



Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

November 18, 2013

By Electronic and Regular Mail

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

Re: Nez Perce Tribe's scoping comments on the U.S. Army Corps of Engineers, Washington State Department of Ecology ("Ecology"), and Cowlitz County intent to prepare an Environmental Impact Statements on the proposed Millennium Bulk Terminals—Longview Shipping Facility Project

Dear Responsible Officials:

The Nez Perce Tribe (Tribe) appreciates the opportunity to provide scoping comments on the US Army Corps of Engineers' (Corps), Washington State Department of Ecology's (Ecology), and Cowlitz County's intent to prepare Environmental Impact Statements under the National Environmental Policy Act (NEPA) and State Environmental Policy Act (SEPA) for the proposed Millennium Bulk Terminals –Longview Shipping Facility Project. These comments incorporate by reference Columbia River Intertribal Fish Commission's November 18, 2013 scoping comments.

I. Project Description

According to Department of Ecology's website and the materials available on it, Millennium Bulk Terminals LLC, (MBTL) and its members Ambre Energy North America, Inc. and Arch Coal, Inc., are proposing the construction, operation and maintenance of a coal export terminal near Longview, Washington adjacent to the Columbia River. The proposed coal export terminal would cover approximately 100 acres of the 416-acre site and would consist of rail unloading, storage, reclaiming and loading ships with coal. MBTL proposes to develop the coal export terminal in two separate stages. MBTL would construct two docks requiring 647 steel piles, one shiploader, two stockpile pads, one tandem rotary dumper, five rail lines, associated facilities and infrastructure in the first stage. Stage two facilities would consist of one additional shiploader on Dock 3, two stockpile pads, and three rail lines to complete the build out of the coal export terminal. The completed coal export terminal would consist of two docks, two shiploaders, four stockpile pads, one tandem rotary dumper, eight rail lines, and associated facilities, conveyors and equipment.

Dredging will be required to provide berthing access from the navigation channel and to provide an adequate turning basin in the vicinity of the docks. MBTL is requesting authorization to dredge and dispose of up to 385,000 cubic yards from within the project footprint. MBTL also seeks authorization to the extent required to perform routine maintenance dredging consistent with the proposed project dredge prism dimensions. Dredging and disposal may occur over one or two construction seasons. Because the site will continue to be subject to river sediment deposition, future maintenance dredging is anticipated on a 1 to 2 year basis to maintain adequate berthing and navigation depths for the facility.

The facility would be designed for 24-hour operation, seven days per week. During Stage 1 operations, approximately one vessel per day would be loaded. At maximum throughput, approximately two vessels per day would be loaded, totaling approximately 1,460 vessel transits through the lower Columbia River annually. Prior to or during loading, vessels would discharge ballast water. It is expected that vessels calling at the site would have exchanged or treated ballast water prior to discharge in accordance with state and federal regulations. Vessels would not typically withdraw ballast water from the Columbia River. The planned total capacity of the facility would be 44 million metric tons of coal annually.

II. General Comments

a. The Treaty of 1855

Since time immemorial the Nez Perce Tribe has used and occupied the lands and waters of north-central Idaho, southwest Washington, northeast Oregon, and portions of western Montana for subsistence, ceremonial, commercial and religious purposes. In Article 3 of the 1855 Treaty with the United States, the Nez Perce Tribe reserved, and the United States secured, the right to take fish and at all usual and accustomed fishing places, and to hunt, gather and pasture on open and unclaimed lands. Treaty of June 9, 1855, with the Nez Perce Tribe, 12 Stat. 957 (1859). The waters within the Tribe's aboriginal territory continue to be used by the Nez Perce. Tribal members exercise their treaty-reserved rights, as well as observe ceremonial, cultural and religious practices within the Columbia River Basin. Resident and anadromous species that rear, hold and migrate through the project area are subject to the Tribe's treaty-reserved fishing rights.

The Tribe's explicit treaty-reserved right to take fish at all usual and accustomed places includes, but is not limited to, a legally protected property interest in accessing all of its usual and accustomed places; and a legally protectable property interest in taking 50% of the fish that are destined to reach all of the Tribe's usual and accustomed places. In a sub-proceeding of United States v. Oregon, 302 F. Supp. 899 (D. Or. 1969), a treaty fishing rights case that has been under the court's continuing jurisdiction for over thirty years, Judge Belloni further clarified the Tribe's treaty-reserved fishing right:

By "destined to reach the tribes' usual and accustomed grounds and stations," I am referring to that portion of the spring run which would, in the normal course of

events, instinctively migrate to these places except for prior interception by non-treaty harvesters or other artificial factors.

