5.4.

6 9.2 At completion the Project is expected to load 70 oceangoing vessels per
7 month, or 840 vessels per year. Each vessel makes 2 "transits" of the Columbia River, resulting
8 in 1,680 total transits annually.

9 9.3 80% of the Project vessels are expected to be in the "Panamax" class,
10 having a capacity of up to 100,000 tons and with a draft of 43 feet. The remaining 20% are
11 expected to be of the "Handymax" class having smaller capacities and somewhat shallower
12 drafts.

13 9.4 Currently there are approximately 3,800 annual transits of the Lower
14 Columbia by commercial vessels unrelated to the Project. These are commercial vessels going
15 to and coming from upriver ports in Portland, Vancouver and elsewhere.

16 9.5 By 2028 the number of transits by unrelated commercial vessels is
17 expected to increase to 4,440. Addition of the Project's vessels would increase the total number
18 of annual transits of the Lower Columbia to 6,120.

19 9.6 The Project would therefore result in a 38% increase in 2028 vessel traffic.

20 9.7 An increase in vessel traffic increases the risk of vessel incidents including
21 collisions, groundings, fire, explosions and other emergencies.
22
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1 9.8 The FEIS anticipates that the Project will result in an increase of 2.8 vessel
2 incidents per year along the Lower Columbia.

3 9.9 The severity of a vessel incident can vary greatly from no damage to total
4 loss, and not all incidences are likely to result in notable damage.

5 9.10 The FEIS finds that if a Project-related vessel incident occurs the impacts
6 could be significant depending on the nature and location of the incident, the weather conditions
7 at the time and the discharge of oil.

8 9.11 The FEIS concludes that although the likelihood of a serious Project-
9 related vessel incident is low, there are no mitigation measures that could completely eliminate
10 the possibility of an incident or the resulting impacts.

11 9.12 The Staff Report does not propose any conditions to mitigate the impacts
12 of a significant vessel incident.

13 9.13 The Hearing Examiner proposed a condition of Project approval similar to
14 one imposed recently in *In re NWIW*, Cowlitz County Hearing No. SL 16-0975. That project is
15 located a few miles upriver near Kalama and involves the production and shipping of methanol
16 by vessel. Its shoreline permit contains the following condition:

17
18 "20. **Methanol Spill Mitigation**. In the event of a spill of methanol
19 from the Project site or from a methanol cargo vessel, resulting in
20 demonstrable impact to the natural shoreline and the resources and
21 ecology of the shoreline, as a condition of continued permit approval the
22 Permittees shall promptly prepare and undertake full mitigation of all
23 impacts to the natural shoreline and resources and ecology of the shoreline
24 as required by the Department of Ecology, the Environmental Protection
25 Agency or any other agency with jurisdiction pursuant to applicable state
or federal law. In the event of any uncertainty as to the sufficiency of
mitigation or its implementation the issue shall be returned to the Hearing
Examiner."

1 9.14 The Applicant objects to the imposition of a similar condition on this
2 Project. The Applicant argues that the vessels used for transporting coal will not belong to the
3 Applicant and it will not have control over them. The Applicant therefore objects to being held
4 responsible for the actions of third parties. (Testimony of Gaines) Additional objections to this
5 proposed condition are found in the Applicant's Responses, Exhibit A-65 in Section 4.

6 10. **Findings Relating to Tribal Resources.**

7 10.1 The FEIS discusses impacts on tribal resources in Section 3.5.

8 10.2 A section of the Columbia River located upstream from the Project site,
9 commonly referred to as "Zone 6", is a critical tribal commercial, subsistence and ceremonial
10 fishing area for a number of American Indian Tribes. Zone 6 consists of that portion of the
11 Columbia River approximately bounded by Bonneville Dam to the west and by McNary Dam to
12 the east, a distance of 147 miles. The location of Zone 6 is identified on Figure 3.5-1 in the
13 FEIS.

14 10.3 Four tribes or confederation of tribes: the Confederated Tribes and Bands
15 of the Yakima Nation, the Confederated Tribes of the Umatilla Indian Reservation, the
16 Confederated Tribes of Warm Springs and the Nez Perce Tribe, have reserved rights to fish in
17 the Columbia River and its tributaries. Collectively these tribes and confederations form the
18 "Columbia River Inter-Tribal Fish Commission" (CRITFC). Member tribes of CRITFC rely on
19 Zone 6 for fishing and are referred to as "Treaty Tribal Fishers".
20

21 10.4 Chinook Salmon is the most abundant species caught by Treaty Tribal
22 Fishers.
23

1 10.5 The Department of Interior, through the Bureau of Indian Affairs, has
2 established 31 fishing access sites on the Columbia River within Zone 6 for the exclusive use of
3 Treaty Tribal Fishers. The sites are managed by CRITFC for the benefit of member tribes. The
4 sites were set aside by the U.S. Congress to provide fishing access to tribal fishers whose
5 traditional fishing grounds were inundated by the Columbia River dams. These sites are deemed
6 to be culturally significant in that they are at or near traditional villages or fishing locations. Of
7 these 31 sites, 20 are located on the Washington side of the Columbia River.
8

9 10.6 Treaty Tribal Fishers gain access to these sites either by boat or from the
10 highway. Highway access often requires crossing the BNSF tracks at-grade. Treaty Tribal
11 Fishers may set up residence at the access sites in May and remain until October. At times
12 during this period there may be as many as 80 tribal members camping at any one of the many
13 access sites.

14 10.7 In addition to these managed access sites, Treaty Tribal Fishers also access
15 the river at many other unimproved points along Zone 6.

16 10.8 Project-related BNSF trains would travel through Zone 6, generally
17 between the highway and the tribal fishing access areas.

18 10.9 The FEIS finds that Project-related trains could result in delays to tribal
19 fisher's access to traditional fishing sites as well as delays to delivery of fish to buyers.
20

21 10.10 In addition, as Treaty Tribal Fishers access the Columbia River at multiple
22 unmapped locations using unimproved, at-grade crossings, Project-related trains could impair
23 Treaty Tribal Fishers' ability to access these traditional fishing locations, especially during
24 summer months.
25

1 10.11 The FEIS finds that Project's new docks, dredging, etc., would cause
2 physical and behavioral responses in fish that would result in injury, and would affect aquatic
3 habitat. Affected fish could include those heading upstream to Zone 6.

4 10.12 The FEIS finds that Project vessels could result in wake stranding and
5 other impacts affecting fish, including those heading upstream to Zone 6, and could have the
6 greatest impact on Chinook Salmon.

7 10.13 The FEIS finds that these construction and operational impacts could
8 reduce the number of fish surviving to adulthood and returning to Zone 6, and could affect the
9 number of fish available for harvest by Native American Tribes.

10 10.14 The FEIS also finds that the Project would result in fugitive coal dust
11 particles being generated by rail transport. Maximum coal dust concentrations would occur
12 within approximately 100 feet from the rail line.

13 10.15 Coal dust particles generated by Project operations as well as Project-
14 related trains would enter into the aquatic environment. This impact is unavoidable but would
15 not be expected to affect fish behavior or fish survival.

16 10.16 To mitigate these various impacts a number of proposed mitigation
17 measures are imposed on the Project and are included in the County's conditions of Project
18 approval.

