

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

3 COLUMBIA RIVERKEEPER, SIERRA
4 CLUB, and CENTER FOR BIOLOGICAL
5 DIVERSITY

6 Petitioners,

7 v.

8 COWLITZ COUNTY, PORT OF KALAMA,
9 NORTHWEST INNOVATION WORKS –
10 KALAMA, LLC, and STATE OF
11 WASHINGTON, DEPARTMENT OF
12 ECOLOGY

Respondents,

WASHINGTON PUBLIC PORTS
ASSOCIATION

Intervenor,

SHB No. 17-010c

ORDER ON MOTIONS FOR PARTIAL
SUMMARY JUDGMENT

13 **INTRODUCTION**

14 Petitioners Columbia Riverkeeper, Sierra Club, and Center for Biological Diversity
15 (Riverkeeper) filed a petition with the Shorelines Hearings Board (Board) for review of
16 Shoreline Substantial Development Permit (SDP) No. 3253 and Shoreline Conditional Use
17 Permit (CUP) No. 1056 (Permits) authorizing construction of the Kalama Manufacturing and
18 Marine Export Facility in Cowlitz County. The Port of Kalama (Port) filed a petition with the
19 Board for review of a condition imposed by the Department of Ecology (Ecology) on the CUP.
20 The matters were consolidated for hearing. Separate motions for partial summary judgment were
21 filed by Ecology, the Port, Riverkeeper, and Northwest Innovation Works – Kalama, LLC

ORDER ON MOTIONS FOR
PARTIAL SUMMARY JUDGMENT
SHB No. 17-010c

1 (NWIW). Prior to completion of briefing on the motions, the Port voluntarily withdrew its
2 petition. The Board dismissed *Port of Kalama v. Ecology*, SHB No. 17-011, and the issues
3 associated with that case (Issues 7.a, 7.b, 8, and 9) were stricken. Accordingly, the Port’s motion
4 for summary judgment is moot.

5 The Board hearing this matter was comprised of Board Member Joan M. Marchioro,
6 Presiding, Thomas C. Morrill, Chair, and Members Kay M. Brown, Grant Beck, Robert Gelder,
7 and Allen Estep. Assistant Attorney General Emily C. Nelson and Senior Counsel Thomas J.
8 Young represented Ecology. Attorneys Jay P. Derr, Brent Carson, and Jenna Mandell-Rice
9 represented the Port. Attorneys Frank J. Chmelik and Jonathan K. Sitkin represented
10 Washington Public Ports Association (WPPA). Attorneys Janette Brimmer, Stephanie Tsosie,
11 and Adrienne Bloch represented Columbia Riverkeeper. Attorneys Erin L. Anderson, Vanessa
12 Soriano Power, Sara A. Leverette, Timothy L. McMahan, and KC Harding represented NWIW.
13 Chief Civil Deputy Douglas E. Jensen represented Cowlitz County.

14 In rendering its decision, the Board considered the following:

- 15 1. Respondent State of Washington, Department of Ecology’s Motion for
16 and Memorandum in Support of Partial Summary Judgment;
- 17 2. Declaration of William Drumheller in Support of Department of
18 Ecology’s Motion for Partial Summary Judgment;
- 19 3. Declaration of Emily C. Nelson in Support of Department of Ecology’s
20 Motion for Partial Summary Judgment, with Exhibits A-E;
- 21 4. Petitioners Columbia Riverkeeper et al. Motion and Memorandum for
Partial Summary Judgment;
5. Declaration of Janette Brimmer, with Exhibits A-F;
6. Declaration of David Noah Greenwald;

