



November 18, 2013

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**Re: Comments on the Scope of the NEPA & SEPA EISs for the
Proposed Millennium Bulk Terminal at the Port of Longview**

Dear Federal and State Officials:

On behalf of the Yakama Nation, I submit for the record the following information and positions regarding the scope of environmental analysis required for the proposed Millennium Bulk Terminal at the Port of Longview, in addition to the coal industry's proposed regional plans for our lands and waters.¹ The Yakama Nation is a federally recognized sovereign Nation created by the Treaty of 1855 with the United States (12 Stat. 951). The Treaty reserves for tribal members certain rights and resources that are necessary to maintain our customary way of life. Among these reserved rights is the right to fish at all Usual and Accustomed places, including the Columbia River. The proposed coal loading facility, dock, increased coal train traffic, and Panamax ships associated with this project would create direct adverse impacts — far beyond any *de minimis* threshold — to Treaty rights, including, among other things, Treaty-reserved salmon, steelhead, lamprey, and other resources critically important to the Yakama Nation and its People.

First and foremost, because of the significant and irreparable direct and indirect impacts that the proposed Millennium Bulk Terminal would have on the Yakama People and our Treaty-reserved rights and resources, the Yakama Nation requests that the U.S. Army Corps of Engineers (Corps), Washington State Department of Ecology (Ecology), and Cowlitz County each deny Millennium's

¹ The Yakama Nation expressly reserves its right to supplement or amend these comments and add to the record to whatever extent permissible under applicable laws and regulations.

applications to construct and operate a bulk terminal for coal export in Longview, Washington. The Millennium Bulk Terminal proposal would permanently violate the Yakama Nation's Treaty rights to fish, hunt and gather traditional foods. It will also potentially result in irreparable harm to the Yakama Nation's cultural resources.

Yakama Nation's Treaty rights in the Columbia River area have been recognized recently in federal court; notably through an injunction imposed to prohibit the shipment of Hawaiian garbage through Yakama ceded lands. In *Confederated Tribes and Bands of the Yakama Nation v. United States Department of Agriculture*, a case concerning the federal agencies' failure to adequately address the Yakama Nation's concerns in permitting a plan to ship garbage from Hawaii through Yakama ceded lands, Judge Shea held that the Yakama Nation was likely to "prevail on [its] NEPA claims that the EA and FONSI failed to adequately analyze the environmental impacts of shipment and receipt of Hawaiian garbage to the Roosevelt Landfill, **which is located on lands ceded by the Yakama Nation, wherein tribal members enjoy 'in common' usufructuary rights** ... Further [the Court found that] there are serious questions about whether Defendants adequately consulted with the Yakama Nation as required by the Yakama Treaty of 1855 and federal Indian trust common law."² The situation before the permitting agencies is analogous to the 2010 Hawaiian garbage case. There, federal agencies did not seriously analyze Treaty-protected rights that would be impacted along the route proposed to transport Hawaiian garbage.

To be clear, Yakama Nation will not negotiate nor agree to so-called mitigation for any violations or actions resulting in the diminishment or destruction of its Treaty-reserved rights and Treaty-protected resources. Put simply, there is no mitigation adequate to compensate my Tribe and its People for the continued degradation of our sacred places, the incremental but constantly worsening damages to our natural resources that sustain our culture, and the threats to the livelihoods and cultural practices of many Yakamas.

As we previously requested (letter dated October 28, 2013), Yakama Nation expressly requests government-to-government consultation with the U.S. Army Corps of Engineers on all aspects of the proposed coal export projects, including the Millennium Bulk Terminal.

YAKAMA NATION CONTINUES TO ASK FOR A COMPREHENSIVE, REGION-WIDE ENVIRONMENTAL ANALYSIS OF ALL COAL EXPORT PROPOSALS

If your agencies do not deny the coal export permit applications outright, Yakama Nation again reiterates its request that a comprehensive, region-wide environmental impact statement (EIS) be completed by the Federal government. In our review of the three proposals³ for coal-related actions pending before the Army Corps of Engineers — including the one that these comments are focused upon — it is self-evident that these proposals "will have cumulative or synergistic environmental impact[s] upon a region," and therefore "their environmental consequences must be considered together."⁴ In turn, we submit that under long-standing Supreme Court precedent concerning the interplay between coal-related proposals and Federal agencies' environmental obligations under

² *Confederated Tribes and Bands of the Yakama Nation v. United States Department of Agriculture*, 2010 WL 3434091 (E.D. Wash. 2010)(emphasis added).

