

Mona L. Ellis

November 29, 2016

****Delivery by electronic upload****

Millennium Bulk Terminals NEPA EIS
c/o ICF International
710 Second Avenue, Suite 550
Seattle, WA 98104

Re: Millennium Bulk Terminal Longview, DEIS Comment

To Whom It May Concern,

On September 30, 2016, the U.S. Army Corps of Engineers (Corps) released a Draft Environmental Impact Statement (DEIS) for the Millennium Bulk Terminals-Longview (MBT) export terminal. In my capacity as a concerned citizen and law student at the University of Colorado, I have reviewed the document and supporting materials and submit these comments in response thereto.

At the outset, I would like to say that regardless of any attempt by the Corps to supplement the DEIS, based on the significant shortcomings set out below, I do not believe the MBT project should go forward. The greenhouse gas (“GHG”) emissions alone cannot be justified based on current climate science. The terminal poses a threat to the nation’s goals of reducing its carbon footprint and ensuring a future for generations to come, generations free from man-made global warming and the catastrophic consequences that follow. In addition, the state of Washington has a plan in place to reduce carbon emissions and approval of the MBT would be in direct contravention of that plan. At a time when our country is moving away from coal, this project seeks to substantially increase coal consumption on a global scale. As a result, and as highlighted within the DEIS, there are most certainly going to be numerous significant impacts which all point to denying this project.

As stated above, there are serious defects within the DEIS where information is either inaccurate, inadequate, or incomplete. Citizens obtain information about projects like MBT oftentimes through agencies such as the Corps in situations such as this. In this instance, it appears that the analysis of the short and long-term risks and apparently inevitable impacts of completing this project have been minimized

or ignored. This comment identifies and discusses several significant defects in DEIS, as follows:

I. THE CORPS HAS UNREASONABLY LIMITED THE SCOPE OF THE NEPA ANALYSIS TO EXCLUDE CONNECTED ACTIONS THAT WOULD NOT GO FORWARD BUT FOR THE TERMINAL

The National Environmental Policy Act (NEPA) is a procedural statute that has a broadly stated goal.¹ NEPA serves two primary purposes: First, it imposes upon an a federal agency the obligation to consider “every significant aspect of the environmental impact of the proposed action. Second, it provides a forum for public comment and consideration of the proposed environmental impacts.² Some have said that Act’s purpose, is more aptly stated as “making the federal government, in its own undertakings, protectors of the environment rather than a contributor to its impairment.”³ NEPA also serves an important additional purpose as a kind of clearinghouse for information required by other relevant laws.⁴

NEPA requires federal agencies to prepare an environment impact statement for all "major Federal actions significantly affecting the quality of the human environment." [42 U.S.C. § 4332\(2\)\(C\)](#). Under the Act, a NEPA document must fully evaluate all of the direct, indirect, and cumulative effects of projects. NEPA defines these terms as follows: Indirect impacts 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\(b\)](#). Cumulative impacts include “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” [40 C.F.R. § 1508.7](#).

These previous sections within NEPA that have been discussed are vastly important to its implementation and purpose. Hence, not only the spirit of the Act but also the text of NEPA *require* that the Corps determine the potential impact that a proposed development would have on the jurisdictional waters (and also)

¹ [Sec. 2 \[42 USC § 4321\]](#).

² See [Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 \(1989\)](#).

³ E.W. Kenworthy, U.S. Environment Law Attacked, N.Y. TIMES, Dec. 14, 1970 (on file with the Library of Congress, in The Douglas Papers).

⁴ See JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 3d Ed. (2009)

"those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." [33 C.F.R. Pt. 325, App. B § 7\(b\)\(1\)](#). The Corps has "control and responsibility" for portions of the project in which "the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially the products of the Corps permit action." [33 C.F.R. Pt. 325, App. B § 7\(b\)\(2\)](#).

The typical factors to consider in order to determine the circumstances under which the potential environmental consequences on non-jurisdictional land are such that the Corps has control and responsibility are: (i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project); (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity; (iii) The extent to which the entire project will be within Corps jurisdiction; (iv) The extent of cumulative Federal control and responsibility.⁵ So while it is true that the *permitting* authority of the Corps is limited to those aspects of a project's development that *directly* affect jurisdictional waters, it has a responsibility under NEPA to analyze all of the environmental consequences of the project which seeks a permit.⁶ Courts have clarified this by explaining that, "it is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility."⁷

A. THE SCOPE OF THE CORPS ANALYSIS OF CUMULATIVE IMPACTS WAS INADEQUATE

In the case of a project like MBT, a coal terminal, courts have held that under NEPA (more specifically the CEQ) climate change and GHGs merit consideration of the indirect impacts. In fact, the impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.⁸ The fact that the Supreme Court has held that an agency may exclude from the scope of a NEPA analysis any environmental effect that does not have a "reasonably close causal relationship" to the proposed development⁹, does not change the result for the Corps in this instance. This is because as to this project, the Corps has conceded that not only will the increased GHG emissions

⁵ [Save Our Sonoran v. Flowers](#), 408 F.3d 1113, 1121 (9th Cir., 2005).

⁶ *Id.*

⁷ *Id.* at 1122.

⁸ [Center for Biological Diversity v. NHTSA](#), 538 F.3d 1172, 1217 (9th Cir. 2005).

⁹ See [DOT v. Public Citizen](#), 541 U.S. 752, 124 S. Ct. 2204 (2004).

from the construction and subsequent operation of MBT be significant, but that this increase will also impact the state of Washington at large and the global atmosphere. Thus, the Corps must provide the necessary contextual information about the cumulative and incremental environmental impacts of the project.

While it is true that NEPA is a procedural statute and does not mandate specific results, the procedures as followed underlie the substantive decisions that an agency makes.¹⁰ The DEIS prepared for this project indicate that there are significant harms and risks that cannot be mitigated. (See Section S.7) While the list should be enough for the Corps to deny this project, it is nevertheless inadequate. A thorough examination of the potential impacts and risks to the environment (both human and natural) that are reasonable foreseeable should be included in the Corps' analysis.

CONCLUSION

The DEIS is not completely lacking with regards to its environmental analysis of GHG emissions. Many potential impacts are clearly stated. Nevertheless, the DEIS fails to identify significant cumulative impacts of the proposed project. My comments are offered in the hopes that this issue will be resolved to ensure that the agency is making a fully informed and transparent decision.

Sincerely,

Mona Ellis

¹⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).