

**SECOND PUBLIC COMMENT ON CLEAN WATER ACT § 401 WATER QUALITY
CERTIFICATION FOR MILLENNIUM BULK TERMINALS—LONGVIEW, LLC,
COAL EXPORT PROJECT (NWS-2010-1225)**

Submitted to the Washington Department of Ecology by Earthjustice on behalf of:

Columbia Riverkeeper
Climate Solutions
Friends of the Columbia Gorge
Association of Northwest Steelheaders
Washington Environmental Council
Oregon Physicians for Social Responsibility
Washington Physicians for Social Responsibility
Sierra Club
RE Sources for Sustainable Communities
Northern Plains Resource Council
Greenpeace USA
National Wildlife Federation
Western Organization of Resource Councils

July 27, 2017



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SENT VIA EMAIL & U.S. MAIL

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RE: Millennium Bulk Terminals—Longview, LLC; NWS-2010-1225; Second Public Comment on Clean Water Act 401 Certification

Dear Director Bellon, Ms. Toteff, and Washington Department of Ecology:

The nation's largest coal export terminal, proposed over and along the Columbia River by Millennium Bulk Terminals—Longview, LLC ("Millennium"), would violate state water quality standards, including the state's Antidegradation Policy. **We urge you to deny the Clean Water Act § 401 certification for Millennium.** The Final Environmental Impact Statement ("FEIS") found "unavoidable and significant adverse environmental impacts" for nine environmental resource areas: social and community resources; cultural resources; tribal resources; rail transportation; rail safety; vehicle transportation; vessel transportation; noise and vibration; and air quality. In addition, the FEIS describes impacts to water quality from project construction and operations, including coal dust discharges from 75 acres of uncovered coal piles and mile-and-a-half long coal trains, that would violate the state's narrative and numeric water quality standards, harm designated uses, and violate the state's Antidegradation Policy. Millennium's proposed location in the Columbia River estuary ignores a multi-billion-dollar, multi-decade effort to restore endangered and threatened salmonids. Based on the sweeping impacts of Millennium's project, Ecology's legal authority compels the agency to deny Millennium's unprecedented proposal to build the nation's largest coal export terminal in the Columbia River estuary.

Millennium proposes handling up to 44 million metric tons of coal a year with 24-hour per day, seven days per week operation for 30 years. The terminal would generate up to 16 trips

by loaded and unloaded trains along rail corridors in Washington, Oregon, Idaho, Montana, and Wyoming each day. The project would add approximately 1,680 transits per year of Panamax vessels to the Columbia River estuary.

The FEIS, scientific evidence, comments by Tribes, federal and state agencies, non-governmental organizations, and everyday citizens document how Millennium's project would harm designated uses, violate narrative and numeric water quality standards, and conflict with the state's Antidegradation Policy. Since the November 2016 401 certification comment period, Millennium has revised the Joint Aquatic Resources Permit Application and submitted a draft compensatory mitigation plan. Despite project modifications and proposed mitigation, the project would violate state water quality standards and, therefore, Ecology must deny the project.

The Coalition's June 13, 2016, comments on Ecology and Cowlitz County's Draft Environmental Impact Statement ("DEIS") (hereafter "Coalition DEIS Comments"), and November 29, 2016, 401 certification comments (hereafter "First Coalition 401 Certification Comments") describe the impacts of Millennium's project on designated uses and how the project violates water quality standards.¹ Commenters disagree with many of the FEIS's conclusions. In particular, Commenters disagree with the FEIS's conclusion on the unmeasurable and insignificant impacts of coal dust in the Columbia River and other waterbodies. Setting aside the FEIS's conclusion on the impacts of coal dust to water quality and designated uses, Ecology's FEIS discloses measurable impacts to water quality and significant/adverse impacts that are not mitigatable. The following comments apply the conclusions of the FEIS to Ecology's legal authority under § 401. Based on this analysis, Ecology must deny the § 401 certification. Even if this were not the case, Ecology has supplementary authority under the State Environmental Policy Act ("SEPA") to deny the project in light of its significant, unmitigatable adverse environmental impacts. It is time to exercise that authority and let Washington move on from this ill-considered and harmful project.