Sohappy et al. v. State of Oregon (Civil No. 68-409, May 8, 1974) at 3. Treaty tribes, such as the Nez Perce Tribe, are also recognized as managers of their treaty- reserved resources. U.S. v. Washington, 384 F. Supp. 312, 339-40, 403 (W.D. Wash. 1974). Protecting rivers and flows for native resident and anadromous fish and wildlife populations is critically important to the Nez Perce Tribe. Resident and anadromous fish stocks that originate above, or rear and hold, within or adjacent to the proposed project are may be affected by the presence and operation of the project. Anadromous fish, including salmon, Pacific lamprey and steelhead as well as resident fish such as sturgeon have deep and lasting cultural and religious significance to the Tribe.

b. The Nez Perce Tribe’s involvement in other coal proposals on the Columbia River

The Tribe has been actively engaged in monitoring the development of other coal proposals on the Columbia River. In 2012 the Tribe submitted comments to the Corps regarding the proposed coal off-loading facility at the Port of Morrow. The Tribe has requested that the Corps perform a full EIS for the proposal, and has expressed significant concerns regarding the project’s impacts to treaty fishing, as well as the project’s impacts on the environment. The Tribe has also provided testimony to the State of Oregon requesting that it acknowledge the project’s impacts on treaty-reserved rights, and asked ODEQ to require a Clean Water Act 401 certification to consider all impacts of the entire project. Moreover, the Affiliated Tribes of Northwest Indians, of which the Tribe is a member, has requested a full environmental review and government-to-government consultation with affected tribes concerning proposed coal terminals on the Columbia.

c. NEPA

NEPA “declares a broad national commitment to protecting and promoting environmental quality.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989); see 42 U.S.C. § 4331. “To insure this commitment is infused into the ongoing programs and actions of the Federal Government, the act also establishes some important ‘action-forcing’ procedures.” Robertson, 490 U.S. at 348 (citing 115 Cong. Rec. 40416 (remarks of Sen. Jackson)). NEPA directs that, to the fullest extent possible, all federal agencies must prepare an EIS whenever they propose “major federal actions significantly affecting the quality of the environment.” Id.; 42 U.S.C. § 4332(C). NEPA’s disclosure goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) “to ensure that the public has sufficient information to challenge the agency.” Robertson, 490 U.S. at 349; Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency on the environmental consequences of its proposed action, NEPA “ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” Robertson, 490 U.S. at 349.

Through the NEPA process, a federal agency must “take[] a ‘hard look’ at the potential

environmental consequences of the proposed action.” Oregon Natural Res. Council v. Bureau of Land Management, 470 F.3d 818, 820 (9th Cir. 2006) (internal quotations omitted). NEPA’s regulations require that an EIS include a discussion of direct, indirect, and cumulative environmental impacts of the proposed action. Direct impacts are “caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect impacts are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” Id. at § 1508.8(b). Indirect 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. Cumulative impacts result when the “incremental impact of the action [is] added to other past, present, and reasonably foreseeable future actions” undertaken by any person or agency. Id. at § 1508.7.

d. SEPA

The Washington State Environmental Policy Act, like its federal counterpart NEPA, was enacted to ensure that “...environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations...” RCW 43.21C.030(2)(a) and (2)(b). To implement this purpose, the SEPA Rules direct agencies to “Identify and evaluate probable impacts, alternatives and mitigation measures, emphasizing important environmental impacts and alternatives (including cumulative, short-term, long-term, direct and indirect impacts). WAC 197-11-030(2)(b) and (g). Also like NEPA, the agencies must consider this information before committing to a particular course of action. WAC 197-11-055(2)(c).

III. Specific Comments

In determining the scope of the EISs, the Tribe requests that the Corps, State of Washington and Cowlitz County not only evaluate the impacts of construction and operation near the terminal, but also fully evaluate the direct, indirect and cumulative impacts of coal trains on a larger geographic scale. The Tribe therefore requests that the following issues be included in the EIS analyses.

a. Impacts to Tribal treaty rights

The Tribe is concerned that this project will negatively affect tribal treaty rights. The Tribe reserves treaty-fishing rights at all usual and accustomed fishing places, including those places along the Columbia and Snake Rivers and their tributaries that depend on fish that rear, hold and migrate through the lower Columbia River. As noted above, the project contemplates significant channel and maintenance dredging and will result in the destruction of wetlands. The lower Columbia provides crucial habitat for treaty-protected resources such as salmon, steelhead, lamprey and resident fish. There are several ESA-listed fish in the project corridor including Lower Columbia River Chinook Salmon ESU, Upper Willamette River Chinook Salmon ESU, Snake River Fall Chinook ESU, Columbia River chum salmon ESU, middle Columbia River steelhead DPS, and lower Columbia River steelhead DPS. These species are of critical importance to subsistence and culture of the Tribe. In addition, lamprey, although currently are not a listed species but are culturally significant to the Tribe, are also located in the project

corridor. These aquatic resources that rear, hold and migrate through the lower Columbia stand to be significantly affected by the project. A full evaluation of the impacts of the project on these treaty resources, therefore, must be performed as part of the EIS.

