

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

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BEFORE

**THE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENERGY AND POWER**

UNITED STATES HOUSE OF REPRESENTATIVES

ON

**“U.S. Energy Abundance: Regulatory, Market and Legal Barriers to
Export”**

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Chairman Whitfield, Ranking Member Rush, and Members of the Subcommittee, I am Jennifer Moyer, Acting Chief of the Regulatory Program for the U.S. Army Corps of Engineers. Thank you for the opportunity to discuss the Army Corps of Engineers (Corps) regulatory authorities under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act (CWA). I will specifically discuss the Corps' role in the permitting of shipping facilities, with a focus on coal and the issues currently being discussed in the Pacific Northwest.

Background on Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act

Section 10 of the Rivers and Harbors Act of 1899 gives the Corps authority to ensure that there are no obstructions to the navigable waters of the United States. Under this authority, the Corps regulates work and/or structures within navigable waters related to activities such as: construction of piers, jetties, and weirs; dredging projects; and other such projects. Section 404 of the Clean Water Act (CWA) established a program to regulate the discharge of dredged or fill material into "waters of the United States." Under the Section 404 authority, the Corps regulates discharges of dredged or fill material into jurisdictional waters of the United States including wetlands. Such discharges often are associated with activities such as highway construction; residential, commercial, and industrial developments; energy projects; and a variety of other projects. In addition to these two authorities, the Corps regulates the transport of dredged material for dumping in ocean waters under Section 103 of Marine Protection Research and Sanctuaries Act (MPRSA). In reviewing project proposals, the Corps must comply with other applicable statutes and regulations.

The Secretary of the Army, acting through the Chief of Engineers, has delegated responsibility for making final decisions on permit applications to the commanders in the 38 Corps districts. The regulatory program is implemented day-by-day at the district level by staff that knows their regions and resources, and the public they serve. Nationwide, the Corps makes tens of thousands of final permit decisions annually. In all but the very rarest of circumstances, these decisions are made at the district level. When implementing the Corps regulatory program, the Corps is neither an opponent nor a proponent for any specific project – the Corps' responsibility is to process permit applications in accordance with all applicable laws and regulations, in order to make fair and objective and timely permit decisions. This responsibility of the Corps district includes preparing the appropriate environmental analysis and other appropriate work under the applicable laws and regulations.

Existing Export Facilities for Coal

Information produced by the U.S. Energy Information Administration indicates that seaports on the Gulf Coast and East Coast have accounted for most U.S. coal exports over the past ten years. These facilities are located in the Baltimore, Norfolk, Mobile, and New Orleans areas. About 65 percent of the total U.S. exports of 107 million tons in 2011 was coking coal, which is used in making iron and steel. In 2012, U.S. exports increased to about 126 million tons due to a substantial increase in the amount of steam coal (used for generating electricity) exported at the Norfolk and New Orleans ports. Depending on the originating and port locations, this coal is shipped to the port facilities over existing rail networks or by barge on the inland waterways

navigation system. The New Orleans and Norfolk Districts of the Corps have received some objections while processing applications for Section 10 and/or Section 404 permits for the construction and operation of expanded coal export facilities in the New Orleans and Norfolk areas.

National Environmental Policy Act (NEPA)

NEPA's mandate is to ensure a fully informed and well-considered decision and that agency conclusions be supported by critical thinking and reasoned analysis of the potential environmental consequences of a proposed agency action, such as a decision on a pending permit based on project-specific facts. NEPA does not mandate any particular result but ensures agencies fully explain the choices made. Corps NEPA documents should be fully transparent with the public, inform the decision-maker, and provide a sound basis for the decision on the Department of the Army permit application. They should also address, concurrently whenever practicable, the other relevant environmental requirements including any necessary consultation or coordination.

The Corps must identify the federal action under consideration and must decide, for purposes of NEPA, whether the Corps has sufficient "control and responsibility" for activities outside of its regulatory jurisdiction such that the issuance of a Corps permit would amount to approval of those activities. For purposes of the Corps regulatory program, the definition of "federal action" is straightforward. The Corps focuses its NEPA analysis on the federal actions defined either by the discharge of dredged and/or fill materials into waters of the United States, and/or by any work in navigable waters.