I. SUMMARY OF ECOLOGY'S AUTHORITY TO DENY THE 401 CERTIFICATION

Under § 401(a) of the CWA, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates. . . ." 33 U.S.C. § 401(a)(1). A state's § 401 power to deny or condition federal environmental permits allows a state to influence—or simply veto—certain federal activities. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994) (holding that states have authority to restrict federal activity pursuant to § 401(d)); *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006) (noting that states have the "primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution.").

¹ See Exhibit 1 (Earthjustice SEPA DEIS Comments (June 13, 2016)) and Exhibit 2 (Earthjustice 401 Certification Comments (Nov. 29, 2016)). Commenters incorporate by reference Exhibits 1 and 2.

The purpose of § 401 is to give states a measure of control over federally permitted projects within their jurisdiction that may harm water quality. *S.D. Warren Co.*, 547 U.S. at 380 (citing S. Rep. No. 92-414, p. 69 (1971) (provision must have “a broad reach” if it is to realize the Senate’s goal: to give states the authority to “deny a permit and thereby prevent a Federal license or permit from issuing to a discharge within such State.”). Because the Millennium project will discharge into waters of the United States, it requires a permit from the U.S. Army Corps of Engineers (“Corps”), and such permit cannot be issued without the required water quality certification from Ecology. *See City of Fredericksburg v. FERC*, 876 F.2d 1109, 113 (4th Cir. 1989).

Under U.S. Supreme Court precedent arising in a case argued by the Washington Department of Ecology, § 401 authority is broad, and it allows a state agency to condition or deny a project based on *any* adverse impact to water quality—not just the discharge that triggers § 401 oversight. *PUD No. 1*, 511 U.S. at 710-13 (“[O]nce the threshold condition, the existence of a discharge, is satisfied . . . the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and any other appropriate requirement of state or tribal laws”). The *PUD No. 1* holding also confirms that § 401 authority may be used to prevent or mitigate violations of *all* the elements of state water quality standards—not just numeric criteria. 511 U.S. 700 at 714-15.

Washington has adopted water quality standards to protect “public health and public enjoyment of the waters and the propagation and protection of fish, shellfish, and wildlife.” WAC 173-201A-010(1). The Columbia River, like all surface waters, is protected by “numeric and narrative criteria, designated uses, and an antidegradation policy.” *Id.* Oregon has similar water quality standards applicable in this reach of the Columbia. FEIS at 4.5-9.

II. MILLENNIUM’S PROJECT WOULD VIOLATE STATE WATER QUALITY STANDARDS

The First Coalition 401 Certification Comments explain in detail why Ecology must deny the 401 certification: Millennium’s project would harm designated uses, contravene the state’s Antidegradation Policy, and violate narrative and numeric water quality standards. Specific grounds for denying the 401 certification are detailed in the Coalition DEIS and First 401 Certification Comments. In the following section, Commenters highlight and update, based on the findings of the FEIS, Ecology’s grounds for denying Millennium’s 401 certification.

A. Millennium’s Project Would Harm Designated Uses

Millennium proposes to build and operate the nation’s largest coal export terminal in the Columbia River estuary, an area designated under Ecology’s water quality standards as spawning and rearing habitat for salmon, primary contact recreation, and water supply for domestic, industrial, and agricultural uses. WAC 173-201A-602. This area of the Columbia is also protected for wildlife habitat, fish harvesting, and many other uses. *Id.* These designated uses would be adversely affected by the project.

Notably, this segment already suffers from numerous existing water quality impairments, which make additional impairments all the more consequential. *See* FEIS 4.5-9 (§ 303(d) listing information); *id.* at 4.5-10 (“Elevated water temperatures, increased nutrient loading, reduced dissolved oxygen, and increased toxic contaminants in the basin pose risks to fish and wildlife, as well as people.”).

