



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

November 29, 2016

VIA U.S. MAIL AND ELECTRONIC MAIL

Colonel John G. Buck
Commander, Seattle District
U.S. Army Corps of Engineers
PO Box 3755
Seattle, WA 98124-3755

Millennium Bulk Terminals-Longview NEPA EIS
c/o ICF International
710 Second Avenue, Suite 550
Seattle, WA 98104
www.millenniumbulkeiswa.gov/submit-comments.html

U.S. Army Corps of Engineers, Regulatory Branch
Attention: Ms. Danette L. Guy
2108 Grand Boulevard
Vancouver, WA 98661
NWS.MBTL@usace.army.mil

**Re: Millennium Bulk Terminals–Longview LLC, Application No. NWS-2010-1225:
Yakama Nation Comments On Draft Environmental Impact Statement**

Dear Col. Buck:

I write to you on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”). As Yakama Tribal Leaders advised you in your meeting with us earlier this month at our Tribal Headquarters, the Yakama Nation has been requesting government-to-government consultation on this matter since at least 2013. While the November meeting was a good start, meaningful consultation on this matter is not yet in sight, much less complete.

We have submitted comments and made direct requests to our trustee (i.e., the United States) for protection of, among other things, the rights reserved to our people in the Treaty with the Yakamas of 1855 (12 Stat. 951). It is unfortunate that we are, at this point, pleading with you again in the final stages of this environmental review process to simply recognize the primacy of our Treaty rights as it pertains to the plans for the Yakamas’ ancestral homelands and waters, areas which continue to sustain our people and our culture. Nevertheless, Yakama Nation respectfully submits the following comments on the Draft Environmental Impact Statement for the Millennium Bulk Terminals Coal Export Project and, once again, requests our trustee take

action to protect our Treaty and the rights of our people, reserved since 1855 and exercised in these lands for millennia.

As we advised you previously, the Yakama Nation has commented, sought consultation, demanded full and comprehensive environmental and cultural analyses, and stood opposed to this matter since my predecessor, Tribal Council Chairman Harry Smiskin, advised you of this position in 2013.¹ In that letter, the Yakama Nation noted that the proposed project, with its “coal loading facility, dock, increased coal train traffic, and Panamax ships . . . would create adverse impacts . . . to Treaty rights, including, among other things, Treaty-reserved salmon, steelhead, lamprey, and other resources critically important to the Yakama Nation and its People.”²

Our staff has reviewed your agency’s draft EIS and we have found that nothing material has changed since our last comments, despite our input and putting your agency on notice that this project will materially and adversely impact Treaty rights. So again, the Yakama Nation opposes this project as it opposes any increase of coal or crude oil trafficking through Yakama ancestral lands and waters, and as it opposes any adverse impacts to its Treaty and the rights reserved to our people. This project—as have virtually all similar projects for over a century in our region—requires the Yakama people to shoulder a disproportionate share of the burdens so that others, far removed from our people, our lands, and our waters, may profit. Unfortunately, our meeting in November with you and with Washington’s Department of Ecology did nothing to encourage us that you, as our trustee, are taking your responsibility to us seriously and in good faith³, and that you intend to give effect to the mandates of the Treaty between your government and ours that you are Constitutionally bound to recognize and honor.

We hope this letter, along with all other comments, information, evidence, and materials we have submitted to date in this matter, speaks to your head and to your heart, and helps you do the right thing here—refuse to permit this project until the Treaty impacts have been fully and appropriately accounted for, and you ensure, as our trustee, that our Treaty rights will not be violated or diminished. Until that point, Yakama Nation must stand unequivocally against this project. There will be no tolerance for further violations or incremental burdens on the Treaty rights our ancestors negotiated for us with the United States in 1855.

1. Draft EIS Section 4.5 Study Area Is Inadequate In Its Consideration of Impacts to Yakama Nation Rights, Resources, and Interests.

Your agency has devised a map that captures perfectly the unreasonably narrow scope of environmental analysis undertaken in the draft EIS. This narrow scope will lead to a general

¹ The Yakama Nation incorporates herein, by reference, all previously submitted comment letters and communication with respect to this project as if fully set forth in this letter.