The specific activity requiring authorization by a Corps permit may, at times, be merely one component of a larger project involving upland activities. Identifying aspects of a broader project over which the Corps may have "control and responsibility" by virtue of its permitting authorities requires careful consideration. Pursuant to the provisions of its Appendix B NEPA regulations, the Corps includes in its reviews the specific activity requiring a Corps permit and those portions of the activity over which the Corps has sufficient control and responsibility to warrant review by the Corps under NEPA.

Proposed Shipping Facilities in the Pacific Northwest Under Review

The Corps is evaluating proposals at three separate and independent shipping facilities in the Pacific Northwest that would require Department of the Army (DA) permit authorizations, as issued by the Corps. Because those three new facilities would involve placing structures in or over navigable waters and/or the discharge of dredged or fill material in other waters of the United States subject to Clean Water Act (CWA) jurisdiction, all three proposed projects require DA permits under Section 10 of the Rivers and Harbors Act of 1899 (RHA) and/or Section 404 of the CWA. The three proposed export terminals in Washington and Oregon have created considerable public interest, in part because the facilities' primary purpose would be to receive coal via rail from the Powder River Basin in Wyoming and Montana, and to ship that coal via barges and Panamax vessels for use in other locations, including Asia. Two of these proposed terminals would be located on the Columbia River – Coyote Island at Port of Morrow, OR (~mile point 270), being evaluated by the Portland District; and Millennium Bulk Terminal at Longview, WA (~mile point 63), being evaluated by the Seattle District. The

third of the proposed terminals, called the Gateway Pacific Terminal, located near Bellingham, WA on the Puget Sound, is also being evaluated by the Seattle District.

Although the proposed shipping facilities share a similar purpose, the facts and circumstances related to each differ substantially. Each of the three proposed facilities would cause very different types of impacts that are subject to regulation under the Corps Section 10 and/or Section 404 regulatory authorities. Section 103 of the MPRSA is not triggered by any of the proposed facilities.

Other potential shipping facilities (e.g. Coos Bay, Grays Harbor, etc.) have also been discussed during in the past several months: however, the Corps is not currently engaged in discussions with or processing permit applications for any facilities beyond the three identified above.

When considered in accordance with the laws and regulations discussed above, many of the activities of concern to the public, such as rail traffic, coal mining, shipping coal outside of U.S. territory, and the ultimate burning of coal overseas, are outside the Corps' control and responsibility for the permit applications related to the proposed projects. We note that coal mining in the Powder River Basin has been occurring for many years, with that coal being shipped by rail to many different destinations. The potential change in rail traffic patterns is beyond the control and expertise of the Corps, and requires no involvement from the Corps. Coal produced from the Powder River Basin currently transits the rail system to various destinations. Similarly, the possible future shipment of coal by oceangoing vessels across the Pacific Ocean beyond the limits of U.S. navigable waters, and the possible future off-loading, distribution, and burning of coal in Asia are attenuated and far removed from the activities regulated by

the Corps at any of the three shipping facilities. Commercial markets drive the need for and destination of coal which could change regardless of the Corps decision regarding the proposed activities in waters within our jurisdiction.

The draft NEPA EIS documents that will be available for public review will explain the Corps' approach to these issues. Indeed, the Corps expects to receive many comments on these issues from the public and from sister federal, state, and local agencies given the substantial interest in the production, transport, and use of coal that may transfer through a port facility that requires a Corps permit for some aspect of its construction. At that point, the public will be able to provide detailed feedback for the Corps to consider as it develops its final NEPA documents.