Of particular concern is the use of the Columbia River for salmon spawning, rearing, and harvesting—all protected designated uses. The FEIS makes clear that the project would adversely affect *all* of these uses in ways that cannot be mitigated. Most prominently, the FEIS finds that the project’s interference with tribal fisheries harvest would be a significant adverse impact. FEIS 3.5-20 (describing problems of access, and “difficult to quantify” potential reductions in harvestable fish resources due to behavioral and habitat impacts). The FEIS identifies numerous other harms to salmon spawning, rearing, and migration. For example, the FEIS discusses the potential impact on wake stranding from the dramatic increase in large ship traffic, and harm to habitat from dredging and pollution. *See generally* FEIS § 4.7. While the FEIS does not explicitly find that harm to fisheries and water quality is “significant and adverse,” the FEIS nonetheless describes project impacts that rise to the level of violations of water quality standards. The fact that the impacts of Millennium’s project are difficult to quantify (e.g., stranding of juveniles) does not mean that the project complies with water quality standards. It calls for a more, not less, precautionary approach. Moreover, these harms are particularly acute in the context of cumulative effects—with substantially increased fish stranding, vessel noise, and other habitat impacts anticipated in the years ahead. FEIS 6-30, 6-53.

Multiple populations of salmon and other fish are protected as endangered or threatened species under federal law due to their imperiled status. The federal and state governments, as well as Tribes, are spending billions of dollars to restore this part of the Columbia for salmon recovery. The Millennium project, in contrast, would set those efforts back. Indeed, authorizing this project is arguably prohibited under federal law due to its impacts on listed salmon. 16 U.S.C. § 1538 (prohibiting actions which result in death or injury, including habitat loss, of federally listed species). To date, the Endangered Species Act (“ESA”) expert agencies—NOAA Fisheries and the U.S. Fish and Wildlife Service—have not issued a Biological Opinion for the Millennium project. However, in comments on the DEIS, the U.S. Fish and Wildlife Service states:

The Service believes that the Millennium Longview Coal Terminal project will cause or result in significant coal dust deposition along the rail transport corridor. We do not agree that the risk of accumulation in soils, sediments, and water is negligible or insignificant. **The Service expects that the proposed action will measurably increase toxic pollutant concentrations in soils, sediments, and water, and will very likely result in exposures,**

potential toxic effects, and impacts to the Service's trust resources.²

The Service also recognizes the project's direct impacts to fish, wildlife, and their habitats from increased marine vessel traffic (e.g., wake stranding of salmonids) and concludes "[t]he applicant and SEPA co-leads have failed to identify mitigation measures that would adequately avoid significant impacts resulting from wake stranding along the marine vessel transport corridor." *Id.*

The FEIS, scientific studies, and comments on the FEIS and 401 certification support denying the 401 certification based on the project's harm to designated uses.

B. Millennium's Project Cannot Withstand Antidegradation Review

Millennium's project fails to comply with Washington's Antidegradation Policy. WAC 173-201A-300 states:

The purpose of the antidegradation policy is to:

(a) Restore and maintain the highest possible quality of the surface waters of Washington;

(b) Describe situations under which water quality may be lowered from its current condition;

(c) Apply to human activities that are likely to have an impact on the water quality of a surface water;

(d) Ensure that all human activities that are likely to contribute to a lowering of water quality, at a minimum, apply all known, available, and reasonable methods of prevention, control, and treatment (AKART); and

(e) Apply three levels of protection for surface waters of the state, as generally described below:

(i) Tier I is used to ensure existing and designated uses are maintained and protected and applies to all waters and all sources of pollution.

(ii) Tier II is used to ensure that waters of a higher quality than the criteria assigned in this chapter are not degraded unless such lowering of water quality is necessary and in the

² Exhibit 3 (U.S. Fish and Wildlife Service Comments on Millennium SEPA DEIS (June 13, 2016)) (emphasis added).

overriding public interest. Tier II applies only to a specific list of polluting activities.

(iii) Tier III is used to prevent the degradation of waters formally listed in this chapter as ‘outstanding resource waters,’ and applies to all sources of pollution.

Ecology evaluates the applicability of Tier I and II under a pollutant-by-pollutant approach.³

Ecology must conduct a Tier II Antidegradation Policy Review for Millennium. WAC 173-201A-320(2)(c) states, “A Tier II will only be conducted for new or expanded actions conducted under the following authorizations[,]” which includes “Federal Clean Water Act Section 401 water quality certifications.” Ecology’s *Water Quality Program Guidance Manual—Supplemental Guidance on Implementing Tier II Antidegradation* states: “New or expanded projects requiring a 401 certification that will potentially cause a measureable change in water quality will be required to undergo a Tier II analysis for antidegradation (for example, a new hydropower project).” Under WAC 173-201A-320(4), “[o]nce an activity has been determined to cause a measurable lowering in water quality, then an analysis must be conducted to determine if the lowering of water quality is necessary and in the overriding public interest.”

