



ORRICK, HERRINGTON & SUTCLIFFE LLP
701 FIFTH AVENUE
SUITE 5600
SEATTLE, WASHINGTON 98104-7097

tel +1-206-839-4300
fax +1-206-839-4301
WWW.ORRICK.COM

Millennium Bulk Terminals-Longview EIS
ICF International
710 Second Avenue, Suite 550
Seattle, WA 98104

Rob McKenna
(206) 839-4415
rmckenna@orrick.com

Department of Ecology, Southwest Regional Office
Diane Butorac, Regional Planner
diane.butorac@ecy.wa.gov

U.S. Army Corps of Engineers, Regulatory Branch
Danette L. Guy, Biologist/Project Manager
Danette.L.Guy@usace.army.mil

Cowlitz County
Elaine Placido, Director Cowlitz County Building and Planning
PlacidoE@co.cowlitz.wa.us

George Raiter, Special Projects Manager
RaiterG@co.cowlitz.wa.us

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Re: Comments regarding Scope of Millennium Bulk Terminals-Longview EIS

Ladies and Gentlemen:

Orrick, Herrington & Sutcliffe LLP hereby submits comments regarding the scoping decision for the Environmental Impact Statement (“EIS”) for the Millennium Bulk Terminals-Longview Project proposed for Longview, WA (the “MBTL Project”) on behalf of our clients, the Attorneys General for the State of Montana and the State of North Dakota (the “States”).

The MBTL Project follows in the footsteps of a proposal by Pacific International Terminals to construct a marine terminal at Cherry Point in Whatcom County (the “Cherry Point Project”). Based on the Washington State Department of Ecology’s (“Ecology”) EIS scope for the Cherry Point Project, the States are concerned about Ecology’s impending scoping decision for the MBTL Project. Ecology’s EIS scope for the Cherry Point Project is unrealistically broad, includes speculative impacts, requires impossible assessments of foreign environmental impacts, and appears to have been designed to hinder the development of that terminal. The Cherry Point Project EIS scope of inquiry not only addresses indirect environmental impacts, but potential effects that are far removed from the decisions pending before Ecology and other agencies within Washington State.

A similarly broad scoping decision in connection with the MBTL Project could adversely affect the States and their citizens in a variety of ways. A scoping decision that delays, burdens or prevents the completion of the MBTL Project would deny citizens of the States access to international markets, burden or prevent interstate commerce and usurp the prerogatives of the United States government with respect to international trade and foreign policy. In addition, some of the issues to be evaluated by Ecology transgress the boundaries of the States, infringing on the States' sovereignty.

For all of these reasons, we are writing to request that the State of Washington and its Department of Ecology forebear from proposing an inquiry into environmental impacts far outside the borders of the State of Washington, and from making decisions regarding the MBTL Project that would unreasonably prevent or unduly burden the construction and operation of the MBTL Project.

The States' Interests in the MBTL Project

The States are fortunate enough to serve citizens who own and produce significant natural resources, including considerable high-quality coal reserves in Montana that can be extracted safely, and with acceptable environmental impacts. Many of the People within the States derive their livelihoods from the mining, transport and use of coal or other natural resources, as well as the environmental mitigation and reclamation activities associated with extraction of the resources. The States and the U.S. government regulate coal mining, transport and combustion to control environmental impacts. The production and sale of coal or other natural resources attract investment into Montana and North Dakota, and fund the development of infrastructure important to the States' citizens. Due to market conditions, and the quality of the States' reserves of coal or other resources, it is cost-effective to transport some of the States' production of resources to U.S. ports for export to foreign markets. Such exports favorably affect the balance of trade, for the States and the U.S. as a whole, and draw from foreign markets revenues and investment that are important to the States and their citizens, as well as to other states and the nation as a whole.

The MBTL Project will provide an alternative means of exporting coal produced in Montana and neighboring states, which will increase their coal exports. The revenue to the States and their citizens will increase employment, reduce public assistance, attract additional investment and fund development and improvements – including environmental improvements – in the States.