- 1 7. Declaration of John Flynn;
- 2 8. Declaration of Miles Johnson;
- 3 9. Declaration of Neal Anderson;
- 4 10. Declaration of Lori Ann Burd;
- 5 11. Northwest Innovation Works-Kalama, LLC's Motion for Summary
6 Judgment;
- 7 12. Declaration of Erin Anderson in Support of NWIW's Motion for
8 Summary Judgment, with Exhibits A-C;
- 9 13. NWIW's Response to CRK et al.'s Motion for Partial Summary Judgment
10 on Issues 2 and 4;
- 11 14. Declaration of Erin Anderson in Support of NWIW's Response to CRK et
12 al.'s Motion for Partial Summary Judgment on Issues 2 and 4;
- 13 15. Port of Kalama's Response in Opposition to Riverkeeper's Motion for
14 Partial Summary Judgment on Issues #2 and #4;
- 15 16. Declaration of Steve Scheele in Support of Port of Kalama's Response in
16 Opposition to Riverkeeper's Motion for Partial Summary Judgment on
17 Issues #2 and #4, with Exhibits PK 006 1-5, Excerpts of JE 001, PK 007
18 1-26, PK 008 1-11;
- 19 17. Port of Kalama's Response in Opposition to State of Washington,
20 Department of Ecology's Motion for and Memorandum in Support of
21 Partial Summary Judgment on Issues #4, #7.a, #7.b, #8 and #9 and
 Columbia Riverkeeper, Sierra Club, and Center for Biological Diversity's
 Motion and Memorandum in Support of Summary Judgment in Case No.
 17-011 On Issues #7.a, #7.b, and #9;
- 18. Declaration of Brent Carson in Support of Port of Kalama's Response in
 Opposition to State of Washington, Department of Ecology's Motion for
 and Memorandum in Support of Partial Summary Judgment on Issues #4,
 #7.a, #7.b, #8 and #9 and Columbia Riverkeeper, Sierra Club, and Center
 for Biological Diversity's Motion and Memorandum in Support of
 Summary Judgment in Case No. 17-011 On Issues #7.a, #7.b, and #9, with
 Exhibit PK 009 1-5;

- 1 19. Declaration of Mark Wilson in Support of Port of Kalama's Response in
2 Opposition to State of Washington, Department of Ecology's Motion for
3 and Memorandum in Support of Partial Summary Judgment on Issues #4,
4 #7.a, #7.b, #8 and #9 and Columbia Riverkeeper, Sierra Club, and Center
5 for Biological Diversity's Motion and Memorandum in Support of
6 Summary Judgment in Case No. 17-011 on Issues #7.a, #7.b, and #9, with
7 Exhibit PK 005 1-137;
- 8 20. Ecology's Consolidated Response to Dispositive Motions;
- 9 21. Second Declaration of Emily C. Nelson, with Exhibits A-E;
- 10 22. Columbia Riverkeeper, Sierra Club, and Center for Biological Diversity's
11 Combined Response to Respondents' Motions for Summary Judgment;
- 12 23. Second Declaration of Janette Brimmer, with Exhibits A-B;
- 13 24. Declaration of Ian Goodman, with Exhibit A;
- 14 25. Declaration of Peter Erickson, with Exhibit A;
- 15 26. Washington Public Ports Association's Opposition to Columbia
16 Riverkeeper at al.'s Motion for Partial Summary Judgment;
- 17 27. Department of Ecology's Reply in Support of its Motion for Partial
18 Summary Judgment;
- 19 28. Third Declaration of Emily C. Nelson, with Exhibits A-B;
- 20 29. Columbia Riverkeeper, Sierra Club, and Center for Biological Diversity
21 Combined Reply in Support of Motions for Summary Judgment;
30. Third Declaration of Janette Brimmer, with Exhibit A;
31. NWIW's Reply in Support of Motion for Summary Judgment on Issues
1(a)-(c), 4, and 6(a);
32. Declaration of Erin Anderson in Support of NWIW's Reply Re Motion for
Summary Judgment on Issues 1(a)-(c), 4, and 6(a); and
33. The Board's file in this matter.

