



November 28, 2016

VIA E-MAIL AND U.S. MAIL

Millennium Bulk Terminals-Longview NEPA EIS
c/o ICF International
710 Second Avenue, Suite 550
Seattle, WA 98104
www.millenniumbulkeiswa.gov/submit-comments.html

U.S. Army Corps of Engineers, Regulatory Branch
Attention: Ms. Danette L. Guy
2108 Grand Boulevard
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Re: Millennium Bulk Terminals—Longview LLC, Application No. NWS-2010-1225:
Comments on Draft EIS and Permit Application

Greetings:

On September 30, 2016, the U.S. Army Corps of Engineers (“Corps”) opened the comment period on the draft Environmental Impact Statement and permit application for the proposed Millennium Bulk Terminals—Longview Shipping Facility Project. The following comments are submitted on behalf of Climate Solutions, Columbia Riverkeeper, Friends of the Columbia Gorge, Association of Northwest Steelheaders, Northwest Guides & Anglers Association, Washington Environmental Council, Oregon Physicians for Social Responsibility, Washington Physicians for Social Responsibility, Idaho Conservation League, Sierra Club, and RE Sources for Sustainable Communities. The commenters are all non-profit organizations dedicated to (1) protecting the environment and natural resources of Washington state and the Pacific Northwest region; (2) ensuring that all citizens of Washington and the Pacific Northwest have clean and healthy air, water, and communities; (3) seeking positive solutions to the challenge of global climate instability caused by combustion of fossil fuels; and (4) working across the region to stop the mining, transport, shipping, and burning of coal. These joint DEIS comments and exhibits supplement any individual comment letters that may be submitted by each signatory group.

This letter addresses three specific issues. As much of the information presented in the DEIS and permit application has been reviewed and commented upon previously, in order to save time and resources for all concerned, we attach and incorporate by reference comment letters previously submitted concerning this project.

First, the Corps has invalidly narrowed the scope of its review, such that indirect and cumulative impacts caused by this proposed project are not included. This vision of NEPA review is legally incorrect. Under NEPA, an EIS must consider direct effects, indirect effects, and cumulative effects. “Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8. The direct effects of an action are those effects “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). The indirect effects of an action are those effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). For example, “[i]ndirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Id.* These types of growth-inducing impacts must be analyzed, even when they are characterized as “secondary.” *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (requiring EIS to address growth-inducing impacts of freeway interchange planned in agricultural area on the edge of urban development).

We have raised the issue of proper geographic scope with the Corps several times before on this and other proposed projects; our scoping comments from 2013 are enclosed as Attachment 1 and should be considered again on this issue.

Second, the Corps’ NEPA DEIS mirrors the SEPA DEIS that was released for public review and comment earlier this year. As the fundamental inaccuracies and errors are the same, our SEPA DEIS comments are included as Attachment 2. Additionally, a CD of exhibits to the SEPA DEIS comment letter is enclosed for inclusion in the record.

Third, the Corps should deny the requested Clean Water Act Section 404 and Rivers and Harbors Act Section 10 permits because the project is not in the public interest and fails to meet the governing criteria. Our SEPA DEIS comments detail the failure of the proposed project to meet the public interest and governing criteria tests and are incorporated here with respect to the substantive permit review.

In short, the CWA’s purpose is to restore and maintain the chemical, physical, and biological integrity of waters of the United States. Section 404 of the CWA advances this purpose by prohibiting the discharge of fill material without a permit. 33 U.S.C § 1344. RHA Section 10 prohibits constructing any structures in or over any navigable waters of the United States unless an applicant obtains authorization from the Department of the Army. The Corps’ CWA Section 404 and RHA Section 10 reviews are governed by two sets of implementing regulations: 33 C.F.R. § 320.4(b)(4), regulations promulgated by the Corps, and 33 C.F.R. Parts 320-330, regulations promulgated by EPA, called the “404 Guidelines.” 40 C.F.R. §§ 230.1-230.80.

Pursuant to the Corps' regulations, a permit "is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) ... and a determination that the proposed discharge is in the public interest pursuant to 33 C.F.R. part 320." 33 C.F.R. § 323.2(g).

