



September 12, 2018

The Honorable John Barrasso  
Chairman, Senate Environment & Public Works Committee  
307 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Tom Carper  
Ranking Member, Senate Environment & Public Works Committee  
513 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of Millennium Bulk Terminals-Longview LLC, (Millennium) please accept this letter in support of the *Water Quality Certification Improvement Act of 2018*. As you know, Millennium proposes to build a coal export terminal on the lower Columbia River. Based on our experience in being the only project proponent to have received a water quality certification denial “with prejudice” in Washington State, and the only project to have been denied a water quality certification on the basis of non-water quality factors, we share your belief that the Clean Water Act (CWA) is to be used to protect water quality, and should not be misused to block projects that might be unpopular to some. Congress never intended that the limited authority provided to *states* under CWA section 401 to weigh in on the propriety of a proposed *federal* permit would be used by states to veto projects based on political concerns having nothing to do with water quality.

To the contrary, as you well know, section 401 was promulgated to enable states to ensure that federally permitted projects would not result in water quality standards violations in state waters. Recent developments in Washington State demonstrate that the CWA, as presently worded, is susceptible to abuse by state actors who have little regard for the *cooperative* federalism imbedded in the statute, and who wish, instead, to dictate whether a federal permit should be issued (or not) by manipulating the section 401 certification process for their political purposes.

In addition to providing support for the proposed legislation, this letter responds to the comments of Washington State Department of Ecology (Ecology) Director Maia Bellon. Director Bellon’s letter to Chairman Barrasso dated August 15, 2018, addressed both the Committee’s proposed legislation and her decision to deny Millennium a section 401 certification “with prejudice.” Director Bellon insists that she denied Millennium’s section 401 certification because her agency found that Millennium “failed to

meet existing water quality standards;” and because Millennium failed to propose any mitigation to offset adverse environmental impacts. As we demonstrate below, these statements are patently false.

First, her lawyers insisted-- -- based on sworn statements from Ecology staff-- that the agency’s denial “with prejudice” was *not* based on CWA factors, but was instead based entirely on authority under the Washington State Environmental Policy Act (SEPA). Unless her lawyers and staff provided false testimony to the administrative tribunal, Director Bellon’s letter to Congress is at best mistaken, or otherwise simply false.

Second, contrary to Director Bellon’s letter, Millennium has both proposed and submitted to Ecology a host of mitigation plans for environmental impacts. We are providing the following information to clear up any discrepancy in the record Director Bellon’s letter created concerning Millennium, and to highlight for the Committee the grossly unfair treatment we received from the Department of Ecology at the direction of Director Bellon, and thus, the need for your proposed legislation.

At Millennium, we are committed to protecting the water resources of the state and federal government and we take that responsibility seriously. We were heartened that the Final Environmental Impact Statement published by the state of Washington and Cowlitz County (SEPA FEIS) concluded that our project would not result in significant adverse impacts to water quality, wetlands, aquatic biota, or fish. Notwithstanding these favorable water quality conclusions in the SEPA FEIS, Ecology Director Bellon denied the water quality certification based largely on indirect impacts from trains and vessels, and specifically, impacts that included air emissions from locomotives, impacts on vehicular traffic, rail capacity concerns and train -caused noise and vibrations, among other non-water quality factors.

### **Millennium Coal Export Terminal**

Millennium is proposing to locate a coal export terminal on a 190-acre brownfield site on the Columbia River near Longview, Washington. At full build-out, the project would be capable of shipping up to 44 million metric ton per year to markets in Asia. The site was selected after a review of more than 20 sites on the west coast of the US, Canada and Mexico for its existing infrastructure. The project would reuse a portion of an industrial site originally developed for the aluminum industry during World War II, coexisting with an operating bulk product terminal. Coal from the Powder River or Uinta Basins would be transported by unit trains to the site over existing rail lines. Two new docks would be constructed on the Columbia River, providing access to Panamax-sized vessels that can reach the site via the existing US Army Corps of Engineers dredged shipping channel.