The Scoping Process

The EIS scoping process is intended to identify probable environmental impacts of a proposed project, to ensure that all the relevant impacts are considered in connection with a proposal. If there are impacts that are not avoidable, the deciding agency must determine whether the benefits of the proposal outweigh the impacts, or offset or mitigate them in some way. These inquiries are comprehensive and wide ranging, and are intended to ensure that an appropriate review, including public comment, is involved in any major public decision.

This process and the legal requirements associated with it are similar on both the federal and state levels. Such inquiries raise legitimate questions about the type and extent of environmental impacts, the proper geographic scope of the inquiry and the likelihood of such impacts causing material harm. These issues – geographic scope, types of harms and probability of occurrence – are governed by law and also by common sense as well as the scope of the reasonable role of governments, particularly state governments. While the inquiry is necessarily comprehensive, it should be limited by practical considerations; agencies are not expected to look at every conceivable issue or at effects that are so remote as to be unforeseeable or unknowable. Issues that are beyond an agency’s expertise, that are indirect or speculative, or cannot be evaluated objectively, should be excluded.

The difference between Ecology’s approach and the approach of the U.S. government in connection with the Cherry Point Project demonstrates the difference between a reasonable scope and an unreasonable scope. As stated in Ecology’s “Frequently Asked Questions” concerning the Cherry Point Project:

The Corps only extends its scope of analysis beyond the activities requiring a Department of the Army permit when the Corps has sufficient *control and responsibility to warrant review*. The Corps is not considering impacts that *may occur in association with the overall coal export process such as . . . shipping coal beyond the territorial seas and/or burning coal overseas* to be the effects of the Corps’ action. These activities are beyond the Corps’ control and responsibility.

Ecology, on the other hand, takes the position that its legal mandate is different – that it is compelled to look into issues that are well beyond its control and responsibility. As explained in Ecology’s FAQs for the Cherry Point Project:

Whatcom County and Ecology implement SEPA in accordance with chapter 197-11 WAC, and must consider any probable, significant, adverse environmental impacts from a proposed project consistent with WAC 197-11-060. Such impacts are subject to review, and possibly mitigation and/or denial if the impacts cannot be mitigated. SEPA does not limit its scope to those aspects within the jurisdiction of the lead agency or agencies, including local or state boundaries.

Contrary to this summary of the law, there is, in fact, no legal difference in the scope of review required to be conducted by the Corps of Engineers and Ecology. The National Environmental Policy Act (“NEPA”) requires consideration of all foreseeable impacts, and does not limit such review to national boundaries. It also authorizes and requires federal agencies to consider environmental impacts outside of the scope of their geographical and subject matter jurisdiction.

The difference between Ecology’s position and the Corps’ position on the correct scope of review is neither mandated by law nor properly within Ecology’s authority. The crux of the issue is succinctly summarized on page 3-7 of Ecology’s March 29, 2013, Scoping Summary Report: “Overall, comments indicated concern for global warming, support for clean energy alternatives to coal and moral opposition to exporting coal to China.” This is the sentiment that

drives Ecology's decision in the Cherry Point Project to conduct a review of coal consumption in foreign markets, including China and presumably other importing nations, and is being used to justify Ecology's expansive review of local permits required to construct a coal export facility.

Countervailing Principles

The States do not believe that the tremendous breadth of the Cherry Point Project scoping decision was legally justified, and believe that a similar scoping decision for the MBTL Project would also be erroneous. There are several important legal principles at stake in the scoping decision by Ecology.

Integrity of Interstate Commerce

The U.S. Constitution assigns to the federal government the right to regulate interstate commerce, and for good reasons. Discrimination by one state against another, the exaction of state tolls or customs duties, and other economic burdens imposed by one state upon the economic activities of the citizens of other states, can be economically crippling. One of the reasons that the United States is a leading world economic power is its unified internal markets for goods and services, and the prohibition on impairment of interstate commerce by individual states.

