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Cowlitz County Department of Building and Planning  
Attn: Ron Melin, Senior Environmental Planner  
County Administration Building  
207 Fourth Avenue North  
Kelso, WA 98626

*Sent via e-mail*

**RE: Comments on the Port of Kalama's Application No. SL 16-0975 for Shoreline Substantial Development and Shoreline Conditional Use Permits.**

Dear Mr. Melin,

Columbia Riverkeeper ("Riverkeeper") submits these comments for the Hearing Examiner's consideration regarding the Port of Kalama's ("Port") Application No. SL 16-0975 for Shoreline Substantial Development and Shoreline Conditional Use Permits for the Kalama Methanol Refinery and Marine Export Terminal.

These comments supplement, and incorporate by reference, the comments submitted by Riverkeeper and others on August 31, 2016, regarding the Port's shoreline permit applications. These comments respond specifically to errors of law and failures of proof that continue to mar the Port's shorelines permit applications, despite the explanations provided in the Cowlitz County Department of Building and Planning's ("County") Staff Report (Exhibit C-1) and the applicant's Response to Comments (Exhibit C-9).

**a. The proposed methanol terminal would interfere with public uses of the Conservancy Shoreline.**

The Washington regulations governing Shoreline Conditional Use Permits ("SCUP") explain that conditional uses may only be permitted in Conservancy Shoreline Districts when "the applicant demonstrates" that "the proposed use will not **interfere** with the normal public use of public shorelines." WAC 173-27-160(1)(b) (emphasis added). Using nearly identical language, the SMP provides that a SCUP can be "granted only after the applicant can demonstrate" that "[t]he use will not **interfere** with the public use of public shorelines."<sup>1</sup>

There is no serious disagreement that "public use of public shorelines"<sup>2</sup> occurs at the project site. As explained in the County Staff Report: "Public recreation in the project area

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<sup>1</sup> *Cowlitz County Shoreline Master Program*, p.25 (emphasis added).

<sup>2</sup> *Id.*; and WAC 173-27-160(1)(b).

consists of low-intensity uses of an unofficial trail system and the sandy beaches, fishing, and visual access associated with the Columbia River, all of which will continue with the project.”<sup>3</sup> Similarly, the Port’s application materials assert that public uses of the public shorelines in and adjacent to the project area include low-intensity uses such as “walking the unofficial trail systems” and the sandy beaches, fishing, visual access, and “scenic viewing” of the river and shoreline.<sup>4</sup>

Accordingly, the only issue with respect to whether the proposal satisfies WAC 173-27-160(1)(b), and the similar requirement in the SMP, is whether the proposal would “interfere” with the public uses that occur in the Conservancy Shoreline at the site. There is ample evidence that such interference would occur because, as the SMP acknowledges, “[o]nce shorelines become occupied with permanent urban development, the . . . quality of recreational experiences available to the public often become severely limited.”<sup>5</sup> As explained in Riverkeeper’s previous comments, the project would degrade air quality in the vicinity of the refinery and terminal and have a very significant impact on visual and aesthetic resources of the shoreline, especially as perceived from the recreational area directly north of the refinery and terminal. Moreover, the placement of eight 20’x 20’engineered log jam (“ELJ”) structures in the water along the beach<sup>6</sup> would likely substantially interfere with anyone attempting to bank fish for salmon or steelhead along much of the beach area.

However, the best evidence of interference with normal public use of the shorelines comes from Kalama residents contemplating living and recreating next to a massive petrochemical facility. Public comments submitted regarding the shorelines permits include statements such as:

- “[T]his project will introduce[] health risks, is unsafe, and will directly [a]ffect our recreational activities! We love going to the river, swimming, fishing, picnics...this refinery will completely [deter] us and anyone else that comes here for family picnics and outdoor activities.”<sup>7</sup>
- “This methanol refinery poses health risks and dangerous hazards, not to mention it will change our rivers ecosystem, our climate and all of our recreational activities we love to

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<sup>3</sup> Exhibit C-1, p.15.

<sup>4</sup> *Shoreline Compliance Narrative*, pp.9, 17. The County should also consider any other public uses of the site, and interference therewith, described in other public comments regarding this shoreline area.

<sup>5</sup> *Cowlitz County Shoreline Master Program*, p.12.

<sup>6</sup> Exhibit C-6, p.94.