Ecology’s FEIS, comments on the DEIS, and comments on the 401 certification demonstrate that Millennium’s project will potentially cause a measureable change in water quality, as defined in WAC 173-201A-320(3)(d), (e), and (f). For example, the FEIS states:

- “Dredging and in-water work would result in temporary increases in suspended sediment and turbidity.” FEIS at 4.5-21.
- “Release of creosote would occur from the removal of existing creosote-treated timber piles associated with two pile dikes. Creosote is composed of more than 300 chemicals, including PAHs, which have been shown to be fatal to marine life (Washington State Department of Natural Resources 2008) ... The removal of creosote-treated piling would result in temporary suspension of sediments and a potential long-term increase in the exposure of creosote in the project area.” *Id.* at 4.5-22.
- “Coal and coal dust could enter the Columbia River directly or via the surrounding drainage channels from spills during loading or unloading or through airborne transport of coal dust during operations. The extent of average annual coal dust deposition was modeled and mapped (Chapter 5, Section 5.7, Coal Dust, Figure 5.7-3). Coal dust is anticipated to deposit a maximum of 0.40 grams per square meter per month (g/m²/month) in or adjacent to the project area. This

³ Letter from U.S. Environmental Protection Agency to Ecology, “EPA Review of 2003 Water Quality Standards Regulations for Antidegradation” at 5 (May 2, 2007), http://www.ecy.wa.gov/Programs/wq/swqs/epa-antideg_policy_approval.pdf.

amount of deposition is well below the benchmark for dust nuisance impacts (2.0 g/m²/month), which is defined as the level of dust deposition that affects the aesthetics, look, or cleanliness of surfaces. Annually, coal dust is anticipated to deposit a maximum of 1.99 grams per square meter per year (g/m²/year) in or adjacent to the project area, including Docks 2 and 3 in the Columbia River. Additional information on these deposition levels is found in Chapter 5, Section 5.7, Coal Dust; the spatial extent of the maximum annual coal dust deposition near the project area is shown in Figure 5.7-3.” *Id.* at 4.5-24.

- “While a release is likely to be relatively small (less than 50 gallons), locomotives have a fuel capacity of 5,000 gallons and could potentially release fuel during operations. Also, fuel trucks would visit the site as required during operations. The frequency would vary based on usage and could range from once or twice per day to once or twice per week. Fuel trucks typically have a 3,000- to 4,000-gallon capacity. A spill could have potential impacts on water quality.” *Id.* 4.5-27.
- “Propeller wash increases the potential for scour and erosion of the sides and bottom of the navigation channel, and thus, could cause temporary, localized increase in turbidity. During transit of the Columbia River to and from Docks 2 and 3, the large propellers on cargo vessels would create turbulence close to the river bottom that could erode bottom sediments. The propeller wash from tugboats transiting to and from Docks 2 and 3 to assist cargo vessels would be nearer the surface and would, thus, have less potential to result in scour or erosion of bottom sediments.” *Id.* at 4.5-29–30.
- “Coal and fuel spills could occur if the cargo tanks on a vessel are ruptured during such events as a grounding or collision; however, the potential for a vessel rupture incident is low.” *Id.* at 4.5-30.
- “Day-to-day rail operations could release contaminants to stormwater, including coal dust, metals, hydraulic and brake fluid, oil, and grease from track lubrication.” *Id.*
- “Construction of the Proposed Action would result in the permanent loss of 24.10 acres of wetlands (Table 4.3-4). Construction activities would permanently fill Wetlands A, C, Z, and P2 and a portion of Wetland Y (Figure 4.3-2) (Grette Associates 2014d) to construct rail lines and coal handling facilities.” *Id.* at 4.3-11.
- “Placement of fill material to construct the proposed coal export terminal would result in the permanent total loss of wetland functions across 24.10 acres of wetlands (Table 4.3-4). The functions most affected would be water quality and wildlife habitat, as evidenced by the rating system scores for the affected wetlands (Grette Associates 2014d). Wetland scores for the Category III wetlands are

highest for the water quality and wildlife habitat functions. Wetland scores for Wetland P2 (the only Category IV wetland) were low for all three functions.” *Id.*

