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**To:** [Gagnon, Steven K NWP](#); [Latcu, Misty M NWP](#)  
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**Subject:** FW: Thoughts from today's briefing on the export terminals (UNCLASSIFIED)  
**Date:** Friday, August 31, 2012 5:59:12 PM  
**Attachments:** [Millennium EIS MFR.pdf](#)  
[NEPA-Significance.pdf](#)

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Classification: UNCLASSIFIED  
Caveats: NONE

Steve, Misty, et al.,

Great work preparing me for today and thanks for your efforts. The below note is one I sent to COL Funkhouser just now. Want you to have visibility on it. As we develop the EIS letter, I'd really like all of the potential effects laid out as I've done below in terms of defining the effect, placing it in context, and indication of the degree of influence of each of the 10 intensity factors. If one doesn't apply to any degree, we should say so. I don't want to leave anything to doubt as to our interpretation. That's the only way I see of thoroughly developing our letter that will be defensible within and outside of the agency.

COL Ike

-----Original Message-----

From: Eisenhauer, John W COL NWP  
Sent: Friday, August 31, 2012 5:58 PM  
To: Funkhouser, Anthony C NWD  
Subject: Thoughts from today's briefing on the export terminals (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Sir,

Just wanted to add some thoughts having had some more time to think about today's "information" brief.

First, to MG Walsh's comment re: foreseeable actions on slide 4, I think we're talking semantics, but in this realm words have real meaning. Based on case law, "foreseeable" and "proposed" have the same meaning. For the projects at Coos Bay and St. Helens, the appropriate term, and the one we'll use going forward, is "speculative" since no agency subject to NEPA is working an action at them at this time.

Regarding the discussion on the significance of River Navigation and Tribal Treaty Rights, we'll continue to look at both, but won't have our final determination until such time as we're ready to issue our decision to go to an EIS. Note that we'll be using many of the same arguments that NWS used in their EIS determination (see first attachment), so as to be consistent in our approach. As this was an "information" brief today, did not expect that exceptional details/justifications to pre-decisional matters would be required, especially as it relates to moving from an EA to an EIS. The following text is intended to show you at least one path that leads us to an EIS. Also, not sure what due-outs, if any, HQs needs if they are not going to assume the decision authority. This is an exhaustive e-mail, and I feel a need to be this explicit following the series of questions today during an "information" briefing.

Note that the EA is a screening document used to determine if an agency will need to prepare either an EIS or construct a FONSI. It is not meant to be an exhaustive effort to thoroughly explore all effects, but rather guide the determination of whether or not there is a significant impact. It's going to do the applicant no good to finalize an EA since I have determined that "it is obvious an EIS is required". Not to do so will only further delay the final permitting decision. I'll be sure to "document . .

.reasons for requiring an EIS". Note that it only takes one significant action to trigger an EIS. I'll give you one example here that is guiding a decision to go towards an EIS.

According to the NEPA Regulations adopted by the President's Council on Environmental Quality (CEQ) (40 CFR 1500-1508), the term significantly is based on the twin criteria of context and intensity (40 CFR 1508.27).

Context means the affected environment in which a proposed action would occur; it can be local, regional, national, or all three, depending upon the circumstances.

Intensity means the degree to which the proposed action would involve one or more of the following 10 factors:

- Adverse effects associated with "beneficial projects";
- effects on public health or safety;
- unique characteristics of the geographic area (e.g., historic resources, park lands, prime farmland, wetlands, wild and scenic rivers, ecologically critical areas);
- degree of controversy;
- degree of highly uncertain effects or unique or unknown risks;
- precedent-setting effects;
- cumulative effects;
- adverse effects on scientific, cultural, or historical resources;
- adverse effects on endangered or threatened species or designated critical habitat (pursuant to the Endangered Species Act); and
- violations of federal, state, or local environmental law.

One example for this permit application:

Significant Indirect Effect - River Navigation/Traffic: The Federal action will have an indirect effect (caused by the action and later in time or farther removed in distance, but still reasonably foreseeable) of increasing (from our estimates doubling) barge traffic in the Columbia River Gorge. From CEQ Regulation 1508, Section 1508.8, "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."

- CONTEXT: The gorge holds federally protected status as a National Scenic Area called the Columbia Gorge National Scenic Area and is managed by the United States Forest Service. It is a highly used local, regional, and national recreation area very well known for its wind-/kite-surfing activities, scenic beauty, fishing, etc.

- INTENSITY: The Federal action will result in a minimum 50% increase in barge traffic through the affected area. This increased barge traffic involves an extremely high degree of controversy (we've received over 30,000 comments from the public on this issue versus our normal receipt of less than 1,000 comments on typical projects and have also been asked to look at it by the EPA and USFWS) and a high degree of involvement with the unique characteristics of the geographic area (e.g., one of only two Federally designated/protected national scenic areas).

Supporting legal precedent for this reasoning is attached. There are two cases in particular that are pertinent: National Parks & Conservation Association v. Babbitt (9th Cir. 2001); and, Public Citizen v. Department of Transportation (9th Circuit 2003).

John

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Caveats: NONE

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MEMORANDUM FOR THE RECORD

SUBJECT: Determination of the requirement for an Environmental Impact Statement (EIS) for the Millennium Bulk Terminals Longview project.

**1. Decision authority:** Pursuant to 40 CFR 1501.3, “*An assessment is not necessary if the agency has decided to prepare an environmental impact statement.*” Pursuant to the U.S. Army Corps of Engineers’ NEPA Implementation Procedures for the Regulatory Program, the District Engineer has the discretion to not prepare an environmental assessment “. . . where it is obvious an EIS is required. However, the district engineer should document his reasons for requiring an EIS.” (see Part 33 CFR 325, Appendix B, Section 7(a)). The Corps’ NEPA regulations state that the scope of analysis under NEPA should address the “specific activity requiring a [Corps] permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review.” 33 C.F.R. pt. 325 App. B Section 7(b)(1). This MFR documents why the subject Department of Army permit application, as currently proposed, requires preparation of an environmental impact statement (EIS).

**2. Application number and applicant:** NWS-2010-1225, Millennium Bulk Terminals Longview, LLC (MBTL)

**3. Permit authority:** This permit action is being taken under authority delegated to the District Engineer from the Secretary of the Army and the Chief of Engineers by Title 33 CFR Part 325.8, pursuant to:

- Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403)
- Section 404 of the Clean Water Act (33 U.S.C. §1344)

**4. Location of work:** In the Columbia River at River Mile 63 and adjacent wetlands near Longview, Cowlitz County, Washington (Figure 1).

**5. Description of proposed work:** The scope of analysis under NEPA for this initial review includes MBTL’s proposal to construct and operate a coal export terminal on approximately 100 acres of a 416-acre site along the north bank of the Columbia River just west of Longview, Washington (Figure 2). The applicant intends to ship coal mined in the Powder River Basin in Montana and Wyoming to the terminal using existing BNSF rail lines, temporarily store the coal at the terminal, and then load the coal onto Panamax-class ships for transport to Asia. The terminal would consist of railcar unloading, coal storage, and ship loading facilities with a nominal capacity of 44 million metric tons per year (Figure 3). MBTL proposes to construct two new structurally independent piers connected by a conveyor and vehicle access ramp. A single access trestle for the two piers would be constructed to minimize environmental impacts. Four coal stockpile pads served by a balloon track with parking for eight trains, two ship loader systems, and appurtenant facilities and infrastructure would also be constructed. The piers and

access trestle in the Columbia River would be supported by 608 total 48-inch-diameter steel piles. Table 1 lists the amount of overwater cover of the proposed structures in the Columbia River at different water depths.

Table 1. Overwater cover of proposed structures in the Columbia River.

Water Depth (ft CRD) <sup>1</sup>	Trestle Area (including pile caps) <sup>2</sup> (ft <sup>2</sup> )	Pier 2 Area (ft <sup>2</sup> )	Pier 3 Area (ft <sup>2</sup> )	Total Area (ft <sup>2</sup> )	Total Area (ac)
+10.9 (OHWM) to 0	15,230	--	--	21,895	0.50
0 to -10	3,382	--	--		
-10 to -20	3,283	--	--		
-20 and below	8,672	122,610	80,664	211,946	4.87
<b>Total</b>	<b>30,567</b>	<b>122,610</b>	<b>80,664</b>	<b>233,841</b>	<b>5.37</b>

<sup>1</sup> At Longview, WA, 0.0' CRD is equivalent to -2.49' NAVD88 and +2.38' MLLW.

