



January 19, 2013

Via email to [comments@eisgatewaypacificwa.gov](mailto:comments@eisgatewaypacificwa.gov)

Randel Perry  
U.S. Army Corps of Engineers, Seattle District  
Care of: GPT/BNSF Custer Spur EIS Co-Lead Agencies  
1100 112th Avenue Northeast, Suite 400,  
Bellevue, Washington 98004

**RE: Notice of Intent To Prepare a Joint Environmental Impact Statement (EIS) for the Gateway Pacific Terminals Bulk Dry Goods Shipping Facility and the Custer Spur Rail Expansion Projects, 77 Fed. Reg. 58531 (Sept. 21, 2012)**

Dear Mr. Perry,

Cloud Peak Energy Inc. (Cloud Peak) respectfully submits these scoping comments in response to the above-referenced Army Corps of Engineers (Corps) joint notice of intent (NOI) to prepare an environmental impact statement (EIS) for the Gateway Pacific Terminals Bulk Dry Goods Shipping Facility and the Custer Spur Rail Expansion Projects (collectively, the Project). As described in the NOI, the Project involves the construction of a three-berth, deepwater wharf and related upland facilities in an area called Cherry Point in Whatcom County, Washington, and an upgrade to the existing Custer Spur rail line.

Cloud Peak is one of the largest U.S. coal producers, specializing in the production of low-sulfur subbituminous coal. Cloud Peak owns and operates three surface coal mines in the Powder River Basin: the Antelope and Cordero Rojo mines in northeast Wyoming and the Spring Creek Mine near Decker, Montana. Cloud Peak Energy also owns rights to substantial undeveloped coal and complimentary surface assets in the northern Powder River Basin, further building the company's long-term position to serve Asian export and domestic customers. Please include these comments in the administrative record for the Project EIS.

#### **I. NEPA Effects Analysis**

The National Environmental Policy Act (NEPA) requires the preparation of an EIS for any major federal action significantly affecting the quality of the human environment.<sup>1</sup> An EIS must detail the environmental impact of the proposed action, any adverse environment effects that cannot be avoided if the project is implemented, and alternatives to the proposed action.<sup>2</sup>

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<sup>1</sup> 42 U.S.C. § 4332(2)(C).

<sup>2</sup> *Id.*

The NEPA implementing regulations issued by the Council on Environmental Quality (CEQ) define environmental effects to include both the direct and indirect effects of a proposed action, as well as cumulative effects. “Direct effects” of a proposed action are those “that are caused by the action and occur at the same time and place.”<sup>3</sup> “Indirect effects” are defined as those that are:

caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 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.<sup>4</sup>

The CEQ regulations define “cumulative impact” 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.”<sup>5</sup> To be cumulative, impacts from different projects must occur at the same time and in the same space; i.e., they must overlap geographically and temporally.<sup>6</sup>

## II. Scope of the Project EIS

**No Programmatic NEPA Analysis.** Prior to the commencement of the Project’s scoping period, certain parties requested that the Corps prepare a programmatic EIS that would encompass multiple commodity terminals being proposed for the Pacific Northwest. The Corps correctly determined that a programmatic analysis was not warranted. As the courts have noted, “a programmatic statement is appropriate only where the *proposal itself is regional or systemic in scope*, or where the proposal is one of a *series of interrelated proposals* that will produce cumulative systemwide effects that can be meaningfully evaluated together.”<sup>7</sup> Here, the various proposed terminals are applicant-driven, independent, and unrelated projects that are neither regional nor systemic in scope. Thus, they can each be evaluated in separate NEPA analyses.

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<sup>3</sup> 40 C.F.R. § 1508.8(a).

<sup>4</sup> *Id.* § 1508.8(b).

<sup>5</sup> *Id.* § 1508.7.

<sup>6</sup> See 40 C.F.R. § 1508.7 (cumulative impacts are incremental and additive); *League of Wilderness Defenders Blue Mountain Biodiversity Project v. Allen*, 615 F.3d 1122, 1136 (9th Cir. 2010) (upholding an EIS that limited its cumulative effects analysis to projects whose effects overlapped in time and space); see also *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) (recognizing that cumulative impacts must occur in the same geographic area).

<sup>7</sup> *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 374 (D.C. Cir. 1981) (emphasis added).

**Framework for Indirect Effects Analysis.** With respect to the specific Gateway Pacific Terminal, some of the scoping comments that already have been submitted are now requesting that the Corps analyze the impacts of coal extraction in the Powder River Basin, increased rail traffic at locations far removed from Whatcom County, and the combustion of the coal overseas. These requests are inconsistent with NEPA's requirements. The Corps' impact analysis need not extend to actions that lack a sufficient causal connection to the proposed action.