² Smiskin Letter to U.S. Army Corps of Engineers and Department of Ecology, November 18, 2013; enclosed with this letter and incorporated as if fully set forth in this letter.

³ In fact, our meeting with Director Bellon of the Washington State Department of Ecology, she revealed that your agency has taken specific steps—despite our objections and the objections of Washington State—to ensure that the scope of environmental review for this project is so narrow that you may sidestep any meaningful analyses of the adverse and material Treaty impacts that will undeniably be part of the cumulative effects of this project.

disregard of the vast majority of cumulative adverse effects on Yakama Nation's Treaty rights that this project will cause. Your agency calls the narrow area of analysis with respect to rights of indigenous peoples a "Study Area." On page 4.5-3, your agency notes:

The study area for this EIS focuses on treaty tribes, and federally recognized tribes. The primary focus is reserved tribal treaty rights, including fishing, hunting, and food gathering rights not limited to accessing usual and accustomed stations and/or places. The geographic extent of the study area is represented by the compilation of the various study areas for the areas of concern (Figure 4.5-1). Different study areas for direct and indirect impacts have not been identified as either impacts could affect treaty resources. The environmental resources discussed in Chapter 5, Natural Environment: Affected Environment and Project Impacts, provide more detail about the individual study areas.⁴

Figure 4.5-1 in the draft EIS indicates that the study area on impacts to Treaty-protected fishing sites extends only from the mouth of the Columbia River "upstream to Vancouver, Washington, and the Willamette River upriver to the Port of Portland."⁵ It does not include areas of the Columbia River upstream of Vancouver, Washington, where significant impacts of this project will be manifest. The scope should at least cover the areas where tribal fishing access, practices, and rights will be most adversely impacted. The "Study Area" in the draft EIS is an unreasonably narrow area considering the scope of this project and the significant cumulative impacts that are its natural byproducts. By unreasonably narrowing the scope of this analysis on tribal rights, your agency is permitting real, negative, and significant impacts to Treaty rights to go totally unaccounted for in this process. This is in keeping with neither the spirit nor the letter of the applicable laws to which you are subject, not the least of which is the Treaty with the Yakamas of 1855; which, as you are likely aware, is the "supreme law of the land" under the United States Constitution.⁶

The draft EIS also indicates that the study area for impacts to fish and fish habitat "includes the vicinity of the proposed export terminal where the noise from construction or operation could affect fish, plus the area of the Columbia River extending downriver from the project area to the landward line of the territorial sea (i.e., a line between the western-most end of the north and south jetties), from here on referred to as the mouth of the Columbia River."⁷ Vegetation impacts analysis in the draft EIS include nothing more than "the project area and the area around the project area for a distance of 1 mile."⁸ Wildlife impact areas analyses are broken up into two categories of study under the draft EIS: terrestrial species and habitats, and aquatic species and habitats. The former category will only study impacts, direct or indirect, in the project area and "the area extending up to 0.5 mile beyond the project area, and the lands in the vicinity where project-related disturbance to wildlife and habitat could occur."⁹ Aquatic species and habitat effects will be reviewed only in "The main channel of the Columbia River" 5.1 miles upriver

⁴ Draft EIS 4.5-3.

⁵ *Id.*

⁶ United States Constitution, Article VI

⁷ Draft EIS 4.5-4.

⁸ *Id.*

⁹ *Id.*

from the project area (presumably), and downriver to the mouth of the Columbia River.”¹⁰ Water quality impacts will only be addressed in the project area and “an area extending 300 feet from the project area into the Columbia River,” in addition to the Consolidated Diking Improvement District (CDID) #1 stormwater drainage ditches “adjacent to the project area, the Columbia River up to 1 mile downstream of the project area, and potential in-river dredged material disposal sites plus an area extending 300 feet downstream of each disposal site.”¹¹

The upshot of this “Study Area” is that the agency is proposing to assess the direct and indirect cumulative effects of this project through an extremely narrow lens that impermissibly excludes from consideration the vast majority of major impacts to the Yakama Nation, its people, and their rights.¹²

