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

Comments of Montana Attorney General on State Environmental Policy Act Draft Environmental Impact Statement for the proposed Millennium Bulk Terminals, Longview, Washington

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I submit the following comments on behalf of the State of Montana:

I. Background

Millennium Bulk Terminals-Longview, LLC has proposed to construct and operate a coal export terminal for the shipment of coal on a 190-acre site (project area) in Cowlitz County, Washington, along the Columbia River. Pursuant to the Washington State Environmental Policy Act (SEPA), Rev. Code Wash. § 43.21C.900, et seq., and regulations promulgated thereunder, this proposal is under review by Cowlitz County and the Washington State Department of Ecology. The Draft Environmental Impact Statement (DEIS) is the result of this review.

Montana is a landlocked, commodity producing state. Our economy, and the well-being of our State's families, depends on access to markets for these commodities.

As a result, we pay attention when our sister states which are blessed with access to coastal waters make decisions about port facilities which provide the gateway to national and international markets for the commodities produced in our State.

That is the reason for our State's interest in the DEIS and in the decisions to be made as the culmination of the review process. The construction and availability of this facility is of paramount importance to the people of our State.

The Commerce clause of the U.S. Constitution gives the United States Congress the power to regulate commerce among the states. Even where the Congress has not acted on a particular matter, the negative implication of that clause, which is commonly called the dormant commerce clause, protects a state like ours from actions taken in other states which would unreasonably restrict the ability of our citizens to engage in interstate and international commerce.

We have every reason to believe that decisions made for this project will recognize and protect our state's interests, but it's our duty, our obligation, to make sure our interests are known. That is the reason for our involvement in the agency's review. Our State, together with the State of North Dakota, was engaged in this review at the scoping phase, and the State of Wyoming also is interested in and commenting upon the DEIS. We will be closely scrutinizing the agencies' responses to our comments, and the comments of others, and to the decision-making to follow, with the object of protecting our State's interests in this project.

We appreciate the work Cowlitz County and the Washington Department of Ecology have put into this Draft EIS, and into getting it produced in a timely fashion. We also appreciate the opportunity to provide these comments, and we look forward to watching this project proceed to final permitting and construction.

Other legal and factual flaws than those mentioned within may be discovered as the State of Montana continues to monitor this process. Montana therefore reserves the right to raise additional concerns in the future should the need arise.

II. Applicable Law relevant to Montana's Commerce Clause Interest

The Washington Supreme Court held in *Parkridge v. Seattle*, 89 Wn.2d 454, 466, 573 P.2d 359, 366, (Wash. 1978), that the State Environmental Policy Act (SEPA) may not be utilized by a governmental agency to block the construction of projects merely because they are unpopular. Instead, SEPA, limits the agency's examination to those specific objective factors set out in Rev. Code Wash. § 43.21C.030. In particular, Rev. Code Wash. § 43.21C.030(2)(e), requires that an agency conducting a SEPA environmental review: "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources".

In reviewing project alternatives and their impacts in this SEPA review, Cowlitz County and the Washington State Department of Ecology, should examine workable and economic alternatives for the use of proposed port facilities and their cumulative social and economic impacts, so as to sustain interstate commerce, and facilitate the flow of

commodities through the State of Washington from the State of Montana to Washington and beyond, to international markets. Washington may not erect barriers to interstate and international commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 64 L. Ed. 2d 702, 100 S. Ct. 2009 (1980); *South-Central Timber Development, Inc. v. Wunnicke*, 467 US 82, 100 (1984).

When selecting alternatives and evaluating the impacts of protective or restrictive regulatory measures for this project, the SEPA review should balance those protective or restrictive measures against the State of Washington's constitutional duty to preserve the flow of goods in interstate commerce under the strictures of the dormant commerce clause. U.S. Constitution, Art. I, §8, cl. 3. "Any state action that 'burden[s] interstate commerce or impede[s] its free flow' is within the domain of the dormant Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown*, N.Y., 511 US 383, 389 (1994) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1, 31 (1937).

Under the dormant commerce clause, it is the constitutional duty of the State of Washington to choose the least restrictive regulatory means to protect its local interests, or be prepared to articulate why it was unable to do so. See, e.g., *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 US 573, 579 (1986); *City of Philadelphia v. New Jersey*, 437 US 617, 627 (1978); *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of State of Or.*, 511 US 93, 107 (1994).

Even if the State of Washington deems the impacts of its selected protective or restrictions conditions to possess only an incidental impact upon interstate commerce, the dormant aspect of the commerce clause of the U.S. Constitution forbids those conditions from being "clearly excessive in relation to the action's putative local benefits." *Pike v. Bruce Church, Inc.*, 397 US 137, 142 (1970).

III. Application of Law to Draft EIS

The DEIS evidences violations of applicable law, including SEPA, in the following respects:

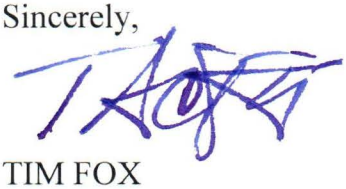
The principal flaw the State of Montana sees in the DEIS is that it requires mitigation by the project applicant for increased GHG emissions from coal burned in Asia during the time period of the project's operation, as a result of the project, based on a modeling scenario that is speculative at best, and accordingly not in compliance with the SEPA requirements that a SEPA EIS evaluate potential impact proximately caused by a proposal.

In addition, there is no basis provided in the DEIS or the supporting documents to conclude that any net additional emissions from burning of coal in Asia emission during the time period of the project's operation, as a result of the project, would cause specific, adverse environmental effects in the state of Washington, and no basis therefore for requiring mitigation for these emissions in the State of Washington. This also violates SEPA, as well as the State's Commerce Clause obligations.

Finally, requiring that the mitigation plan be approved by the State creates a new and open-ended permit requirement which creates a level of uncertainty that would in itself tend to make the project uneconomic. This provision violates SEPA and the State's Commerce Clause obligations.

In summary, the State of Montana has a vested interest in the agencies' review of the project, and in the decision-making to follow the review. Our interest is protected by the provisions of the United States Constitution. We urge the agencies' to take this important interest into full account in the continuing review of the project and in the decision-making to follow.

Sincerely,



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