Preparation of NEPA Documents for the Three Pacific Northwest Shipping Facilities

The Corps Seattle and Portland Districts are currently reviewing three separate proposals (one for each of the three proposed terminals) and preparing a project-specific NEPA document for each. Based on anticipated direct, indirect and cumulative impacts, the Corps is preparing a separate draft EIS for the Gateway project and another draft EIS for the Millennium project. For the Coyote Island project, the Portland District is currently preparing an environmental assessment. When that document is completed, the district will determine whether a site-specific EIS is required, or instead to prepare a Finding of No Significant Impact (FONSI). The scope of analysis that the Corps will establish in the review of each proposal will include the specific activity requiring a DA permit (issued by the Corps), the environmental impacts of that specific activity, and those portions of the entire project (that is, the portions that are beyond the

regulatory jurisdiction of the Corps) over which there is sufficient federal control and responsibility to warrant Corps NEPA review. The preparation of the NEPA documents for these projects is at an early stage.

The Corps has received feedback from members of the public suggesting that it should prepare a single EIS to assess the potential impacts of all three shipping facilities in the Pacific Northwest. Two concepts established by the Council on Environmental Quality NEPA regulations provide the framework for determining how to respond to these suggestions. First, the regulations require a programmatic EIS. One type of programmatic NEPA review is for a "federal action" that consists of "adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or directive." 40 C.F.R. 1508.18(b)(3). The second type of programmatic NEPA review is often referred to as "area-wide" or "regional", where the NEPA review focuses on a range of federal actions that share certain commonalities. These would include broad actions occurring in the same general location or having relevant similarities such as timing or impacts. 40 C.F.R. §§ 1502.4(b)-(c) and 1508.25. There is no compelling justification for the preparation of a "programmatic EIS" with respect to the three proposed facilities under review. The Corps does not build or finance the construction of these or other land-side port facilities, nor is it allocating its resources to implement any plan for development. Rather, the Corps is dealing with them in its regulatory program responsibilities. They are independent projects in different locations, whose impacts are not related. (See 40 C.F.R. 1502.4(b) and 1508.18(b)(3)).

Regulations at 40 C.F.R. 1508.25 address how a federal agency that has decided to produce an EIS should determine the "scope" of that EIS in terms of the "range of actions" to be considered. This "range of actions" does not include "unconnected single actions." 40 C.F.R.1508.25. Federal actions that should be considered together include "connected actions," "cumulative actions" (actions with cumulatively significant impacts), and "similar actions" (those that have similarities that logically could be considered together, such as actions with common timing or geography) 40 C.F.R.1508.25. "Connected actions" are separate actions that may automatically trigger another, actions that cannot or will not proceed absent related actions, or actions that are "interdependent parts of a larger action and depend upon the larger action for their justification." (The labels "area-wide" or "regional" are sometimes used to describe one EIS that assesses multiple proposed federal actions in a geographic area, because those actions are connected or similar, or would have cumulative environmental effects). The Corps has determined that neither a Programmatic nor an area-wide/regional EIS are appropriate when considering the proposed permits in light of based on these NEPA regulations.

In addition to the shipping facilities, there is also a separate permit application for a new BNSF rail spur at the Gateway Terminal. In this context, the Gateway Pacific and BNSF proposals are being considered in a single NEPA document because they fall within the regulatory definitions of "cumulative actions," "connected actions," and "similar actions." The applicants for both of these projects propose fill of wetlands on a defined site, with implications for cumulative impacts to that resource; both projects are "connected" in that they are parts of a larger development of a port facility and "similar"

in that they have common timing and are proposed for the same site.

However, the other permit applications, for the Millennium Bulk Terminal and the Port of Morrow proposal, are being considered in separate project specific NEPA documents – separate both from each other and from the analysis of the Gateway Pacific/BNSF project. The three proposed facilities are in different watersheds and are not sufficiently close to one another from a cumulative impacts perspective to justify one EIS for all three permit applications.

Summary

We are certainly aware of and appreciate the concerns that members of the public have expressed in association with the proposed shipping facilities in the Pacific Northwest. Our Seattle and Portland Districts are reviewing these proposals, and are carrying out the NEPA “scoping” process to determine which potential environmental effects to analyze in detail. As I clarified above, the scope of our analysis with respect to these proposals is defined by law and regulation. The Corps districts will therefore carefully consider each of these proposals on its merits, while appropriately bounding the scope of their analysis and their consideration of the impacts.

I appreciate the opportunity to be here today and I will be happy to answer any questions you may have.