- “All water quality and hydrology functions would be lost from Wetlands A, C, Z, and P2, with a portion of those functions lost in Wetland Y.” *Id.*
- “Wetland Y vegetation would likely be affected by coal dust. The impact of coal dust on vegetation would depend on dust load, climatic conditions, and physical characteristics of the vegetation. Impacts could include blocked stomata, which would reduce respiration and/or decrease transpiration; altered leaf surface reflectance and light absorption; and increased leaf temperature due to optical properties of the dust (Chaston and Doley 2006; Doley 2006:38; Farmer 1993).” *Id.* at 4.3-11.

In short, the FEIS describes how the project “will potentially cause a measurable change in water quality.” Ecology, therefore, must reach a “necessary and overriding public interest determination” pursuant to WAC 173-201A-320(4) and implementing guidance.

Ecology must consider “the benefits and costs of the social, economic, and environmental effects associated with the lowering of water quality” as part of the “necessary and overriding public interest determination” analysis. WAC 173-201A-320(4)(A). In conducting the analysis, Commenters urge Ecology to consider the voluminous record documenting costs to Tribes, municipalities, businesses, individuals, endangered species, and the environment from Millennium’s project. Ecology must also consider the applicant’s unsupported conclusions on the project’s benefits.

As part of this analysis, Ecology should consider the Washington Department of Natural Resources’ (“DNR”) January 5, 2017, decision denying Millennium’s request to sublease state-owned aquatic lands. Earlier this year, DNR denied Millennium’s request for a proprietary right—a sublease—to use state-owned land for the coal export terminal. Millennium cannot operate the proposed coal terminal without DNR’s consent. Of particular importance to Ecology’s WAC 173-201A-320(4)(A) analysis, DNR’s decision letter states:

The need for evaluation of Millennium’s financial condition is also supported by the historically poor market conditions in the coal industry. The sale of Arch Coal’s membership interest to LHR Infrastructure leaves LHR as the sole owner of Millennium. LHR is a wholly owned subsidiary of Lighthouse Resources, which owns and operates coal mines in the Powder River Basin. The difficulties currently faced by the coal industry are well documented. A steep decline in demand for coal has lead [sic] to several bankruptcies among the largest coal producers. In addition to Arch Coal, several other major U.S. coal companies, including Peabody Energy Corp., Alpha Natural Resources, and Patriot Coal Corp., have filed [for] bankruptcy since 2015. According to the November 3, 2016,

Annual Coal Report produced by the U.S. Energy Information Administration, U.S. coal production dropped 10.3 percent in 2015 to its lowest level since 1986. The EIA forecasts that U.S. coal production for 2016 has decreased by an additional 15 percent, to its lowest level since 1978 and will remain at historically low levels in 2017.⁴

DNR's multi-year review of Millennium's request to sublease state-owned aquatic lands supports a finding that the lowering of water quality is not necessary and in the overriding public interest. Based on Millennium's impacts to water quality, public health, and the economy, Ecology cannot conclude Millennium demonstrates a "necessary and overriding public interest" in siting a coal export terminal on the Columbia River.

In conducting the WAC 173-201A-320(4)(A) analysis, Ecology must pay particular attention to the disproportionate impacts on Tribes and Native Americans, and other environmental justice communities. In evaluating the public interest, Ecology must consider the conclusions of the FEIS documenting disproportionate and unmitigatable impacts to Tribes and low-income and minority communities. A Health Impact Assessment ("HIA") is underway and, in turn, the FEIS does not incorporate the HIA findings. Even without the HIA, the FEIS concludes that the project's impacts on public health are "unavoidable and significant." FEIS at S-58. For example, the FEIS found an increased cancer risk for people living near the terminal. The FEIS states:

Based on the inhalation-only health risk assessment, diesel particulate matter emissions primarily from Proposed Action-related train locomotives traveling along the Reynolds Lead, BNSF Spur, and BNSF main line in Cowlitz County would result in areas of increased cancer risk. The maximum modeled cancer risk increase in the City of Longview would be **50 cancers per million in the Highlands neighborhood, a low-income and minority community**. This impact would constitute a **disproportionately high and adverse** effect on minority and low-income populations and would be unavoidable and significant.