In reviewing the application, the Corps must conduct a "public interest review," which requires a determination of the "extent of public and private need for the proposed work," "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed ... work," and "the permanence of detrimental effects." 33 C.F.R. §§ 320.1(a)(1), 320.4(a)(2)(i)-(iii). In making these determinations, the Corps must consider "[a]ll factors which may be relevant to the proposal," including "the cumulative effects" of the project. 33 C.F.R. § 320.4(a)(1).

EPA, in turn, has issued "guidelines" that also govern the issuance of dredge and fill permits, *see* 40 C.F.R. Part 230, and that are binding on the Corps. 33 C.F.R. § 320.4(a)(1). These regulations provide that "dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c). Moreover, "[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines." *Id.* at 230.1(d). The Guidelines state that "[t]he guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." *Id.* Therefore, these regulations prohibit the Corps from issuing any permit "if there is a practicable alternative ... which would have less adverse impact on the aquatic ecosystem." *Id.* at § 230.10(a). An alternative is "practicable" if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* at § 230.10 (a)(2).

In addition, the Guidelines prohibit permitting a discharge that will violate state water quality standards, violate toxic effluent standards, jeopardize a species currently protected under the ESA, or violate any requirement designed to protect a marine sanctuary under the Marine Protection, Research, and Sanctuaries Act. *Id.* at § 230.10(b). The Guidelines further provide that the Corps may not issue a dredge and fill permit "which will cause or contribute to significant degradation of the waters of the United States." *Id.* § 230.10(c). Such effects include adverse impacts to human health and welfare, the life stages of aquatic life or other wildlife dependent on a site, the overall integrity of an aquatic ecosystem, and human use such as recreation or economic values. *Id.* at §§ 230.10(c)(1)-(4).

Pursuant to the Corps' implementing regulations, the "decision whether to issue a permit will be based upon an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 CFR § 320.4(a)(1). This "public interest" review lies at the heart of the Corps' analysis and must guide the agency's review of the Millennium Bulk Terminals proposal. The public interest review is intended to be

broad, capturing all relevant issues that could impact the environment, human health and natural resources. The Guidelines state:

Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources.

33 CFR § 320.4(a)(1). The Corps' regulations include a non-exhaustive list of factors that may be relevant for each individual project. 33 CFR § 320.4(a)(1) states in part:

All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

Id. Consistent with the mandate that the Corps consider “all those factors that become relevant,” this non-exhaustive list of factors includes issues beyond those directly related to the impacts of in-water work. *Id.* By requiring an analysis of “cumulative impacts” and by including a non-exhaustive, but far reaching, list of factors, the Corps' regulations clearly require a broad analysis of the public interest that captures all impacts associated with the project and not just those that result directly from the permitted activities.

The Corps must apply the following criteria when determining whether the project is in the public interest:

- (i) The relative extent of the public and private need for the proposed structure or work;
- (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

33 CFR § 320.4(a)(2).

Where impacts are unavoidable, the Guidelines require that there be appropriate and practicable steps taken to minimize harm to aquatic ecosystems by the discharge activity. *Id.* § 230.10(d). EPA separates into seven broad categories the factors the Corps must assess in regards to impact minimization: location of discharge, the material to be discharged, controlling the material after discharge, methods and technology used to disperse material, impacts to plant and animal populations, and impacts to current and potential human use. *Id.* at §§ 230.70-76. Any permit that does not conform to the Guidelines is invalid. The degree of analysis required under the Guidelines is commensurate with the impacts to the aquatic environment.

* * *

We urge the Army Corps to correct its scope of environmental review to include all direct, indirect, and cumulative impacts caused by this proposed project in the final EIS. Based on the project's significant detrimental impacts, we also urge the Corps to deny CWA and RHA authorizations as antithetical to the public interest.

Sincerely,



Kristen L. Boyles
Jan Hasselman
Earthjustice

Attorneys for Climate Solutions, Columbia Riverkeeper, Friends of the Columbia Gorge, Association of Northwest Steelheaders, Northwest Guides & Anglers Association, Washington Environmental Council, Oregon Physicians for Social Responsibility, Washington Physicians for Social Responsibility, Idaho Conservation League, Sierra Club, and RE Sources for Sustainable Communities

Attachments

cc: Department of Ecology (via U.S. Mail with attachments)