



KATIE SWEENEY  
*General Counsel*

November 18, 2013

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

Dear Sir/Madam:

**Subject: Millennium Bulk Terminals – Longview, LLC Project NEPA/SEPA  
Environmental Impact Statements**

On August 16, 2013, the U.S. Army Corps of Engineers (Corps), the Washington Department of Ecology (Ecology) and Cowlitz County announced the initiation of scoping to prepare environmental impact statements (EIS) pursuant to the National Environmental Policy Act (NEPA) and the State Environmental Policy Act for the proposed Millennium Bulk Terminal in Longview, Washington. The National Mining Association (NMA) appreciates the opportunity to submit comments on the scope of the EIS. NMA's members are producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to mining. Most NMA members rely on rail or ports to move their products and thus are interested in ensuring adequate infrastructure and capacity for such transport.

Originally, the Corps, Ecology, and Cowlitz County entered into a memorandum of understanding (MOU) to jointly prepare an EIS for the MBT project. The MOU was recently amended however due to the Corps' and the state's clearly divergent views on the breadth of EIS coverage. As the Corps announced in Congressional testimony earlier this year regarding the appropriate scope of NEPA analyses for proposed coal export projects in the Pacific Northwest, the agency's regulations mandate a narrow scope limited to aspects of the proposed project that are within the Corps control and responsibility. The Corps acknowledged that "many of the activities of concern to the public, such as rail traffic, coal mining, shipping coal outside of U.S. territory, and the ultimate burning of coal overseas, are outside the Corps' control and responsibility."

November 18, 2013

Page Two

(June 18, 2013, statement of Jennifer A. Moyer, Corps Acting Chief of Regulatory Programs, before the House Energy and Commerce Committee's subcommittee on Energy and Power, p. 5).

Shortly thereafter, Ecology announced, in the context of a separate coal export project, that it would require a broad analysis of environmental impacts, including the effects of burning U.S. coal overseas and both in-state and out of state rail impacts. Thus, last month, Corps, Ecology and Cowlitz County modified the MOU to indicate that the agencies will use a synchronized process to create two EISs instead of one joint document. Therefore, NMA's comments below address the appropriate scope of NEPA and SEPA for the MBT project.

### **Appropriate Scope of the Corps NEPA Analysis**

The scope of a NEPA analysis is not boundless. As the Supreme Court has determined agencies are not required to consider all conceivable environmental impacts but rather those that are significant, reasonably foreseeable and can be described with sufficient specificity. Further, the Court has rejected the notion that all impacts potentially made possible by an agency's approval of a project need to be analyzed under NEPA and instead looks to a close causal relationship between the agency action and impacts that need to be assessed.

Fortunately, the Corps has recognized the limitations placed on the agency's determining the scope of analysis. As explained in the June 18, 2013 testimony, not only did the Corps announce a narrow scope of NEPA analysis for coal export facilities, it also rejected requests for a regional or programmatic analysis. Despite the Corp's determination, several groups continue to urge the Corps to conduct an analysis that addresses all viable coal export projects in the Pacific Northwest.

The Corps determination to conduct a site-specific NEPA analysis for each individual port project is consistent with the agency's regulations as well as Supreme Court precedent. In a penultimate ruling on programmatic EISs, the Supreme Court clearly indicated that ultimate decisions as to scope are left to the agency conducting the NEPA analysis:

The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise, and is properly left to the informed discretion of the responsible federal agencies.

*Kleppe v. Sierra Club*, 427 U. S. 390, 413 (1976).

The Corps properly incorporates Supreme Court and other judicial NEPA precedent as well as the Council on Environmental Quality's (CEQ) NEPA regulations into the

agency's own NEPA regulations (33 CFR 325, Appendix B). Pursuant to the Corps regulations, the district engineer establishes the scope of the NEPA analysis in order to address the impacts of the specific activity requiring a permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review. Further, the regulations consider the Corps to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction only where the Federal involvement is sufficient to turn an essentially private action into a Federal action. As the Corps notes in its 2007 "Legal Guidance on the NEPA Scope of Analysis in Corps Permitting Activities,"<sup>1</sup> determining the scope of analysis under NEPA has always been a highly fact-specific endeavor:

The delineation of an appropriate scope of analysis is not subject to a universal rule, and that each fact situation must be evaluated to determine if there is sufficient Federal control and responsibility over the activities occurring within and outside of jurisdictional waters to warrant broadening the scope of analysis beyond the specific activity occurring within jurisdictional waters and requiring a Corps permit.