Id. at S-14 (emphasis added). The FEIS goes on to conclude that, "[b]ased on an inhalation-only health risk assessment, coal export terminal operations and Proposed Action-related trains would **increase the cancer risk** associated with diesel particulate matter emissions." *Id.* at S-35 (emphasis added). The FEIS also concludes that, if the Federal Railroad Administration does not approve a Quiet Zone near the terminal, "the impacts would be unavoidable and significant." *Id.*

⁴ Exhibit 4 at 2 (Letter from Commissioner of Public Lands Peter Goldmark to Mark Stiffler, NW Alloys, Inc. (Jan. 5, 2017)). Millennium and NW Alloys sued DNR in state court, challenging DNR's authority to deny Millennium's sublease consent. That case is pending in Cowlitz County Superior Court.

at S-14. Ecology should also take note of the recent health assessment prepared for a much smaller coal terminal project in Oakland. Exhibit 9.

Ecology's WAC 173-201A-320(4)(A) analysis must also account for the project's climate change impacts. The FEIS concludes that the greenhouse gas ("GHG") impact of exporting 44 million tons of coal varies significantly based on different assumptions but suggests that under the "preferred scenario," the impact would be just under 2 million tons of CO₂ equivalent annually. This amount is very significant (equivalent to adding **425,000 cars to the road annually**) and far above the thresholds of what should be considered acceptable at a time when the state is committed to reducing carbon pollution. Under some scenarios, emissions could be as high as **55 million tons of GHG**, substantially higher than **Washington state's entire GHG footprint from all sources**. The climate impacts alone demonstrate that the lowering of water quality is not necessary and is not in the overriding public interest.

In addition to the impacts disclosed in the FEIS, Ecology must consider comments on the Millennium DEIS that address the project's costs and benefits, including comments filed by: the Confederated Tribes of Umatilla Indian Reservation, the Upper Columbia United Tribes, the Coeur d'Alene Tribe, the Cowlitz Indian Tribe, and the Swinomish Indian Tribal Community.

Ecology must also consider comments from elected officials, municipalities, agencies, non-profits, and others in reaching a public interest determination. This includes comments on the DEIS filed on behalf of: the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, the National Park Service, the Columbia Gorge Scenic Area Commission, the Washington Department of Health, the Washington Utilities and Transportation Commission, the Washington DNR, the cities of Hood River, Camas, Washougal, Portland, North Bonneville, Olympia, Stevenson, Tacoma, Vancouver, Seattle, and Whitefish, the Oregon and Washington Physicians for Social Responsibility, and hundreds of thousands of other organizations and individuals. These comments detail Millennium's impacts to water quality and designated uses and why the project harms the public interest.

C. Millennium's Project Would Violate Numeric and Narrative Water Quality Standards

DEIS comments detail how coal dust and other project impacts would harm water quality. *See* Exhibit 1 at 40–51. In the following section, Commenters highlight Ecology's grounds for denying Millennium's 401 certification under narrative and numeric water quality standards.

Ecology should deny the project based on violations of WAC 173-201A-240(1) and WAC 173-201A-260(2). WAC 173-201A-240(1), "Toxic Substances," states:

Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon

those waters, or adversely affect public health, as determined by the department.

In addition, WAC 173-201A-260(2), “Toxics and aesthetics criteria,” states:

The following narrative criteria apply to all existing and designated uses for fresh and marine water:

(a) Toxic, radioactive, or deleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health (see WAC 173-201A-240, toxic substances, and 173-201A-250, radioactive substances).

(b) Aesthetic values must not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste (see WAC 173-201A-230 for guidance on establishing lake nutrient standards to protect aesthetics).

Scientific studies, including many attached to the Coalition DEIS comments, show that coal from terminals and trains enters nearby water and can affect numerous aspects of water quality. In addition, DEIS comments from expert federal, tribal, and state agencies support findings of narrative and numeric water quality standards violations. *See* Exhibit 2 (First Coalition 401 Certification Comment at 9–14 (Nov. 29, 2016)) (highlighting agency comments describing impacts from coal dust to water quality and designated uses).

