NATIONAL ASSOCIATION OF Manufacturers

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MBTL SEPA Draft EIS
c/o ICF International
710 Second Avenue, Suite 550
Seattle, WA 98104

Re: Millennium Bulk Terminals-Longview SEPA Draft Environmental Impact Statement.

The National Association of Manufacturers (NAM), the largest manufacturing association in the United States representing manufacturers in every industrial sector and in all 50 states, submits the following comments to the Cowlitz County Department of Building and Planning and the Washington State Department of Ecology (the Agencies) on the Draft Environmental Impact Statement (EIS) under the State Environmental Policy Act (SEPA) for the Millennium Bulk Terminals – Longview (MBTL) coal export terminal.

MBTL is reinvesting in an underutilized 416-acre site, upgrading what was a 1940's era aluminum smelter, and removing and recycling over 300,000 tons of waste from the site. The proposed redevelopment of this facility would create a coal receiving, storage and shipping terminal bringing a private investment of over $680 million dollars into the area. MBTL will generate millions of dollars in economic output in Washington and the Pacific Northwest, creating 2,650 direct and indirect jobs in the region during its construction phase and over 300 long-term jobs in the community.

The NAM strongly supports timely construction of the MBTL project. Export projects like MBTL are vital to the success of domestic manufacturing and job creation. Currently, ninety-five percent of the world's consumers live outside the borders of the United States. To find new customers, grow jobs domestically and improve our country's competitiveness, manufacturers must modernize our export infrastructure to stay competitive in an increasingly tough global economy. Exports constitute 20 percent of U.S. manufacturing production, and have increased at a rapid rate in recent years. In fact, U.S. manufactured goods exports more than quadrupled since 1990, growing twice as fast as U.S. GDP since 2002. Unfortunately, the United States is still falling behind. U.S.-manufactured goods exports fell 6.1 percent in 2015 – a trend that has continued so far in 2016. Indeed, the U.S. exports far less of its manufacturing output than the global average. Expanding ports and related infrastructure will allow manufacturers to meet global demands for our products while growing our economy and creating jobs. Especially in a region like the Pacific Northwest where one in four jobs is related to trade, MBTL is the kind of export infrastructure project that will help increase family-wage jobs for the local community.

Moreover, the Draft EIS determined any number of additional positive benefits for the region, without adverse impact. Both MBTL construction and the proposed rail improvement

would further the future economic growth for Longview. See Draft EIS 3.2.19-20, SEPA Rail Technical Report 3-9. In the course of construction and operation, any coal dust from the exports would be able to be controlled, that EPA projected standards would be met, traffic for the region would not be adversely affected, and that the project would have no "unavoidable and significant adverse environmental impacts." *Id*. at 5.7.8 and 5.7-27, Summary Chapters at page 35, Draft EIS at 3.2-25, *Id*. at 4.3.8.

However, there are a number of areas where the NAM would suggest either revision or further review before the EIS is finalized. Those areas include inconsistencies within the draft, limiting the scope of GHG emissions studied to those actually attributable to MBTL, and a revision to the mandatory nature of mitigation measures prescribed. These suggested areas are further detailed below.

<u>The Agencies Must Clarify and Eliminate Inconsistencies in the Draft EIS</u>

A primary purpose of SEPA and NEPA is to promote informed and transparent decision-making. To do this, it is imperative that EISs and other SEPA documents are clear and free from internal inconsistencies that could confuse rather than inform both decision makers and the public. There are several such inconsistencies in the Draft EIS, and the NAM urges the Agencies to eliminate these inconsistencies and make the necessary revisions to the text.

For example, Section 5.8.2.8 of the Draft EIS states that "[t]here would be no unavoidable or significant adverse impacts" from the Proposed Action. *Id.* at 5.8-33. In contrast, after calculating the projected GHG emissions attributable to the Proposed Action in the Agencies' models, the Draft EIS states that "emissions attributable to operations of the Proposed Action under the 2015 Energy Policy Scenario are considered adverse and significant." *Id.* at 5.8-16-17. These two statements cannot be reconciled and the Agencies must revise their conclusions in the Final EIS.

Likewise, Section 5.8.2.7 of the Draft EIS states that "[p]otential climate change impacts on the Proposed Action in the project area are not considered significant and would not necessitate mitigation" *Id.* at 5.8-33. In contrast, in the section describing potential mitigation measures, the Draft EIS states that "[t]he Applicant *will implement* the following measures to mitigate greenhouse gas emissions." *Id.* at 5.8.21. The Draft EIS also states that the Applicant "will prepare" and obtain approval of a greenhouse gas mitigation plan. *Id.* at 5.8.22. Again, these statements cannot be reconciled with the Agencies' conclusion that mitigation is not necessary. The Agencies must harmonize their intended treatment of mitigation measures for the Proposed Action.