**Corps' Must Exclude Potentially Related Downstream and Upstream Actions Not within the Agency's Control**

Thus, turning to the facts at hand regarding the MBT project, the Corps lacks sufficient control and responsibility over potentially related downstream and upstream actions to support the preparation of a broad programmatic EIS. For example, under the Corps' regulations, clearly the downstream increased or extended use of coal to generate electricity overseas would be too attenuated to analyze. In *Department of Transportation v. Public Citizen*, the Supreme Court held that DOT was not required to assess impacts of cross-border operations under NEPA that the department had no discretion to prevent. 541 U.S. 752 (2004). Similarly, the Corps cannot prevent the burning of coal overseas, even coal that is exported from the U.S. since the Corps cannot impose a moratorium on coal exports. NEPA simply is not the law to answer the question raised by many requesters of a more expansive, programmatic EIS: whether or how coal exports to Asia fit with the larger strategy of moving to a lower carbon future?

Furthermore, the Corps has no authority over upstream coal leasing actions even if the agency could somehow assert that leasing of federal coal in the PRB is part of the MBT project. Nor are the potential environmental impacts of coal leasing ignored by the

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<sup>1</sup> The guidance has specific applicability within the U.S. Court of Appeals for the Ninth Circuit to ensure that the Corps NEPA process can withstand the judicial scrutiny of that circuit. Thus, the guidance should be particularly useful for the Corps as it considers the MBT project as the physical location of the permitted facilities lie in the state of Washington, which falls within the ninth circuit. For example, the guidance notes that the Ninth circuit has held that the Corps need not expand its NEPA scope of analysis beyond the specific activity requiring a Corps permit in situations where some development could occur in the upland area regardless of whether the permit application is granted.

federal government. The Department of the Interior manages federal coal leasing and conducts extensive NEPA analyses in advance of coal lease sales. These analyses typically include effects of rail transport, greenhouse gas emissions and other climate change impacts.<sup>2</sup> Some Northwest port project opponents may argue that at a minimum the Corps should evaluate any increased coal production that may be “induced” by a new export route. Such an argument, however, ignores the fact that market conditions for coal generally dictate how much coal is produced in the U.S. and that there is no direct correlation between coal production and export capacity. Extensive quantified and detailed publicly-available information exists to support the conclusion that general market forces determine level of coal production.

### **Scope Should Include the Social and Economic Benefits of Coal Exports**

For the U.S., coal exports offer a classic example of how international trade confers reciprocal benefits to both exporting and importing countries. Our 250-year supply of coal, the world’s largest, is enough to serve our domestic needs as well as those of present day Europe and the growing needs of fast-growing developing countries.

Over the past decade, our steady growth in coal exports – from about 60 million short tons in 2000 to a record 123 million short tons last year – have added substantial value throughout coal’s supply chain. Coal exports have added jobs for American workers and revenue for local communities. Additional coal terminal expansions will enable the

U.S. to meet more of the world’s growing need for affordable energy while benefiting Americans as well. The abundance and affordability of U.S. coal will be of critical assistance to the 1.4 billion people in the world currently without access to electricity. Studies show that every tenfold increase in electricity is linked with a better standard of living, higher literacy and a healthier population. The Corps should take these social and economic benefits into account in the MBT project EIS.