1 The following issues, which were submitted by the parties and set out in the Amended
2 Consolidation and Prehearing Order, are the subject of the pending motions:

- 3 1. Did Cowlitz County and the Department of Ecology (Ecology)
4 erroneously approve the Shoreline Substantial Development and
5 Conditional Use Permits (the Permits) for the Northwest Innovation
6 Works – Kalama, LLC methanol manufacturing and shipping facility (the
7 Project) based on the conclusion that the Project would have no significant
8 adverse impact, as defined by the State Environmental Policy Act (SEPA),
9 because:
 - 7 a. the Final Environmental Impact Statement (FEIS) did not
8 adequately disclose, analyze, and consider the upstream environmental
9 impacts of the Project, including the greenhouse gas emissions and other
10 impacts with the extraction and transport of massive volumes of natural
11 gas and the construction and operation of a new regional pipeline that will
12 likely be necessary to meet the Project’s demand for gas;
 - 11 b. the FEIS did not adequately disclose, analyze, and consider the
12 downstream environmental impacts of the Project, including the
13 greenhouse gas emissions and other impacts associated with transport of
14 the methanol to China and production of olefins from methanol;
 - 13 c. the FEIS did not accurately and adequately disclose, analyze, and
14 consider the full greenhouse gas emissions or carbon intensity from the
15 ULE process for the production of olefins from methanol[.]
- 15 2. Did Cowlitz County and Ecology erroneously rely on Ecology Guidance
16 in not requiring mitigation of the Project’s greenhouse gas emissions?
- 17 4. Did Cowlitz County and Ecology issue the Permits in violation of the
18 Shoreline Management Act (SMA), RCW 90.59, implementing
19 regulations, and the Cowlitz County Shoreline Management Master
20 Program (CCSMP) by authorizing portions of the Project that are not
21 “water-related” or “water-dependent” to be considered within the
shoreline?
6. Whether Cowlitz County’s issuance of the Shoreline Substantial
Development Permit (SSDP) and Ecology’s approval of the Shoreline
Conditional Use Permit (SCUP), inclusive of the restrictive conditions
imposed thereon, comply with the SMA and its implementing regulations

1 at Ch. 173-27 WAC, and the CCSMP. Specifically, this issue includes the
2 following sub-issues:

3 a. Whether the SMA requires breaking a project into multiple
4 elements and requires each element to be water-dependent or water-related
5 before it can be located within the jurisdictional shoreline.

6 Based on its review of the record and foregoing pleadings, the Board enters the following
7 ruling:

8 **BACKGROUND**

9 NWIW and the Port propose to construct and operate a methanol manufacturing facility
10 and new marine terminal (Project) on approximately 100 acres of the Port's North Port site. JE
11 001 at 68. The Project site is located at approximately River Mile 72 along the east bank of the
12 Columbia River. *Id.* at 70. As proposed, elements of the Project will be located within the
13 shoreline, making the Project subject to the Shoreline Management Act (SMA), ch. 90.58 RCW,
14 and the Cowlitz County Shoreline Master Program (SMP). JE 006 at 4. The SMP categorizes
15 the shoreline into four districts: Natural, Conservancy, Rural, and Urban. Portions of the Project
16 are proposed to be constructed in the Urban and Conservancy Districts, as well as upland of the
17 shoreline. JE 006 at 33-36.

18 NWIW proposes to manufacture methanol from natural gas supplied by a lateral pipeline
19 to be constructed by Northwest Pipeline GP. JE 001 at 68. The methanol produced will be
20 stored on site and subsequently shipped by marine vessel to Asia where it is expected to be used
21 to produce olefins. Olefins are the primary component in the production of a variety of
consumer products, including plastic goods, clothing, and furniture. *Id.* at 68.