The project site is located in Cowlitz County, Washington, a county with unemployment rates that far exceed other Washington counties. Cowlitz County residents have expressed a strong support for the family-wage construction and operation jobs that would come with the project, and would provide opportunities for workers to stay close to home rather than having to commute long distances to find work.

Millennium’s objective is to transform the former Reynolds smelter site into a new, economically vibrant and environmentally responsible world-class port facility. To accomplish this, we are actively and voluntarily working with state and local agencies in our cleanup efforts. Millennium, Northwest Alloys (Alcoa) and Ecology have entered a voluntary agreement to ensure the cleanup of the site follows all state rules and regulations. Evidence of localized contaminants from Reynolds’ operations has been measured, and although the site has been classified by Ecology as low-risk, we are closely and carefully coordinating an extensive cleanup process. Cleanup costs are carried by the private entities and not the public. Reports on the progress of our efforts are regularly submitted to local and state agencies. By conducting a thorough investigation and developing cleanup plans in compliance with applicable laws and regulations, we are a step closer to our goal of building a world-class port facility in an environmentally responsible way.

### **Permitting History**

Millennium applied for local (Cowlitz County), state, and federal permits for the project in February 2012, over six years ago. In order to provide full disclosure of all of the potential impacts of the project, we have provided the agencies with over 15 million dollars to pay for a third party consultant to write separate state (SEPA) and federal (NEPA) EISs. The 13,600 page SEPA EIS was completed in April 2017. The NEPA Draft EIS was published in September 2016.

### **Ecology’s Denial of Millennium’s CWA Section 401 Water Quality Certification**

Director Bellon’s letter attempts to defend her agency’s actions in denying the project a Section 401 Water Quality Certification. According to Director Bellon: *“The facts of this denial are simple: Millennium failed to meet existing water quality standards and further failed to provide any mitigation plan....”*

This statement is in direct contradiction to her department’s reply brief to the Washington Pollution Control Hearing Board (PCHB) insisting that Ecology did not deny the certification “with prejudice” based on the deficiencies set forth in Section III (water quality) of the denial Order. That part of the Denial Order dealt with information that Ecology alleged was both missing and necessary for it to *first make* a determination as to whether it had “reasonable assurance” that the project would not violate water quality standards. In other words, Section III of the Order stated that Ecology simply could not determine based on the information it had, *whether or not* project discharges would comply with water quality standards.

Accordingly, the case she lays out in her letter to you is flatly contradicted by the plain language of the Denial Order itself. At best, it is inconsistent with both Ecology testimony during the appeal of the permit denial and the findings of the Washington PCHB (Decision at paragraph 19 concluding that the Denial “with prejudice” was based solely on SEPA), and at worst, is plainly disingenuous.

Instead of properly relying on the CWA, Ecology insisted that Director Bellon “*decided to exercise Ecology’s SEPA substantive authority on the first permit decision before her —the 401 certification-- and deny the certification with prejudice.*” Ecology explained that “*the reason Ecology issued the denial “with prejudice” is that the significant, adverse, impacts identified in the EIS cannot reasonably be mitigated. Since they cannot be mitigated, there is no way for Millennium to address them and consequently no basis on which to continue keeping the section 401 process open.*” In short, the record demonstrates that the denial “with prejudice” was based on anything other than water quality concerns, and in no way stemmed from any agency findings or conclusions that Millennium’s proposed project would not be able to comply with water quality standards.

### **SEPA Findings and Proposed Mitigation**

Similarly, Director Bellon’s claims as to the impacts and risks that the project would pose are both contrary to testimony of her own lawyers and staff, and to the findings of the SEPA EIS. Her agency undeniably concluded in the Final EIS that Millennium’s proposed coal export project will not have a significant adverse effect on water quality. Millennium is now appealing Ecology’s certification denial, and the PCHB’s decision upholding that denial, because both Ecology and the PCHB have inaccurately applied the CWA to our project. We are confident the law is on our side.