19 10.17 Despite the imposition of these mitigating measures, the FEIS concludes
20 that construction and operation of the Project could result in indirect impacts on tribal resources,
21 causing physical or behavioral responses to fish and affecting aquatic habitat. These impacts
22 could reduce the number of fish surviving to adulthood and returning to Zone 6, which could
23 affect the number of fish available for harvest by Treaty Tribal Fishers.
24
25

1 10.18 The FEIS also concludes that Project-related trains would travel through
2 areas adjacent to and within the usual and accustomed fishing areas of Treaty Tribal Fishers, and
3 could restrict access to tribal fishing areas, although various factors make the scope of this
4 impact difficult to quantify.

5 10.19 Additional tribal impacts unrelated to the FEIS are addressed in Section
6 20.

7
8 **11. Findings Relating to Net Greenhouse Gas (GHG) Emissions.**

9 11.1 The FEIS analyzes the Project's Greenhouse Net Gas (GHG) emissions in
10 Section 5.8.

11 11.2 The FEIS analyzes the Project's net GHG emissions under four scenarios:
12 (1) the 2015 U.S. and International Energy Policy Scenario; (2) the No Clean Power Plan
13 Scenario; (3) the Lower Bound Scenario; and (4) the Upper Bound Scenario. These four
14 scenarios and their key concepts are explained on page 5.8-8 of the FEIS. The four scenarios
15 were compared against a baseline representing conditions if the Project was not built.

16 11.3 The FEIS concludes that the 2015 U.S. and International Energy Policy
17 Scenario best represented existing conditions under which the Project would operate.

18 11.4 Relying on the 2015 U.S. and International Energy Policy Scenario, the
19 FEIS concludes that the average net emissions during full Project operations is 1.99 Million
20 Metric Tons of carbon dioxide equivalent (CO_{2e}).

21 11.5 The FEIS concludes that unless the net GHG emissions (1.99 Million
22 Metric Tons) is fully mitigated, these emissions will have an unavoidable, significant adverse
23 environmental impact.
24
25

1 11.6 The FEIS, at page 5.8-24, states that the Applicant proposed to mitigate
2 100% of the GHG identified in the 2015 U.S. and International Energy Policy Scenario. That is,
3 at operations at maximum capacity, the Applicant proposed to mitigate 1.99 Million Metric Tons
4 per year from 2028 to 2038.

5 11.7 During the hearing the Applicant announced that this statement in the
6 FEIS is incorrect. The Applicant does not propose to mitigate 100% of the GHG emissions
7 identified in the 2015 U.S. and International Energy Policy Scenario.
8

9 11.8 It does not appear that this correction was made known to any parties prior
10 to this hearing. In particular, Ecology was not notified of this correction during its consideration
11 of the Applicant's request for a Section 401 Clean Water Certification.

12 11.9 Despite the FEIS conclusions, County Staff does not propose any
13 condition of Project approval that would require mitigating for net GHG emissions.

14 11.10 The Applicant instead proposes to mitigate 100% of the Project's "Scope
15 1" emissions. The Applicant calculates that this would amount to approximately 10,000 tons per
16 year, or 1/2 of 1% of the mitigation required in the FEIS.

17 11.11 The term "Scope 1" refers to a GHG emissions measuring system
18 involving three tiers of emissions: Scope 1 emissions are also referred to as "direct GHG" and
19 are defined as "emissions from sources that are owned or controlled by the organization"; Scope
20 2 emissions are also referred to as "energy indirect GHG" and are defined as "emissions from the
21 consumption of purchased electricity, steam, or other sources of energy generated upstream from
22 the organization"; and Scope 3 emissions are also referred to as "other indirect GHG" and are
23 defined as "emissions that are a consequence of the operations of an organization, but are not
24 directly owned or controlled by the organization".
25

1 11.12 The FEIS does not use the terminology Scope 1, Scope 2 and Scope 3, but
2 its analysis of net emissions appears to include Scope 1, Scope 2 and Scope 3 emissions.

3 **12. FINDINGS RELATING TO THE PROJECT'S COMPLIANCE WITH THE**
4 **SHORELINES MANAGEMENT ACT (SMA) AND THE COUNTY SHORELINE**
5 **MASTER PROGRAM (SMP).**

6 12.1 The Columbia River is a shoreline of statewide significance.

7 12.2 For shorelines of statewide significance the SMA and the SMP declare
8 that preference is given in the following order to uses which: (1) recognize and protect the
9 statewide interest over local interests; (2) preserve the natural character of a shoreline; (3) result
10 in long term over short term benefit; (4) protect the resources and ecology of the shoreline; (5)
11 increase public access to publicly owned areas of the shoreline; and (6) increase recreational
12 opportunities for the public in the shoreline;

13 12.3 The Applicant has the burden of proving that all of the requirements of the
14 SMA and the Cowlitz County SMP have been met.

15 12.4 The noise impacts of the Project, as set forth in Section 2 of the Findings,
16 preclude any conclusion that the use results in long term over short term benefit.

17 12.5 The increased risk of cancer related to the Project, as set forth in Section 3
18 of the Findings, precludes any conclusion that the Project results in a long term over short term
19 benefit.

20 12.6 The traffic impacts of the Project, as set forth in Section 4 of the Findings,
21 preclude any conclusion that the Project results in a long term over short term benefit.
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1 12.7 The disproportionate impacts of the Project on minority and low income
2 populations as a result of noise impacts, as set forth in Section 5 of the Findings, preclude any
3 conclusion that the Project results in a long term over short term benefit.

4 12.8 The impacts of the Project on the Reynolds Historic District, as set forth in
5 Section 6 of the Findings, preclude any conclusion that the Project results in a long term over
6 short term benefit.

7 12.9 The impacts of the Project on statewide rail capacity, as set forth in
8 Section 7 of the Findings, preclude any conclusion that the Project recognizes and protects
9 statewide interest over local interests.

10 12.10 The impacts of the Project on rail safety, as set forth in Section 8 of the
11 Findings, preclude any conclusion that the Project recognizes and protects statewide interest over
12 local interests.

13 12.11 The impacts of the Project on vessel transportation, as set forth in Section
14 9 of the Findings, preclude any conclusion that the Project recognizes and protects statewide
15 interest over local interest. These Findings further preclude any conclusion that the Project
16 protects the resources and ecology of the shorelines.

17 12.12 The impacts of the Project on tribal resources, as set forth in Section 10 of
18 the Findings, preclude any conclusion that the Project recognizes and protects statewide interest
19 over local interest, and further precludes any conclusion that the Project protects the resources
20 and ecology of the shorelines.

21 12.13 The impacts of the Project on net Greenhouse Gas emissions, as set forth
22 in Section 11 of the Findings, preclude any conclusion that the Project recognizes and protects
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1 statewide interest over local interest, and further preclude any conclusion that the Project protects
2 the resources and ecology of the shorelines.

3 **FINDINGS RELATING TO UNRESOLVED ISSUES.**

4 **13. Finding Relating to the Applicant's Ability to Construct Docks and Other**
5 **Improvements on Leased State-owned Aquatic Lands.**

6 13.1 As noted in the Background Section, the aquatic lands adjacent to the
7 Project site are owned by the State of Washington. These aquatic lands are leased to Northwest
8 Alloys under Aquatic Lands Lease No. 20-B09222 through January 2038 (the "Aquatics Lease").