1 Producing methanol from natural gas involves three key steps: (1) reforming natural gas
2 to synthesis gas (a mixture of hydrogen and carbon oxides); (2) converting the synthesis gas to
3 methanol; and (3) purifying the methanol to the required purity. *Id.* at 74. The production of
4 methanol from natural gas results in the emission of greenhouse gases and other air pollutants.
5 *Id.* at 146. NWIW originally proposed to use conventional Combined Reformer (CR)
6 technology to produce methanol. To address greenhouse gas and other emissions, NWIW
7 evaluated the use of Ultra-Low Emissions (ULE) technology. ULE is a new technology that has
8 not previously been used at any full-scale methanol production facility. Given the expected
9 reduction in emissions, NWIW selected ULE technology as its preferred alternative. *Id.* ULE
10 technology requires the use of substantially more electricity than CR technology. Because
11 Cowlitz County Public Utility District currently lacks sufficient transmission capacity to supply
12 the required electricity, NWIW proposes to construct an on-site natural gas generator to supply
13 part of its electricity needs. JE 001 at 77. Use of ULE technology to manufacture methanol and
14 the on-site generation of electricity will result in 31 percent less greenhouse gas emissions per
15 year as compared to CR technology. *Id.* at 164, 171. Even though projected emissions are
16 expected to be reduced by 31 percent through the use of ULE technology, the total greenhouse
17 gas emissions from the Project are projected to be 1,076,000 tons per year. *Id.* at 163. The
18 projected greenhouse gas emissions are more than one percent of Washington State's total
19 greenhouse gas emissions. JE 006 at 40.

20 NWIW and the Port submitted an application to Cowlitz County requesting a SDP and
21 CUP for the Project. JE 006 at 2. Cowlitz County and the Port, with Ecology's concurrence,

1 served as co-lead agencies under the State Environmental Policy Act (SEPA). Finding that the
2 Project could have significant environmental impacts, the co-lead agencies determined that
3 preparation of an environmental impact statement (EIS) was warranted. A Draft EIS was issued
4 for public comment on March 3, 2016. The Final EIS was issued on September 30, 2016. *Id.* at
5 5.

6 The Final EIS analyzed the potential impacts of the Project and related actions on air
7 quality and greenhouse gas emissions. JE 001 at 146-75. The Final EIS employed an internal
8 Ecology document, “Guidance for Ecology: Including Greenhouse Gas Emissions in SEPA
9 Reviews” (Guidance), to assess the impacts of project-related greenhouse gas emissions using
10 CR and ULE technologies. The Final EIS states that it applied the Guidance to inform the
11 assessment of the project’s greenhouse gas impacts because the Guidance is the only State
12 guidance available that informs project proponents or Washington permitting authorities about
13 how determinations of significance should be made for greenhouse gas impacts and when
14 mitigation is required. JE 001 at 155-56, 163-66, 171. Ecology developed the Guidance in 2011
15 to assist its employees “in determining which projects should be evaluated for greenhouse gas
16 emissions and how to evaluate those emissions under SEPA when Ecology is the lead agency.”
17 Brimmer Decl., Ex. B; McFarland Decl. at ¶ 4. To determine whether greenhouse gas impacts
18 are significant, the Guidance provides in relevant part:

19 A proposal will be presumed to be not significant for greenhouse gas emissions
20 and thus no further mitigation for greenhouse gas emissions will be necessary if it
is:

21 . . .

- expected to result in emissions of 25,000 metric tons or more a year and
has incorporated mitigation measures to reduce its emissions by

1 approximately 11% below what its emissions would have been without
2 those mitigation measures.

3 Brimmer Decl., Ex. B at 7 (emphasis original).

4 Under Ecology’s Guidance, a project’s proposed greenhouse gas impacts are presumed
5 not to be significant if the project incorporates mitigation measures reducing its emissions by
6 approximately 11 percent below its estimated emissions without mitigation. The use of ULE
7 technology results in substantial reductions in greenhouse gas emissions as compared with other
8 methanol manufacturing technology. The Final EIS found that, “[b]ecause the ULE Alternative
9 was investigated and selected for the purpose of reducing air emissions that the CR Alternative
10 would otherwise produce, the ULE technology itself is a mitigation measure.” JE 001 at 173.

11 Because the 31 percent reduction in greenhouse gas emissions through the use of ULE
12 technology exceeded the 11 percent goal recommended in Ecology’s Guidance for mitigating
13 project-related greenhouse gas emissions, the Final EIS determined that the Project meets
14 Ecology’s Guidance and its presumption that the Project’s impacts will not be significant for
15 greenhouse gas emission. The Final EIS also noted that NWIW had proposed a voluntary limit
16 on its greenhouse gas emissions as a condition of its preliminary air discharge permit, thus
17 ensuring that its greenhouse gas emissions would not exceed the facility-wide emissions
18 identified in the Final EIS. The Final EIS concluded that, “[b]ecause no significant impacts have
19 been identified, no additional mitigation measures are proposed for the ULE Alternative” and the
20 proposed Project “would not result in unavoidable significant adverse impacts related to air
21 quality or [greenhouse gas] emissions.” JE 001 at 173-74.