<sup>2</sup> Area of concrete pile caps that would extend beyond the trestle.

Sewer, water, electrical, compressed air, telecommunications, other utility lines, and a stormwater collection system would be attached to the trestle and pier structure. MBTL proposes to operate dust suppression systems and enclosed conveyors and transfer points to contain coal dust and any spillage. On land, stormwater would be collected and treated onsite prior to being discharged into the Columbia River.

The proposed project could result in permanently filling approximately 20-22 acres of formerly forested wetlands, approximately 3-10 acres of existing wetlands, and 10,560 linear feet of jurisdictional ditches (Figure 4). The former wetlands were illegally cleared and filled between July 2006 and April of 2009 by the prior lessee of the site, Chinook Ventures. An undetermined (but small) amount of formerly forested wetlands were cleared but not filled. MBTL, the current lessee, was not involved in the violation but has volunteered to work with the Corps to resolve this violation.

To accommodate fully loaded Panamax-class ships at the terminal, MBTL proposes to dredge approximately 500,000 cubic yards of substrate over a 48-acre area along the riverward side of the proposed piers. Current bottom elevations in this area range from -21 to -42 feet Columbia River Datum (CRD). The proposed dredging would lower the bottom elevation to a target depth of -43 feet CRD plus a 2-foot overdredge allowance. The material would be disposed of in the flow lane of the Columbia River at a site that would be determined by the Corps of Engineers, Portland District. MBTL expects to conduct regular maintenance dredging in the future but has not provided specific information about the anticipated extent or frequency of that work.

**6. Project purpose:** At this time, MBTL's stated project purpose is "...to establish a Coal Export Terminal capable of handling up to 44 MMTPA with existing and efficient rail access and sufficient berthing area for ocean-going ships transloading material from an American Pacific Coast port for export to Asia. While achieving this purpose, MBTL would reuse and transform

*an existing industrial or 'brownfields' site.*" The Corps has preliminarily determined that the basic project purpose is to export coal and the overall project purpose is to construct a rail-to-ship transfer facility to export western coal to Asia. At this time, the full range of sources of the coal has not yet been determined and the export market is presumed to be limited to Asia.

**7. General environmental setting:** The project site, located at 4029 Industrial Way, in Longview, Washington, is owned by Northwest Alloys (NWA), a wholly-owned subsidiary of Alcoa. The property is located along the north bank of the Columbia River in unincorporated Cowlitz County, the western-most portion of a strip of shoreline area stretching east to the Cowlitz River and adjacent to the city of Longview to the north. The lands in the vicinity of the property are currently zoned for mixed-use light industrial, heavy industrial, and commercial uses. The site is located west (downstream) of Longview's port and industrial shoreline area and east of the Port of Longview.

In 1923, the Consolidated Diking Improvement District No. 1 (CDID #1) established the right of way for the Columbia River Levee and constructed the levee along the length of the property fronting the Columbia River. The levee facilitated development of the project site for various industrial uses over time including an aluminum smelter, industrial landfill, cryolite recovery, and industrial wastewater treatment. The most recent uses of the 416-acre site have been importing, handling, and exporting a variety of bulk materials and sub-leasing to other parties for other industrial activities. MBTL began operating the bulk materials facility in January 2011.

Adjacent properties are owned by the Port of Longview, CDID #1, Burlington Northern Santa Fe Railway Company (BNSF), Bonneville Power Administration (BPA), and Weyerhaeuser Company. To the west (downstream), the Port of Longview property is currently undeveloped but includes electrical transmission line towers. MBTL also owns a portion of the land between the Port of Longview property and the Columbia River. To the east, the Weyerhaeuser property contains a number of large buildings used in pulp and paper production, including a sawmill and chemical plant. To the north, between the site and Highway 432/Industrial Way, are properties owned by BNSF and BPA containing primarily railroad and electrical infrastructure. NWA and BPA own adjacent properties on the north side of Highway 432/Industrial Way. High-tension electrical power lines cross that area, which is largely undeveloped though previously modified by drainage projects.

The NWA property (project site) is generally flat and includes the Columbia River Levee adjacent to the river and a former U.S. Army Corps of Engineers dredged material disposal site located along the river on the east end. A gravel access road runs along the top of the Columbia River Levee.

Industrial activities pre-dating MBTL have altered the project area to varying degrees. Since the aluminum smelter closed in 2001, much of the site has been decommissioned or re-purposed. Ongoing activities, located primarily near the center of the property, include bulk material storage and conveyance, sanitary sewer and wastewater treatment, stormwater retention, and offices. Decommissioned infrastructure associated with prior uses include a former cable plant (west), pot lines and cast houses (central), and cryolite plant (east). The west and east ends of

the site include areas formerly used for landfill and industrial mud disposal, and a closed black mud pond containment facility.

There is little vegetation where current and/or former industrial infrastructure occurs. The portion of the project site between the former cable plant and the black mud pond consists of trees to the north and a cleared area to the south, and is crossed by roads. Much of land over the former landfill and mud disposal areas is vegetated with herbaceous and/or shrubby vegetation and crossed by a variety of roads and rail lines. The capped black mud pond is covered by grass. Areas adjacent to the levee are maintained (mowed) grasses with a narrow, discontinuous fringe of riparian vegetation comprised largely of shrubs, except along the eastern part of the property where there are also areas of trees. The ponded area between the dike and the Columbia River at the former Corps dredged material disposal area was created by a previous site tenant excavating sand from the area.

The land within the footprint of the proposed coal terminal has been altered by the construction and operation of industrial infrastructure and facilities, contaminant disposal facilities, landfill and disposal areas, and road and rail corridors. Vegetation covering the landfill and disposal areas consists primarily of weedy herbaceous species and shrubs.

Shoreline vegetation on the project site is limited due to extensive diking and riprapping along the Columbia River. In some areas, vegetation exists in a narrow strip between the dike and the river; most of this vegetation is maintained in grass through mowing by the CDID #1. A narrow strip of scrub-shrub vegetation (e.g., willow, blackberry) dominates above the waterline, while riprap and large root wads characterize the waterline. Shallow water habitat occurs in a 300- to 550-foot-wide zone along the shoreline between the +4 feet and -10 feet CRD elevations. The river bottom drops fairly steeply from -10 to -20 feet CRD; deep water substrate, which begins at -20 feet CRD, is characterized by an unvegetated silty sand substrate.

Approximately 20-22 ac of formerly forested wetlands in the project area were cleared and largely filled by the previous leaseholder, Chinook Ventures, without Department of the Army authorization. As discussed in Section 5, above, the Corps and MBTL, the subsequent leaseholder, are working to resolve this violation separately from the coal terminal permit application evaluation.

**8. Functions and values assessment of resources impacted:** The historical use of the project area and adjacent properties for industrial activities have greatly altered the resources currently found on and near the site.

Shoreline vegetation along the Columbia River is generally limited to a narrow strip between the levee and the river composed primarily of willow (*Salix spp.*), red elderberry (*Sambucus racemosa*), cottonwood (*Populus spp.*), rushes (*Juncus spp.*), sedges (*Carex spp.*), and various non-native shrubs and grasses including Himalayan blackberry (*Rubus armeniacus*). Grassy areas are regularly mowed by the CDID #1. This shoreline vegetation provides habitat for migratory and resident birds and small mammals, and shading and food web support for aquatic species. This habitat is of relatively low value because of its limited area of occurrence, low species diversity, and low quality due to recurring maintenance activities. However, given the

general condition of riparian habitat along the Columbia River in the vicinity of the project area, even low value habitat has some importance.

