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General Counsel

January 21, 2013

Mr. 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.

Dear Mr. Perry:

Subject: Docket number COE-2012-0016: Scoping for Proposed Gateway Pacific Terminal and Custer Spur Rail Expansion

On September 21, 2012, the U.S. Army Corps of Engineers (Corps) announced its intent to initiate scoping to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA) for the proposed Gateway Pacific Terminal and Custer Spur Rail Expansion (Gateway Project). 76 Fed. Reg. 58531. 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.

Appropriate Scope of the 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.

Corps Role in Determining the Scope

In conjunction with the Gateway Project and in response to public reports of other potential Northwest port projects, the Corps is in receipt of numerous requests for preparation of a broad or programmatic environmental impact statement (PEIS). For example, the U.S. Environmental Protection Agency (EPA) requested a broadly-scoped cumulative impact analysis while Oregon Governor John Kitzhaber wants a programmatic and comprehensive environmental impact statement. Several environmental groups have also requested a PEIS. The requests seek analysis of the environmental impacts from the mining of the coal to be shipped from the terminals – duplicating existing analyses already done in conjunction with coal leasing – to domestic greenhouse gas impacts of the ultimate use of the coal in Asia, a request that not only exceeds the bounds of NEPA but is simply technically infeasible.

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,"¹ determining the scope of analysis under NEPA has always been a highly fact-specific endeavor:

¹ 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 Gateway 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

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.

A PEIS is Not Warranted

Thus, turning to the facts at hand regarding the Gateway Project, the Corps lacks sufficient control and responsibility over potentially related downstream and upstream actions to support the preparation of the requested PEIS. Clearly, even if the Corps could somehow assert that leasing of federal coal in the PRB is part of the Gateway Project, the Corps has no authority over such upstream leasing actions. Nor are the potential environmental impacts of coal leasing ignored by the 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.² 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.

The Corps’ control over the downstream increased or extended use of coal to generate electricity in Asia is even more attenuated than its authority to address coal leasing issues. 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 in Asia, even coal that is exported from the U.S. since the Corps cannot impose a moratorium on coal exports. The Corps’ downstream NEPA analyses should only extend to impacts associated with potential impacts of vessel traffic in U.S. territorial waters since any strong federal interest wanes once vessels enter international waters. NEPA simply is not the law to answer the question raised by many PEIS requesters: whether or how coal exports to Asia fit with the larger strategy of moving to a lower carbon future?

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.

²See, 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>

Other Northwest port project opponents argue that the Corps' eventual role in permitting other potential Northwest ports triggers a requirement to prepare a PEIS. However, most of these other projects are in the very initial permitting stage or still in the pre-feasibility stage. The requests for a PEIS frequently mention five additional port projects (Port of Morrow; Millennium Bulk Terminal; Port Westward Expansion; Coos Bay; and Grays Harbor) that should be evaluated. However, the timing and approval of these other potential terminals are too uncertain to merit preparation of a PEIS. In fact, one much discussed project, Grays Harbor, has been already been cancelled by the project proponent.

A Project-Specific EIS is Defensible

Based on the project facts, an EIS that evaluates the direct, indirect and cumulative impacts of the Gateway Project meets the Corps and CEQ regulations as well as the mandates of NEPA. In fact, the cumulative impact analysis will likely address, at least in part, some of the concerns raised by the PEIS requesters. CEQ regulations require the Corps to assess "cumulative impacts on the environment which result 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."³ There are bounds, however, to the cumulative impact analysis, namely that future actions must be reasonably foreseeable and not speculative.⁴ Furthermore, as the Corps notes in its NEPA guidance, the Supreme Court made clear that NEPA analyses do not need to encompass all effects that would not have been generated "but for" the grant of the federal permit. In *Department of Transportation v. 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.

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

³ CEQ NEPA Regulations, 40 USC 1508.7.

⁴ See *Kleppe v. Sierra Club*, 427 U.S. 390, 402, and U.S. Environmental Protection Agency, "Consideration of Cumulative Impacts in EPA Review of NEPA Documents," Office of Federal Activities (1999).

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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 Gateway Project EIS.

Conclusion

NMA urges the Corps to follow its well-established regulations and policy in determining the scope of the EIS for the Gateway Project. Not only would a PEIS be contrary to Corps policy as applied to the facts, the preparation of a PEIS at this juncture would be premature lead to significant delays for Gateway Project and other potential port facilities that have or will submit permit applications to be evaluated by the Corps. Preparation of a PEIS would likely take 3-5 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, requiring a PEIS for the Gateway Project would create a dangerous, time consuming precedent for all export activity that requires a Corps Section 404 permit. Therefore, the Corps should reject the PEIS requests and prepare a site-specific EIS for the Gateway Project.

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

Sincerely,



Katie Sweeney