1 As noted above, although the proposal to use ULE technology and generate electricity
2 on-site results in a 31 percent reduction in greenhouse gas emissions, the total Project
3 greenhouse gas emissions are estimated to be over one million tons annually. JE 001 at 163.
4 Moreover, the estimated greenhouse gas emissions using ULE technology does not include
5 offsite emissions, such as greenhouse gas emissions from production and transportation of
6 natural gas, offsite production of electricity, or ocean-going vessels transporting methanol to
7 Asia beyond three nautical miles off the coast of Washington. JE 006 at 40. As estimated, the
8 quantity of greenhouse gases identified in the Final EIS that are associated with the Project will
9 increase Washington's total emission of greenhouse gases by more than one percent. *Id.*

10 The Cowlitz County Hearing Examiner held a three-day public hearing on the application
11 for the shoreline permits for the Project on January 23 through 25, 2017. For procedural reasons,
12 the Final EIS was not appealed to the Hearing Examiner and the document was treated as
13 unchallenged in that proceeding. JE 006 at 5. On March 8, 2017, the Hearing Examiner issued a
14 Corrected Findings of Fact, Conclusions of Law and Decision approving the SDP and CUP with
15 conditions. JE 006.

16 The Project also requires an air discharge permit from the Southwest Clean Air Agency
17 (SWCAA). On June 7, 2017, SWCAA issued Final Air Discharge Permit 16-3204 for the
18 Project, limiting total greenhouse gas emissions from the Project to 1,076,000 tons per year. PK
19 001.

20 By letter dated June 8, 2017, Ecology acknowledged its receipt of the SDP and approved
21 the CUP with additional conditions. JE 005. In Condition 4, Ecology required NWIW to

1 mitigate greenhouse gas emissions from its facility on an annual basis through compliance with
2 the Clean Air Rule or through a reduction equation set forth in Condition 4. *Id.* at 3-4.
3 Riverkeeper timely filed a petition with the Board requesting review of the Permits and the Final
4 EIS.

5 ANALYSIS

6 A. Summary Judgment

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

13 The party moving for summary judgment must show there are no genuine issues of
14 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
15 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
16 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
17 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
18 then the nonmoving party must present evidence demonstrating that material facts are in dispute.
19 *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare
20 assertions concerning alleged genuine material issues do not constitute facts sufficient to defeat a
21 summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014).

1 When determining whether an issue of material fact exists, all facts and inferences are construed
2 in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068
3 (2002). The Board will enter summary judgment for a non-moving party under appropriate
4 circumstances. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470
5 (1992).

6 **B. Final EIS failed to adequately analyze Project’s GHG impacts (Issues 1(a)-(c) and 2)**

7 The determination of whether an EIS is adequate is a question of law. *OPAL v. Adams*
8 *County*, 84 Wn.2d 869, 875, 913 P.2d 793 (1996). EIS adequacy refers to the legal sufficiency
9 of the environmental data contained in the impact statement. *Klickitat County Citizens Against*
10 *Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390, 398-99 (1993),
11 amended, 866 P.2d 1256 (Wash. 1994)(citing R. Settle, *The Washington State Environmental*
12 *Policy Act: A Legal and Policy Analysis* § 14(a)(i) (4th ed. 1993)). The adequacy of an EIS is
13 tested under the “rule of reason.” *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614–15,
14 744 P.2d 1101 (1987); *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344–45, 552 P.2d 184
15 (1976). As the Court in *Klickitat County Citizens* explained:

16 In order for an EIS to be adequate under this rule, the EIS must present
17 decisionmakers with a “reasonably thorough discussion of the significant
18 aspects of the probable environmental consequences” of the agency's
19 decision. The rule of reason is “in large part a broad, flexible cost-
effectiveness standard”, in which the adequacy of an EIS is best
determined “on a case-by-case basis guided by all of the policy and factual
considerations reasonably related to SEPA's terse directives.”