Under applicable laws, your agency must consider not only direct impacts or effects, but also indirect effects, and cumulative effects. Federal law defines effects for purposes of the requisite review here as including effects which are “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”¹³ The regulations define direct effects as those “caused by the action and occur at the same time and place.”¹⁴ Indirect effects are those effects “caused by the action and are later in time **or farther removed in distance, but are still reasonably foreseeable.**”¹⁵ In this case, there are some effects to Treaty and other rights of our people that will likely occur “later in time” and which your agency’s inappropriately narrow scope of review will not consider because of that narrow scope. But the most significant impacts to Yakama Nation’s rights, especially with respect to fishing rights, will be immediate or as soon as the project becomes operational, and are reasonably foreseeable, but are “farther removed in distance” beyond your agency’s presently narrow scope.

In short, the narrow scope your agency is taking here with respect to fishing sites, and indeed, the Yakama Nation’s rights, people, and interests in general, is a failure to take the “hard look,” your agency is required to take. As the applicable regulations indicate, “[i]ndirect 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.”¹⁶ Federal courts have described NEPA as a “an environmental full disclosure law” aimed at giving the public information so that it “can weigh a project’s benefits against its environmental costs.”¹⁷ In this case, the narrow scope proposed in the study area not only frustrates the purpose of NEPA as “an environmental full disclosure law,” it directly undermines it. There is no full disclosure here.

¹⁰ *Id.*

¹¹ *Id.*

¹² Such impacts include but are not limited to Treaty rights, fishing rights, rights to gather foods and medicines, and the economic justice impacts to the people who derive their living from the lands and waters that will be impacted beyond the study area identified here but in direct consequences of the project.

¹³ 40 C.F.R. § 1508.8.

¹⁴ *Id.*

¹⁵ *Id.* (emphasis added).

¹⁶ 40 C.F.R. § 1508.8(b).

¹⁷ See e.g., *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1049 (2d Cir. 1985).

Yakama Nation has successfully fought off projects with impacts that are likely and foreseeable, but geographically remote from the “project area,” and it fought these project based on rights we retain within our Ceded Lands, and in our usual and accustomed areas; right implicated here.¹⁸ In one case against the U.S. Department of Agriculture, we demanded our trustee consider negative effects to our people resulting from the transportation of garbage from Hawaii to the Roosevelt Landfill—through, among other things, actual and meaningful government-to-government consultation between sovereigns—despite the fact that those effects would likely occur in areas some distance away from the landfill itself.¹⁹ The federal district court there noted in its order enjoining the project that the Yakama Nation was “likely to suffer irreparable harm,” from the effects of *shipping* Hawaiian garbage through the Yakama Nation’s Ceded Lands, and lands and waters in which it retains “usufructuary rights.”²⁰ Here, increased rail and barge traffic *shipping* the promised coal through our ancestral homelands may not be immediately adjacent to what your agency calls “the project area,” but these adverse effects are direct results of this project, and our Treaty precludes you from permitting this project without fully considering our rights and the impacts of this project to those rights.

Specifically regarding the Yakama Nation, the draft EIS indicates that “Yakama Nation people fish for salmon, steelhead, and sturgeon for commercial, subsistence, and ceremonial purposes.”²¹ While this is true, it should be noted that Yakama Nation members also harvest lamprey and other fish species, and take animals on land that are not accounted for in the draft EIS with respect to this project. Similarly, the draft EIS provides that Yakama Nation “[f]ishing locations include the mainstem Columbia River from Bonneville Dam to McNary Dam (Zone 6) and the tributaries flowing into the Columbia River on the Washington State side of the river.”²² Again, while this is true technically, this is not an accurate or complete account of the extent of Yakama Nation’s Treaty-protected fishing sites, nor the usual and accustomed areas in which Yakama Nation people exercise their fishing rights. Yakama Nation members continue to fish downriver of the Bonneville Dam and beyond the McNary Dam. Along the same lines, the draft EIS section specifically addressing fishing sites themselves is too narrow in its description of Yakama fishing sites and the areas in which Yakama Nation members enjoy usufructuary and protected Treaty rights, and doesn’t account for our tribal members’ fishing activities beyond the limited description in the draft EIS. The Treaty protects Yakama members’ usual and accustomed fishing sites, including those not yet identified or registered with Yakama Nation’s government or any non-tribal government. Yakama members are hesitant to identify fishing spots for a wide variety of reasons, not the least of which is fear for their own safety and to avoid the harassment and worse that tribal fishers have endured for over a century in practicing their Treaty-protected rights, often at the hands of non-tribal government officials. Put simply, the draft EIS is impermissibly narrow in terms of the extraordinarily limited geographic scope of its review regarding tribal fishing and the adverse effects of the project on those rights. It also distorts the extent and nature of tribal fishing rights by providing an incomplete picture of those rights, including where and how the rights may be exercised.

