

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

**RE: Notice of Intent to Prepare a Joint Environmental Impact Statement / Gateway Pacific Terminals Bulk Dry Goods Shipping Facility and the Custer Spur Rail Expansion Projects**

Dear Mr. Perry:

I am writing, on behalf of the multi-sector membership of the Western Business Roundtable, to provide our input regarding the 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").<sup>1</sup>

As described in the NOI, the Project involves the construction of a three-berth, deepwater wharf and related upland facilities in Whatcom County, Washington, and an upgrade to the existing Custer Spur rail line to support the movement of goods to those port facilities.

The Roundtable's interest in this matter is not on the specific merits of the Gateway facilities nor the Custer Spur rail line upgrade. Rather, our focus is on the larger discussion underway regarding the proper scope of National Environmental Policy Act ("NEPA") reviews of the handful of new, individually owned/operated, multi-commodity export facilities (including the Project) now being considered at various locations in the Pacific Northwest.

We are concerned regarding proposals from some policymakers and environmental advocacy organizations – which first surfaced in connection with the Coyote Island Terminals LLC Coal Transloading Facility at Port of Morrow, Oregon – that the Corps should diverge from current rules and legal precedent and expand the scope of NEPA reviews of port facilities, and related transportation infrastructure, that facilitate the export of domestic fossil fuel commodities.

These opponents of commodity exports have sought to expand NEPA reviews beyond the normal project-specific focus and toward a 'system-wide' analysis -- a Programmatic Environmental Impact Statement ("PEIS") -- which would group all the proposed facilities together and then produce a broadly-scoped cumulative impact analysis of commerce utilizing port facilities as their conduit for export. Such analysis would presumably include both the cumulative effects of the export (in this case coal transport from the point of production in the Western region to the West Coast) and the indirect effects of the use of that

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<sup>1</sup> 77 Fed. Reg. 58531, September 21, 2012.

commodity (in this case the 'impacts' of coal use in Asia and the U.S.)

Such an approach is highly problematic for multiple reasons including, but not limited to:

- It would require an unwarranted deviation from the standard project /action-based NEPA review process;
- Such a deviation would set a dangerous precedent, which could fundamentally change the NEPA review process going forward;
- It is counter to legal case law;
- It is at odds with a variety of Executive Orders, Council on Environmental Quality (“CEQ”) NEPA reform guidance and other Obama Administration pronouncements on regulatory and export policies.

## **ROUNDTABLE STATEMENT OF INTEREST**

The Roundtable is a broad-based coalition of companies doing business in the Western United States. Our membership is comprised of a coalition of corporations and organizations representing a broad cross-section of Western business including, among others: manufacturing; mining; electric power generation/transmission/distribution; energy infrastructure development; energy supply exploration and development and transportation; energy services; and environmental engineering.

We work to defend the interests of the West and support policies that encourage economic growth and opportunity, freedom of enterprise and a common-sense, balanced approach to conservation and environmental stewardship.

NEPA has very real implications for Roundtable members, many of which are involved in energy and natural resource development activities, manufacturing and other commercial applications in a number of states. Many of these companies depend on export facilities in the Pacific Northwest. Our members have extensive experience with the NEPA process including, unfortunately, the project delays and escalating costs associated with compliance under the Act.

## **NEPA ANALYSIS – REGULATORY FRAMEWORK**

The NEPA statute requires the preparation of an EIS for any major federal action significantly affecting the quality of the human environment.<sup>2</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>3</sup>

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<sup>2</sup> 42 U.S.C. § 4332(2)(C).

