

ENCLOSURE

Washington State Department of Ecology's Comments on Public Notice of Permit Application for Coyote Island Terminals LLC; US COE Number NWP-2012-56

1. There are Numerous Coal Export Proposals Pending in Oregon and Washington:

Coyote Island Terminals seeks to ship coal from locations in Oregon to overseas markets. The proposal would entail the coal traveling by train from the Powder River Basin to the Port of Morrow, then loaded onto barges and traveling on the Columbia River to Port Westward. At Port Westward, the coal would then be loaded onto Panamax vessels and shipped to Asia. At full build-out, the facility proposes to annually ship 8.8 million tons of coal.

There are permit applications pending for three other coal export facilities in the Pacific Northwest. SSA Marine has submitted an application for a coal export facility in Whatcom County, Washington at Cherry Point, with annual export of 48 million tons at full build-out. Millennium Bulk Logistics (a subsidiary of Ambre Energy, like Coyote Island Terminals) has submitted an application for a coal export facility in Longview, Washington with annual export capacity of 44 million tons at full build-out. A dredging permit at Coos Bay, Oregon is currently under appeal, with expectations that the dredging will accommodate a coal export facility with approximate annual export capacity of 10 million tons. All of these facilities would entail transport of coal by train from the Powder River Basin to their Oregon and Washington locations, followed by shipment overseas to Asian markets. There are also two other permit applications expected at two separate sites at the Port of St. Helens, Oregon and Hoquiam, Washington.

2. The National Environmental Policy Act (NEPA) Requires Consideration of Cumulative Impacts:

We believe that NEPA provides a helpful and instructive process for and requires consideration of cumulative impacts. In 40 C.F.R. §1508.7, the Council on Environmental Quality (CEQ) has defined cumulative impacts 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.”

In 1997, CEQ issued comprehensive guidance on cumulative impacts analysis under NEPA.¹ In its guidance, CEQ notes that: “The range of actions that must be considered includes not only the project proposal, but all connected and similar actions that could contribute to cumulative effects.” “Similar actions” are defined in 40 C.F.R. §1508.25(3) as “reasonably foreseeable or proposed agency actions [with] similarities that provide a basis for evaluating the environmental consequences together, such as common timing or geography.” According to CEQ, “the goal of cumulative effects analysis, like that of NEPA itself, is to inject environmental considerations into the planning process as early as needed to improve decisions.”

Cumulative impacts result from geographic and temporal crowding of environmental disturbances. In Table 1-2 of its guidance, CEQ enunciates and describes eight principles of cumulative impacts analysis. In setting forth these principles, CEQ recognizes that: “[i]ndividual effects from disparate activities may add up or interact to cause additional effects not apparent when looking at the individual effects one at a time” and that “repeated actions may cause effects to build up through simple addition (more and more of the same type of effect), or different actions may produce effects that interact to produce cumulative effects greater than the sum of the effects.”

In Table 2-1 of its guidance, CEQ poses seven questions to assist federal agencies in identifying potential cumulative impacts. In the present situation, two questions are particularly relevant: (1) “Is the proposed action one of several similar past, present, or future actions in the same geographic area?” and (2) Do other activities (whether governmental or private) in the region have environmental effects similar to those of the proposed action?”

Like CEQ, courts have recognized the need for cumulative impacts analysis under NEPA. It is also helpful to look at what the courts have said about federal agency responsibility in doing cumulative impacts analyses. In the important cumulative impacts case of *Kleppe v. Sierra Club*, 427 U.S. 390(1976), the Supreme Court stated: “[W]hen several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.” And in 2004, the Ninth Circuit Court acknowledged that NEPA requires a federal agency to analyze the cumulative impacts of non-federal actions even if the federal agency has no control over those actions, and that in order to justify the need for a cumulative impacts analysis, it is enough to identify the *potential* for cumulative impacts, not that such impacts will necessarily occur. *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 2004).