In *U.S. Department of Transportation v. Public Citizen*, the U.S. Supreme Court addressed the scope of indirect effects that need to be considered in an agency's NEPA analysis.<sup>8</sup> The case involved a Presidential decision lifting a moratorium that prohibited Mexican motor carriers from obtaining operating authority within the U.S.<sup>9</sup> The moratorium was to be lifted once new regulations providing the trucks with operating authority were promulgated by the Federal Motor Carrier Safety Administration (FMCSA).<sup>10</sup> FMCSA developed proposed rules and prepared an environmental assessment (EA) for those rules.<sup>11</sup> The EA did not consider the air quality impact that could be caused by the increased presence of Mexican trucks in the U.S., concluding that any such impact would qualify as an effect of the President's lifting of the moratorium, as opposed to an effect of the regulations.<sup>12</sup> The Ninth Circuit found the EA to be deficient because it did not consider the environmental impact of lifting the moratorium when that action was reasonably foreseeable at the time FMCSA prepared the EA, and directed FMCSA to prepare an EIS.<sup>13</sup>

The Supreme Court reversed, finding that the trucks' entry was not an indirect effect of the issuance of the regulations because FMCSA was unable to countermand the President's lifting of the moratorium or otherwise categorically exclude Mexican trucks from operating in the United States.<sup>14</sup> The court noted that the plaintiffs erroneously relied on "but for" causation, which it ruled was insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.<sup>15</sup> Instead, the court determined that NEPA requires a "reasonably close causal relationship" akin to proximate cause in tort law.<sup>16</sup>

It also stated that inherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process.<sup>17</sup> In that case,

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<sup>8</sup> 541 U.S. 752, 767 (2004).

<sup>9</sup> *Id.* at 760-61.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 761.

<sup>12</sup> *Id.* at 761-62.

<sup>13</sup> *Id.* at 762.

<sup>14</sup> *Id.* at 767.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

under the “rule of reason,” the causal connection between the proposed regulations and the entry of Mexican trucks was insufficient to make FMCSA responsible under NEPA to consider the environmental effects of entry as the purposes of NEPA would not be fulfilled by requiring FMCSA to consider the environmental impact at issue; FMCSA had no ability to prevent cross-border operations and lacked the power to act on whatever information might be contained in an EIS.<sup>18</sup> Thus, *Public Citizen* stands for the proposition that an agency’s scope of analysis should be defined by proximate causation between the proposed federal action and the environmental effect, not based simply on the fact that “but for” the agency action, the environmental effect would not occur.

Other courts have similarly limited the scope of agency’s NEPA review. In *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*,<sup>19</sup> the court analyzed the Corps’ NEPA regulations, which provide that the Corps “should establish the scope of the NEPA document . . . to address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.”<sup>20</sup> Based on these regulations and the Supreme Court’s holding in *Public Citizen*, the court held that the NEPA analysis for Section 404 permits associated with mountaintop mining had to analyze only the impacts of filling jurisdictional waters, not the impacts of the entire valley-fill project.<sup>21</sup>

After discussing the *Public Citizen* decision, the court recognized that “but for” the Corps 404 permit, the valley fill could not be built.<sup>22</sup> However, such “but for” causation was insufficient to require the Corps to consider the more remote impacts of the entire valley fill because the Corps had no legal authority to prevent placement of fill material in areas outside of the waters of the United States.<sup>23</sup> The court concluded that the upland effects were “not essentially a product of Corps action” and, therefore, did not need to be included in the scope of the Corps’ NEPA analysis.<sup>24</sup>

The court’s decision in *New Jersey Department of Environmental Protection v. U.S. Nuclear Regulatory Commission* is another example of a court upholding an impact analysis of limited scope based on a lack of sufficient causal connection.<sup>25</sup> The court specifically noted that the Supreme Court directed courts to “draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not” and that “this line appears

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<sup>18</sup> *Id.* at 769.

<sup>19</sup> 556 F.3d 177 (4th Cir. 2009).

<sup>20</sup> 33 C.F.R. part 325, App. B § 7(b).

<sup>21</sup> 556 F.3d at 194-97.

<sup>22</sup> *Id.* at 196-97.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 197 (quoting 33 C.F.R. part 325, App. B § 7(b)(2)).

<sup>25</sup> 561 F.3d 132 (3d Cir. 2009).

to approximate the limits of an agency's area of control."<sup>26</sup> Based on that precedent, the court determined that the Nuclear Regulatory Commission did not need to study the effects of an aircraft attack on the Oyster Creek Nuclear Generating Station because the "causation chain is too attenuated to require NEPA review."<sup>27</sup>

**Application of Framework to the Project.** Based on the Supreme Court's holding in *Public Citizen* and the cases that have applied that holding, the Corps need not consider as an indirect effect of the Project any effect that lacks a reasonably close causal relationship to the Project. The extraction, transport, and combustion of coal lack that requisite causal relationship. The Corps has no control or authority over any of these activities. Thus, like the FMCSA in *Public Citizen*, it lacks the power to act on whatever information might be contained in an EIS regarding the impacts of such activities. The "manageable line" defining the scope of the effects analysis does not encompass these actions, which are geographically and causally removed from the proposed Project. Therefore, the Corps should properly limit the scope of the Project EIS to those direct, indirect, and cumulative effects that have a reasonably close causal relationship to the Project, i.e., the proposed facilities and immediate area of the Project, and should not extend that analysis to the impacts of coal extraction, transport, and use over which the Corps has no control.

Cloud Peak appreciates the opportunity to comment on the scope of the analysis for the Gateway Pacific Terminal and Custer Rail Spur Expansion.

Sincerely,



Bob Green

General Manager Sustainable Development & External Relations  
Cloud Peak Energy Resources, LLC

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<sup>26</sup> *Id.* at 140 (citations omitted).

<sup>27</sup> *Id.*