The prohibition on state regulation of interstate commerce does not prohibit a state from imposing reasonable health, safety and environmental regulations. Such regulations protect a recognized interest of the regulating state and are the least restrictive alternatives for achieving the state's objective. In applying such regulations, a state is prohibited from discriminating against out-of-state commerce. These are basic, well-established and well-understood principles of federal Constitutional law.

Ecology's scope of review for the Cherry Point Project ranges far beyond the boundaries of legitimate state interest. The scoping decision for that proposal seeks information on coal use in China and other importing countries, the environmental impacts of resource extraction and transportation within and from the States, and other environmental impacts nationally and globally. The connection of these inquiries to Washington's interest in health, safety and its own environment is indeterminate (and probably immeasurably small). The States do not believe that Washington State has articulated a legitimate state interest in connection with certain aspects of its scoping decision for the Cherry Point Project, including its climate change inquiries. The decision before Ecology is fundamentally a local one – whether to issue a permit for construction – and the scope of Washington State's legitimate regulatory jurisdiction in such matters is limited to the protection of that state's waters, wetlands and other local resources. These interests do not and would not support a decision to deny construction permits on the basis of concerns about use of coal in Asia, or the perceived lack of stringency of environmental regulation in the States.

The result might be different if the effects of Ecology's decision on the Cherry Point Project were not wholly discriminatory against out-of-state commerce. As is commonly known,

Washington State has relatively insignificant commercially extractable coal reserves, and therefore has no specific interest in the companies that own, produce and sell coal nationally or internationally. The effect of any decision to limit or prohibit coal exports would fall entirely upon other states, including Montana and neighboring states. A regulatory decision that is discriminatory in this fashion is doubly objectionable under the commerce clause of the U.S. Constitution. It seeks, in effect, to impose upon other states the costs of a policy decision in the State of Washington, by discriminating against products produced in other states in applying its regulatory jurisdiction.

This discrimination is also manifest in Ecology's focus on the commodity exported. If the proposed terminal were limited to exporting iron ore, timber, or consumer products, it is unlikely that Ecology could legally consider the uses of those products in foreign countries, or the environmental impacts of their production in other states within the U.S. The fact that the proposed exports include coal appears to be the determining factor in Ecology's position on the Cherry Point Project. No other product would be analyzed in a comparable fashion. The environmental review of an export terminal would instead be focused on the environmental impacts of the terminal itself, as it should be.

Underlying this entire discussion, of course, is the fact that the U.S. Congress has not authorized states to regulate interstate commerce in relation to climate change, and has not enacted national legislation to control greenhouse gas emissions indirectly by limiting the sale or export of coal. The regulatory actions actually authorized by Congress are limited to the use of fossil fuels within U.S. borders. Under the federal Clean Air Act, major sources of greenhouse gas emissions are regulated, require permits to operate and require control or mitigation of greenhouse gas emissions. This is the exclusive federal mandate applicable to climate change. The U.S. government has not authorized regulation aimed at extraterritorial regulation of air pollutants, including greenhouse gases, despite the consideration of numerous proposals to do so. Under such circumstances, where Congress has elected not to regulate in the manner suggested by Ecology, and has in fact adopted a different regulatory approach to the issue, States are preempted from setting up their own regulatory programs.

International Commerce and Foreign Relations

The U.S. Constitution assigns to the federal government two other important responsibilities besides the regulation of interstate commerce – the power to regulate *foreign* commerce, and the power to determine and conduct foreign policy. In the scoping decision for the Cherry Point Project, Ecology essentially substituted its judgment for that of the U.S. government on both of these issues. The States object to these actions on the basis that they potentially impose upon other states limitations on foreign commerce and diplomacy that the federal government has not sanctioned or authorized.