9 13.2 Docks 2 and 3 would be constructed within the area of the Aquatics Lease.

10 13.3 On October 24, 2017, DNR issued its written "Memorandum of Decision"
11 (the "Memorandum of Decision") notifying Northwest Alloys, as Lessee, that DNR is denying
12 permission to construct Docks 2 and 3 and other necessary improvements within the Aquatics
13 Lease area. (Exhibit A-104)

14 13.4 The Memorandum of Decision notes that Northwest Alloys cannot build
15 improvements on the leased property without DNR's prior written consent. The Aquatics Lease
16 gives DNR the right to deny requests to build improvements if it determines that denial is in the
17 best interest of the State. The Memorandum of Decision analyzes the proposed improvements
18 and concludes that it is not in the State's best interest for these improvements to be constructed
19 on State-owned aquatic lands.

20 13.5 Although the Memorandum of Decision is addressed to Northwest Alloys
21 it would apply equally to the Applicant, either as the operator for Northwest Alloys or as its
22 sublessee.
23
24
25

1 14. **Findings Relating to the Ability of the Applicant to Conduct Dredging on**
2 **Non-Leased State-owned Aquatic Lands.**

3 14.1 To accommodate berthing of Panamax-size vessels the Project requires
4 substantial dredging adjacent to proposed Docks 2 and 3.

5 14.2 Much of the proposed dredging area lies outside of the Aquatics Lease
6 area. Exhibit A-27 identifies both the Aquatics Lease area (surrounding Docks 1, 2 and 3) as
7 well as the proposed dredging area, referred to as the "Dredging Prism", which lies mostly south
8 and west of the Aquatics Lease area.

9 14.3 The Memorandum of Decision reminds Northwest Alloys that the
10 Aquatics Lease:

11 "Applies only to the leased property. The lease does not authorize
12 activities on lands outside the leased area. Accordingly, a separate
13 authorization from DNR would be required for dredging areas outside the
14 leasehold. DNR has not received an application to conduct dredging
15 outside the leased area associated with the plan submitted by Northwest
16 Alloys."

17 14.4 To date Northwest Alloys (and by extension, the Applicant) has not
18 applied for or been given permission to conduct dredging on State-owned aquatic lands lying
19 outside the Aquatics Lease area.

20 14.5 Without the proposed dredging of the "Dredging Prism" as shown on
21 Exhibit A-27, Project vessels will be unable to berth at proposed Docks 2 and 3.

22 14.6 Although DNR has not expressly denied permission to dredge outside of
23 the Aquatics Lease area, its refusal to allow construction of Docks 2 and 3 suggests that a request
24 to undertake dredging on nearby aquatic lands, once made, will likely be denied as well.

1 15. **Findings Relating to the Applicant's Ability to Dispose of State-owned**
2 **Dredge Materials.**

3 15.1 If dredging on State-owned aquatic lands is eventually approved, the
4 resulting dredging will produce 350,000 yards of dredge material requiring disposal.

5 15.2 The Memorandum of Decision reminds Northwest Alloys (and by
6 extension the Applicant) that the disposal of these State-owned dredge materials must be
7 approved by DNR. The Memorandum states:

8 "The plan submitted for DNR's approval by Northwest Alloys also failed
9 to identify how Millennium would dispose of the significant amount of
10 dredge material generated by the proposal.

11 From the information Northwest Alloys submitted, it appears Millennium
12 may be contemplating removal of dredge materials from the Columbia
13 River. DNR has an interest in ensuring that the State receives
14 compensation for valuable material removed from the Columbia River and
15 that removal is in the State's best interest. Removal of rock, gravel, sand,
16 silt, and any other valuable material from the River requires a contract of
17 lease from DNR that authorizes the removal of the valuable material and
18 fixes the compensation owed the State. Northwest Alloys lease with
19 DNR does not provide the required authorization.

20 Because the plans and specifications submitted by Northwest Alloys are
21 inconsistent with the lease and fail to provide essential information
22 necessary to review the proposal, DNR has determined that it is in the best
23 interest of the State to deny Northwest Alloys request at this time."
24 (Exhibit I-104, pages 5 and 6 of Memorandum)

25 15.3 The Staff Report, at page 6, notes that the Applicant had been working
with the Corps of Engineers and other agencies for permission to place the dredge material at the
Ross Island Sand & Gravel site in Oregon. The Corps' approval of this request is currently
pending.

1 15.4 Even if the Corps of Engineers approves the Applicant's request to dispose
2 of the dredge material at the Ross Island Sand & Gravel site, this proposed disposal lacks the
3 necessary permission from DNR.

4 15.5 The Project's dredge material could be placed elsewhere in the Columbia
5 River but this alternative has been found to be problematic. As noted in both the Staff Report
6 and the testimony of the Applicant's consultant, Glenn Grette, the physical composition of the
7 dredge material has prevented finding a suitable location in the river to deposit it.

8 15.6 As the Applicant does not have DNR's permission to place the State-
9 owned dredge material in Oregon, and as its placement in other areas of the river has proven
10 problematic, there is no approved plan for the disposal of the Project's dredge materials.

12 **16. Findings Relating to Water Availability.**

13 16.1 As set forth at page 2-15 of the FEIS, the Applicant's intended primary
14 source of industrial water for Project operations is treated stormwater. Onsite wells are intended
15 as a backup source during dry weather and as otherwise needed.

16 16.2 Water will be needed for both Project operations and fire protection.
17 Operations include dust control, stockpile spraying, and equipment wash down. The Project is
18 reliant upon water to properly manage coal dust.

19 16.3 It is anticipated that peak process water demand would be approximately
20 5,000 gallons per minute, and peak emergency fire water demand would be approximately 1,500
21 gallons per minute. The Applicant's existing activities on the leased property have a current
22 demand of approximately 1,063 gallons per minute (FEIS at 4.4-15).

1 16.4 The Applicant's lease with Northwest Alloys includes an assignment of
2 historical water rights to withdraw groundwater from onsite wells. These historical groundwater
3 rights allow withdrawal of 23,150 gallons per minute.

4 16.5 The FEIS finds that the Project's anticipated industrial water need, coupled
5 with its current needs, is within the volume of water rights held by Northwest Alloys. It adds,
6 however, that it is unknown whether these water rights were relinquished back to the State of
7 Washington for nonuse. The FEIS concludes that if these historical water rights have been
8 relinquished new water rights will need to be applied for under the normal regulatory process.

9 16.6 Ecology, in its Decision denying the Applicant's request for a Section 401
10 Water Quality Certification, reminds the Applicant that its plan to collect and use stormwater
11 requires that the Applicant obtain a water right permit in accordance with Chapter 90.03 RCW.
12

13 16.7 To date the Applicant has not applied for a water right permit to collect
14 and reuse stormwater as its primary source of water.

15 16.8 Ecology also notes that the historical groundwater rights held by
16 Northwest Alloys may no longer be valid as Ecology has not been provided with any information
17 documenting their continued beneficial use since the early 2000's.