Several cases have also specifically addressed the responsibility of the Army Corps of Engineers to consider cumulative impacts in the context of NEPA. For example, in *Te-Moak Tribe of Western Shoshone v. Dep't of Interior*, 608 F.3d 592 (9th Cir. 2010), the Ninth Circuit Court concluded that the Corps was required to take a hard look at increased vessel traffic associated

¹ Considering Cumulative Effects Under the National Environmental Policy Act, Council on Environmental Quality, January 1997, available at <http://ceq.hss.doe.gov/nepa/ccenepa/ccenepa.htm>.

with a new dock at BP's Washington State oil refinery, including consideration of cumulative impacts of the dock when combined with existing and proposed future projects. The District Court of Wyoming concluded in a 2005 case that, before issuing a §404 permit under the Clean Water Act, the Corps was required to consider all cumulative impacts to the "natural and physical environment" rather than confine its analysis to wetlands impacts. *Wyoming Outdoor Council v. US Army Corps of Engineers*, 351 F.Supp. 2d 1232, 1241 (D. Wyo. 2005). In a case involving a NEPA determination for multiple casinos on the Mississippi coast, the D.C. District Court concluded that cumulative impacts alone can constitute grounds for an EIS under NEPA. *Friends of the Earth v. US Army Corps of Engineers*, 109 F.Supp. 2d 30, 42-43 (D. D.C. 2000).

The Coyote Island Terminals' proposal could result in potential environmental impacts of considerable importance. This potential is magnified when considered cumulatively along with impacts from other similar projects in the region. Areas of concern that merit a hard look, at a minimum, include:

- Increased vessel traffic on the Columbia River, including navigational and maritime safety concerns
- Protection of water quality, including increased risk of spills in the Columbia River
- Coal dust emissions at the facility and during product transit
- Emissions of other air pollutants, including diesel particulate and greenhouse gases
- Increased rail traffic, including railroad capacity, increased noise, and delay times for emergency vehicles at rail crossings

Some of these impacts are addressed in more detail below.

3. Cumulative Impacts to the Columbia River System have the Potential to Be Significant:

As noted above, multiple new coal terminals are currently proposed along the river that would increase vessel traffic, would increase risks to maritime safety and environmental protection. Infrastructure concerns such as anchorages, fuel transport, and pilot availability should be addressed as they affect the level of risk presented by an increase in vessel traffic. Facility and vessel operations need to be described in more detail to determine the full level of impacts. However, using the Public Notice for Permit Application as our source of information, we have determined, at a minimum, that the following issues should be considered in an EIS. We have also identified some areas where more information is needed.

For background, in 2010, the number of vessels entering the Columbia River bound for Washington or Oregon ports, was 1,467 cargo vessels and 116 tank ships. At maximum capacity under the Port of Morrow proposal, there would be 156 more cargo ships. Additionally, 1,248 more barge trips would substantially increase barge traffic upriver. Thus, for this project alone, there would be an 11% increase in cargo vessel traffic and an even more significant increase in barge traffic upriver. The cumulative impact from all the planned coal projects would be even

greater. This sizable increase cannot simply be folded into the current infrastructure or operational processes on the Columbia River. In addition, the Columbia River system is a confined river system with multiple ports, a breaking coastal bar at the entrance, and no federal vessel traffic system, all of which increase the potential for risk. Vessel impacts from this project (singly and cumulatively) could be significant and should be analyzed.

The coal is proposed to travel by barge from the Port of Morrow to Port Westward. However, very little information was provided on the plan for Port Westward operations or structures. No information is provided on the enclosed transloading barge or its operations. No information is provided on how the barges and ship will be secured while at Port Westward. If Coyote Island Terminals proposes to use the current World War II-era dock in the area, additional studies and surveys should be conducted to verify the stability of the structure for the proposed operations and depths. If permanent anchors will be utilized, additional information is needed on how these will be installed and used. The environmental impacts of the various options should be considered.

Assuming the enclosed transloading barge will remain in one place, information on how the vessel will be fueled and what vessel emissions will be released should be provided and analyzed. Depending on the operations, the barge may have office or living spaces onboard, so there should be information on how the sewage and gray water will be discharged.

A description of how the coal will be transported from the barge to the vessel is missing. If the system is not fully enclosed, the potential for releases of coal dust exists. Also, how will the coal dust that is collected be handled? And at the Port of Morrow, will the conveyor system be fully or partially enclosed? How will coal dust be controlled there? The environmental impacts associated with coal dust should be considered.

Oil spill risk should also be considered. Will oil be stored on site to fuel tugs? As no land-side facility is proposed, in the case of a spill, where will spill response equipment be located? Will barge personnel be trained in spill response and booming operations? Oil spill response equipment, personnel and training need to be better described.

There are also navigational concerns that should be considered. First, navigation concerns should be addressed for Port Westward due to the narrow width of the river at that location and the nearness of the navigational channel. The significant increase in barge traffic from the Port of Morrow to Port Westward must pass through several locks and transit along a depth-constrained channel with areas of potential shoaling. What are the proposed lengths, beams and depths of the barges? How will the increase in barge traffic be managed to prevent near-misses or groundings? Safety factors should be considered, such as requiring the use of Automatic Identification System (AIS) on board each tug and tow and improved AIS monitoring capability for the upriver portion of the Columbia River. These potential impacts should be analyzed in an EIS.