<sup>7</sup> Exhibit C-10, p.158.

do at the river.... fishing, swimming, family picnics... these will all be things we will no longer be able to enjoy[,] at least not here.”<sup>8</sup>

- “I enjoy fishing and recreating near port properties and I do not want to worry about the safety of myself and my family while enjoying these activities.”<sup>9</sup>

These statements, and similar statements that are likely to be made during public testimony at the January 23<sup>rd</sup> hearing, strongly indicate that this proposal would actually interfere with the recreational activities of real people who use Washington’s shorelines near the project area.

The Port, and the County’s Staff Report, persist in conflating the idea of preserving “access” to recreational areas with the broader protection against interference with the public’s use.<sup>10</sup> Other portions of Ecology’s rules, and the SMA, specifically protect public access; therefore, the prohibition on interference with public uses of the shoreline in Conservancy Districts necessarily requires more than merely allowing the public to get to the shoreline. The Port’s interpretation of this prohibition fails to prevent interference with public uses of the Conservation Shoreline District because it would allow any project—so long as physical access is maintained—regardless of the level or quality of public use that remains after the project is constructed.

Tacitly admitting that WAC 173-27-160(1)(b) requires more than public access, the Port’s Response to Public Comments provides three examples of public access points near industrial sites.<sup>11</sup> These examples are inapposite and unhelpful for many reasons. First, none of the examples the Port supplies are even *remotely* comparable to a 100-acre petrochemical facility and transloading dock. Second, because the Port does not explain whether any of these recreational/industrial sites are in Conservancy shorelines or required SCUPs, these examples are not helpful in assessing whether those projects satisfied WAC 173-27-160(1)(b)’s test. Third, the mere existence of public access points and some level of public use near industrial facilities does not—as explained in the preceding paragraph—indicate that those industrial facilities don’t “interfere” with public use. The Port’s examples contain no information on whether the level or quality of recreational or other public use changed as a result of proximity to those industrial facilities. Accordingly, the Port has failed to meet its burden to show that the methanol refinery would not interfere with public uses like fishing and scenic access at the proposal site—and the bulk of the evidence suggests that recreation would be negatively impacted.

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<sup>8</sup> Exhibit C-10, p.95.

<sup>9</sup> Exhibit C-10, p.142.

<sup>10</sup> *Shoreline Compliance Narrative*, p.9.

<sup>11</sup> Exhibit C-9, pp.7–9.

Finally, the County should resist the understandable temptation to balance some amount of interference with public use of Conservancy Shorelines against the perceived benefits of the project (economic or otherwise). Ecology's Shorelines rules, and the County's SMA, have already struck that balance. With respect to projects like the methanol refinery, the rules prohibit any interference with existing public uses of shorelines in Conservancy Districts.

**b. Many portions of the industrial use proposed in the shorelines are not water-related or water-dependent.**

The Port's application proposed siting portions of the industrial use in the shorelines, including, among other things: the "Security guard shack;" "Security guard shack parking;" "Electrical Substation;" "Security fencing;"<sup>12</sup> "Bulk product storage tanks" and associated containment berm; "Fire suppression water storage;" "Infiltration pond;" "First flush pond;" "Foam building;" "Security fencing;" and "Site grading and excavation."<sup>13</sup> The Port attempted to justify siting these portions of the industrial use within 200 feet of the ordinary high water mark by claiming that "Methanol production is . . . a water-related use since it needs to be located in immediate proximity to the dock export facility . . . ."<sup>14</sup> As Riverkeeper's August 31, 2016, comments on the Port's shorelines permit applications explained, this is simply not true. There is no logical reason that many portions of the industrial use must be built in the shorelines; they could easily be moved a matter of feet to the east, into the upland portion of the site without compromising the economic viability of the project. Accordingly, many portions of the proposed industrial use are not water-related and may not be permitted in shorelines.

In response to Riverkeeper's August 31, 2016, comments, the Port now asserts that all construction related to methanol production is both a "water-dependent" use as well as a "water-related" use,<sup>15</sup> and attempts to provide further support for the Port's interpretation of the rules implementing the Shorelines Management Act.<sup>16</sup> Riverkeeper addresses each of the Port's arguments contained in the Response to Comments below.

The Port begins by acknowledging that "[m]ost of the methanol manufacturing facility is located outside shoreline Jurisdiction."<sup>17</sup> This is an obvious, but telling, admission. The fact that most of the methanol manufacturing process can be accomplished outside of shorelines demonstrates that some other aspects of methanol manufacturing—such as methanol storage tanks or the stormwater infiltration pond—are not actually "dependent on their location on[,] or

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<sup>12</sup> *Shoreline Compliance Narrative*, p.5.