18 16.9 In December 2016, Ecology requested information from the Applicant
19 documenting the current and recent water uses at the Project site. As of September 26, 2017, the
20 Applicant had not provided this information.
21

22 16.10 Ecology concludes that without proof of water rights the Applicant will
23 not be able to legally carry out the Project.
24
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1 16.11 As the Applicant has not received, or even applied for, a water right to
2 collect and use stormwater and as the Applicant has so far failed to produce any evidence
3 proving the continued validity of historic groundwater rights, there is currently no evidence that
4 the Project has sufficient water to properly manage coal dust, provide for other operational needs
5 or assure adequate fire suppression.

6 **17. Findings Relating to Anti-Idling Policies.**

7 17.1 The shipping of coal will result in the arrival of 840 oceangoing vessels at
8 the Project's docks annually and the arrival of over 23,000 locomotives at the Project's railyard
9 annually. These vessels and locomotives will rely on diesel motors.

10 17.2 The use of these diesel motors will result in Diesel Particulate Matter
11 (DPM). The FEIS finds that DPM is harmful and is the cause of the increased risk of cancer
12 from the Project. The FEIS therefore recommends that "anti-idling" policies be imposed upon
13 both vessels and locomotives to eliminate or at least minimize DPM caused by unnecessary
14 idling.

15 17.3 The County Staff Report recognizes the benefit of anti-idling policies but
16 proposes that the Applicant implement its own anti-idling policies. (Condition 32)

17 17.4 The County's proposed Condition 32 would allow the Applicant to decide
18 what anti-idling policies to impose on its operations, or whether to impose any at all.

19 17.5 The Hearing Examiner proposed a condition of Project approval similar to
20 one imposed recently in *In re NWIW*, Cowlitz County Hearing No. SL 16-0975. As previously
21 noted in Finding 9.13, that project involves a nearby methanol production and shipping facility.
22 That project anticipates a maximum of 72 vessels annually, or less than 10% of this Project's
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1 vessels. Despite the Project's fewer number of vessels, it was determined that an anti-idling
2 policy was nonetheless important. In order to minimize vessel-related DPM the following
3 condition was imposed on that project's shoreline permit:

4 "(A) All methanol cargo vessels shall be equipped with the necessary
5 technology to rely on shore power for all onboard activity while berthed at
6 the marine terminal. No berthed methanol vessel shall operate its engines
7 to provide electrical power except in the event of an emergency outage to
8 shore power."

9 17.6 In the industry, the use of shore power for all shipboard activity while
10 docked is known as "cold ironing".

11 17.7 The Applicant objects to the imposition of a cold ironing policy on this
12 Project. The Applicant argues that such a policy would be expensive, impractical and
13 unprecedented in the bulk products shipping business. (Testimony of Bennett)

14 17.8 The Applicant adds that in the Kalama Methanol Project, the developer
15 owned the fleet of vessels being used and could construct the vessels to a common electrical
16 system. In contrast, this Project will rely on independent bulk carriers and the Applicant will not
17 have the same control over the electrical systems they use. (Testimony of Bennett)

18 17.9 The Applicant has not prepared a formal anti-idling policy for vessels.
19 When asked what its anti-idling policy would be the Applicant replied that it would "be the same
20 as is done elsewhere." (Testimony of Bennett)

21 17.10 In regard to an anti-idling policy for locomotives, the Applicant testified
22 that it would rely on the policies of BNSF. (Testimony of Bennett)

1 **18. Findings Relating to Possible Impacts from Wake Stranding.**

2 18.1 When the wake from a vessel meets the shoreline it can carry fish and
3 deposit them on the beach, potentially stranding them where they would be susceptible to stress,
4 suffocation, and predation before they could return to the water. This phenomenon is referred to
5 as "wake stranding".

6 18.2 Wake stranding depends on various factors such as the slope and breadth
7 of a beach; the river's stage; tide stage; depth of water; vessel size; direction of travel and speed
8 and wakes from other passing vessels.

9 18.3 Wake stranding has been documented at various locations along the Lower
10 Columbia River. Those portions of the Lower Columbia shoreline having gentle shoreline
11 slopes, sandy beaches, a confined river channel and close proximity to the navigation channel,
12 along with various other factors, tend to have a higher incident of wake stranding. Studies have
13 also suggested that wake stranding is particularly troublesome along "Barlow Point", located a
14 short distance downriver from the Project site. Studies to date have concluded that sub-yearling
15 Chinook Salmon are particularly susceptible to wake stranding due to their small size and
16 preference for swimming near the shore. Lower Columbia Chinook Salmon are a threatened
17 species.
18

19 18.4 The FEIS, at page 4.7-33, notes that while the scientific literature
20 generally acknowledges the problem of wake stranding in the Lower Columbia River, the
21 literature has not yet identified methods to quantify its impact to Chinook Salmon or other fish.
22 Nonetheless, the FEIS concludes that this Project's 1,680 transits will have an adverse effect on
23 Chinook Salmon and other fish as a result of wake stranding.
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1 18.5 During the environmental review process several federal and State
2 agencies, including U.S. Fish and Wildlife, Washington Department of Fish and Wildlife
3 (WDFW) and Washington Department of Natural Resources (DNR) expressed concerns that the
4 DEIS understated the Project's additional impact to the wake stranding problem, and encouraged
5 additional study of the phenomenon to determine the Project's impact and necessary mitigation.

6 18.6 The County Staff Report does not discuss wake stranding or propose any
7 mitigation. The County explains that this is an issue best addressed through the federal
8 permitting process. (Testimony of Placido)

9 18.7 In response to questioning from the Hearing Examiner, the Applicant
10 revealed that it has recently proposed a mitigation plan for wake stranding. This proposed
11 mitigation plan is contained in a Memorandum from Mr. Grette to National Marine Fishery
12 Services (NMFS) dated May 30, 2017. (Exhibit A-60)

13 18.8 According to the Applicant's proposed mitigation plan, the Applicant
14 believes that its Project activities will cause the 3,800 unrelated commercial vessels going to and
15 from upriver ports to slow for several miles. The Applicant asserts that this will reduce vessel
16 speeds past Barlow Point, thereby reducing wake stranding at this critical location and mitigating
17 for any wake stranding the Project's vessels might cause further downriver.

18 18.9 The various upriver ports (Portland, Vancouver, etc.) have not been
19 notified of this mitigation plan or of its claim that the Project will force their vessels to slow. It
20 is unknown whether these ports will disagree or, conversely, whether these ports will argue that,
21 if true, the Project fails to recognize and protect the statewide interest over local interest.
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1 18.10 During the hearing there was conflicting testimony as to whether the
2 Project would cause all non-project vessel traffic to slow past Barlow Point. The Applicant's
3 witness, Dan Mills, testified in writing that the Project would force all other traffic to slow to 8
4 knots past Barlow Point (Exhibit 206). But a member of the public, Rob Rich, who has several
5 decades of experience with Columbia River transportation, testified that the Project would not
6 cause other vessels to slow.

7
8 18.11 On October 10, 2017, NMFS issued its Biological Opinion for NWIW (the
9 Kalama Methanol Project) (Exhibit A-61), previously referred to in Findings 9 and 17. It
10 includes a Wake Stranding Monitoring Plan for the Kalama facility. (Exhibit A-62) The
11 monitoring plan requires NWIW to fund, either individually or with others, a study to examine
12 the rates of fish stranding at three sites along the Columbia River: Barlow Point, County Line
13 Park and Sauvie Island. Studies will extend over seven months (March through September) in
14 years one, three and five of the project, with year zero being the first March after product is
15 shipped from the Kalama facility. The study can be delayed up to two years to allow other
16 applicants from other projects to participate in funding. (The Kalama project is not yet
17 approved, let alone operational, and so "year zero" of the study remains at least a few years
18 away.)