In her letter to you, and in other public statements, Director Bellon makes claims that are not supported by the SEPA EIS her own agency produced. Director Bellon wholly ignores the mitigation that Millennium has proposed to more than offset wetland and habitat losses. Among her claims, and the rebutting facts found in Ecology’s EIS, are the following:

#### **Bellon Claim:**

##### **The project would destroy 24 acres of wetlands on the site.**

**FACT:** As stated in Section 4.3 of the SEPA FEIS, 24 acres of existing wetlands would be filled. Millennium submitted a Conceptual Mitigation Plan in May 2017 to the U.S. Army Corps of Engineers (Corps), Cowlitz County and Ecology. The Mitigation Plan identifies a nearby downriver site that is currently a ditched and drained agricultural pasture. The Plan would convert the pasture into 61 acres of wetlands, rehabilitate approximately 14 acres of degraded wetlands, and revegetate approximately 14 acres of upland buffer, providing a total of 88 acres of mitigation. This mitigation proposal provides more than what is required for wetland mitigation and is intended to insure against any unforeseen shortfalls in wetland creation. Neither the Corps nor the County has found the Plan to be inadequate. To the contrary, the County reviewed the plan, determined it to be adequate and issued a permit for that activity in July 2017.

Section 4.3 of the SEPA FEIS concludes: *“Compliance with laws and implementation of the mitigation measures described above would reduce and compensate for impacts on wetlands. There would therefore be no unavoidable and significant adverse environmental impacts on wetlands.”*

Most of the wetlands that will be impacted by the proposal (over 21 acres) are considered Category III wetlands, and only three acres are considered Category IV wetlands. Washington State ascribes this rating system to wetlands based on their functions. Washington State Wetland Rating System for Western Washington (Hruby 2006). Category I wetlands have the highest level of function, are afforded the widest buffers, and impacts on such wetlands require the largest amount of compensatory mitigation. Category IV wetlands, on the other hand, have the lowest level of function, are afforded more narrow buffers, and impacts on such wetlands require a lower amount of compensatory mitigation.

Millennium’s proposed wetland mitigation plan would convert an existing ditched and drained agricultural pasture to a diverse habitat of emergent, forested and scrub-shrub wetlands within the historic, and now disconnected, floodplain of the Columbia River. The proposed mitigation would restore hydrology and historic forested and scrub-shrub wetlands, and provide potential habitat for wildlife such as Columbia white-tailed deer. In total, the mitigation would convert over approximately 61 acres of upland pasture to palustrine forested, scrub-shrub, and/or emergent wetlands, rehabilitate approximately 14 acres of degraded emergent wetlands and revegetate approximately 14 acres of upland buffer.

**Bellon Claim:**

**Dredging 41 acres of river bed would damage Washington’s water quality.**

**FACT:** The dredging would be required to provide ships access from the US Army Corps maintained Columbia River shipping channel to the proposed new docks. As required by the Corps and other agencies, a sediment characterization report has been prepared. On August 25, 2017, Jennifer Sutter, Project Manager for Oregon’s Department of Environmental Quality (DEQ), found that the dredge material would meet Class A criteria because the dredged spoils contain constituents at a level below detection levels for chemicals, metals and pesticides of concern to water quality. Dredge material that meets Class A criteria by definition does not impair water quality.

**Bellon Claim:**

**Driving 537 pilings into the river bed for over 2,000 feet of new docks would result in the loss of five acres of aquatic habitat.**

**FACT:** Millennium has proposed to construct an aquatic habitat mitigation site by converting an existing, isolated pond to an off-channel aquatic habitat connected to the Columbia River. Our Conceptual Mitigation Plan for Wetlands and Aquatic Habitat was submitted to Ecology, Cowlitz County and the Corps in May of 2017. Cowlitz County has approved the plan and issued a Critical Areas Permit for the project in July 2017. Millennium proposes to construct the Off-Channel Slough Mitigation Site, which will provide seasonally-inundated off-channel habitat with associated emergent and riparian vegetation, by improving an existing pond and connecting it to the river. This habitat type was historically widespread but has since been vastly reduced throughout the lower Columbia River system. The pond is located along the shore, riverward of the levee, in the upstream portion of the Millennium lease area adjacent to the bulk terminal. As described below, approximately 12 acres of new habitat would be created to more than offset the loss of the five acres.