¹⁸ See *Confederated Tribes and Bands of the Yakama Nation v. United States Dep’t of Agriculture*, 2010 WL 3434091 (E.D.Wash.).

¹⁹ *Id.*

²⁰ *Id.* at *4.

²¹ Draft EIS 4.5-9.

²² *Id.*

A proper environmental “full disclosure” analysis in this matter must account for the real scope of reasonably foreseeable direct *and* indirect effects of this project if your agency intends to comply with the applicable law and honor the Yakama Nation’s Treaty. It must be reasonable in the geographic scope of the study area to consider impacts to the Yakama Nation and other Native Americans’ rights, resources, and interests. It must also begin with an accurate premise regarding the nature and extent of those rights, and the areas in which those rights are exercised. Furthermore, it must recognize that the rights likely to be affected by this project extend beyond fishing, and include, among other things—impacts to our religious practices, our culture, our ability to provide food for elders, youth, and the disabled, and our overall socio-economic wellbeing. Beyond specific analysis regarding, for example, the adverse effects to our religious practices that will result from diminished fishing, a proper EIS in this case must also account for the broader impacts resulting from the climate change effects of increasing fossil fuel use.

Simply, the draft EIS is woefully inadequate in terms of addressing tribal rights and interests, and in particular, addressing the rights and interests of Yakama people.

For additional and specific concerns raised by the Yakama Nation three years ago, see the attached and previously incorporated letter dated November 18, 2013, from the Yakama Nation’s former Tribal Council Chairman to your agency. These include, among other things, the following specific areas of concern and requests, which are generally unaddressed in the draft EIS:

- Analysis of the impacts of increase in rail traffic to tribal communities;
- Analysis of rail capacity and traffic control measures necessary to handle additional trains required by the Millennium project;
- Analysis of the likelihood of coal train derailments, shipping spills, and fire and explosion probabilities, and the impacts such incidents are likely to have on the terrestrial and aquatic environments, along with an analysis of how such incidents would be handled by first responders;
- Analysis of emissions from rail and ship traffic, terminal operations, and combustion by end users, including, among other things, how such emissions would exacerbate currently compromised air quality in the Columbia River Gorge, toxicity levels in our rivers and fish, as well as climate change and ocean acidification;
- Analysis of fugitive coal dust deposits along our lands and waters, at the terminal and during transport of coal through the Columbia Basin and to the final destination of the coal;
- Analysis of impacts to all cultural resources, including Traditional Cultural Properties, directly and indirectly resulting from the project. As noted previously, there are over 10,000 historic properties documented along the entire route, and many more that are yet to be identified. Impacts to cultural resources extend beyond impacts to “sites,” and such an analysis should include impacts to our ongoing cultural practices, such as longhouse

services, ceremonies that require fish, roots, and other traditional foods and medicines, and the ability for us to freely practice our religious beliefs in light of the adverse effects that will result from this project;

- Analysis of all direct *and indirect* impacts to aquatic and terrestrial species and habitat along the *entire* transportation route of the coal required by the Millennium Bulk Terminals project. As the Yakama Nation and others have noted, the section of the river adjacent to the proposed terminal is the Lower Columbia River, an area designated as critical habitat for endangered species under the Endangered Species Act, including ESA-listed salmon and steelhead populations.