19 18. **Findings Relating to Statewide Impacts from At-Grade Rail Crossings.**

20 18.1 The Project has been formally opposed by the cities of Vancouver,
21 Washougal, Camas, Olympia, Tacoma, Seattle, Stevenson, and North Bonneville in the State of
22 Washington; by the cities of Sandpoint, Dover, Ponderay and Kootenai in the State of Idaho; by
23 the cities of Livingston, Missoula and White Fish in the State of Montana; and by the cities of
24 Portland, Milwaukie and Hood River in the State of Oregon.

1 18.2 These cities have expressed a common concern that the Project's trains
2 will have significant adverse impacts to traffic at at-grade rail crossings and impair the cities'
3 ability to deliver emergency services.

4 18.3 As examples, Vancouver (population 175,000) notes that it has 27 at-grade
5 crossings, 13 of which have no alternate access. Nearby Washougal notes that it has 5 at-grade
6 crossings including the most heavily used at-grade rail crossing in the State.

7 18.4 The FEIS, in Section 5.3.4.2, contains a study of selected at-grade rail
8 crossings throughout the State. A list of the selected crossings is found at 5.3-21 and a map
9 showing their location is at 5.3-23 (the "FEIS Study"). The FEIS Study examines 44 at-grade
10 rail crossings throughout the State. The selected crossings are largely in sparsely populated areas
11 of rural counties, and are almost entirely in Eastern Washington.

12 18.5 The only selected crossings in Western Washington are 6 crossings in
13 mostly-rural Lewis County (population 75,000). These include the crossing in Vader (SR 506)
14 with a population of 600 residents; the crossing in Winlock (SR 505) with a population of 1,200;
15 the crossing at Big Hanaford Road north of Centralia with no nearby population; and 3 crossings
16 on the east side of Centralia (population 15,000).

17 18.6 The FEIS does not examine any crossings in Vancouver (population
18 175,000) or the rest of Clark County; Olympia/Lacey (population 100,000) or the rest of Thurston
19 County; Tacoma (population 211,000) or the rest of Pierce County; or Auburn (population
20 78,000) or the rest of King County.

21 18.7 The FEIS concludes that, *at the selected sites*, the Project will not result in
22 unavoidable, significant adverse impacts to traffic. But the FEIS does not reach any conclusion
23 as to the Project's impacts at the at-grade rail crossings not studied.

1 18.8 As the FEIS Study does not examine impacts to traffic in any of
2 Washington's urban centers, especially those in Western Washington, the Study does not inform
3 the decision making as to whether the Project recognizes and protects the statewide interest over
4 local interest.

5 19. **Findings Relating to the Lease of BPA Property.**

6 19.1 Portions of the proposed Project site are located on property owned by the
7 Bonneville Power Administration (BPA). Areas owned by BPA are identified on the map
8 submitted as Exhibit A-27.

9 19.2 As noted in the Staff Report, a portion of the Project's rail loop would be
10 constructed on 2 parcels currently owned by BPA. BPA has not yet made a determination
11 whether to grant necessary easements to the Applicant. BPA will not make this determination
12 until the Corps of Engineers has issued the NEPA FEIS.

13 19.3 The Applicant responds that it has 3 alternative site layouts, one of which
14 does not require use of BPA property.

15 20. **Findings Relating to Further Analysis of Coal Dust Impacts on Aquatic and**
16 **Tribal Resources.**

17 20.1 Nearly 30 American Indian Tribes or Nations have formally opposed the
18 Project. ^{1, 2} These Tribes express a number of common concerns including: an increased risk of
19 rail accidents on tribal property and appropriate mitigation; increased risk of fire; impacts from
20
21

22 ¹ These include the 12 Confederated Tribes or Nations of the Yakima Nation; the 5 tribes comprising the Columbia
23 River Inter-Tribal Fish Commission; the 4 tribes comprising the Upper Columbia United Tribes; the 3 tribes of the
24 Umatilla Reservation; the Northern Cheyenne; the Nez Perce; the Lummi Nation; and the Cowlitz Tribe.

25 ² Another American Indian Tribe, the Crow Tribe, is in support of the Project.

1 train horn noise, increased risk of train strike, especially to Tribal Treaty Fishers; and effects on
2 fish populations and the Tribes' treaty rights.

3 20.2 The FEIS addresses some of the tribal concerns but acknowledges that
4 many tribal issues fall outside of its scope.

5 20.3 A commonly expressed tribal concern is that coal and coal dust from
6 Project-related trains, along with diesel emissions, will have significant adverse impacts upon
7 tribal property and tribal resources, including fish.

8 20.4 The FEIS, at page 5.7-6, notes that: "the U.S. Geological Survey (USGS)
9 is preparing a study that identifies methods for determining potential impacts on aquatic
10 resources from coal dust exposure ."

11 20.5 The official website for the USGS confirms that such a study is being
12 undertaken. The USGS website states:

13 "Federal and state natural resource managers and Northwest Indians are
14 concerned with potential impacts from unintentional release of coal dust
15 from train cars during transport through the Northwest. . . . To date, very
16 little scientific data exists that is suitable to address these concerns. There
17 exists a strong desire and need for science to better understand and
18 determine if transporting coal can have any measurable environmental
19 impacts. Multiple USGS science centers are collaborating on a pilot that
20 leverages the Survey's chemical, hydrological, and biological expertise to
21 conduct reconnaissance-level sampling and analysis of mercury (Hg) and
22 Polycyclic Aromatic Hydrocarbon (PAH) levels in air, water, sediment,
23 and biota at sites of interest near rail lines. . . .

24 This study will evaluate some of the risks to Indian trust resources
25 associated with coal transport. If coal transport continues to grow in the
region, this study will provide critical baseline data necessary in order to
determine whether the expanded transport results in increased contaminate
distribution and exposure. If this study is not conducted, and coal
transport continues to grow, we will be unable to determine whether and
to what extent coal transport results in environmental contamination and
risk to wildlife, fishes, and any Indian trust resources.

1 20.6 The USGS website does not indicate the current status of this study and
2 none of the parties are aware of its status.

3 20.7 The USGS study, if completed, would inform the decision making with
4 respect to protecting the ecology and resources of the shoreline including tribal resources.

5 **22. Findings Relating to the Impact of the Recent Repeal of the Clean Power**
6 **Plan.**

7 22.1 As set forth in Section 11 of the Findings, the FEIS analyzes the Project's
8 net GHG emissions under four scenarios and concludes that the "2015 U.S. and International
9 Energy Policy Scenario" is the most representative of current U.S. policy.

10 22.2 One of the alternative scenarios examined in the FEIS is the "No Clean
11 Power Plan Scenario". An explanation of this scenarios is found on page 5.8-8 of the FEIS:

12 "The No Clean Power Plan scenario represents the state of the energy
13 markets as of 2016. It does not include implementation of the Clean
14 Power Plan. The No Clean Power Plan scenario uses the base set of
15 assumptions and assumes that no additional national or international
16 climate policies will be enacted beyond those implemented by mid-2015."