This compensatory mitigation will provide new off-channel aquatic habitat, which is highly valuable to juvenile salmonids of the lower Columbia River and has been disproportionately lost through development and management of the Columbia River. The proposed Site will achieve the following environmental goals:

- Provide off-channel aquatic habitat that is connected to the Columbia River.
- Ensure access to the off-channel habitat for juvenile salmonids.
- Provide structurally diverse native vegetation communities within the off-channel habitat.
- Provide structurally diverse native riparian vegetation on the outer berm.

Functional objectives detail how the goals of the mitigation action will be implemented. The functional objectives for the Aquatic Mitigation Action are as follows:

- Provide 7.0 acres of new off-channel aquatic habitat below OHW that incorporates emergent, shrub, and forested components.
- Provide an effective connection between the Columbia River and the off-channel habitat.
- Establish 4.5 acres of native emergent, shrub, and tree species within the off-channel habitat.
- Establish 0.75 acre of native riparian vegetation on the outer berm.

**Bellon Claim:**

**The application provided insufficient information on how contaminated wastewater and stormwater would be managed at the site during both construction and operations. The application did not provide sufficient information to demonstrate that wastewater and stormwater discharges would meet state water quality standards, including an inadequate description of the types and amounts of contaminants in the discharge, and an incomplete analysis of how the treated discharge would potentially impact the ambient water quality of the Columbia River. The application did not provide sufficient information on how contaminated wastewater and stormwater would be adequately controlled to minimize the discharge of pollution to the Columbia River.**

**FACT:** Section 4.5 of the SEPA FEIS describes the best management practices proposed by MBT-Longview and the robust measures available and proposed for managing wastewater and stormwater during both construction and operations. The SEPA FEIS acknowledges that impacts could occur but that the level of impacts would be below benchmarks or applicable standards designed to protect water quality. The SEPA FEIS made repeated findings that the project would not result in significant adverse effects to water quality, wetlands, fish, and the aquatic environment more generally and anticipated that technology was available and would be implemented to ensure that any impacts would be mitigated in accordance with applicable water quality standards. Section 4.5 of the SEPA FEIS concludes: *“Compliance with laws and implementation of the measures and design features described above would reduce impacts on water quality. There would be no unavoidable and significant adverse environmental impacts on water quality.”*

Millennium submitted detailed information to Ecology to demonstrate its ability to meet water quality standards sufficient for a section 401 certification, but Ecology decided not to work with Millennium to complete the certification process. Ecology and Director Bellon decided instead to abruptly terminate the process and deny the certification “with prejudice” to veto the project altogether, and in so doing, relied on non-water factors found in that same EIS.

**Bellon Claim:**

**The company would need access to sufficient water supplies to manage coal dust and to suppress fires during normal operations at the site. The company could not demonstrate they had sufficient rights to use water wells on the site for these purposes.**

**FACT:** As stated on page 4.4-23 of the SEPA FEIS: *“Approximately 1,200 gpm during the wet season and 2,000 gpm during the dry season (approximately 2,034 AFY) would normally be required for dust suppression. On-site groundwater wells would provide approximately 635 gpm (1,025 AFY) to maintain minimum water levels in the storage pond to meet process water demands during the dry season. Water from the storage pond could also be used for the fire hydrant, sprinklers and deluge systems, watering of landscaping and other non-recyclable uses. Northwest Alloys holds water rights that originally authorized extraction of 23,150 gpm up to a total volume of 31,367 AFY.” “The total demand accounts for less than 10% of the maximum pumping limit allowed under original water rights. Therefore, operation of the Proposed Action would have a negligible impact on groundwater supply. The Applicant would ensure that water rights are current before withdrawing any water for construction or operations; water rights would be maintained for ongoing groundwater use during operation of the Proposed Action.”*

The Columbia River is not a closed basin, and new water rights can be obtained if needed.