Coal export terminals are notoriously dirty. The FEIS, however, concludes that coal dust from Millennium will have no unavoidable or significant impacts on the Columbia River. Setting aside the validity of the FEIS’s conclusion, the FEIS does not answer the question of whether Millennium’s project would cause violations of state narrative and numeric water quality standards. For the reasons explained below and in the Coalition DEIS Comments, Exhibit 1, Ecology should conclude that Millennium’s project would violate standards, including WAC 173-201A-240(1) and WAC 173-201A-260(A)(a)–(b).

Scientific literature from around the world documents the detrimental and measurable impacts of coal terminals adjacent to waterbodies.⁵ For example, in a study of coal dispersal at

⁵ *See* Exhibit 5 (Bounds, William J. and Johannesson, Karen H., *Arsenic additions to soils from airborne coal dust originating at a major coal shipping terminal*, 185 *Water Air and Soil Pollution* (2007)); Exhibit 6 (Johnson, Ryan and Bustin, R.M., *Coal dust dispersal around a marine coal terminal (1977-1999)*, *British Columbia: The fate of coal dust in the marine*

the Roberts Bank Coal terminal in British Columbia, scientists studied the amount of coal found in the sediment at one of the most ecologically important estuaries on the West Coast of North America.⁶ As would be the case at Millennium, much of the escaping coal dust complained of at Roberts Bank was from uncovered rail cars on the site.⁷ To determine how present coal was in the estuary, the scientists measured the coal content of sediment at various distances from the terminal, and compared that to “background” coal content in a control area.⁸ The study found that control areas had a background sediment coal content of .65-.77%, while sample sites near the terminal had a coal content of up to 11.9%.⁹ Coal was not just present in sediment immediately adjacent to the terminal, either. Moderate areas of accumulation (1-3% coal content) existed a half-mile in either direction of the terminal.¹⁰ The Roberts Bank Coal terminal study is one example of scientific literature describing toxic and aesthetic impairments from coal dust.

For the reasons explained above, the state cannot certify that this project complies with state water quality standards, and the § 401 certification must be denied. We urge Ecology to move forward expeditiously with such a finding.

III. ECOLOGY SHOULD DENY THE PROJECT UNDER ITS SUPPLEMENTARY SEPA AUTHORITY

As demonstrated above, Ecology has the ability under its existing regulatory authorities to deny these projects due to their adverse impacts on water quality, shorelines, and the “public interest.” Even if that was not the case, Ecology has *supplementary* authority under SEPA to deny the project when it makes its decisions under the above authorities. RCW 43.21C.060; WAC 197-11-030(1) (“The policies and goals set forth in SEPA are supplementary to existing agency authority.”). Even if a project met the requirements of the CWA (which this one plainly does not), SEPA provides additional authority to condition or deny projects, even where they meet all other requirements of law. This principle of law is well established. *West Main Associates v. Bellevue*, 106 Wn.2d 47, 53 (1986) (“a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance”); *Donwood v. Spokane County*, 90 Wn. App. 389 (1998) (“counties therefore have authority under SEPA to condition or

environment, 68 International Journal of Coal Geology (2006)); Exhibit 7 (Levings, C.D., *Juvenile Salmonid Use of Habitats Altered by a Coal Port in the Fraser River Estuary, British Columbia*, 16 Marine Pollution Bulletin 6 (1985)); Exhibit 8 (Evaluation of Coal Dust and Spillage Control Measures Alaska Railroad Corporation, Aurora Energy Services, LLC Coal Terminal Seward, Alaska, Expert Report of Steven Klafka (Mar. 7, 2012)).

⁶ Exhibit 6 at 57-58.

⁷ *Id.* at 59.

⁸ *Id.* at 61.

⁹ *Id.* at 62.

¹⁰ *Id.* at 63.

deny a land use action based on adverse environmental impacts even where the proposal complies with local zoning and building codes.”).