1 *Klickitat County Citizens*, 122 Wn.2d at 633 (internal citations omitted). When reviewing an
2 EIS, the Legislature has directed that the decision of the agency regarding the adequacy of an
3 EIS is to be “accorded substantial weight.” RCW 43.21C.090.

4 Riverkeeper challenges the adequacy of the Final EIS, asserting that it erroneously
5 concluded that the Project’s greenhouse gas emissions were not significant. Riverkeeper argues
6 that estimated emissions identified in the Final EIS alone show that those emissions are
7 significant. The Final EIS’s estimate of Project-related greenhouse gas emissions, which
8 Riverkeeper asserts is conservative, is in excess of one million tons per year. Citing the Hearing
9 Examiner’s finding that greenhouse gas emissions from onsite operations will increase
10 Washington’s total emission of greenhouse gases by more than one percent, Riverkeeper argues
11 that this magnitude of emissions from a single source is clearly significant, particularly when
12 Washington has embarked on several initiatives to reduce greenhouse gas emissions.

13 Riverkeeper Motion for Partial Summary Judgment at 9-11.

14 Riverkeeper further argues that the Final EIS and Ecology mistakenly relied on the
15 Guidance to conclude that the Project would not have significant adverse impacts. According to
16 Riverkeeper, because the Final EIS’s use of the Guidance resulted in a determination that
17 selection of an alternative technology would result in an 11 percent reduction of greenhouse gas
18 emissions, an analysis of significant aspects of the Project’s probable environmental impacts was
19 truncated as was consideration of the need for mitigation or Project denial. By prematurely
20 terminating the analysis of environmental impacts, Riverkeeper asserts that the Final EIS did not
21 comply with SEPA’s requirement for case-by-case environmental impact analysis. *Id.* at 9-14.

1 NWIW argues that the Final EIS adequately addressed all of the Project’s probable
2 upstream and downstream impacts and that investigation of the alleged impacts raised by
3 Riverkeeper would exceed available agency guidance and require speculation on greenhouse gas
4 impacts. NWIW asserts that no state or federal agency has published rules concerning the
5 quantification of indirect greenhouse gas emissions in an environmental review, and thus
6 Ecology’s Guidance is the best and only source on the subject and the Board should not disturb
7 the Port and Cowlitz County’s reasonable reliance on the Guidance in their SEPA analysis.
8 NWIW Motion for Summary Judgment at 10-19. Concurring with NWIW, the Port asserts that
9 the lead agencies are entitled to rely on the Guidance and doing so was not improper as a matter
10 of law. Because SEPA rules afford lead agencies the discretion to incorporate existing studies
11 and material in their environmental analysis, the Port argues that it was not unreasonable or
12 unlawful for the lead agencies to use Ecology’s Guidance in this instance. Port’s Response to
13 Riverkeeper’s Motion at 4-7.¹

14 NWIW and the Port reject Riverkeeper’s assertion that, by relying on the Guidance, the
15 Final EIS failed to consider mitigation measures to address greenhouse gas emissions. They
16 assert that the Final EIS considered two mitigation measures: (1) the use of ULE technology and
17 (2) a cap on annual greenhouse gas emissions. NWIW and the Port argue that, under SEPA
18 regulations, project alternatives can include mitigation measures and the use of ULE technology
19 constitutes mitigation. According to NWIW and the Port, the Final EIS considered more than
20 just the Guidance. It also considered the regulatory landscape and mitigation measures required

21 _____
¹ Although Cowlitz County was a co-lead agency in the issuance of the Final EIS, the County did not submit a response to Riverkeeper’s motion for summary judgment.