<sup>3</sup> *Id.*

NEPA implementing regulations issued by the CEQ define environmental effects to include both the direct and indirect effects of a proposed action, as well as cumulative effects. Under those regulations:

- “Direct effects” of a proposed action are defined as those that are “*caused by the action and occur at the same time and place.*”<sup>4</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.*”<sup>5</sup>
- “Cumulative impacts” are defined 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>6</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>7</sup>

## RELEVANT OBAMA ADMINISTRATION EXECUTIVE ACTIONS

The Corps’ approach here needs to be evaluated both in terms of the NEPA regulations, but also in the context of President Obama’s Executive Orders and other relevant actions by the Administration to institute regulatory reform and export policies. Important in that regard:

- On March 11, 2010, President Obama signed Executive Order: “*National Export Initiative.*” President Obama said the Executive Order would help meet his Administration’s goal of doubling exports in the next five years by working to remove trade barriers.<sup>8</sup>
- On January 18, 2011, the President issued Executive Order: “*Improving Regulation and Regulatory Review.*” In it, he directed all federal agencies to “*develop and submit plans to identify and review existing regulations that can be made more effective and less burdensome, while achieving regulatory objectives.*”<sup>9</sup>
- On December 13, 2011, the CEQ issued draft guidance intended to improve the efficiency and timeliness of reviews under NEPA. The Council stated as its purpose in issuing the guidance:

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<sup>4</sup> 40 C.F.R. § 1508.8 (a).

<sup>5</sup> *Id.* § 1508.8(b).

<sup>6</sup> *Id.* § 1508.7.

<sup>7</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>8</sup> Executive Order 13534, “*National Export Initiative*” (March 11, 2010): <http://www.whitehouse.gov/the-press-office/executive-order-national-export-initiative> .

<sup>9</sup> Executive Order 13563: “*Improving Regulation and Regulatory Review*” (January 18, 2011): [http://www.reginfo.gov/public/jsp/Utilities/EO\\_13563.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf) .

*“The National Environmental Policy Act (NEPA) and CEQ regulations implementing NEPA provide numerous techniques for preparing efficient and timely environmental reviews. CEQ is issuing this guidance for Federal departments and agencies to emphasize and clarify these techniques, consistent with a thorough and meaningful environmental review and keeping in mind the following basic principles:*

- *NEPA encourages simple, straightforward, and concise reviews and documentation that are proportionate to and effectively convey the relevant considerations in a timely manner to the public and decision makers, while comprehensively addressing the issues presented;*
  - *NEPA should be integrated into project planning rather than be an after-the-fact add-on;*
  - *NEPA reviews should coordinate and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference;*
  - *Early and well-defined scoping can assist in focusing environmental reviews on appropriate issues that would be meaningful to a decision on the proposed action;*
  - *Agencies are encouraged to develop meaningful and expeditious timelines for environmental reviews; and*
  - *Agencies should respond to comments in proportion to the scope and scale of the environmental issues raised. This guidance applies to the preparation of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) consistent with legal precedent and agency NEPA experience and practice.”<sup>10</sup>*
- In March, 2012, the President issued Executive Order: *“Improving Performance of Federal Permitting and Review of Infrastructure Projects.”* The President stated, *“Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities.”<sup>11</sup>*
  - In May, 2012, the President issued Executive Order: *“Identifying and Reducing Regulatory Burdens.”* This EO speaks to how federal agencies are to use their retrospective review processes going forward: *“Consistent with Executive Order 13563 and Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), agencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens, and shall, to the extent practicable and consistent with law, give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety, and our environment.”<sup>12</sup>*

## **ROUNDTABLE RECOMMENDATIONS**

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<sup>10</sup> 76 FR 77492, December 13, 2011.

<sup>11</sup> Executive Order (Number TBA): *“Improving Performance of Federal Permitting and Review of Infrastructure Projects”* (March 22, 2011): <http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>.

<sup>12</sup> Executive Order (Number TBA): *“Identifying and Reducing Regulatory Burdens”* (May, 2012): <http://www.whitehouse.gov/the-press-office/2012/05/10/executive-order-identifying-and-reducing-regulatory-burdens>.

- **The Corps Should Use Established Permitting Review Processes.**

We are not questioning the need for Pacific Northwest export facilities to be analyzed under NEPA. However, established review processes should be used. The environmental reviews should be project/action-specific, not broadly drawn to capture the overall system of commerce across the West or nation.