The application contemplates a significant increase in vessel and rail traffic. The analysis must include a thorough evaluation of the impacts of increased vessel traffic on anadromous and resident fish. This analysis should include impacts to aquatic resources caused by ballast intake and wake strandings, as well as threats posed by increased turbidity, noise, lighting, and impacts during operations like coal dust and other toxics. In addition, the increased rail traffic may affect Tribal member access to usual and accustomed fishing places and other traditional use areas as well as interfere with Tribal member use of those places through increased noise disturbances, coal dust, and diesel pollution. For all these reasons the Tribe believes that the increase in vessel and train has the potential to interfere with tribal treaty fisheries.

b. Impacts to Tribal member health

Given the large amount of coal that is contemplated to be transported by rail from the Powder River Basin and exported by vessel through the lower Columbia River to Asia, the Tribe is concerned about the project's potential impacts to Tribal member health. Coal dust and diesel emissions are known to cause respiratory disease, particularly affecting sensitive populations such as children and the elderly. In addition, the coal dust that settles on the water can have adverse environmental consequences to the river corridor. Coal dust can affect natural biological processes and can potentially affect fish and other biota that reside in the rivers.

c. Impacts to Tribal cultural resources

The action agencies need to evaluate the project's impacts on Tribal cultural resources, including historic properties under the National Historic Preservation Act. Section 106 of the NHPA requires the agency official to "determine and document the area of potential effect in consultation with the appropriate State Historic Preservation Officers and Tribal Historic Preservation Officers." 36 C.F.R. 800.4(a). The area of potential effect is defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 C.F.R. 800.16(d).

As stated above, the geographic scope of the evaluation should be sufficiently broad to evaluate direct or indirect alterations to the character and use of historic properties. Therefore, the NHPA analysis should include transport of coal by rail to the facility as well as through the lower Columbia to Asia. This analysis should include, but not be limited to, evaluating the impacts of air pollutants and other toxics on historic properties.

d. Range of Alternatives

Agencies are to “rigorously explore and objectively evaluate all reasonable alternatives,” and to explain why any alternatives were eliminated. 40 C.F.R. §1502.14(a). The regulations further state that agencies are to consider “reasonable alternatives not within the jurisdiction of the lead agency” and the no-action alternative. *Id.* at § 1502.14(d).

The agencies need to take a meaningful look at the no-action alternative. The Tribe also requests that the agencies consider an alternative or alternatives that identify alternate locations for the facility that are not on the Lower Columbia River and which do not require significant alteration of aquatic habitat that may be harmful to treaty-protected resources.

e. Environmental Justice

A Presidential memorandum accompanying Executive Order 12898 cites the NEPA process as an opportunity for agencies to address the environmental injustice of disproportionate impacts.

The CEQ also published guidance for environmental justice analyses to determine any disproportionately high and adverse human health or environmental effects to low-income, minority, and tribal populations. One of these principles is to “recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed action.”

Currently, the Nez Perce Tribe harvests significantly less fish than traditional salmon harvest levels. The decimation of salmon runs and disappearance of other traditional foods have seriously affected the Tribal economy. Today, Tribal members face a high poverty and unemployment rates. The EISs need to include an environmental justice discussion of disproportionate impacts of the project on the Tribe or its members. Any impacts on salmon, steelhead, lamprey or other trust resources, will have a disproportionate impact on the Tribe due to their reliance on fish and the importance of fish to Tribal culture, spirituality and economy. Tribal members consume a substantially higher rate of fish than the non-Tribal communities.

f. Socioeconomics

The evaluation needs to include an economic analysis of the impact of the project on the Nez Perce Tribal economy and the health and welfare of its people. The analysis should fully address social and economic factors unique to the Tribe and its treaty rights and resources, which extend throughout the Columbia and Snake basins. This analysis should include the Tribe’s efforts to restore fish runs in the Columbia River that rear in and migrate through the project area, and the economic benefits that will flow to the non-Tribal public from the re-establishment of healthy and harvestable fish runs in the area.

IV. Conclusion

Thank you again for the opportunity to review the proposed project. The Tribe anticipates consulting formally and through staff-to-staff interactions with the Corps throughout the development of this proposal. The Tribe also extends an invitation to the Department of Ecology

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and Cowlitz County to contact the Tribe with any questions or to request a meeting between our staff or with the Nez Perce Tribal Executive Committee. Please contact Michael Lopez, Staff Attorney, Nez Perce Tribe Office of Legal Counsel, at (208) 843-7355 for assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Whitman", with a large, stylized flourish at the end.

Silas C. Whitman
Chairman