<u>The EIS Must Be Limited to GHG Emissions Attributable to the Proposed Action</u>

In the Draft EIS, the Agencies conduct what is essentially a life cycle analysis of GHG emissions associated with MBTL to include all GHG emissions from facility construction and operation, as well as emissions from the transport and ultimate combustion of coal. As the NAM explained in comments on the scoping document, evaluating all GHG emissions identified in a life cycle analysis is inconsistent with both NEPA and SEPA and would dramatically overstate the actual impact of MBTL.

Further, this expanded analysis creates a very dangerous precedent that could be used to block exports. Not only do virtually all manufactured products have an environmental footprint, but the decision to make the port operator account for the footprint of those goods as a

condition to building the port is a dangerous policy manufacturers fear could restrict exports. It could also become a template for other states, and could be easily applied to other goods. Port operators should not be forced to mitigate for the life cycle environmental impact of the goods passing through their terminals, whether those goods are grains, fruits, semiconductors, automobiles, energy or anything else.

The fundamental purpose of an EIS is to inform agency decision making on the issue pending before that decision maker. To do so effectively, it is critical that agencies do not add to the decision-making criteria environmental impacts that are either so far removed from the project, or so speculative that they are not relevant to the discrete project and decision before the agency. Applying appropriate boundaries not only promotes informed agency decision making by ensuring that decisions are based on environmental impacts over which the federal agency has control, but also protect agencies and private entities whose permit or license applications are subject to NEPA and SEPA review against unnecessary litigation over hypothetical, tangential, or *de minimis* environmental effects. These limits should be strictly applied in the unique context of GHG emissions and climate change where, unlike other environmental impacts, GHG emissions are universally mixed in the atmosphere and bear no specific geographic nexus to the climate impacts they may cause.

The federal standard for reasonably foreseeable environmental impacts under NEPA must be followed if the NEPA process is to retain integrity and meaning. That same standard is also informative with respect to the scope of impacts considered under SEPA. For example, courts have held that indirect effects must only be considered when there is a "reasonably close causal relationship" that would qualify as a "proximate cause" under tort law. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *see also Public Citizen*, 541 U.S. at 767 (citing W. Keeton, *et al*., Prosser and Keeton on Law of Torts 264, 274-75 (1983) for proximate cause standard). Thus, for example, under NEPA an agency need not consider environmental effects of actions over which the agency has no control. *Public Citizen*, 541 U.S. at 770 ("We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."); *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007) (same). Indeed, agency decision-making that rests on factors outside an agency's substantive authority would be deemed arbitrary and capricious.

Application of this proximate cause standard for indirect effects has significant implications for consideration of upstream and downstream GHG emissions for projects such as MBTL. Specifically, under NEPA a federal action cannot be considered a proximate cause of an upstream or downstream impact if such upstream or downstream impact is likely to occur even without the proposed action. Courts have frequently addressed this issue in the context of induced growth, finding that an agency need not consider the environmental effects of third party development when the federal project is responding to development that would occur anyway. *See, e.g.*, *Citizens for Smart Growth v. Dep't of Transp.*, 669 F.3d 1203, 1205 (11th Cir. 2012) (no need to evaluate "the project's stimulation of commercial interests in a previously residential area" when "commercial uses in the study area were already being planned or developed"); *City of Carmel-By-The-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) ("The construction of Hatton Canyon freeway will not spur on any unintended or, more importantly, unaccounted for, development because local officials have already planned for the future use of the land, under the assumption that the Hatton Canyon Freeway would be completed."); *Morongo Band of Mission Indians v. Fed. Aviation Administration*, 161 F.3d 569 (9th Cir. 1998) ("[T]he project was implemented in order to deal with existing problems; the fact

that it might also facilitate further growth is insufficient to constitute a growth-inducing impact under 40 C.F.R. § 1508(b).”).

The same analysis applies to upstream effects. For example, in *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010), the court held that environmental effects associated with oil production in Canada need not be considered when evaluating a pipeline project because the oil would be produced and transported regardless of whether the pipeline project would be completed. Thus, a proposed federal action cannot be considered a proximate cause of upstream and downstream action simply because it is part of the same chain of events.

This has important implications for the life cycle analysis of GHG emission included in the draft EIS. For example, the life cycle analysis includes emissions associated with the transportation and combustion of coal. *See* Draft EIS at 5.8-5, 5.8-14. However, if the Millennium Terminal will not induce additional coal transport or coal combustion, the GHG emissions associated with those activities need not be included when evaluating the potential impacts of the project. Thus, if the coal transported to the terminal would be mined and sold for export through other means if the project were not completed, then the project is responding to existing demand for coal exports and not inducing more use. Likewise, if U.S coal exported from MBTL merely displaces coal from other locations, it is not inducing additional combustion of coal for electricity. Under either of these circumstances emissions associated with those activities cannot be attributed to the terminal and should be excluded from the EIS.