Shallow water habitat exists primarily from the toe of the dike (at +4 feet CRD) to -10 feet CRD. Deepwater habitat begins at approximately -20 feet CRD. Shoreline and shallow water habitats are important to the aquatic species using the area. All populations of Pacific salmon and steelhead and eulachon spawning within the Columbia River basin use the Columbia River mainstem and estuary to complete part of their life history, including migration, rearing and smoltification. The nearshore environment (shallower than -20 feet CRD) is an area where out-migrating juvenile salmon and steelhead in the river find refuge and food. These are important areas for juveniles to avoid high flows, avoid predators, successfully compete, begin the behavioral and physiological changes needed for life in the ocean, and reach the ocean in a timely manner. This area is also particularly important for eulachon migration. The Cowlitz River, which flows into the Columbia River approximately five miles upstream of the project area, is a very important natal stream for eulachon. Many of the species found in the vicinity of the project area are listed as threatened or endangered under the Endangered Species Act. Designated critical habitat for several ESA-listed species also occurs in the vicinity of the project area. Steller sea lions, protected under the Marine Mammal Protection Act, migrate through the area following fish runs. Essential Fish Habitat for Pacific salmon also occurs in the project area.

Prior to the unauthorized clearing and filling that occurred between July 2006 and April of 2009, the project area contained approximately 25-30 ac of a diverse mix of forested, scrub-shrub, and emergent wetlands that provided high quality wildlife habitat, moderate food web support, floodwater storage, and water quality enhancement. These wetlands supported a variety of migratory and resident birds and small mammals. A portion of the remaining forested wetland that would be impacted by the proposed on-site rail operations contains an active heron rookery.

**9. Relationship to existing uses:** The project site is located in an area zoned for commercial and industrial use. The area contains developed industrial sites, several of which depend on direct access to the Columbia River. Surrounding lands are typically zoned for commercial, residential, and agricultural uses. MBTL currently operates a separate adjacent bulk products terminal handling such materials as alumina for Alcoa, coal for the neighboring Weyerhaeuser Company site, green petroleum coke, and cementitious materials. Based on the available information, the Corps has determined this bulk products terminal operates independently on an adjacent, but separate, part of the NWA property.

The Columbia River is heavily used for commercial/industrial transportation, recreational and Tribal fishing, and recreational boating. The commercial vessel traffic includes both ocean-going vessels and barges.

**10. Description of potential impacts of concern (including short term/long term and direct/indirect impacts):** The following is a discussion of the potential impacts of the project as currently proposed. This discussion is intended to identify potential impacts of concern rather than to serve as an exhaustive evaluation of impacts.

## A. Physical and/or Chemical Characteristics.

Water Quality. Short-term impacts related to construction could include increased turbidity and suspended sediments during dredging, in-water disposal of dredged material, and piling installation. Any future maintenance dredging would likely have similar short-term impacts to water quality each time maintenance dredging is conducted. Long-term impacts from operation of the facility would primarily be associated with stormwater discharges, pollutants entering the water from the handling of the coal, equipment used on the trestle/pier, and rail operations. MBTL would need to comply with the most recent State Stormwater runoff guidelines and obtain any applicable state/local permits.

Water Quantity and Flow Regime. Construction of the terminal would result in a substantial increase in impervious ground cover, as well as loss of on-site surface water storage capacity if on-site wetlands and ditches are permanently filled. This could modify local drainage patterns and increase runoff rates in the project area.

Air Quality. Construction activities would result in a short-term increase in vehicle emissions and particulate matter air pollution (e.g., airborne dust). Operation of the facility, including handling of the coal and emissions from vehicles, rail engines, and vessels, could also result in an increase in airborne dust. In particular, coal dust could become airborne from unloading rail cars, stockpiling coal on site, conveying stockpiled coal to the piers, and loading ocean-going ships. The extent of the impact of coal dust on air quality in the vicinity of the coal terminal would depend on the specific coal handling equipment and procedures used by MBTL.

Drainage Patterns. Constructing the coal terminal as proposed would leave on-site wetlands permanently filled, eliminating nearly all previously existing stormwater storage capacity, and further alter local drainage patterns on this already highly disturbed industrial site.

## B. Biological Characteristics.

Endangered Species. Construction and operation of the coal terminal, including maintenance dredging, would likely adversely affect a number of aquatic species due to increased suspended sediment and turbidity, increased noise, disturbance of migration and foraging behaviors, and degradation of habitat. Long-term effects caused by operating the terminal could include permanent loss of habitat, interference with juvenile salmon migration, high noise levels, and reduced water quality. The proposed overwater structures would likely affect aquatic species both directly (e.g., lighting conditions, predator-prey interactions) and indirectly (e.g., long term changes in sediment accumulation patterns, substrate character, and water quality). Shading from overwater structures reduces the amount of light energy available for photosynthesis for phytoplankton and algae, each of which is an important part of the food web supporting juvenile salmon in the nearshore environment. Heavily shaded areas can delay fish migration and drive juvenile salmon, eulachon, and other smaller fish into deeper waters where they face increased risk of predation.

Additional large vessel traffic in the Columbia River resulting from the MBTL project could cause ship wake stranding of juvenile salmon, increase the risk to marine mammals of ship



strikes, interfere with marine mammal migration and breeding. Based on the Corps' preliminary analysis, construction and operation of the proposed coal terminal are likely to result in take to the following ESA-listed species and adverse modification of their designated critical habitats:

- Upper Columbia River Spring-run Chinook (*Oncorhynchus tshawytscha*), endangered
- Snake River Spring/Summer-run Chinook (*O. tshawytscha*), threatened
- Snake River Fall-run Chinook (*O. tshawytscha*), threatened
- Lower Columbia River Chinook (*O. tshawytscha*), threatened, and designated critical habitat
- Upper Willamette River Chinook (*O. tshawytscha*), threatened
- Lower Columbia River coho (*O. kisutch*), threatened
- Columbia River chum (*O. keta*), threatened, and designated critical habitat
- Upper Columbia River steelhead (*O. mykiss*), threatened
- Snake River Basin steelhead (*O. mykiss*), threatened
- Middle Columbia River steelhead (*O. mykiss*), threatened
- Lower Columbia River steelhead, (*O. mykiss*), threatened, and designated critical habitat
- Upper Willamette River steelhead, (*O. mykiss*), threatened
- Snake River sockeye salmon (*O. nerka*), endangered
- Columbia River Basin bull trout (*Salvelinus confluentus*), threatened, and designated critical habitat
- Southern DPS green sturgeon (*Acipenser medirostris*), threatened
- Southern DPS Pacific eulachon (*Thaleichthys pacificus*), threatened , and designated critical habitat
- Steller sea lion (*Eumetopias jubatus*), threatened
- Leatherback sea turtle (*Dermochelys coriacea*), endangered, and designated critical habitat
- Humpback whale (*Megaptera novaeangliae*), endangered.
- Marbled murrelet (*Brachyramphus marmoratus*), threatened.

Essential Fish Habitat (EFH). Based on the Corps' preliminary review, construction and operation of the proposed coal terminal is likely to adversely affect EFH for Pacific salmon due to the permanent loss of habitat resulting from the installation of 608 total 48-inch-diameter piles, dredging a 48-acre area in the river to maintain a bottom elevation of -43 feet CRD, and degradation of habitat from reduced water quality, increased shading and noise, and vessel traffic that interferes with habitat use.

Special Aquatic Sites. (Sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, as defined in 40 CFR 230.40-45). Construction of the proposed terminal could result in the permanent loss of 25-30 acres of wetlands and up to two miles of drainage ditches, some segments of which have wetland characteristics. Approximately 20-22 acres of forested wetlands on the project site were cleared and filled by the previous leaseholder without Department of the Army authorization. Remaining wetlands, including some that were cleared but not filled, are interspersed among the filled wetland areas. MBTL, which had no involvement in the illegal work, is voluntarily working with the Corps to resolve this violation. Currently available information indicates these wetlands were a relatively high functioning mix of forested, scrub-shrub, and emergent wetlands.

Fish and Wildlife. Constructing the coal terminal piers and access trestle and would likely impact fish, shellfish, benthic and epibenthic organisms, birds, and pinnipeds and other marine mammals due to construction noise (particularly installation of piling), replacement of habitat by piling, increased turbidity, and disruption of migration. Upland construction would affect terrestrial wildlife primarily through habitat loss and changed foraging behavior caused by increased noise and vehicle traffic.