The export of coal by citizens of the States (or other states) through privately-owned facilities in the State of Washington involves commerce between citizens of the U.S. and foreign nations. The scope of the environmental review selected by Ecology in the Cherry Point Project suggests that Ecology may decide to limit coal exports or even deny a permit for the MBTL

Project and the Cherry Point Project on the basis that Ecology believes that exporting coal to China is a bad idea. The States strongly believe that such regulatory decisions are outside the scope of Washington's authority under the U.S. Constitution, and improperly burden international commerce.

Similar considerations are at play in terms of conducting foreign relations. The U.S. and many of its trade partners, including China, have been discussing climate change impacts and potential agreements for decades, and have not resolved to regulate such emissions or work cooperatively to implement climate change programs. The reasons for this lack of agreement are complex, but relate to the economic impacts upon both the U.S. and developing nations of imposing any regulation of greenhouse gases that would not be effective without global agreement. In essence, Washington would be taking upon itself the task of remedying the absence of international agreement among potential importing countries and the U.S. regarding greenhouse gas emissions control. The States believe that such action by Washington State is inappropriate, and is an improper attempt to substitute its own judgment for that of the international community, including its own federal government.

Effect on the Scoping Decision

A fundamental issue in shaping the scoping decision is whether Ecology has the ability to prohibit or limit the MBTL Project based on the outcome of its environmental review. The States believe that Washington is not permitted by law to regulate coal exports from Montana to China (or elsewhere) based on climate change impacts, and therefore should not consider the impacts of greenhouse gas emissions from coal combustion in importing countries. If Washington is prohibited by law from burdening interstate and foreign commerce or conducting foreign policy, why would the analysis of foreign environmental impacts be useful? And if Washington were to make decisions to limit emissions in other states (or countries), how is such a decision anything other than regulating outside Washington's borders? The States believe that state regulation of extraterritorial activities – particularly when the effects are entirely outside of the state – is legally and constitutionally unsupportable.

The Army Corps of Engineers has excluded from its review those issues that are beyond its control, for just this reason. If there is no regulatory action within its jurisdiction that can be taken to mitigate off-site or remote impacts, then the Corps does not review those impacts. It focuses on those that are controllable by mitigation and that occur within its jurisdictional boundaries. This is an approach that the States support, and that the States believe Washington should follow.

Scope of Expertise

The substantive issue to be addressed in Ecology's Cherry Point Project environmental review is whether coal exports from the U.S. would have a material effect on greenhouse gas emissions in the countries that import the coal. If the coal is burned, as expected, it would emit greenhouse gases. But that is not the question to be addressed in Ecology's environmental review. The proper question is whether those emissions would be *greater* than otherwise would

have occurred *without* the exports. In other words, is there a net negative impact? The issue raised in the Cherry Point Project is whether greenhouse gas emissions in foreign nations would be higher or lower than the emissions that would occur in the absence of the Cherry Point Project.

This analysis is well beyond the expertise of Ecology, and is a topic that could consume an exorbitant amount of resources (including fossil fuels). The issue is complicated because it requires an analysis of complex and vast global markets. Coal resources exist all over the globe, varying in quality, depth and cost. The sourcing of coal in China, for example, involves thousands of large and small mines, domestically and internationally, and is affected by imports from many countries. The evaluation of net impacts would require Ecology to analyze and predict the changes in this international market, including the internal markets in importing countries (like China), in response to the supply of coal from the U.S. This analysis would also need to address the quality of the coal actually used, since greenhouse gas emissions could actually go down as a result of substituting higher quality coal for lower quality sources. In evaluating the MBTL Project, if Ecology were to adopt the same scoping position it did with Cherry Point, it would need to know whether alternative sources would be found (and their quality and price) to replace coal from the MBTL Project, or whether the MBTL Project would actually increase international demand for coal.

The market forces are not the exclusive determinant of the sources of coal and import practices. The domestic regulation of coal-producing and coal-importing countries would also matter, as would the domestic and international programs to regulate or offset greenhouse gas emissions. In addition, Ecology would have to predict (presumably using computer models) the resource planning and growth of fossil fuel sources in multiple countries, including China and other nations, a process that would require speculation concerning foreign governments' environmental politics. Otherwise, the actual net impact could not be calculated or determined.