#### **Bellon Claim:**

**Because the site is a toxic cleanup site from past smelter operations, it has preexisting groundwater and soil contamination. The application needed to show how construction would affect this contamination and future cleanup work, and ensure that the discharge would continue to meet water quality standards. The application did not provide sufficient information to show that construction activities would be conducted in a way that would ensure that the existing contamination at the site would be properly contained and managed.**

**FACT:** There has been an extensive (over 12 year) process to develop both a renewed NPDES permit for the site and a Remedial Investigation/Feasibility Study (RI/FS) on voluntary site cleanup. The cleanup site is ranked by Ecology as a 5 (on a 1 to 5 scale), which is the lowest risk ranking for both human health and the environment. As noted on page 4.4-18 of the SEPA FEIS, *“Construction of the Proposed Action could encounter previously contaminated areas currently identified in the MTCA Cleanup Action Plan, which could degrade groundwater quality. However, with the exception of two small areas—the eastern corner of the Flat Storage Area and the northeastern portion of Fill Deposit B-3 (Figure 4.4-5 in the FEIS)—cleanup actions are not recommended in the draft Cleanup Action Plan within the project area. For the Flat Storage Area and Fill Deposit B-3, construction and remediation activities would be coordinated to prevent spread of contamination or environmental impacts.”*



## Waiver

As you know, under current law, the State was required to issue a final certification decision within one year of receipt of Millennium's application for a CWA Section 401 certification. 33 U.S.C. § 1341(a)(1) ("if the state . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . shall be waived with respect to such Federal application."). To accommodate agency processes, Millennium applied for a CWA Section 401 certification three times over the last six years of permit processing. Millennium first applied for a CWA Section 401 certification on February 22, 2012 as part of its Corps permit application. At the Corps' request, Millennium withdrew the application to allow time for the completion of the EISs. On July 13, 2016, as the SEPA EIS neared completion, Millennium again submitted an application for a CWA Section 401 certification. To allow for additional time for Ecology to consider Millennium-provided reports and materials, and at Ecology's request, Millennium withdrew this application once again on June 21, 2017 and reapplied for the third time on June 27, 2017. Therefore the State was required to issue a final decision on that application by June 27, 2018.

Although Ecology issued an initial decision on September 26, 2017 denying Millennium's certification, the record demonstrates that the State has waived its right to issue a CWA section 401 certification in two separate and independent ways. First, more than one year passed between Ecology's receipt of the application and the PCHB's issuance of the final 401 certification decision. During the ensuing appeal of Ecology's certification denial, Ecology told the Superior Court in Cowlitz County that its Denial Order was not final until the PCHB reviewed and decided Millennium's administrative appeal. The PCHB's decision was made more than one month after the expiration of the one year statute of limitations period set forth under CWA section 401.

*Second*, even if this final decision was timely (and it was not), the certification decision made by Ecology and affirmed by the Board, is not the certification required by 33 U.S.C. §1341(a)(1). Pursuant to CWA section 401, the State was required to determine whether a facility's discharge will violate "the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317" of the CWA. 33 U.S.C. § 1341(a)(1). The State did not make this determination. Instead the State decided to answer a different question: whether Ecology should deny the project based on SEPA, R.C.W. §43.21C.060. But Congress did not authorize states to certify whether a proposed project should be denied under SEPA either in CWA section 401 or anywhere else in the CWA.

## Conclusion

Millennium is committed to operating in a responsible manner. We value our natural environment and the safety of our employees. Our employees have lived in and around Cowlitz County for generations. They understand the unique opportunities offered by the Columbia River and the responsibility that comes with protecting the air, water and land that surround it.

In closing, we can have clean water and a healthy environment while safely utilizing the vast natural resources provided by the Columbia River. We thank you for your efforts to clarify the original intent of the CWA, and section 401 in particular, and trust that this letter will both set the record straight as it concerns Millennium's project, and provide support for the badly needed clarifying amendment your committee is debating.

Sincerely,



Kristin Gaines  
Sr. Vice President of Regulatory Affairs  
Millennium Bulk Terminals-Longview

CC: Patty Murray, Senator  
Maria Cantwell, Senator  
Jaime Herrera Beutler, Representative  
Senate Environment & Public Works Committee Members