<sup>13</sup> *Shoreline Compliance Narrative*, Table 1; see also Port of Kalama, *Shorelines Graphics Figure 5: Utility Plan* (February 2016).

<sup>14</sup> *Id.* at 8.

<sup>15</sup> Exhibit C-9, p.4.

<sup>16</sup> Exhibit C-9, pp.3–5.

<sup>17</sup> Exhibit C-9, p.3.

use of[,] the shorelines of the state . . .” RCW 90.58.020. If, for instance, the methanol shift tanks can be built *outside* the shorelines, there is no logical reason why the methanol storage tanks must be built *in* the shorelines.

The Port’s main argument appears to be that that “entirety of the project is water-dependent and/or water-related” because [1] “all accessory facilities are necessary components of the marine terminal use and [2] co-location is required to ensure the facility’s economic viability . . . .”<sup>18</sup> First, as discussed at in Riverkeeper’s August 31, 2016, comments, most of the portions of the use proposed in the shoreline are not actually “necessary components of the marine terminal” because the export terminal dock and transloading equipment do not require, for instance, the stormwater infiltration pond to be built in the adjacent shorelines. Second, the Port has provided no evidence to support its assertion that the entire project would become economically inviable if portions of the proposed use that do not actually involve methanol transloading and shipping were removed from the shorelines. Absent such proof, the Port has failed to meet its burden to support its application.

The only conceivable reason why relocating some methanol manufacturing support facilities by a matter of a few feet—to get them out of the shorelines—could impact the project’s economic viability would be if the Port does not have enough available real estate in the adjacent upland to build an entire methanol refinery. However, this is not an appropriate consideration in the shorelines permitting process. If the Port and its tenant miscalculated or underestimated the amount of buildable upland area necessary for the methanol manufacturing facility, that is their own fault. The Shorelines Management Act (“SMA”) does not permit the use of shorelines as a ‘spill-over’ building area for facilities—like guard shack parking lots—that don’t actually need to be located within 200 feet of Washington’s waterways. And even if running out of buildable upland real estate *was* a valid basis for encroaching into Washington’s shorelines, the Port never met its burden to show that such encroachment is necessary to the project’s economic viability.

The Port also makes the somewhat bizarre argument that “exceptional circumstances” support locating otherwise non-water-related industrial uses in the shorelines at the site.<sup>19</sup> The Port apparently fails to appreciate that the “exceptional circumstances” requirement is an *additional* requirement for locating industrial uses in Conservancy Shoreline districts,<sup>20</sup> not an alternative avenue for demonstrating that a use is water-related. Moreover, the regulations that the Port quotes, WAC 332-30-137(1), actually govern the state’s management of state-owned aquatic lands, not shorelines permits.

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<sup>18</sup> Exhibit C-9, p.4.

<sup>19</sup> Exhibit C-9, pp.4–5.

<sup>20</sup> See SMP’s Economic Development Policy 5(h); see also Exhibit C-1 (Staff Report), p.20; see also Riverkeeper’s August 31, 2016, Comments on Application No. SL 16-0975, p.15.

The Port’s citation to *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wash. App. 503 (2006) is also inapposite. In that case, a mining company sought shorelines permits to construct a “barge-loading facility: the dock and pilings, trestle, conveyor, and dolphins,” in order to load sand and gravel from a nearby mine onto barges. *Id.* at 511–12. The company was not seeking a shoreline permit for any portion of the mine, and “[t]he mine [was] located in the upland portion of the site;” not in the shorelines. *Id.* at 510. Opponents of that barge-loading facility essentially argued, unsuccessfully, that the barge loading facility was not truly “water dependent” because the mine had previously exported sand and gravel by truck, and therefore did not require a dock. Riverkeeper’s argument is much different. Riverkeeper is not arguing that the Port’s proposed dock and methanol transloading equipment are not “water related” industrial uses; those portions of the proposed use are clearly necessary to get methanol from the upland area where “[m]ost of the methanol manufacturing facility is located”<sup>21</sup> onto ships. Instead, Riverkeeper is arguing that components of the methanol manufacturing process—like the mine in *Preserve Our Islands v. Shorelines Hearings Bd.*—could be sited outside of the shorelines without any material impact to the project’s viability.

### **Conclusion**

For the reasons stated above, and for the reasons explained in Riverkeeper’s August 31, 2016, comments, the proposed methanol refinery and export terminal do not comply with the applicable shorelines and land use requirements of Washington and Cowlitz County law. The County should therefore deny the Port’s applications. Thank you for your attention to this matter.

Submitted by,



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<sup>21</sup> Exhibit C-9, p.3.