Benthic Flora & Fauna. Impacts would include the permanent loss of 7,640 square feet of benthic substrate that would be replaced by 608 total 48-inch-diameter piles, temporary (though likely repeated) impacts to 48 acres of deep water habitat from dredging (virtually the entire area to be dredged currently has a bottom elevation of -21 feet CRD or lower), and habitat degradation from shading by 5.37 acre of new overwater structures. Dredging is likely to repeatedly degrade or destroy already limited habitat, disrupt foraging opportunities for fish species, and destroy or displace benthic and epibenthic organisms.

### C. Human Use Characteristics.

Cultural Resources and Historic Properties. The State Historic Preservation Officer (SHPO) has indicated historic buildings are present in the uplands. The SHPO is also concerned the wakes from a large number of additional deep-draft vessels would cause additional shoreline erosion and substantively increase the likelihood of exposing cultural resources currently buried in the banks of the lower Columbia River. A documented archaeological site located in the project area could also be impacted as a result of increased large vessel traffic.

The Cowlitz Indian Tribe was contacted because of its close historical association with the general area. In a preliminary response, the Tribe recognized the area has been substantially affected by past industrial development and did not provide specific concerns about the project's potential impact on cultural resources or fishing rights. The tribe expressed general concern about the potential impacts of the proposed project on wetlands, groundwater, and habitat.

Navigation. Constructing the piers and access trestle would involve a number of vessels ferrying materials to the site and barges facilitating pile driving and installation of overwater structures, which would likely adversely affect navigation in the vicinity of the project area during construction. At full capacity, MBTL's coal terminal would load two deep-draft Panamax-class vessels per day resulting in about 730 additional trips per year in the lower Columbia River. This represents an increase of about 50% in the 1,500 deep-draft vessels currently using the Columbia River's navigational channel each year. In addition, there are a number of reasonably foreseeable other projects in the lower Columbia River that would result in substantive increases in deep-draft vessel traffic. For example, the Port of Kalama's grain storage and loading modernization project (currently under construction), Port of Longview's recently constructed grain terminal, Port Westward's proposed coal transloading facility, Port of Vancouver's proposed potash export terminal, and other bulk material handling facility proposals are likely to further increase the number of deep-draft vessel trips in the lower Columbia River by at least one thousand trips per year.

Marine Sanctuaries. The project area is not located in or near a marine sanctuary.

Noise. Construction of the piers and access trestle, particularly pile driving, would result in short-term noise level increases over ambient levels. In uplands, land clearing, grading, and construction of terminal facilities would also substantially increase noise at the project area during the construction period. Operating the terminal would result in a permanent increase in noise from such continuously occurring activities as unloading coal train cars, managing the coal stockpiles, operating the conveyor system, loading ships, and moving trains and ships in and out of the terminal facility. Although operation of the terminal would be continuous, noise levels would be expected to be highly variable.

Transportation. Construction activities would temporarily impact local traffic as construction material, equipment, and personnel come and go from the project site. Operation of the terminal would increase rail and vehicular traffic in Longview's industrial area along the Columbia River for the foreseeable future. The increase in vehicular traffic (primarily from terminal employees) is not likely to be substantial. However, approximately 16 mile-and-a-half-long trains (8 arriving loaded with coal, 8 returning empty to the mines) would be expected to pass through the industrial area of West Longview along the Columbia River on existing tracks. Each train would typically consist of 4 to 5 locomotives and 125 to 150 cars each carrying between 102 and 121 tons of coal, depending on the specific type of coal car. This additional rail traffic would almost certainly cause additional traffic delays and safety hazards at rail crossings, including vehicle and pedestrian collisions.

Other Evaluation Factors. Other factors likely to be affected to some degree by the proposed project include shoreline erosion and accretion, economics, aesthetics, general environmental concerns, recreation, energy needs, safety, and the general needs and welfare of the people. The Corps has received preliminary inquiries from individuals and non-governmental and governmental organizations regarding the potential impacts of the proposal. Additional information and analysis are needed to determine the significance of these impacts.

#### D. Summary of Cumulative Impacts.

The Council on Environmental Quality (CEQ) regulations define a 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 (40 CFR 1508.7). For purposes of this initial review of the project's likely impact on the human environment, the cumulative impacts analysis includes the Columbia River from Bonneville Dam to the mouth of the Columbia River and Longview, Washington and vicinity. It is believed this scope will provide an effective initial analysis of the cumulative impacts of the proposed project.

The Columbia River drains a 259,000-square-mile basin in seven states (Oregon, Washington, Idaho, Montana, Nevada, Wyoming, and Utah) and one Canadian province. It flows for more than 1,200 miles, from the base of the Canadian Rockies in southeastern British Columbia to the Pacific Ocean at Astoria, Oregon, and Ilwaco, Washington. Although humans have lived along the river for more than 10,000 years, modern engineering in the 19th and 20th centuries has dramatically altered the Columbia. Engineering projects on the river began with navigation canals at Cascade Locks in 1896 and at The Dalles-Celilo in 1915. In 1932, private power

companies completed Rock Island Dam on the middle river. In 1933, the federal government began work on Bonneville Dam on the lower river and Grand Coulee Dam on the upper river. By 1975, eleven dams stood on the main stem of the Columbia River and more than 400 stood on its tributaries, generating a total of over 21 million kilowatts of electricity.

At Longview, the bank of the Columbia River has been greatly altered over the last century by industrial development and upstream hydropower projects. The city of Longview began in the 1920s with construction of the Columbia River Levee and, beginning in 1923, construction of the Long-Bell Lumber Company on 2,000 acres of land along the Columbia River. Longview is a planned city built initially to house the 14,000-person workforce needed for the two Long-Bell mills. By 1927, the Port of Longview, Weyerhaeuser Timber Company, and Longview Fibre Company had each constructed major facilities along the river at Longview. Development of these industrial facilities required substantial diking along the river and backfilling behind the dikes since most of the land at these facilities was low, flat, and subject to flooding and high water tables. In 1941, Reynolds Metals Company started construction of a major aluminum plant along the river.

The 1980 eruption of Mount St. Helens has resulted in a continuous input of substantial amounts of sediment and ash into the Columbia River via the Toutle and Cowlitz Rivers. The lack of natural flushing floods due to upstream hydropower development and significant sediment input from Mount St. Helens has substantially increased deposition of sediment along the bank of the Columbia River at the Longview industrial area. Regular maintenance dredging is required at a number of sites in the Longview industrial area to allow continued use by deep-draft vessels.

A majority of wetlands in the project vicinity within the Longview area have been, or are still, affected by industrial activities. Many historic drainages, including those in the project basin, have been manipulated or channelized. Recent developments in the project vicinity include expansion of existing industrial sites, residential and commercial developments. The project area has experienced extensive disturbance over at least the past century due to road building, rail development, gas line and power line installation, homesteading, forest harvesting, industrial development, and other development. Together these land uses have resulted in filling, ditching, and draining of wetlands, rerouting of streams, clear-cut logging and other vegetation removal, levee construction, and shoreline degradation. Habitat and water quality in the river has been affected by shoreline armoring, construction of overwater structures, maintenance dredging, installation of stormwater outfalls, and increased impervious surface area along the river.

The proposed work would perpetuate many of the impacts caused by construction of the aluminum plant in the 1940s, although it would also involve a substantial site clean-up operation to remediate environmental contamination left by previous users/owners of the site. Additional impacts would likely result from construction and operation of new overwater structures, permanent filling of wetlands and drainage channels, handling coal, and maintaining a 48-acre deep water moorage area.

Based on the currently available information, the proposed action would likely have notable cumulative impacts on air and water quality, endangered species, habitat for fish and other aquatic habitat, special aquatic sites (wetlands), navigation, and transportation. The direct and

indirect impacts of the proposed action (both short- and long-term) are described above. There are a large number of existing and reasonably foreseeable industrial facilities along the Columbia River and its major tributaries (e.g., Snake River, Willamette River) involving the import and export of materials and products. There are at least 12 Lower Columbia River Ports, and a number of larger cities, such as Portland, Vancouver, and Longview, with additional industrial areas adjacent to the ports. Virtually all these facilities degrade or destroy important shoreline and nearshore habitat, interfere with fish migration, degrade air and water quality, hinder private and commercial navigation, and increase ship and rail traffic.

Given the anticipated likely impacts of the proposed action, as described above, and the extensive environmental impacts of past and reasonably foreseeable industrial and commercial development along the Lower Columbia River, the cumulative impacts of the proposed action appear to be significant.