³ Coyote Island Terminal at Port of Morrow, OR; Gateway Pacific Terminal at Cherry Point, WA; Millennium Bulk Terminal at Port of Longview, WA

⁴ *Kleppe v. Sierra Club, et al.*, 427 U.S. 390, 410, 96 S.Ct. 2718 (1976).

federal law, “[o]nly through comprehensive consideration of pending proposals can the [permitting] agency evaluate different courses of action.”⁵

In any event, because of the significant impacts this particular proposal will have, federal law requires agency consideration of the “cumulative impacts” resulting from the proposed project. Federal regulations define cumulative impacts as:

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.⁶

Therefore, even if the agency determines that a comprehensive region-wide EIS is not required in this instance, the cumulative impacts of the Millennium Bulk Terminal proposal in addition to all other coal-related projects in the region, plus all separate *current, past, and reasonably foreseeable future* environmentally taxing uses of the area — and in particular, the Columbia River and adjoining lands — all should be considered as the permitting agencies execute their respective duties to analyze cumulative impacts with respect to the Millennium Bulk Terminal project under federal and other applicable laws.⁷

Given the fragile and already damaged ecosystem immediately surrounding the proposed site of the Millennium Bulk Terminal and the entire region, as well as the long history of Treaty violations from energy development in the region that permanently and irreparably have harmed my People, it is imperative for the permitting agencies to analyze all impacts from the coal’s origins in the Powder River Basin or otherwise, through our Ceded and Usual and Accustomed Use Areas, to burning the coal in Asia. Failure to complete such critical analyses is an unacceptable derogation of your responsibilities at the expense of our people, the environment, and our economy.

COMMENTS ON THE SCOPE OF THE MILLENNIUM BULK TERMINAL EIS

As you are aware, the proposed Millennium Bulk Terminal would be located on a now defunct aluminum production facility that is currently undergoing a remedial investigation under Washington State’s Model Toxics Control Act (MTCA). The state cannot short-cut cleanup of the current contamination onsite to accommodate a new use. Some of the contaminants at the proposed Millennium Bulk Terminal site include fluoride, cyanide, metals, and PCBs, which have all been shown to be toxic to aquatic receptors. The EIS should include a full description of the extent of the contamination and how a coal port can be constructed without impeding the implementation of a remedy that is fully protective of Yakama Nation’s resources. It seems impossible that a proper EIS can be completed if the nature of the contamination is still being characterized and the method of cleanup, including cleanup levels, has not been determined. Yakama Nation expects that the post-remedy conditions of the site will be fully resolved and disclosed in the environmental review of the

⁵ *Id.*

⁶ 40 C.F.R. § 1508.7.

⁷ *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005); *see also Mountaineers v. United States Forest Service*, 445 F.Supp.2d 1235, 1247 (W.D. Wash. 2006)(finding that cumulative impacts analyses are required even in federal agencies’ preparations of EAs).

Millennium Bulk Terminal proposal.

With that, Yakama Nation recommends that the scope of the Millennium Bulk Terminal EISs to be completed under the National Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA) include evaluations of all potential impacts to our cultural and Treaty-reserved resources, our environment, public health and safety, and to our economies. We also request that these cumulative impacts be studied on a region-wide level, from the coal's origins in the Powder River Basin, through our homelands, to the final destination, including the impacts to our region from the intended use of the coal at its final destination. From our initial assessment and understanding, the potential impacts associated with transporting and burning the coal would result in direct and indirect damages to our People, natural and cultural resources, economies, and our ability to exercise our Treaty-reserved rights.

We commend the Washington State Department of Ecology on its decision to identify and analyze the full range of impacts associated with the Cherry Point coal-related proposal, including transportation-related impacts through the state, climate change effects, etc. We not only urge, we request the permitting agencies here to follow this same leadership and responsible governance, to the extent Millennium's permits are not denied outright. The U.S. Army Corps of Engineers cannot ignore nor defer its Trust and legal responsibilities to analyze all project impacts, including direct and cumulative impacts under NEPA, the National Historic Preservation Act (NHPA), and other applicable federal laws. By delegating its responsibilities to the State, as the Corps seems to be choosing to do with the Gateway Pacific Project at Cherry Point, the Federal government is failing to uphold its Trust responsibilities to the Yakama Nation. It is the Federal government's responsibility to ensure that the Yakama Nation's Treaty rights, resources and People are protected, as guaranteed under the Treaty of 1855.

Accordingly, Yakama Nation requests that the Millennium Bulk Terminal EISs prepared by the U.S. Army Corps of Engineers under NEPA and Washington State Department of Ecology under SEPA include, in addition to the general scope of issues described above, shall include, but not be limited to an analysis of impacts to and a discussion of geology and soils; vegetation, fish and, wildlife; water quality, runoff/absorption; air quality, climate, and climate change; energy and natural resources; environmental health, noise, risk of fire or explosion, releases of potential releases of toxic or hazardous materials; land and shoreline use; economic, population, housing, and employment; historic and cultural resources; aesthetics; transportation, including vehicular, waterborne, and rail traffic; and public services and utilities. Specific examples include, but are not limited to:

- A safety analysis of the potential impacts at current and projected levels of rail traffic to tribal fishers, their customers, and tribal members on and near the Yakama Reservation and especially through the Columbia River Gorge. Tribal members are exposed to train-strike risk when crossing rails to access homes, fishing sites, and markets for the sale of harvested fish. A sad history of train-related fatalities at current levels of rail traffic naturally suggests that elevated levels of rail traffic in the Columbia Basin, particularly through the Columbia Gorge, will increase mortalities to tribal members attempting to exercise Treaty reserved fishing and food gathering rights at usual and accustomed places. The probability of train-strike fatalities, injuries, and property damage can be quantified based on these tragic statistics, and the EIS should analyze the expected additional mortalities to tribal members and others that would be caused by the projected increase in rail traffic associated with this proposal. Similarly, tribal members and others would be exposed to increased health and safety risks created by the empty

coal trains transiting the Yakama Reservation and other rail lines in central Washington on the return trip to the Powder River Basin.

- An assessment of track capacity and traffic control measures necessary to handle the projected 16 additional unit trains that would deliver coal to the Millennium Bulk terminal. This should include an assessment of vehicle traffic delays and economic costs to communities bisected by rail lines.
- An analysis of the likelihood and frequency of coal train derailments, shipping spills, and fire and explosion probabilities, and the impacts that such incidents would have on the terrestrial and aquatic environments. This risk analysis can and needs to be quantified. Coal train derailments are common and their impacts are real. The EISs shall also include a discussion of how such incidents would be handled, who would respond, and which parties and/or agencies would be responsible for clean-up.
- An analysis of the emissions from rail and ship traffic, terminal operations, and combustion by the end users. This emissions analysis needs to include types, quantities and effects to human health and the environment. Specific examples include how these emissions would exacerbate the currently compromised air quality in the Columbia River Gorge (from local and Asian sources), toxicity levels in our rivers and fish, as well as climate change and ocean acidification.
- An analysis of the amounts and effects of the fugitive coal dust that would be deposited upon our lands and waters at the terminal and during transport through the Columbia Basin and across the Northern Pacific Ocean. We have observed and it has been documented that current coal trains are already depositing coal dust on our lands and into our waters in the region. Further, fugitive dust onsite poses direct threats to the aquatic environment. Stormwater management and fugitive dust suppression methodologies need to be discussed. These cumulative impacts need to be quantified and discussed in relation to Clean Water Act requirements, among other applicable laws, regulations, and Treaty rights.
- An analysis of impacts to all cultural resources, including Traditional Cultural Properties. As with the scope of analysis under NEPA and SEPA, Yakama Nation expects that the Area of Potential Effect (APE) for the Millennium Bulk Terminal shall include the entire transportation route, including impacts from the coal's origins through our Usual and Accustom areas and our Ceded Lands to its final destination in Asia. There are over 10,000 historic properties documented along the entire route, and many more that are yet to be identified. We expect that the APE will not be limited to the Millennium Bulk Terminal site, but will also include the proposed Port of Morrow and Cherry Point coal export terminal sites, in addition to the entire route from Montana to Asia. Yakama Nation expects that all impacts to cultural and archaeological resources will also be analyzed under the NHPA and any other laws applicable to archaeological and cultural resources.
- An analysis of all impacts to aquatic and terrestrial species and habitat along the transportation route, at the proposed site of the Millennium Bulk Terminal, and adjacent to the shipping channel westward of the terminal. The proposed Millennium Bulk Terminal is located adjacent to the Lower Columbia River. This section of river is designated as Critical Habitat for Endangered Species Act (ESA)-listed salmon and steelhead populations and is so designated because every single salmon originating above this point migrates through this section of river as a juvenile and

as a returning adult. The construction and operation of this facility poses threats to populations of salmon, steelhead and other aquatic species of cultural importance such as the Pacific Lamprey. Further, the operation of Panamax-class ships is certain to increase the incidence of wake-stranding juvenile salmonids and lamprey in the lower Columbia adjacent to the shipping channel. The EIS should assess the potential magnitude of additional wake stranding mortality associated with the project proposal.

Thank you for your time and consideration. Yakama Nation stands prepared to help provide any information you may need in developing your respective EISs. To arrange our government-to-government meeting between the Corps and Yakama Nation, please contact Philip Rigdon, Deputy Director of Yakama Nation Department of Natural Resources at (509) 865-5121 extension 4655.

Sincerely,


Harry Smiskin, Chairman
Yakama Nation Tribal Council

CC: Honorable Governor Jay Inslee, Washington State
Honorable Governor John Kitzhaber, Oregon State
Paul Cloutier, U.S. Army Corps of Engineers
Dennis McLerran, U.S. Environmental Protection Agency
Will Stelle, National Marine Fisheries Service
Robyn Thorson, U.S. Fish & Wildlife Service
Daniel Elliot III, Surface Transportation Board
Nancy Sutley, Council on Environmental Quality
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