2. The Corps Should Deny The Clean Water Act Section 404 and Rivers and Harbors Act Section 10 Permits.²³

The purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the waters of the United States. Section 404 fulfills this legislative mandate by prohibiting discharge of fill material without a permit.²⁴ The Rivers and Harbors Act Section 10 prohibits erecting structures in or over navigable waters of the United States without authorization from the U.S. Department of the Army. Regulations, including those promulgated by your agency, govern your review of application requests under these two federal laws. Applicable regulations require your agency to conduct “a case-by-case evaluation of a specific project involving the proposed discharge(s) . . . and a determination that the proposed discharge is in the public interest pursuant to 33 C.F.R. part 320.”²⁵

A public interest review—requiring a determination of the “extent of public and private need for the proposed work . . . the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed . . . work . . . and the permanence of detrimental effects”—is required for the application.²⁶ Your agency must consider all factors “which may be relevant to the proposal,” including the “cumulative effects” of the project.²⁷ In addition to the foregoing, regulations governing the application at issue here require that “dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.”²⁸ Furthermore, “degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines.”²⁹ Accordingly, your agency is prohibited from issuing a permit “if

²³ The Yakama Nation incorporates the comments on the draft EIS regarding this project submitted by Earth Justice and the Columbia Riverkeeper, among others, as those comments pertain to the permit applications regarding this project under the Clean Water Act Section 404 and the Rivers and Harbors Act Section 10.

²⁴ 33 U.S.C. § 1344.

²⁵ 33 C.F.R. § 323.2(g).

²⁶ 33 C.F.R. §§ 320.1(a)(1), 320.4(a)(2)(i)-(iii).

²⁷ 33 C.F.R. § 320.4(a)(1).

²⁸ 40 C.F.R. § 230.1(c).

²⁹ *Id.* at 230.1(d).

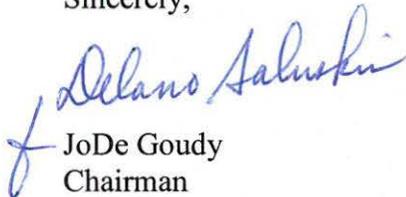
there is a practicable alternative ... which would have less adverse impact on the aquatic ecosystem.”³⁰

Here, given the facts, evidence, and other applicable regulations, the Corps should deny the Clean Water Act and Rivers and Harbors Act authorizations as being detrimental to the public interest.

Once again, the Yakama Nation opposes any and all increase of coal or crude oil trafficked through Yakama ancestral grounds. Nothing your agency or anyone else has advanced shows that this trafficking of fossil fuels will not violate and diminish our rights. To the contrary, the evidence reveals that the Yakama people, along with other tribal people in our region, will be forced under this project to bear the majority of the burdens of this project’s adverse effects with none of the benefits. As you know, your predecessors effectively negotiated our Treaty while holding a gun to my ancestors’ heads. Since 1855, the hostile posture of the federal government towards our people has persisted almost ceaselessly, despite your claimed status as the trustee of your Native Wards. We notified you the last time we corresponded with you in writing that the threats of projects like the Millennium Bulk Terminals project are existential threats to our culture, religious practices, and our people’s ability to provide sustenance and nurture those who have no voice and those who are yet to come. Nothing has changed in that respect upon review of the draft EIS.

Notwithstanding, we look forward to meaningful government-to-government consultation to address the deficiencies in the draft EIS. There is much work to be done. Please contact Elizabeth Sanchez, Yakama Nation Environmental Manager at esanchez@yakama.com, to coordinate consultation. I look forward to meeting with you all in the near future.

Sincerely,



JoDe Goudy
Chairman
Yakama Tribal Council

³⁰ *Id.* at § 230.10(a). An alternative is “practicable” if it is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* at § 230.10 (a)(2). Other relevant guidelines on permit applications under the governing regulations include prohibitions against permitting a discharge that results in: violation of state water quality standards; violation of toxic effluent standards; jeopardizing a species currently protected under the ESA; or violation of any requirement designed to protect a marine sanctuary under the Marine Protection, Research, and Sanctuaries Act. *Id.* at § 230.10(b). Additionally, a permit may not be issued “which will cause or contribute to significant degradation of the waters of the United States.” *Id.* § 230.10(c). Significant degradation can include adverse impacts to human health and welfare, the life stages of aquatic life or other wildlife dependent on a site, the overall integrity of an aquatic ecosystem, and human use. *Id.* at §§ 230.10(c)(1)-(4).