#### E. Proposed Mitigation.

The Corps permit process would ensure the project's likely adverse impact to the aquatic environment are avoided and minimized to the extent practicable. MBTL plans to propose appropriate and practicable compensatory mitigation for impacts that cannot be avoided or further minimized. No compensatory mitigation plan has been submitted to the Corps to date.

### **11. Other Applicable Federal and State Laws and Treaty Rights.**

#### A. Federal and State Laws.

Endangered Species Act – Formal consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service would be required under Section 7 of the Act.

Magnuson Stevens Fishery Conservation and Management Act – Consultation with the National Marine Fisheries Service would be required.

Marine Mammal Protection Act – Consultation with the National Marine Fisheries Service would be required.

National Historic Preservation Act – Consultation with the Washington State Historic Preservation Officer and certain Tribes would be required under Section 106 of the Act.

Coastal Zone Management Act – The project is not located in a coastal county and does not require certification of consistency with the Washington Coastal Zone Management Program.

Section 401 of the Clean Water Act – The project would require certification by the Washington Department of Ecology that the work complies with applicable State and Federal water quality standards pursuant to Section 401 of the Act.

## B. Treaty Rights.

A number of Indian Tribes have fish harvest interests in the Lower Columbia River, including the Nez Perce Tribe, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Warm Springs Reservation of Oregon (all members of the Columbia River Inter-Tribal Fish Commission (CRITFC)) and the Cowlitz Indian Tribe. CRITFC member tribes have expressed their concern about the potential impacts of the three coal terminal projects proposed in the Lower Columbia River on their treaty fishing rights, and have requested government-to-government consultation on these projects. These tribes have not specified how the MBTL project might impact their fishing or other treaty rights. The Cowlitz Indian Tribe, although not a treaty tribe, has also requested government-to-government consultation regarding the MBTL project and other coal terminal projects in the Columbia River.

**12. Evaluation of Significance:** Pursuant to Section 102(2)(C) of the NEPA, CEQ's implementing regulations at 40 CFR Part 1500, and the Corps' implementing regulations at 33 CFR Part 230 and 33 CFR Part 325, Appendix B, Federal agencies must include a detailed environmental impact statement in every recommendation or report for a major Federal action significantly affecting the quality of the human environment. To determine whether a Federal action would significantly affect the quality of the human environment, CEQ regulations require the proposed action be evaluated in terms of context and intensity (40 CFR 1508.27).

A. Context: The significance of an action must be analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality (40 CFR 1508.27(a)). Significance varies with the setting of the proposed action, and both short- and long-term effects are relevant.

The MBTL coal terminal project, as currently proposed, would have a significant impact on the human environment at the local and regional levels. The proposed work would likely result in the permanent destruction of 25 to 30 ac of wetlands adjacent to the Columbia River. Wetlands in the Longview area and much of the Lower Columbia River region have been heavily impacted over the last century, primarily by industrial development, and are becoming a limited resource. Therefore, there would be a significant regional impact.

The shoreline and nearshore aquatic environments along the Lower Columbia River and the lower reaches of its major tributaries have also been heavily impacted by industrialization and urbanization. The proposed project would degrade or destroy a significant amount of in-water habitat due to the shading (5.37 acres) of overwater structures, regularly dredging a 48-acre basin, and in-water disposal of the dredged material. The initial amount of in-water disposal would likely be about 500,000 cubic yards and, based on maintenance dredging at nearby industrial ship loading/unloading facilities, could amount to additional dredging and in-water disposal of several hundred thousand cubic yards every few years. These impacts would have significant permanent effect on aquatic species that use the near-shore environment, particularly those federally listed fish species depending on nearshore habitat to forage and find refuge from predators as they migrate from their natal streams to the Pacific Ocean.

The proposed project would result in increased rail traffic locally in the region and could create congestion with other rail traffic. The details of the rail traffic have not been fully determined so the likely impact to local and regional rail traffic cannot, at this time, be fully analyzed. However, the public throughout the Pacific Northwest has already raised the project's potential impacts to rail traffic and the associated impacts from using rail to transport coal as significant concerns. The proposed project could also result in significant impacts to local traffic with the increased number of trains traveling through the south Longview area between the BNSF mainline and coal terminal.

By volume, the Columbia River is the largest North American river flowing into the Pacific Ocean, discharging an average of about 265,000 cubic feet per second. The Columbia River is the fourth largest river by volume in the United States. The mouth of the Columbia River is subject to heavy shoaling, high currents, and bad weather, making it one of the more dangerous ship crossings in the United States and requiring a pilot to guide each vessel through the mouth of the river. The size of the Columbia River allows heavy use for commerce. Operation of the proposed terminal would increase current deep-draft vessel on the Columbia River by about 730 round trips per year, or by about 50% of the current large vessel traffic, further congesting vessel traffic in the lower 60 miles of the Columbia River. Increasing the volume of vessel traffic by this amount through the mouth of the river would significantly affect navigation.

B. Intensity: This refers to the severity of impact. The CEQ has identified ten factors (listed below) a Federal agency should consider in determining the significance of a proposed action (40 USC 1508.27(b)(1)-(10)).

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

Impacts from the construction and operation of the MBTL coal terminal would include temporary construction impacts; permanent loss of wetlands and other aquatic resources; degradation of aquatic habitat for ESA-listed species; increases in noise, air, and water pollution; repeated maintenance dredging; and increased road, rail, and river traffic. These impacts would be long-term and adverse. Beneficial impacts from this proposal include environmental clean-up of the site prior to construction.

(2) The degree to which the proposed action affects public health or safety.

The proposed project would increase the amount of industrial activity in the Longview area. Similar to other large bulk materials handling facility, operation of the proposed terminal could affect public health due to changes in air and water quality. Increased road and rail traffic supporting the terminal could affect public safety, particularly in the local area. The public throughout the Pacific Northwest has raised concerns about potentially significant public safety and human health issues associated with transporting such large amounts of coal by train to the MBTL terminal and other proposed coal export facilities in the northwest.

(3) Unique characteristics of the geographic area, such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

The project area is located in an existing industrial area along the Columbia River. The site does contain structures and cultural resources that could possibly be determined to be historic properties upon further evaluation. The Lower Columbia River provides critical habitat and passage for 20 federally listed fish and mammal populations, many of which migrate to the upper reaches of the Columbia River's 259,000-square-mile watershed.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

There is a high level of public controversy surrounding this project, particularly among the large number of environmental and citizens organizations opposed to the project. These groups, as well as a number of government officials, state agencies, and Indian Tribes have already expressed their concerns in writing. In general, concerns appear to be focused on impacts to human health and public safety from transporting coal to the terminal, impacts to endangered species and navigation in the Columbia River, and such general impacts as regional air and water quality, global warming, and increased rail and road traffic.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

There is some degree of uncertainty about undiscovered pollutants from previous industrial activities on the site that could be encountered during construction. There is also some uncertainty about the impact the work might have on potentially historic and/or cultural properties. There is also uncertainty about both the direct and indirect impacts of handling coal, particularly coal dust, on the local environment and human health. However, none of the possible effects of the proposed project appear to be highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

Industrial development in the project vicinity (i.e., the Longview industrial waterfront area) is likely to continue to meet demands for industrial sites with direct access to highways, rail, and shipping. This type of industrial development, particularly for transporting bulk commodities, is common in the Lower Columbia River and this project is not likely to set any precedent for future actions.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.