The practical reasons for concisely drawn, individual reviews are numerous:

- Assessing environmental impacts that go beyond the project level becomes difficult and prone to conjecture and subjective judgments. Here, the geographic scope would be extremely large. The commodities that move across the region to West Coast ports for export are varied (agricultural commodities, energy resources, intermodal, etc.).
- Such broad assessments are inefficient and duplicative. Opponents of multi-commodity export facilities are asking the Corps to review a broad range of potential impacts, including the impacts of coal mining on public lands. However, any coal mining that is occurring on such lands has already been evaluated and subjected to a variety of environmental and NEPA reviews through the relevant federal land management agencies. The same is true for most linear facilities which would transport commodities to ports for export.
- Each proposed Pacific Northwest port project is slated to develop in stages depending on commodity markets, so it is difficult to say what the “cumulative impacts” will be. If multiple projects are green-lighted, it is possible (depending on the market) that there will not be full build-out of any of the projects.

Given these facts, the Roundtable does not see any reasonable basis for either application of a PEIS approach or use of broad cumulative impacts review for multi-commodity facilities. Neither aligns with legal precedent, the CEQ NEPA regulations/guidance or the President’s regulatory reform Executive Orders. Individual site-specific analyses are the only appropriate approach for these projects, based on precedence and case law (discussed in more detail below).

- **Use of a PEIS For Stand-Alone Projects Is Not Supported by Legal Precedent.**

We strongly oppose suggestions that various Pacific Northwest commodity terminals be lumped together into a single PEIS for NEPA purposes. We are very pleased that the Corps has thus far rejected such a proposal.

Legal precedent certainly does not support such an approach, when applied to stand-alone projects, each located in different areas and owned/operated by different parties. As the federal 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 system wide effects that can be meaningfully evaluated together.*”<sup>13</sup>

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<sup>13</sup> *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 374 (D.C. Cir. 1981).

In 1976, the U.S. Supreme Court held that agencies are not required to do a regional study if they are not also preparing a regional policy.<sup>14</sup> This has been reconfirmed in several subsequent court decisions involving a diversity of projects. In this line of cases, courts have rejected the argument that a combined NEPA document is necessary for multiple proposed actions, where the individual NEPA analyses each contained a comprehensive evaluation of cumulative impacts.<sup>15</sup> In the current situation, the Corps has no authority to do a regional policy limiting commodity exports.

- **Suggested “Life Cycle” Cumulative Impacts Analyses of Coal Exports is Not Supported NEPA Regulations or Case Law.**

We also want to address the assertions by some parties that the Corps should do cumulative impacts analyses which would both extend back to the mining of coal at locations throughout the West/ transportation from the mine mouth to port and extend forward to the use of the commodity at its final foreign destination. Under NEPA regulations and legal case law, the Corps should deny such requests. 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 determined that NEPA requires a “*reasonably close causal relationship*” in order for an impact to be relevant.<sup>16</sup>

The Court also found that NEPA requires application of a “*rule of reason.*” Agencies are to decide whether/to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process. *Public Citizen* thus requires that the Corps’ scope of analysis here be defined by proximate causation between the proposed federal action and the environmental effect.

Other federal decisions limit agencies’ NEPA review scope to those impacts over which they have regulatory authority and control. For example, in 2009 the 4th Circuit Court of Appeals applied *Public Citizen* in the case of *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*<sup>17</sup> There, the Court found 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.*” Based on these regulations and the Supreme Court’s holding in *Public Citizen*, the court held that the NEPA analysis for Clean Water Act 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.

Thus, based on *Public Citizen* and the cases that have applied that Supreme Court decision, 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 and lacks the authority to address any associated impacts.

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<sup>14</sup> *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

<sup>15</sup> *Earth Island Inst. V. U.S. Forest Serv.*, 351 F.3d 1291, 1305 (9<sup>th</sup> Cir. 2003); *City of Shoreacres v. Waterworth*, 332 F. Supp.2d 992, 1013-14 (S.D. Tex. 2004); *Methow Forest Watch v. U.S. Forest Serv.*, 383 F. Supp. 2d 1263, 1270 (D. Or. 2005).

<sup>16</sup> *U.S. Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004).