Permitting authorities regularly employ this authority to deny projects with significant adverse impacts—in many cases, impacts that are far less serious or factually well-grounded than the ones at issue here. *See, e.g., Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69-70 (1978) (upholding denial of high-rise project based on aesthetic, property values, and noise impacts); *Victoria Tower P’ship v. City of Seattle*, 59 Wash. App. 592, 602 (1990) (upholding denial of 16-floor tower and mitigation to 8-floors); *State v. Lake Lawrence Pub. Lands Prot. Ass’n*, 92 Wn.2d 656, 659 (1979) (upholding denial of development of 14-acre parcel because of effects on bald eagles); *Cook v. Clallam Cnty.*, 27 Wash. App. 410, 414 (1980) (upholding permit denial of commercial development in rural area); *W. Main Associates v. City of Bellevue*, 49 Wash. App. 513, 521-23 (1987) (upholding denial of permits based on historic/cultural impacts, view impacts, shadow impacts, traffic impacts, and air impacts).

SEPA and its implementing regulations lay out requirements for conditioning or denial pursuant to SEPA’s substantive authority, as well as appropriate procedures. WAC 197-11-660. Two critical factors exist. First, a denial “shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency....” RCW 43.21C.060. Second, in order to deny a proposal, an agency must find a project would cause “significant adverse environmental impacts” as identified in an EIS, and that “reasonable mitigation measures are insufficient to mitigate the identified impact.” WAC 197-11-660.

Both conditions are easily satisfied here. First, Ecology has adopted policies for the exercise of its SEPA substantive authorities, and they are sweeping indeed. WAC 173-802-110. The rule addresses Ecology’s “overriding policy... to avoid or mitigate adverse environmental impacts” arising from its permitting decisions. Ecology’s policies also speak to the state’s responsibilities to act as a “trustee of the environment for succeeding generations.” Overall, the policies embody Ecology’s recognition that “each person has a fundamental and inalienable right to a healthful environment.” The project described in the FEIS—even with the FEIS’s substantial flaws and omissions—collides sharply with such policies. A project that will increase the risk of cancer and result in other adverse health impacts in poor communities, that significantly increases the risks of accidents and spills, that will tie traffic up for hours a day, and that will violate the state’s obligations to Tribes to preserve access to fishing, cannot be squared with Ecology’s substantive SEPA policies.

Second, the FEIS itself identifies nine areas where there are significant adverse environmental impacts on which to rest a denial under Ecology rules. Some of these could theoretically be mitigated, for example, by substantial investments in new rail and traffic infrastructure. However, these mitigation measures at this time are neither “reasonable” nor “capable of being accomplished,” as they involve decisions that are outside the control of Ecology, Cowlitz County, and the applicant, and will not occur on the timeframe by which decisions must be made. WAC 173-802-110(2). Moreover, other significant adverse impacts simply cannot be mitigated at all.

The legislature provided agencies with substantive denial authority precisely to deal with situations like this one. This ill-advised project, which would place this state at the center of a global hub for the transportation of dirty fossil fuels, would have impacts that are both significant and unavoidable. It collides with the vision and the values that this state has adopted for itself. That's why the legislature has granted Ecology the specific statutory authority to say no to this project. We ask that you exercise that authority here.

One final point bears emphasis. With respect to the additional greenhouse gas emissions associated with increased coal consumption proximately caused by the operation of the project, the FEIS offers a range of possible outcomes based on different assumptions. See FEIS Ch.5.8. However, as our experts have convincingly demonstrated in their DEIS comments, the only scenario in which the project would be economic to build and operate is the "upper bound" scenario, which would result in 55 million tons of new CO₂e annually for the life of the project. FEIS 5.8-19. This dramatic increase in greenhouse gases will cumulatively contribute to the continued degradation of water quality, fisheries, shorelines, and multiple other values that the CWA, SMA, and SEPA seek to protect. To cite just one example, the state has made a strong commitment to address the issue of marine water acidification, which threatens the state's economy and quality of life. Authorizing a project that would dramatically increase the state's greenhouse gas footprint undermines this goal. And in the wake of the total collapse of federal leadership on climate issues, it is critical for the state to redouble its efforts to ensure that it is not authorizing projects, like this one, which exacerbate climate pollution. This is yet another basis on which to deny the project.

Sincerely,



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Earthjustice

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Attachments