The proposed coal terminal project is a single and complete project and not known to be related to other actions proposed by MBTL or others.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

The State Historic Preservation Officer (SHPO) has indicated the project could impact historic structures (e.g., former aluminum plant buildings) in uplands in the project area. The SHPO has also noted concerns about the wakes of additional deep-draft vessels eroding Columbia River streambanks and exposing cultural resources buried in the banks of the river; possible impacts to an archaeological site in the project area; and impacts to the Columbia River Scenic Gorge from increased rail traffic passing through that area. The Cowlitz Indian Tribe staff recently expressed preliminary concerns about the impacts of the project on wetlands, groundwater, and habitat but did not provide specific concerns about cultural or historic resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

Based on currently available information, the proposed work is likely to result in take of ESA-listed fish species and adverse modification of designated critical habitat. The Corps has made preliminary “may affect, likely to adversely affect” determinations for 13 Columbia River salmon and steelhead ESUs and their designated critical habitats, bull trout and its designated critical habitat, eulachon and its designated critical habitat, green sturgeon, and the Steller sea lion. The Corps has made preliminary “may affect, but not likely to adversely affect” determinations for green sturgeon critical habitat, leatherback sea turtle and its designated critical habitat, humpback whale, and marbled murrelet.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

None of the actions proposed by MBTL knowingly threatens violation of any laws. However, there is an existing violation on the property. The previous leaseholder of the property, Chinook Ventures, mechanically cleared and/or filled 20-22 acres of wetlands and other waters of the U.S. without Department of the Army authorization. MBTL is voluntarily working with the Corps to resolve this unauthorized activity under Section 404 of the Clean Water Act. The Corps and MBTL are holding preliminary discussions about developing a settlement agreement that would compensate for the temporal environmental impacts of the violation to date and provide clear agreements on a final resolution depending on the outcome of the coal export terminal permit decision. Final resolution options include authorizing the permanent fill of all wetlands illegally cleared/filled with appropriate and practicable compensatory mitigation, fully restoring all impacted sites, or some combination of after-the-fact authorization, restoration, and compensatory mitigation.

**13. EIS Determination.** Based on a review of the project's potential impacts, and after considering the context and intensity factors outlined above, our staff recommendation is to require an Environmental Impact Statement (EIS). It appears the proposed project may have a significant individual and/or cumulative impact on the following elements of the human environment:

- Special aquatic sites
- Endangered species
- Navigation
- Air quality
- Fish habitat
- Benthic flora and fauna
- Transportation
- Tribal Treaty rights

I have found sufficient preliminary information is available on which to make this determination and, therefore, no agency or public participation is necessary at this time. Based on the project evaluated in this assessment, authorization of this project would be a major Federal action significantly affecting the quality of the human environment, which, therefore, requires preparation of an EIS to comply with NEPA. A scoping process will begin after a notice of intent has been published to inform the public of the issues to be addressed by the EIS.

13 JUL 12

Date



Bruce Estok  
Colonel, Corps of Engineers  
District Engineer

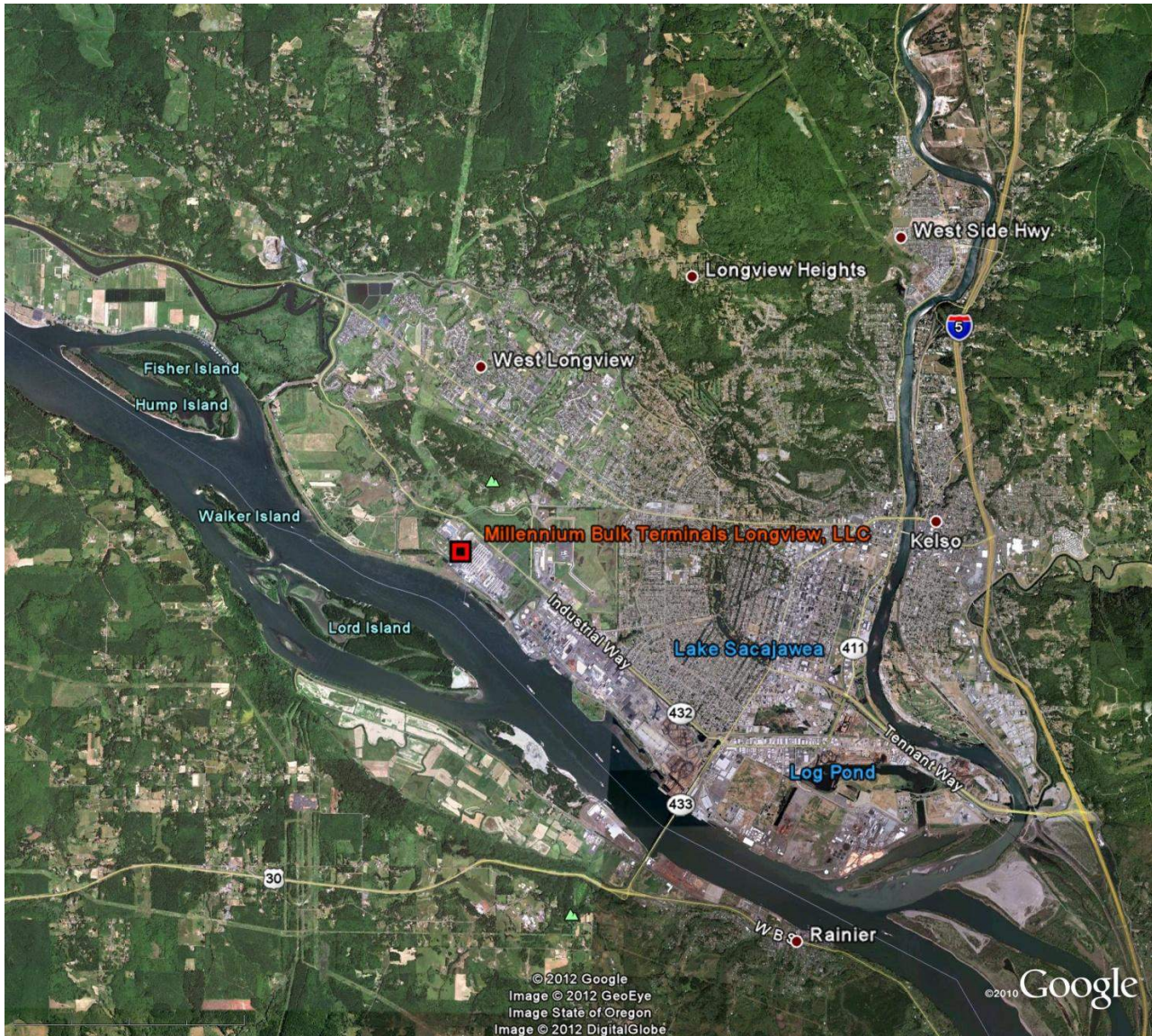


Figure 1. General location of MBTL Coal Export Terminal project.