<sup>17</sup> *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

- **Regional Reviews and Broadly Drawn Cumulative Impact Analyses Would Set a Troubling Precedent for NEPA Reviews of Networked Projects.**

If the approaches suggested by commodity export opponents were to be applied, a dangerous precedent would be set. The result would be unwarranted scope expansions for NEPA reviews and project-action delays for all sorts of other national network projects, from transportation infrastructure, to linear facilities such as telecommunications, pipelines and electric transmission systems, to dams and water delivery systems. This approach could bring infrastructure development – and the economic sectors dependent on that infrastructure – to a virtual standstill.

How would such an outcome be in compliance with the President’s Executive Orders intended to streamline permitting processes for key infrastructure?

- **Regional Reviews and Broadly Drawn Cumulative Impact Analyses Contradict Obama Administration Support for NEPA Reform.**

The Roundtable has long supported efforts to reform NEPA. We recognize that the original intent of the NEPA statute remains laudable: to have a reasonable process to evaluate how best to carry out human activities -- on lands requiring federal permits or other approvals -- with appropriate consideration given to the effects those activities may have on the environment. Unfortunately, over the years that Congressional intent has become distorted. The statute has increasingly been used, by those opposed to sustainable economic growth and prosperity, to delay and obstruct projects and economic activity. The current advocacy campaign being carried out against multi-commodity export facilities nationwide is a perfect example of this tactic.

Arguments for expanded scope or broadly-drawn cumulative impacts analyses depend on moving away from good science and consistently applied regulatory policy. Such approaches contradict the Obama Administration's statements of support for responsible NEPA reform. We would point the Corps once again to the White House CEQ's direction to agencies in its 2011 NEPA Guidance document: *"NEPA encourages simple, straightforward, and concise reviews and documentation that are proportionate to and effectively convey the relevant considerations in a timely manner to the public and decision makers."*<sup>18</sup>

- **A Cumbersome Regulatory Process Designed to Frustrate Exports of U.S. Commodities is at Odds With the President’s Export and Regulatory Reform Initiatives.**

President Obama, in Executive Order 13534, laid out an aggressive vision for expanding U.S. exports:

*“Creating jobs in the United States and ensuring a return to sustainable economic growth is the top priority for my Administration. A critical component of stimulating economic growth in the United States is ensuring that U.S. businesses can actively participate in international markets by increasing their exports of goods, services, and agricultural products. Improved export performance will, in turn, create good high-paying jobs....The National Export Initiative (NEI)*

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<sup>18</sup> 76 FR 77492, December 13, 2011.

*shall be an Administration initiative to improve conditions that directly affect the private sector's ability to export.”<sup>19</sup>*

Proposed Pacific Northwest multi-commodity export facilities are critical to achieving the President’s goal; so, too, are the many Western sectors producing the goods which are transported to those port facilities. We urge the Corps to keep in mind the President’s export policy objectives as it discharges its responsibilities of review. Needless complications and duplicative reviews are at odds with both the President’s export policy and his various regulatory reform initiatives discussed above in these comments.

## CONCLUSION

Although the EPA, some policymakers and environmental advocacy groups have called for a system-wide analysis and/or a combined EIS for all proposed and conceptual port projects-actions and associated activities, neither approach is required under NEPA/associated case law nor is appropriate under these circumstances. Adopting them would make the EIS legally vulnerable.

The Corps is not proposing a regional plan for ports. Currently proposed projects are geographically separated and are proceeding on different project schedules; some conceptual projects have not even reached a proposal stage. Thus, nothing about these projects warrant NEPA review approaches contrary to legal and procedural precedent. The only equitable, efficient and appropriate approach is comprehensive individual analyses for each proposed project/action.

Moreover, the Obama Administration has been very vocal in its stated desire to increase regulatory efficiency as a means to jumpstart the nation’s anemic economic recovery. The Corps plays a key role in that regard. We strongly urge the agency to abide by President’s many Executive Orders and related regulatory reform actions. The focus should be on running project-specific NEPA processes in the most efficient and timely manner possible.

Thank you for your consideration of these comments.



Holly Propst  
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Western Business Roundtable

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<sup>19</sup> Executive Order 13534, “National Export Initiative” (March 11, 2010).