17 22.3 Under the "No Clean Power Plan Scenario" the Project's net GHG
18 emissions are substantially higher than under the "2015 U.S. and International Energy Policy
19 Scenario". Table 5.8-7 of the FEIS identifies the total GHG emissions under each scenario for
20 the Project from 2021 to 2038. Under the 2015 U.S. and International Energy Policy Scenario
21 the total emissions are 21.58 Million Tons, but under the No Clean Power Plan Scenario total
22 emissions increase to 50.97 Million Tons, or approximately two and a half times more net GHG
23 emissions.
24
25

1 The conditions proposed in the Staff Report do not reasonably mitigate these impacts. At
2 the conclusion of the hearing the County chose not to propose any new conditions, and the
3 Applicant's position is nearly identical to the County's. As a result, neither the County nor the
4 Applicant propose reasonable mitigation for any of the unavoidable, significant adverse
5 environmental impacts identified in the FEIS.

6 More specifically:

7 • The parties' proposed mitigation for noise impacts is insufficient to ensure that
8 Quiet Zones will be implemented.

9 • The parties do not propose any mitigation for the increased risk of cancer. Their
10 only suggestion is that eventually the BNSF fleet will upgrade to Tier 4 status, but currently only
11 6% of the BNSF fleet meets this standard. The remainder of the fleet will not be completely
12 upgraded for more than 20 years.

13 • The parties' proposed conditions to mitigate traffic impacts do not ensure that the
14 necessary track improvements will be made to the Reynolds Lead.

15 • The parties do not propose any conditions addressing the impacts to the Reynolds
16 Historic District.

17 • The parties' proposed conditions fail to ensure rail capacity or rail safety.

18 • The parties do not propose any conditions to ensure vessel safety and appropriate
19 responsibility for any vessel accident.

20 • The Mitigation Plan, approved as part of the Critical Areas Permit, will address
21 some tribal concerns but not all of them. The parties do not propose any additional conditions to
22 address additional tribal impacts.
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1 • The County proposes no Greenhouse Gas mitigation, while the Applicant
2 proposes less than 1% of that required under the FEIS.

3 Cowlitz County has adopted SEPA rules promulgated by the Department of Ecology.
4 CCC 19.11.020. Cowlitz County recognizes its right to condition or deny permits if such
5 decision is based upon policies that have been identified and incorporated into regulations, plans,
6 or codes formerly designated as possible bases for the exercise of substantive authority under
7 SEPA. CCC 19.11.110

8 The County has adopted the following bases for the exercise of substantive authority
9 under SEPA:
10

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

15 (a) Fulfill the responsibilities of each generation as trustee of
16 the environment for succeeding generations.

17 (b) Assure for all people of Cowlitz County safe, healthful,
18 productive, and aesthetically and culturally pleasing surroundings.

19 (c) Attain the widest range of beneficial uses of the
20 environment without degradation, risk to health or safety, or other
21 undesirable and unintended consequences.

22 (d) Preserve important historic, cultural, and natural aspects of
23 our national heritage.

24 (e) Maintain, whenever possible, an environment which
25 supports diversity and variety of individual choice.

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

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

CCC 19.11.110(b)(1)

1 Cowlitz County also recognizes that each person has a fundamental and inalienable right
2 to a healthful environment and that each person has a responsibility to contribute to the
3 preservation and enhancement of the environment. CCC 19.11.110(b)(2)

4 Again, the parties have not reasonably mitigated the ten unavoidable, significant adverse
5 environmental impacts identified in the FEIS. Failure to reasonably mitigate these impacts
6 conflicts with virtually every one of the County's environmental policies stated above.

7 Accordingly, the requested Shoreline Permits must be denied under the County's substantive
8 SEPA authority.

9
10 **2. Compliance with the Requirements of the SMA and the SMP.** In order for the
11 Shoreline Permits to be approved, the Applicant must meet its burden of proving that all of the
12 requirements of the SMA and SMP have been met. As a result of the Applicant's inability to
13 reasonably mitigate the unavoidable, significant environmental impacts identified in the FEIS, it
14 has failed to meet this burden. The Project does not recognize and protect statewide interest over
15 local interest; result in a long term over short term benefit; or protect the resources and ecology
16 of the shorelines, all as set forth more fully in the Findings of Fact.

17 **3. Unresolved Issues.** A number of unresolved issues further preclude the
18 Applicant from meeting its burden of proving that all requirements of the SMA and SMP have
19 been met:

20
21 • The Applicant has been denied permission from the State to build Docks 2 and 3
22 in the Aquatics Lease area; to engage in dredging outside of the Aquatics Lease area; and to
23 remove dredging materials from the Columbia River. Collectively these three denials preclude
24 constructing Docks 2 and 3 and performing necessary dredging. Unless these barriers are
25 overcome the requested Shoreline Permits cannot be granted.

1 • Although this application has been pending for five years, the Applicant has not
2 yet applied for the necessary water permits. Large quantities of water are essential for this
3 Project, especially for control of coal dust. The current absence of any assurance that necessary
4 water is available prevents further consideration of the needed permits.

5 • Anti-idling policies for both vessels and locomotives must be established. To
6 date no formal policies have been presented. The Applicant's proposal to "do what is done at
7 other ports" is not an acceptable anti-idling policy. Given the number of vessels and locomotives
8 involved and the harmful impact of diesel particulate matter resulting from needless idling, there
9 must be a more robust effort to avoid this problem. This includes a thorough analysis of whether
10 "cold ironing" is possible. Similarly, given that more than 23,000 locomotives will arrive at the
11 site each year the anti-idling policy for locomotives cannot be left up to BNSF and requires a
12 more thorough analysis.

13 • Wake stranding has been increasingly recognized as a significant problem along
14 the Lower Columbia River, with its greatest impact on young Chinook Salmon, a threatened
15 species. Federal and State agencies have universally recognized the need to better understand
16 the impacts of this phenomenon and determine proper mitigation. The Applicant's recently
17 revealed Mitigation Plan is noteworthy in that it claims the Project will cause all other
18 commercial vessel traffic on the river to slow past Barlow Point, and that this disruption serves
19 as mitigation for the Project's own wake stranding impacts. The upriver ports affected by this
20 claim have not yet been alerted to this plan, or given a chance to respond. It is possible that the
21 Project will effectively create a "no wake" zone past Barlow Point, but ports and State agencies
22 must be allowed to participate in the discussion. Ultimately the Project's impact on wake
23 stranding needs to be calculated and mitigated.

1 • The study of statewide rail crossings found in the FEIS provides little, if any,
2 useful information as to the impact of this Project on urban traffic. The rural, sparsely populated
3 crossings selected for the study provide no meaningful information as to whether coal trains will
4 have significant impacts on our cities. The study fails to examine a single urban rail crossing in
5 Western Washington. Again, it is the Applicant's burden to prove that the Project protects
6 statewide interest over local interest. This has not yet been proven. Further analysis needs to be
7 undertaken, preferably with an opportunity for cities to identify those crossings most likely to be
8 impacted.

9
10 • It remains to be seen whether BPA will agree to allow its properties to be used by
11 the Applicant. If not, further review of the Applicant's alternative proposed layout must be
12 undertaken.