1 by other existing environmental laws or rules. NWIW Response to Riverkeeper’s Motion at 8-9;
2 Port Response to Riverkeeper’s Motion at 11-13. NWIW and the Port assert the Board should
3 accord the lead agencies’ determination as to the scope of Final EIS substantial weight. They
4 further argue that, judging the Final EIS under the rule of reason, the Board should reject
5 Riverkeeper’s claims that the document is deficient in any respect.

6 In its response, Ecology stated that the Guidance, which was intended for internal use,
7 was removed from its webpage in April 2016 to allow for its revision. McFarland Decl. at ¶¶ 4,
8 7. Ecology’s additional experience with greenhouse gas emissions and SEPA review since 2011
9 demonstrated that the Guidance needed to be updated to incorporate new scientific information,
10 as well as to be consistent with federal greenhouse gas emissions guidance and Ecology policies.
11 *Id.* at ¶¶ 6-7. Arguing that the agency did not rely on the Guidance in its review of the CUP,
12 Ecology stated that had it followed the Guidance it would not have imposed a condition in the
13 CUP requiring NWIW to mitigate for the Project’s greenhouse gas emissions. Ecology rejected
14 claims that it found the Project’s greenhouse gas emissions to be insignificant. According to
15 Ecology, the inclusion of the CUP condition was evidence of the agency’s determination that
16 NWIW’s greenhouse gas emissions were significant. Ecology’s Consolidated Response at 16.

17 The Board finds that the Final EIS fails to provide adequate analysis to support its
18 conclusion that the Project would not result in unavoidable adverse impacts related to
19 greenhouse gas emissions. The Final EIS’s no significant adverse impacts conclusion was based
20 almost entirely on Ecology’s Guidance. JE 001 at 173.

1 Ecology has acknowledged that the Guidance is of limited value. The Guidance rests on
2 a weighty presumption and formulaic conclusion. Under the Guidance, a project that is
3 “expected to result in emissions of 25,000 metric tons or more a year and has incorporated
4 mitigation measures to reduce its emissions by approximately 11% below what its emissions
5 would have been without those measure” is “presumed not to be significant for greenhouse gas
6 emissions and thus no further mitigation for greenhouse gas emissions will be necessary[.]”
7 Brimmer Decl., Ex. B at 7 (emphasis original). Moreover, Ecology withdrew its Guidance in
8 April 2016, which was more than four months before the Final EIS was issued. Ecology
9 withdrew the Guidance with the intent to update the document to make it consistent with federal
10 guidance, Ecology policies, and new scientific and legal information concerning greenhouse gas
11 emissions. McFarland Decl. at ¶¶ 6-7.

12 The error in relying on the Guidance is further demonstrated by Ecology’s imposition of
13 Condition 4 in the CUP approval. Ecology determined that the Project’s estimated greenhouse
14 gas emissions were significant and imposed a condition on the CUP to address them. Ecology’s
15 Combined Response at 16. The imposition of Condition 4 cannot fix the Final EIS’s failure to
16 adequately evaluate the Project’s potential impacts, because there has been insufficient analysis
17 of the impacts to determine whether the condition is adequate and there has been no opportunity
18 for the public to evaluate and comment on the potential impacts and potential mitigation
19 measures.

20 The Board finds that NWIW and the Port’s assertion that the Final EIS looked at more
21 than the Guidance and NWIW’s voluntary greenhouse gas emissions cap in reaching a no

1 significant adverse impact determination is not supported by the document or the record
2 presented. The Port's claim that the Final EIS evaluated the Project in the context of other
3 regulatory limitations when determining that ULE technology provided adequate mitigation is
4 incorrect.² Port's Response to Riverkeeper's Motion at 11-13. The Final EIS chapter on
5 cumulative impacts included only a cursory discussion of Washington State's policy initiatives
6 and goals for reduction of greenhouse gas emissions in the state. Although NWIW correctly
7 notes that the Final EIS discussed air quality permitting under federal regulations, the document
8 concludes that NWIW's preferred ULE technology would not be subject to federal Prevention of
9 Significant Deterioration regulations. JE 001 at 150.