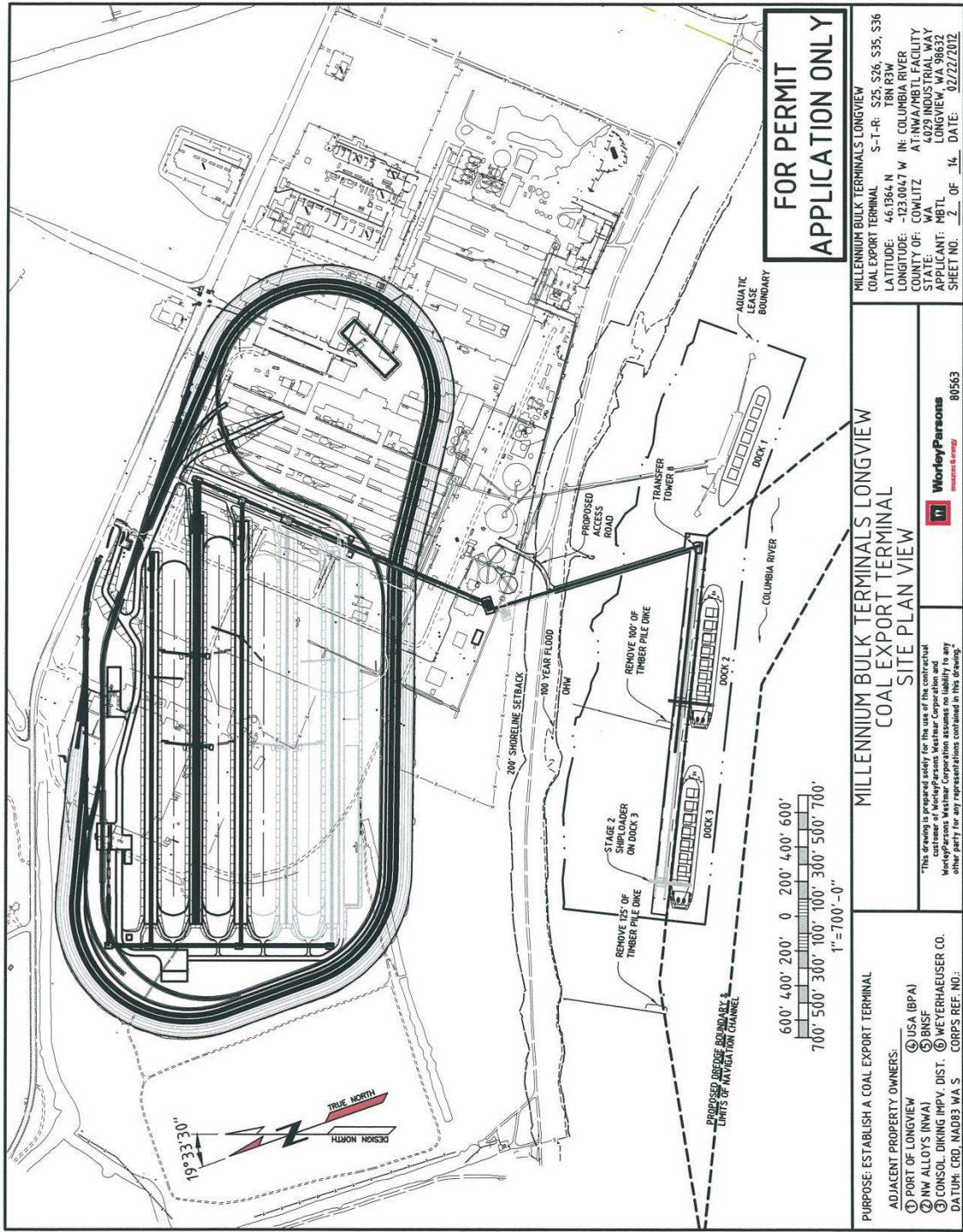


Figure 3. General site plan of MBTL Coal Export Terminal project.

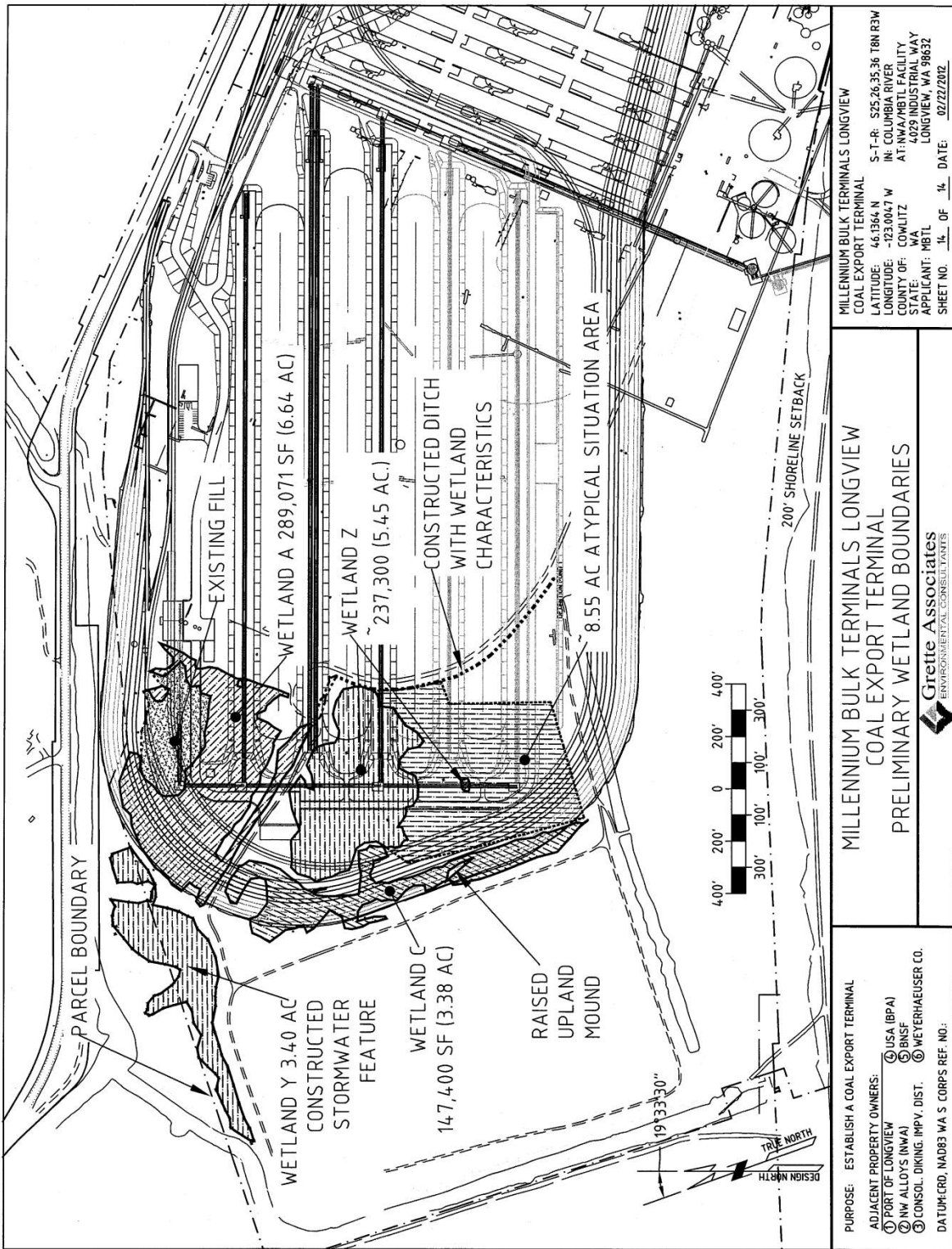


Figure 4. General location of wetlands on the MBTL Coal Export Terminal project area based on a preliminary delineation that has not been verified by the Corps of Engineers.

## Determining "Significance" Under NEPA

### Recent Court Decisions Highlight the Importance of "Context" and "Intensity"

#### Introduction

The National Environmental Policy Act (NEPA) requires federal agencies to prepare an environmental impact statement (EIS) for any proposed action "significantly affecting the quality of the human environment." Because of this requirement, the word *significantly* is one of the key terms used in NEPA compliance. The presence of significant environmental effects triggers the requirement to prepare an EIS; the absence of significant environmental effects allows a federal agency to prepare a Finding of No Significant Impact (FONSI). To assist federal agencies in determining the appropriate level of analysis and the concomitant requisite documentation, an environmental assessment (EA) is typically prepared to determine the presence of significant effects.

Because the EIS is a more detailed document than a FONSI and requires a more extensive preparation process, federal agencies typically favor preparation of an EA to support a FONSI. According to the U.S. Environmental Protection Agency, federal agencies annually prepare more than 50,000 EAs leading to FONSI, contrasted with about 500 EISs. Despite this overwhelming trend in NEPA compliance, the conclusion of *no significant impact* is often not well supported by the accompanying EA.

According to the NEPA Regulations adopted by the President's Council on Environmental Quality (CEQ) (40 CFR 1500-1508), the term *significantly* is based on the twin criteria of *context* and *intensity* (40 CFR 1508.27).

#### Defining Context and Intensity

*Context* means the affected environment in which a proposed action would occur; it can be

local, regional, national, or all three, depending upon the circumstances.

*Intensity* means the degree to which the proposed action would involve one or more of the following 10 factors:

- Adverse effects associated with "beneficial projects";
- effects on public health or safety;
- unique characteristics of the geographic area (e.g., historic resources, park lands, prime farmland, wetlands, wild and scenic rivers, ecologically critical areas);
- degree of controversy;
- degree of highly uncertain effects or unique or unknown risks;
- precedent-setting effects;
- cumulative effects;
- adverse effects on scientific, cultural, or historical resources;
- adverse effects on endangered or threatened species or designated critical habitat (pursuant to the Endangered Species Act); and
- violations of federal, state, or local environmental law.

#### Recent Court Decisions

Unfortunately, neither those regulations nor most agency NEPA procedures provide adequate guidance about how to use the criteria in decision-making. The failure to document and discuss these criteria can leave a federal agency vulnerable to legal challenge. Three recent decisions in the 9th Circuit Court of Appeals illustrate what can happen if agencies misapply the context and intensity criteria.