13 • If timely completed, the USGS study of coal dust impacts may provide critical
14 information as to whether the transport of coal is having any significant impacts on aquatic or
15 tribal resources.

16 • The recent repeal of the Clean Power Plan by EPA suggests that the Project's net
17 Greenhouse Gas emissions should be reevaluated under the "No Clean Power Plan Scenario".

18 • As part of its Decision denying the Applicant's Section 401 Clean Water
19 Certification, Ecology requested additional materials from the Applicant to better address
20 important issues relating to wetlands, water, etc. The information sought is of equal benefit to
21 this decision making.
22

CONCLUSIONS OF LAW

23
24 1. The Hearing Examiner has jurisdiction over the parties and the subject matter.
25

1 2 Any Conclusions of Law contained in the foregoing Background Section,
2 Findings of Fact or Analysis Section are hereby incorporated by reference and adopted by the
3 Hearing Examiner as his Conclusions of Law.

4 3. All public notice requirements for this application have been met.

5 4. The Project is located within 200 feet of the Ordinary High Water Mark of the
6 Columbia River. The Columbia River is a shoreline of statewide significance. This Project is
7 therefore subject to the requirements of the Shoreline Management Act (SMA), Chapter 90.58
8 RCW.

9 5. For shorelines of statewide significance, Ecology and local governments shall
10 give preference in the following order to uses which: (1) recognize and protect the statewide
11 interest over local interest; (2) preserve the natural character of a shoreline; (3) result in long
12 term over short term benefit; (4) protect the resources and ecology of the shoreline; (5) increase
13 public access to publicly owned areas of the shorelines; (6) increase recreational opportunities
14 for the public in the shoreline; (7) provide for any other element as defined in RCW 90.58.100
15 deemed appropriate or necessary. (RCW 90.58.020)

16 6. The Washington Legislature enacted the SMA because Washington's shorelines
17 are fragile and the mounting pressure of development in the shorelines necessitates coordination
18 in their management. The SMA is broadly construed to protect the State's shorelines as fully as
19 possible. All development on the shorelines of the State must conform to the SMA. *Beuchel v.*
20 *Department of Ecology*, 125 Wn.2d 196, 203 (1994).

21 7. The Applicant has the burden of proving that all requirements of the SMA and the
22 Cowlitz County SMP have been met for the issuance of a Shoreline Substantial Development
23 Permit and Shoreline Conditional Use Permit.
24
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1 DATED this 14 day of November, 2017.

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4 _____
5 Mark C. Scheibmeir
6 Cowlitz County Hearing Examiner
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INDEX OF AGENCY RECORD
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Millennium Bulk Terminals - Longview, Coal Export Terminal
Shorelines Substantial Development Permit and Conditional Use Permit No. SL 17-0992

- C-1 Staff Report to the Hearing Examiner
- C-2 JARPA (July 13, 2016)
- C-3 Critical Areas Permit Issued July 19, 2017
- C-4 Shoreline Application Notice September 8, 2017
- C-5 Hearing Notice
- C-6 SEPA Determination
- C-7 Final EIS
- C-8 Shoreline Application Response Document
- C-9 Coal Export Terminal Wetland Impact Report - Parcel 619530400 (Grette Associates, September 15, 2014)
- C-10 Conceptual Mitigation Plan (Grette Associates, May 25, 2017)
- C-11 Sediment Characterization Report (Dalton, Olmsted, Fuglevand, July 12, 2017)
- C-12 2017 Dredge Material Management Program (DMMP) Dredge Suitability Determination
- C-13 Oregon Department of Environmental Quality Acceptance of Dredge Material at Ross Island
- C-14 Economic & Fiscal Impacts of Millennium Bulk Terminals Longview (Berk, April 12, 2012)

APPLICANT EXHIBIT LIST
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Shorelines Substantial Development Permit and Conditional Use Permit No. SL 17-0992

- A 26 MBT - Longview Pre-hearing Memorandum
- A 27 Site Map
- A 28 2012 JARPA
- A 29 Applicant Proposed Mitigation Measures
- A 30 BNSF Comment Letter in Response to Notice of Application, October 8, 2017
- A 31 Critical Areas Report, Glenn Grette, 2017
- A 32 Technical Response Analysis Population Level Impact of Tribal Resources in Zone 6 (2016)
- A 33 Technical Memorandum, Clarification on the DEIS Comments, Technical Response Analysis of Population - level Impacts on Tribal Fish Resources in Zone
- A 34 Glenn Grette, Tribal Fisheries Impact, Pre-filed Testimony
- A 35 Expert Report of NERA and ERM
- A 36 Expert Opinion of Robert Scofield, Assessment of Health Risks Associated with Diesel Exhaust
- A 37 Expert Report, Air Quality Impacts, Landau
- A 38 Export Report, Evaluation of Potential Coal and Coal Dust Impacts on Aquatic Resources - Anchor QEA
- A 39 Curriculum Vitae for Trevor Simmons
- A 40 Curriculum Vitae for Glenn Grette
- A 41 Curriculum Vitae for Ted Sprague

Applicant's Exhibit List Updated
Applicant's Exhibit A 67

- A 42 Curriculum Vitae for Charles "E" Halbert
- A 43 Curriculum Vitae for Robert Scofield
- A 44 Curriculum Vitae for David Haury
- A 45 Curriculum Vitae for Julie Carey
- A 46 Curriculum Vitae for Mary Hess
- A 47 Curriculum Vitae for Dan Mills
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- A 51 Applicant's Preliminary List of Witnesses
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- A 53 Certificate of Service of Rhonda S. Vogelzang
- A 54 K. Gaines power point
- A 55 T. Simmons power point
- A 56 G. Grette power point
- A 57 D. Kaitala Written Testimony
- A 58 T. Sprague Power point
- A 59 M. Bridges written testimony
- A 60 Addendum to the Biological Assessment for NOAA Fisheries Species, May 30, 2017, G. Grette & Associates

- A 61 Kalama Manufacturing and Marine Export Facility Biological Opinion, October 10, 2017
- A 62 Updated Wake Stranding Monitoring Plan, for the October 10, 2017 Kalama Manufacturing and Marine Export Facility Biological Opinion
- A 63 GHG Scope of Emissions power point slides (2) supporting responsive testimony
- A 64 Applicant's Proposed Mitigation Measures Table (Update to Exhibit A 29)
- A 65 Table of Responses-Applicant
- A 66 Dava Kaitala, BNSF, Supplemental Written Testimony
- A 67 Applicant Exhibit List, (Update to Exhibit 52)

INTERVENOR'S EXHIBIT LIST
COWLITZ COUNTY FILE NO. 12-04-0375
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- I-101 Riverkeeper's Pre-hearing Brief
- I-102 DOE 401 Denial
- I-103 DNR Sublease Denial
- I-104 DNR Construction Denial
- I-105 DNR SSDP Comment Letter (October 6, 2017)