10 Contrary to NWIW and the Port's assertions, the Final EIS lacks sufficient analysis and
11 information regarding how it reached a no significant impact conclusion without relying on
12 Ecology's Guidance. The Final EIS's reliance on the Guidance prematurely stopped its analysis
13 of potential mitigation. *See* WAC 197-11-440(6). As a result, authority under SEPA to impose
14 conditions or deny the Project based on greenhouse gas emissions was limited by RCW
15 43.21C.060.

16 Like the Cowlitz County Hearing Examiner, the Board is troubled by the Project's
17 emission of greenhouse gases without further evaluation of potential mitigation measures. JE
18

19 ²The Port cites to a 2003 unpublished opinion of the Court of Appeals for the proposition that it is acceptable to
20 recognize compliance with other existing laws and regulations when evaluating mitigation in an EIS. Port's
21 Response to Riverkeeper's Motion at 13. The Port's citation to that opinion is not consistent with the requirements
of Washington Court General Rules and, therefore, it is not accorded any persuasive value. *See* GR 14.1(a)
(unpublished Court of Appeals' opinions have no precedential value and are not binding; party may cite as non-
binding precedent an unpublished opinion of the Court of Appeals filed on or after March 1, 2013, if opinion is
identified as such by the citing party).

1 006 at 82-83. Even without including all off-site sources,³ the Project will emit more than one
2 million tons of greenhouses gas annually, increasing Washington’s total emissions by more than
3 one percent. However, unlike the Hearing Examiner, the Board does not have to treat the Final
4 EIS as unchallenged. Accordingly, because it failed to fully analyze the impacts of greenhouse
5 gas emissions from the Project and to consider whether additional mitigation is required, the
6 Final EIS is remanded to Cowlitz County and the Port for further SEPA analysis consistent with
7 this opinion. The Cowlitz County Hearing Examiner’s approval of the SDP and CUP is
8 therefore reversed, because it relies on the flawed Final EIS.

9 Because the Board has determined that the Final EIS is not adequate, the Board does not
10 need to reach Issues 4 and 6(a).

11 **ORDER**

12 The Board GRANTS summary judgment to Columbia Riverkeeper, Sierra Club and
13 Center for Biological Diversity on Issues 1(a)-(c) and 2. Cowlitz County’s Shoreline Substantial
14 Development Permit No. 3253 and Shoreline Conditional Use Permit No. 1056 are reversed
15 based on the invalidity of the underlying Final Environmental Impact Statement. This matter is
16

17 _____
18 ³ As noted above, the Final EIS’s greenhouse gas estimate omits several offsite emission sources associated with the
19 Project, such as greenhouse gas emissions from production and transportation of natural gas, offsite production of
20 electricity, and some vessel transportation. The evidence presented demonstrated that some or all of those emissions
21 can be estimated and included in the impact analysis. For example, in reliance on Ecology’s Guidance, the Final
EIS does not evaluate greenhouse gas emissions associated with ocean-going vessel transport of methanol beyond
the three nautical-mile territorial sea limit. JE 001 at 164-65. The Final EIS claims this was appropriate because the
ultimate destination of the methanol is not known. The purpose of the Project, however, is to manufacture methanol
for shipment to Asia. While the precise ports of call may not be known, as evidenced by Ecology’s recent EIS for a
coal export facility, estimates of greenhouse gas emissions associated with the vessel transport could be made. See
Second Brimmer Decl., Exs. A and B. Lacking such analysis renders the Final EIS inadequate as it fails “to present
decisionmakers with a ‘reasonably thorough discussion of the significant aspects of the probable environmental
consequences’ of the agency’s decision.” *Klickitat County Citizens*, 122 Wn.2d at 633 (internal citations omitted).

1 REMANDED to Cowlitz County and the Port of Kalama for further SEPA analysis consistent
2 with this opinion.

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SO ORDERED this 15th day of September, 2017.

SHORELINES HEARINGS BOARD

JOAN M. MARCHIORO, Presiding

THOMAS C. MORRILL, Member

KAY M. BROWN, Member

ROBERT GELDER, Member

GRANT BECK, Member

ALLEN ESTEP, Member