### **Appropriate Scope of State’s SEPA Analysis**

The State of Washington enacted its own version of NEPA, the State Environmental Policy Act (SEPA) in 1971. For the most part, SEPA is virtually identical to NEPA. See generally Weiner, Kenneth S., “NEPA and State NEPAs: Learning from the Past, Foresight for the Future,” 39 ELR 10675, 2009. Not unsurprisingly, therefore, Washington state courts have found that there are limits to the scope of SEPA analyses. As enunciated by the state supreme court, “the mandate of SEPA does not require that every remote and speculative consequence of an action be included in the EIS.” *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 1974. In addition, Washington state courts have held that the adequacy of an EIS must be judged by application of the rule of reason that was adopted by the federal courts in *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); and *Natural Resources Defense Council, Inc. v.*

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<sup>2</sup>See, for example the Wright Area Coal Lease EIS prepared by the Bureau of Land Management, available at <http://www.blm.gov/wy/st/en/info/NEPA/documents/hpd/Wright-Coal.html>

November 18, 2013

Page Five

*Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) and by the Supreme Court in *Department of Transportation v. Public Citizen*. *Id.* at 344. Specifically, in *Public Citizen*, the Supreme Court noted that “NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause. The Court analogized this requirement to the familiar doctrine of proximate cause from tort law.” 541 U.S. at 767. Thus, SEPA similarly requires the existence of such a close causal relationship in determining the impacts to be addressed in an EIS.

NMA believes that Ecology and Cowlitz County have exceeded these legal constraints in pursuing an EIS that evaluates remote impacts such as greenhouse gas emissions of end-use coal combustion. Given the difficulty discussed by many federal courts regarding the difficulties in demonstrating that greenhouse gas emissions can be tied to specific climate impacts, Ecology should proceed cautiously if it determines to analyze such impacts in the MBT EIS. An approach that Ecology could consider is that used by the Bureau of Land Management (BLM) in recent EISs it prepared in conjunction with federal coal lease sales. For example, in the South Gillette Area EIS, BLM thoughtfully discussed its analysis of climate impacts while simultaneously acknowledging the scientific uncertainties:

Specific levels of significance have not yet been established for GHG emissions, and given the state of the science; it is not yet possible to associate specific actions with the specific climate impacts. Since tools necessary to quantify incremental climatic changes associated with these GHG emissions are presently unavailable, the analysis cannot reach conclusions as to the magnitude or significance of the emissions on climate change. The impacts of climate change represent the cumulative impacts of, among other factors, all worldwide GHG and emissions and land use management practices. To the extent that emission data were available or could be inferred from representative data, potential GHG emissions have been identified that could result from development of the proposed LBA tracts, as well as emissions that will result from selection of the no action alternative. The analysis provides a qualitative measure of the incremental change on GHG emissions resulting from the proposed LBA tracts, as compared to no action. The analysis also provides a measure of the incremental change resulting from the LBA tracts in relation to GHG emissions from all current coal mines.

BLM, 2009 Final Environmental Impact Statement for the South Gillette Area Coal project, p. 3-266.

In addition, Ecology and Cowlitz County should consider the precedent setting nature of the decision to conduct such a far-ranging analysis under SEPA. Under the logic used to determine the scope of the MBT EIS, state regulators would have similar authority to determine the appropriateness of any shipments from the state if the environmental impact associated with such shipment is considered significant.

November 18, 2013

Page Six

## Conclusion

NMA urges the Corps to follow its well-established regulations and policy in determining the scope of the EIS for the MBT project. Furthermore, the state regulatory agencies should adhere to state court precedents (which mirror federal court decisions) in determining the appropriate scope of EIS analysis. Preparation of an inappropriately broadly scoped EIS will increase the time for reaching a decision on the application, years, creating additional expenses for the applicants, and would detrimentally impact job creation and efforts by countries such as China and India to lift hundreds of millions of people out of poverty by supplying affordable coal-powered electricity. In addition, a wide-ranging EIS for the MBT project would create a dangerous, time consuming precedent for all export activity that requires a Corps or state permit.

NMA appreciates the opportunity to submit these comments on the scope of the MBT project EIS. If you have any questions, please contact me at [ksweeney@nma.org](mailto:ksweeney@nma.org) or (202)463-2627.

Sincerely,

A handwritten signature in black ink that reads "Katie Sweeney". The signature is written in a cursive, flowing style.

Katie Sweeney