PUBLIC EXHIBIT LIST
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- P-126 Ed or Harriet Griffith Shoreline Email of October 24, 2017
- P-127 Standard Letter from Various Individuals Starting With " I urge Cowlitz County and the Department of Ecology to reject the Shoreline Substantial Development"
- P-128 Steve Harrington Email of October 18, 2017
- P-129 Standard Letter from Various Individuals Starting With "I am writing to reaffirm our support of Millennium Bulk Terminal"
- P-130 Charles Pace Email of October 9, 2017
- P-131 Richard I. Woods Letter of October 4, 2017
- P-132 BNSF Comments on Millennium Dated October 8, 2017
- P-133 Standard Letter from Various Individuals Starting With "I would like to thank the Washington Department of Ecology"
- P-134 Mark Uhart, LTC USA Ret., Email of October 17, 2017
- P-135 Thrinley DiMarco, Email of October 17, 2017
- P-136 David M. Scheer, D.C., Email of October 12, 2017
- P-137 Mike Conlan, Email of October 9, 2017
- P-138 Rodger Wehage Email of October 31, 2017

			Received
P-139	Chris Turner	Comments and materials	11-2-17
P-140	Gregory Monahan Phd	Comment Letter	11-2-17
P-141	Patricia Bellamy RN	Comment Letter	11-2-17
P-142	Diane Winn RN	Comment Letter	11-2-17
P-143	Pat Dubke	Comment Letter	11-2-17
P-144	Leigh McKeirnan	Comment Letter	11-2-17
P-145	Susan Schwartz	Comment Letter	11-2-17
P-146	James Lanz	Comment Letter	11-2-17
P-147	Kathryn Ketcham	Comment Letter	11-2-17
P-148	Patricia Kullberg	Comment Letter	11-2-17
P-149	Peter Cornelison	City of Hood River Councilor / Comments	11-2-17
P-150	Larry Horst	Comment Letter	11-2-17
P-151	Linda Leonard	Comment Letter	11-2-17
P-152	Dave Gillihan	Comment Letter	11-2-17
P-153	Larry Wilhelmsen	Comment Letter	11-2-17
P-154	Marilee Dea	Comment Letter	11-2-17
P-155	Diane Dick	Comment Letter	11-2-17
P-156	Stephen Chandler MD	Comment Letter	11-2-17
P-157	Alona Steinke RN	Comment Letter	11-2-17
P-158	Cathryn Chudy	Comment Letter	11-2-17
P-159	Jessica Zimmerle	Comment Letter	11-2-17
P-160	Leda Zakarison	Comment Letter	11-2-17
P-161	Daniel Jaffee	Comment Letter	11-2-17
P-162	Edith Gillis	Comment Letter	11-2-17
P-163	Mona McNeil	Comment Letter	11-2-17
P-164	Emma Lamb-Smith	Comment Letter	11-2-17
P-165	Mark Keely	Comment Letter	11-2-17

P-166	Sally Keely	Comment Letter	11-2-17
P-167	Cambria Keely	Comment Letter	11-2-17
P-168	Theodora Tsongas Phd	Comment Letter	11-2-17
P-169	Don Steinke	Comment Letter	11-2-17
P-170	Christine Dupris - Cowlitz Tribe	Comment Letter & materials	11-3-17
P-171	Norman Roark Monahon - Cowlitz Tribe	Comment / Testimony	11-3-17
P-172	Celine Cloquet - Cowlitz Tribe	Comment / Testimony	11-3-17
P-173	David Isaacs	Comment Letter/ Testimony	11-3-17
P-174	Pamela Mattson-McDonald	Comment Letter/ Testimony	11-3-17
P-175	Fred Greef	Comment Letter/ Testimony	11-3-17
P-176	Joel Rupley	Comment Letter/ Testimony	11-3-17
P-177	Paul Youman	Pathway 2020 materials	11-3-17
P-178	Darrel Whipple	Comment Letter/ Testimony	11-3-17
P-179	Mike Wallin	"Build it Right" document	11-3-17
P-180	Mike Elliott	Comment Letter/ Testimony	11-3-17
P-181	Nate Stokes	Comment Letter/ Testimony	11-3-17
P-182	Dixie Bailey	Comment Letter/ Testimony	11-3-17
P-183	Michelle Nelson	Comment Letter/ Testimony	11-3-17
P-184	Shannon Stull	Comment Letter/ Testimony	11-3-17
P-185	Thomas Gordon	Comment Letter/ Testimony	11-3-17
P-186	Shane Nehls	Comment Letter/ Testimony	11-3-17
P-187	Jeff Childers	Comment Letter/ Testimony	11-3-17
P-188	Diana Gordon	Comment Letter/ Testimony	11-3-17
P-189	Lori Black	Comment Letter/ Testimony	11-3-17
P-190	Deborah Romerein	Comment Letter/ Testimony	11-3-17
P-191	John Sutton	Comment Letter	11-6-17
P-192	Chris Turner	Comment Letter	11-6-17
P-193	Diane Dick	Comment Letter	11-6-17
P-194	Jerry Iyall - Cowlitz Tribe	Comment / Testimony	11-6-17
P-195	Anita Thomas	Comment Letter	11-6-17
P-196	Nadine Haynes	Comment Letter	11-6-17

P-197	Capt. Kimberly Higgins	Comment Letter	11-6-17
P-198	Marcia Denison	Comment Letter	11-6-17
P-199	Jeff Wilson - Longview Port Commissioner	Comment Letter	11-6-17
P-200	Alyse Vasil	Comment Letter	11-6-17
P-201	Katie Frei	Comment Letter	11-6-17
P-202	Rodger Wehage	Comment Letter	11-6-17
P-203	Rick Gill	Comment Letter	11-6-17
P-204	Bo McCall	Comment- Email	11-6-17
P-205	Kate Mickelson - Columbia River Steamship Operators Assoc.	Comment	11-6-17
P-206	Jason Jenkins	Comment - Email	11-6-17
P-207	Aaron Barber-Strong	Comment - Email	11-6-17
P-208	Jeff Wilson _ Longview Port Commissioner	Comment Email	11-6-17
P-209	Diana Leigh	Comment/handouts	11-6-17
<i>Hearing adjourned - all further comments have been received by E-mail</i>			
P-210	Monty Anderson	Comment - Email	11-6-17
P-211	Jason Howard	Comment - Email	11-6-17
P-212	Russell Thompson	Comment - Email	11-6-17
P-213	Christian Daniels - IBEW Rep	Comment - Email	11-6-17
P-214	Michael Bosse' - IUOE Rep	Comment - Email	11-6-17
P-215	Josh Swanson - IUOE Rep	Comment - Email	11-6-17
P-216	Den Mark Wichar	Comment Email	11-6-17
P-217	Marcie Keever, Oceans & Vessels Program Director	E-mailed Comment 2,064 letters from Friends of the Earth members	11-6-17
P-218	S.J. Jacky	Comment - Email	11-6-17
P-219	Rejean Idzerda	Comment - Email	11-6-17
P-220	Ann Turner	Comment - Email	11-6-17
P-221	Sharon Miller	Comment E-mail	11-6-17
P-222	Laura Skelton, MS	Comment E-mail	11-6-17
P-223	Capt. Dan Jordan - Columbia River Bar Pilots	Comment E-mail Dated 11-1-17	11-6-17
P-224	Spencer Ward	Comment E-mail	11-6-17
P-225	Don Jensen - Mayor City of Longview	Comment E-mail	11-6-17

P-226	Inga Fisher Williams	Comment E-mail	11-6-17
P-227	Paul Moyer	Comment E-mail	11-6-17
P-228	Liz Wainwright - Merchants Exchange of Portland	E-mail Comment	11-6-17