4. Increased Rail Traffic Could Result in Potential Environmental Impacts:

The Public Notice states that there will be eleven coal trains traveling weekly to the Port of Morrow at full build-out. Ecology assumes that the trains will be making round trips. Thus, it appears that this proposal would result in 22 additional train trips to and from the proposed facility, or slightly over 3 trips per day. We understand that the trains will travel on BNSF tracks from the Powder River Basin, traveling through Spokane, and then continuing southwest through Washington until crossing the border in the south to Oregon.

The trains associated with at least two of the other proposed facilities are expected to travel this same route in Washington. Those proposals at full build-out could result in approximately 18 daily trips (Gateway) and 16 daily trips (Millennium Bulk). Thus, a minimum of 37 coal trains might daily transit the same route. The rail traffic from some of the other proposals may also travel the same route, further adding to the potential for environmental impacts of increased traffic.

In 2006, the Washington State Transportation Commission published a Statewide Rail Capacity and System Needs Study.² The study shows a rail system that is at, or over, capacity in several critical areas along the rail line. Specific to the present proposal, Figure 3 in the study shows that rail capacity is constrained along much of the BNSF route from Sandpoint to Oregon and is congested in the Spokane area. Figure 4 in the study shows Spokane as a “choke point” in the rail system. Rail capacity issues are an important challenge for this proposed project, especially when considered cumulatively with the other proposals.

The increase in coal train traffic also presents the potential for other environmental impacts of concern. For example, coal dust is known to be emitted from uncovered coal cars during transit. The length and number of trains could result in longer wait times at at-grade crossings for emergency personnel and members of the traveling public. Increased trains could result in noise impacts and increased air emissions, including diesel particulate emissions. The potential for these and other types of impacts have not gone unnoticed by communities located along this corridor. Many are expressing strong concerns about the potential for significant environmental impacts that could occur from the cumulative impacts of these proposals. These communities' concerns and these potential impacts should be considered in an EIS for the proposal.

5. The Corps' Regulations and NEPA Require Consideration of Both Direct and Indirect Impacts that would be Proximately Caused by a Proposal:

Some of the impacts identified in this letter, such as those associated with facility operations, are direct impacts of the project. Some of the impacts, such as those arising from increased vessel

² The study can be found at <http://www.wstc.wa.gov/Rail/RailFinalReport.pdf>.

and rail traffic, may be more properly described as “indirect” impacts, which CEQ defines in 40 C.F.R. §1508.8(b) as those impacts “which are caused by the action and are later or farther removed in distance, but are still reasonably foreseeable.” Both direct and indirect impacts must be considered under NEPA.

All impacts which are “proximately caused” by the proposal under consideration should be analyzed in a NEPA document. In *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court defined proximate cause as “a reasonably close causal relationship between the environmental effect and the alleged cause.” Consistent with this standard, courts have required federal agencies to take a hard look at indirect impacts that would be proximately caused by a proposal, even if those impacts are well outside of the immediate vicinity of the proposal and/or are further removed in time from the proposal itself. For example, the Ninth Circuit Court held that BLM needed to look at the indirect impacts of transporting and processing refractory ore prior to making permit decisions on a mine proposal. *South Fork Band Council of Western Shoshone v. Dep't of Interior*, 588 F.3d 718, 725-26 (2009).

Corps' regulations define the scope of what the Corps considers under NEPA. Typically, the Corps focuses its analysis on “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.” 33 C.F.R. Part 325, App. B §7(b). In urging the Corps to look at cumulative impacts associated with increased vessel and rail traffic, Ecology notes that it is not asking the Corps to expand the scope of its NEPA analysis beyond what is required under the Corps' regulations. Rather, vessel and rail impacts are indirect impacts that are expected to be proximately caused by the proposal that is pending before the Corps. For that reason, those impacts are appropriately considered in an EIS.

6. Conclusion:

Because of the confluence of several coal export proposals in the Oregon-Washington region, it is imperative that a federal agency consider the cumulative impacts of these proposals. In fact, in 40 C.F.R. §1508.25(a)(3), CEQ authorizes agencies to analyze similar actions in the same EIS, and notes that an agency “should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.”

Should the Corps decline to do this broader cumulative impact analysis as part of a single EIS, it is still imperative that agencies making permit decisions on individual projects consider the direct, indirect, and cumulative impacts of those decisions.