***National Parks & Conservation Association v. Babbitt* (9th Cir. 2001) 241 F 3d. 722**

The National Park Service (NPS) was asked to increase the number of large cruise ships and other tour boats that would be allowed in Glacier Bay National Park, Alaska. To support its decision to allow such an increase, the NPS prepared a FONSI supported by an EA, in which it concluded that the increase would not “significantly affect the quality of the human environment.” The National Parks & Conservation Association disagreed and challenged the agency for failing to prepare an EIS.

The court began its decision by noting:

Glacier Bay National Park and Preserve is a place of unrivaled scenic and geological values associated with natural landscapes and wildlife species of inestimable value to the citizens. The Bay was proclaimed a national monument in 1925 and a national park in 1980. UNESCO designated Glacier Bay an international biosphere reserve in 1986 and a world heritage site in 1992.

Against this *context*, the court then considered three of the intensity criteria in the CEQ NEPA regulations: (1) the unique characteristics of the geographic area, (2) the degree to which the effects of the project were controversial, and (3) the degree to which the effects were uncertain.

In view of its opening remarks, the court had little problem concluding that the Glacier Bay environment represented the classic example of “unique characteristics,” the impacts on which would likely be significant. Because the unique characteristics were undisputed, the court then focused on the other two criteria.

With regard to *uncertainty*, the NPS admitted that for every issue discussed in the EA, environmental impacts would occur, but concluded that the degree of such impacts were “unknown” or “uncertain.” Additionally, by way of mitigation, the NPS committed to: (a) postapproval monitoring of the increased ship traffic; (b) postapproval ecological studies to

determine the extent of ecological impacts; and (c) development of additional postapproval management programs that could possibly reduce the impacts.

The court found that there was considerable *uncertainty* regarding both the possibility of impacts of increased ship traffic and the effectiveness of proposed mitigation measures to actually reduce the impacts. In evaluating the NPS’s efforts, the court concluded that the agency did not take NEPA’s requisite “hard look” at the environmental consequences prior to project approval. Further, the court noted that the lack of predecision environmental information was the very problem that NEPA (and EISs in particular) had been designed to address.

With regard to *controversy* the decision also held that the EA was deficient. In reaching this conclusion, the court focused both on the sheer volume of negative comments (citing “An outpouring of public protest”) and the fact that the majority of the comments related specifically to the uncertainty of the impacts.

***Anderson v. Evans* (9th Circuit 2002) 314 F 3d. 1006**

A Native American tribe proposed to resume whale hunting in a particular part of Puget Sound in the state of Washington. In approving the resumption of hunting, the National Oceanic and Atmospheric Administration (NOAA) prepared a FONSI supported by an EA in which it concluded that the hunt would not “significantly affect the quality of the human environment.” The lawsuit followed. In its decision, the 9th Circuit considered both the *context* of the proposal and several of the *intensity* factors.

With regard to *context*, the court held that a resource may be “locally significant” even if it is not significant from a regional or national perspective. Accordingly, the court concluded that the relatively small resident whale population in the Puget sound rendered the context significant.



With regard to *intensity*, the court found that the NOAA failed to correctly decide three of the ten *intensity* factors: *controversy*, *uncertainty*, and *precedent-setting effect*. The court found that the EA neither adequately addressed the three factors, nor was it supported by evidence on the record. Consequently, the court held that the resumption of whaling had the potential to “significantly affect the quality of the human environment” and accordingly ordered the preparation of an EIS.

***Public Citizen v. Department of Transportation*  
(9th Circuit 2003) 316 F 3d. 1002**

The U.S. Department of Transportation prepared a FONSI supported by an EA in connection with proposed regulations that would allow certain Mexican trucks to be driven in the U.S. under the North American Free Trade Agreement. The FONSI was challenged on the basis that the agency’s conclusion of nonsignificance of the impacts was improper under several of the *context* and *intensity* criteria in the CEQ NEPA regulations. The appellate court agreed.

With regard to *context*, the court held that the agency used the wrong context when it compared future truck emissions to a national emissions inventory rather than to the local air pollution situation in the border communities where the impacts would occur. According to the court, this use of the wrong context resulted in the agency understating the significance of the air quality impacts. The fact that most border communities were already in violation of air quality standards was an important factor in the court’s reasoning.

With regard to *intensity*, the court found that the agency had misused four of the 10 criteria found in the CEQ NEPA regulations. First, it failed to consider the adverse public health aspects of the new regulations. Second, the agency overlooked the high level of uncertainty regarding future levels of truck traffic and the resultant emissions. According to the court, the uncertainty itself was a trigger for a finding of significance. Third, the agency failed to consider that the increased truck emissions would likely

violate both the California and federal Clean Air Acts. Finally, the court found that the overwhelming outpouring of public protest (90% of comments in opposition) was a trigger for the *controversy* criterion of significance.

## How to Avoid Problems

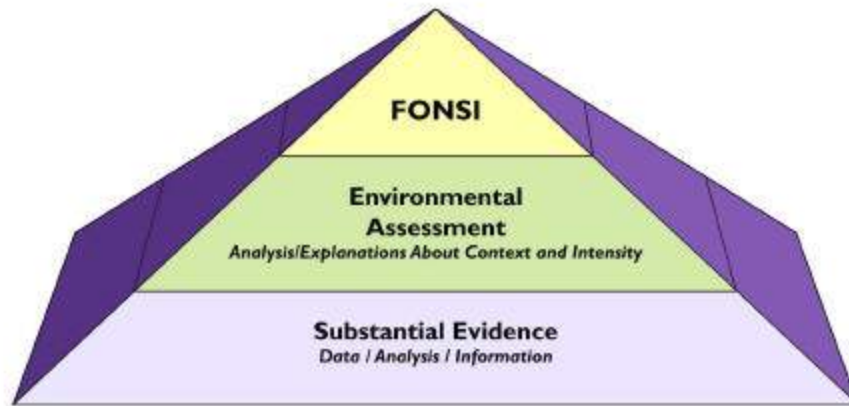
As emphasized by the foregoing decisions, when a federal agency intends to rely on a FONSI for NEPA compliance, it must convincingly demonstrate - with either hard data, certain and definitive mitigation measures, or both - that the impacts of the proposed action would not be significant. This is best done by a systematic and careful evaluation of the context and intensity criteria, with the necessary factual documentation to support its conclusions of nonsignificance.

One way of ensuring that context and intensity get proper consideration is to develop an EA worksheet or checklist that explicitly incorporates the context and intensity factors. This worksheet should include a discussion of context and all relevant intensity factors for each resource of the human environment potentially affected by the federal action.

Further, to support a FONSI, an agency’s EA must include an explanation, supported by substantial evidence, for each of the context and intensity factors. If an agency intends to use the EA to support a FONSI there must be substantial evidence to support the conclusion that all the impacts would not be significant (see figure, Page 4). If, on the other hand, substantial questions remain unanswered about the significance of environmental impacts, the agency should prepare an EIS.

The above cases suggest that, at least in some instances, federal agencies may attempt to predetermine that an EIS will not be necessary and then use the EA to rationalize that conclusion-whether or not the evidence supports it. To avoid such problems, federal agencies should stop using EAs as surrogates for EISs. Rather, the EA should be used as intended by the CEQ regulations: as a tool to determine the whether to prepare an EIS or a FONSI.

## Determining Significance with the FONSI Pyramid



To support a FONSI, a lead agency must document and explain in the EA that the impacts of a proposed action would not be significant. Accordingly, the analysis in the EA must include a discussion of the applicable context and intensity factors for each resource that would be affected by the proposed action. It should explain why the combination of context and intensity would result in significant or nonsignificant impacts.

The conclusions regarding significance in the EA must, in turn, be based on substantial evidence that consists of data, analysis, and information. This relationship may be schematically represented by a pyramid, in which the FONSI is supported by the EA, which is in turn supported by the substantial evidence.

The more solid the pyramid that the lead agency builds, the better that agency's chances of withstanding challenges to its decision to rely on a FONSI.

**NOTE:** In the April 2003 *Environmental Update* regarding recently voided CEQA Guidelines sections, it was noted that Section 15152 (f)(3)(c) was voided, but the text was not struck out in the update. Please note that this section

was, indeed, voided by the California Court of Appeal in its *Communities for a Better Environment v. California Resources Agency* (2002) [103 Cal.App.4th 98] decision.

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