In the Draft EIS, the Agencies appropriately recognize that GHG emission need not be included in the EIS simply because they are associated with the life cycle of the coal that would be transported through the terminal. *See* Draft EIS at 5.8-22 (“However, not all of the emissions are attributable to MBTL because some of the coal being shipped from the coal export terminal could displace coal shipped from other areas and change transportation.”). In fact, the Draft EIS concludes that virtually all of the coal exported from the terminal would displace other sources. Applying the reasoning in *Sierra Club v. Clinton*, 746 F. Supp. 2d at 1045, NAM urges the Agencies to take the same approach in determining whether GHG emissions associated with the transport of coal should be included when evaluating the potential impacts of the terminal. By excluding GHG emissions that cannot be fairly attributed to the project, the Agencies will be better able to make an informed and transparent decision based on the analysis contained in the final EIS.

From the time of its initial application, agencies have been pressured to widen the scope of NEPA analyses to include all manner of issues and potential impacts that are outside the scope of the proposed major federal action to be addressed in the EIS. Repeatedly, the courts have rejected demands to so broaden the Act’s scope. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981). Moreover, the Washington Court of Appeals has ruled that SEPA’s requirements are “inapplicable” and only NEPA’s requirements apply to a joint NEPA/SEPA EIS; therefore, an expanded review by the Agencies for MBTL should not have applied. The Agencies must resist such pressure here and avoid an inappropriate expansion of the GHG emissions attributable to MBTL.

<u>The Agencies Should Not Impose Mandatory Mitigation Measures for GHG Emissions as Part of the SEPA Process</u>

Despite stating that “[p]otential climate change impacts on the Proposed Action … would not necessitate mitigation,” Draft EIS at 5.8-33, the Draft EIS appears to include a number of

mandatory mitigation requirements. *Id.* at 5.8-21-22. Among other things, the Draft EIS suggests that MBTL must prepare and obtain approval of a "greenhouse gas mitigation plan that mitigates for 50 percent of the greenhouse gas emissions identified in the 2015 Energy Policy Scenario." *Id.* at 5.8-22. Imposing mandatory mitigation requirements is neither required by law nor consistent with SEPA's primary purpose of informing agency decision-making. Moreover, imposing a mitigation requirement based on life cycle GHG emissions could have a significant and detrimental precedent on future projects in the State of Washington.

The NAM does not dispute that the identification and evaluation of mitigation measures is an important part of the SEPA process. In fact, the SEPA implementing regulations direct agencies to "identify, evaluate, and require or implement, where required by the act and these rules, reasonable alternatives that would mitigate adverse effects of proposed actions on the environment." WAC 197-11-030(2)(g). Likewise, the regulations state that an EIS must "[c]learly indicate those migration measures (not described in the previous section as part of the proposal or alternatives), if any, that could be implemented or might be required, as well as those, if any, that agencies or applicants are committed to implement. *Id.* 197-11-440(6)(c)(iii). However, under most circumstances, an applicant is not required to implement the mitigation measures identified in an EIS. In this respects, an EIS is fundamentally different from a Mitigated DNS, where mandatory mitigation measures are imposed as part of the SEPA process to ensure that a proposed action will not have significant environmental impacts.

Here, the Agencies have already concluded that an EIS is necessary, but appear to impose a series of mandatory mitigation measures as part of the approval process. Such mandatory requirements are not necessary here. In particular, the Agencies should not require the terminal to mitigate 50 percent of the GHG emissions identified in the 2015 Energy Policy Scenario. *See* Draft EIS at 5.8-22. While Washington requires mitigation of GHG emissions under some circumstances, *see* RCW 80.70 and RCW 80.80, the Agencies concede "[t]he mitigation requirements in RCW 80.70 and RCW 80.80 are not directly applicable to the Proposed Action." Draft EIS at 5.8-21. Under these circumstances, there is no basis for the Agencies to require mitigation of GHG emissions from the Proposed Action, let alone mandatory mitigation at the upper end of what these inapplicable regulations require of other sources. Requiring mitigation of GHG emissions in this SEPA review would impose substantial burdens on the Millennium Terminal and would also have the potential to create precedent that would discourage future investments in the state. For these reasons, the Agencies should clarify in the final EIS that all GHG mitigation measures should remain voluntary.

Conclusion

As manufacturers we rely on terminals like MBTL to export our goods, products and raw materials to customers around the world. United States coal exports are supported by jobs in the manufacturing industry. These jobs include mining and support activities for coal mining; construction; railroad transportation; transport by water and truck; port operations and cargo handling; and all the manufacturing supply chain jobs that support these activities. Manufacturers support investments in private infrastructure projects that improve the nation's transportation and export capacity while also meeting established environmental standards. Through a thorough SEPA process, MBTL has shown that the project will be able to promote economic gains for the community and industry, create jobs, and maintain environmental harmony. The NAM offers that a final EIS would benefit from clarifications to three items detailed: inconsistencies within the document, limiting to those GHG emissions which are actually attributable to MBTL, and that mitigation measures proposed under SEPA are voluntary

for the project. Manufacturers appreciate the opportunity to comment on the Draft EIS, and hope the Agencies will approve such a worthy project as MBTL soon.

Sincerely,

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