

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

WILLIAM L. KOVACS  
SENIOR VICE PRESIDENT  
ENVIRONMENT, TECHNOLOGY &  
REGULATORY AFFAIRS

1615 H STREET, NW  
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January 18, 2013

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

**RE: Joint Environmental Impact Statement (EIS) for the Gateway  
Pacific Terminals Bulk Dry Goods Shipping Facility and the Cluster  
Spur Rail Expansion Projects; Scope of Environmental Review**

Dear Mr. Perry:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, strongly urges the U.S. Army Corps of Engineers (Corps) to deny the pending request by the Environmental Protection Agency and environmental advocates to prepare a "cumulative, programmatic" environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) for the proposed Gateway Pacific Terminal/Cluster Spur. A programmatic EIS of the kind requested would include a far-reaching analysis of coal exports from the Pacific Northwest to other parts of the world, and the attendant impacts on the United States of generating electricity abroad with that coal. There is no precedent for conducting a programmatic EIS with such a vast scope, and there is certainly no compelling reason to set such a precedent. Many of the Chamber's member companies would be negatively impacted by expanding the scope of environmental review to evaluate the foreign use of products sold by the U.S. to other countries.

The Chamber has spent the past three years studying the paralyzing effect that excessive environmental reviews have had on major infrastructure and energy projects, including port dredging, road building, and construction of power plants. Thousands of projects are delayed or killed outright each year because of endless environmental reviews and the legal challenges that accompany them. The Chamber's 2010 study *Project No Project* demonstrates that for energy projects alone, some 351

projects were stopped or significantly delayed by these reviews, at a cost of 1.9 million jobs each year that otherwise could have been made available to people who desperately needed them.

Subjecting the Gateway Pacific Terminal/Cluster Spur project to a programmatic EIS is both unnecessary and inconsistent with the requirements of NEPA. A programmatic EIS is unnecessary because the major elements of the project are already operating and have previously been scrutinized (mining operations and rail transport to Washington). Nothing about the Gateway Pacific Terminal/Cluster Spur project suggests that a programmatic EIS is in any way warranted: the project is not complex, the project does not contemplate numerous separate activities occurring in the same area over time or any extensive spatial activity such as a lengthy new transmission corridor. The project does not involve a multitude of actors or an interrelated series of actions. In short, the project involves the ordinary export of a product overseas from a port facility in a very typical way. Recent guidance issued by the Council on Environmental Quality clarifies that “NEPA encourages straightforward and concise reviews and documentation that are proportionate to potential impacts and effectively convey the relevant considerations to the public and decision makers in a timely manner while rigorously addressing the issues presented.”<sup>1</sup>

A programmatic EIS for an export terminal that considers specifically how a fuel product is used outside of the U.S. is also clearly beyond the intended scope of NEPA. Courts that have considered whether NEPA should apply to U.S. products (including energy projects) sold or transported overseas have found that NEPA does not apply to those activities.<sup>2</sup> Similarly, Executive Order 12114 clarifies that NEPA does not apply to the effects of federal projects overseas.<sup>3</sup> While NEPA certainly applies to operations of the Gateway Pacific Terminal/Cluster Spur project *within the U.S.*, it should not apply to activities by companies that purchase exported coal in foreign countries.

NEPA was certainly never intended by Congress to apply to actions within other countries undertaken by foreign citizens. If this were not true, every transaction of every kind with all other countries would be subject to review under NEPA,

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<sup>1</sup> Council on Environmental Quality, “Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act” (March 6, 2012).

<sup>2</sup> See *NRDC v. NRC*, 647 F.2d 1345 (D.C.Cir. 1981) (export license for nuclear reactor sold to Philippines not subject to NEPA review); *Greenpeace v. Stone*, 748 F.Supp 749 (D. Haw. 1990) (transportation of chemical weapons through West Germany by U.S. not subject to NEPA review).

<sup>3</sup> 44 Fed. Reg. 1957 (1979).

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including activities that occur after the transaction is complete. This would give NEPA a virtually unlimited scope, which was clearly not the intention of Congress when NEPA was enacted in 1969. NEPA was enacted to ensure that federal agencies include environmental considerations in their project reviews. Unfortunately, never-ending NEPA reviews have been used to delay projects so long that project sponsors are ultimately compelled to give up. In short, these endless reviews are *destroying* economic activity and preventing the creation of millions of jobs needed by our citizens.

If the Corps imposes a programmatic review upon export projects such as the Gateway Pacific project that transports products or people to foreign countries, agencies would be obliged to conduct NEPA reviews of all aspects of U.S. trade with other nations. Agencies would also have to evaluate how every product will ultimately be used by customers who purchase American products. In effect, agencies like the Corps would be put in the position of regulating international trade under NEPA. Congress did not intend the NEPA review process to be used to regulate international trade.

Therefore, the Corps should decline to expand the scope of the NEPA review of the Gateway Pacific Terminal/Cluster Spur project to include overseas activities.

Thank you for the opportunity to share our perspectives on this important issue. Please do not hesitate to contact me to address any questions you may have regarding the Chamber's views on this matter. I may be reached at (202) 463-5457 or by e-mail: [wkovacs@uschamber.com](mailto:wkovacs@uschamber.com).

Sincerely,



William L. Kovacs

Cc: The Honorable Jo-Ellen Darcy, United States Assistant Secretary of the Army  
(Civil Works)