The States submit that such inquiry is well outside the capabilities of Ecology, not only because much of the information is not available, but because the analysis is so complex as to be essentially impossible. Any prediction of how markets would react to U.S. exports of coal to China or elsewhere, and whether net emissions of greenhouse gases would increase as a result, is essentially a guess. In addition, because this analysis requires the prediction of coal production and consumption patterns, and relevant prices, as well as regulatory policies and practices, nationally and internationally, such an exercise is mainly aimed at predicting events that would transpire over decades. Ecology would not only need to fully understand the current coal markets, but also accurately predict the effects of national and international policies favoring or disfavoring coal use. Ecology would also need to understand the dynamics of resource planning and investment in major facilities in multiple countries. Such an analysis could only be described as "speculative."

Additionally, no investigation of the environmental burdens in foreign nations or other states would be complete without a comparable investigation of the potential benefits. If, as Ecology determined in connection with the Cherry Point Project, the environmental impacts in

foreign nations must be taken into account under Washington law, the foreign benefits should be equally relevant. Likewise, the benefits within the States would be equally relevant to the balancing of costs and benefits Ecology would be required to make. After tallying such benefits, Ecology would need to exercise its discretion to evaluate whether the domestic and international benefits of exporting coal to various foreign countries outweigh any environmental and climate change impacts in multiple states and countries.

The States therefore believe it to be self-evident that the EIS scope identified for the Cherry Point Project is much too inclusive to be workable, and that a narrower scope is more appropriate for the MBTL Project. We therefore encourage Ecology to limit the scoping decision to matters within the jurisdiction of the State of Washington.

Summary

The present proceedings arise because the MBTL Project needs approvals from Cowlitz County and Ecology under statutes intended to protect wetlands, waterways and coastal resources. Like NEPA, the State Environmental Policy Act requires the State of Washington to consider the full range of environmental impacts and benefits of approving the MBTL Project in connection with these approvals. But there is nothing about the permitting process or environmental impact assessment that requires the relevant agencies to assess global environmental impacts, or to involve an investigation of every possible consequence of approving the MBTL Project. If every state decision were subject to that scope of analysis, every project would require decades to investigate and approve.

Ecology's decisions on the MBTL Project, including the scoping decision, extend far beyond the borders of Washington. A decision to investigate environmental impacts in China or other importing countries, as well as in the States, is a decision that those extraterritorial impacts should play a role in determining whether these other States' citizens may engage in commerce nationally and internationally. Deciding against the MBTL Project on the basis of indirect and speculative impacts in China, for example, would be a decision to hinder China from obtaining high-quality coal from Montana and a decision to prevent Montana's citizens from producing and selling such coal. The States believe that such actions are far outside of Washington's legitimate environmental concerns, regulate extraterritorially beyond Washington's borders and infringe on the rights of the citizens of other States and nations.

Moreover, such a decision, if fully implemented, would involve balancing costs and benefits of the MBTL Project beyond Washington's borders. In evaluating extraterritorial impacts, Washington should incorporate an analysis of economic and other benefits in Montana and North Dakota, as well as in the importing nations, like China. Decisions of that scope and magnitude, which affect other states and even foreign nations, should properly be the subject of national regulation and/or international agreement, and should not be implicated in the determination of whether to issue a permit for redevelopment of a waterfront property.

Therefore, on behalf of the States, their citizens, other coal-producing states and foreign nations seeking to improve the economic conditions for their citizens, we request that the scope



of review of the environmental impacts for the MBTL Project be limited to matters within the jurisdiction of the State of Washington that it can meaningfully analyze and control, and therefore exclude environmental and climate change effects in the States and the countries to which the States' coal production would be exported through the MBTL Project.

Sincerely,

A handwritten signature in black ink that reads "Rob McKenna". The signature is written in a cursive, slightly slanted style.

Rob McKenna
Partner