PERMITTING COAL EXPORT TERMINALS IN THE PACIFIC NORTHWEST
An Overview of Regulations and the Political Context
Currently, four coal export terminal projects have pending permit applications in Washington State and Oregon. Additional permit applications are expected for two more facilities in the months ahead. The announced capacity of the six U.S. projects is over 150 million tons of coal per year, most of which would follow a single rail path through the region. The sudden interest toward opening up the U.S. west coast to coal exports from the Powder River Basin (PRB) has generated much controversy regionally and has been covered closely by the national media.

This paper focuses on the steps necessary to secure approval of these projects. It will identify some of the challenges that terminal proponents face in securing construction permits for these projects in a region known for its protective environmental standards and its informed and engaged citizens. Although many large industrial projects do successfully receive permits in this region, and although the organizations responsible for this white paper have supported many such projects, this overview explains how time-consuming the permitting process for projects that meet fierce public opposition can be—with uncertain results.

In summary, many federal, state, and local permits will be required before terminal proponents can begin construction of any project in Washington or Oregon. The permits address multiple air and water pollution concerns, land use, and protected wildlife species. Attendant to these permitting processes are comprehensive environmental reviews that allow extensive public participation. These reviews culminate in an environmental impact statement (EIS) that must disclose all environmental impacts between coal mines and terminal sites, and will address a range of pollution, economic, energy security, and global-climate concerns. Ultimately, the EIS will be used by various federal- and state-level decision-makers, many of them elected officials, to decide whether to authorize the projects.

Many of these decision-makers ran on platforms of environmental conservation and clean energy. There are abundant indications that these decision-makers will come under intense public pressure to deny permits. Opponents of the terminals include national organizations, as well as many local interests, and are diverse, politically powerful, and well-funded. Public opposition to these projects is substantial and growing. A few examples of this opposition: 40,000 petition signatures were sent to Washington State Commissioner of Public Lands Peter Goldmark; over 800 citizens attended a meeting on the Cherry Point GPT terminal simply to learn about the public involvement process; and dozens of letters, statements, and resolutions from local entities have been submitted on the coal exports issue. It is highly likely that permitting will also come under scrutiny from the public, the media, and other elected officials.
Permitting Coal Export Terminals in the Pacific Northwest — An Overview of Regulations and the Political Context

PERMITTING AND LEGAL OVERSIGHT

A large number of agencies and entities have a say in whether coal export terminals receive required permits, leases, and approvals. In some cases, those agencies simply ensure compliance with specific regulatory standards. In other cases, they will approve or deny projects based on a weighing of public benefits and harms. What follows is a discussion of the key agencies and other entities that must approve (or not oppose) the construction of proposed coal terminals in Washington and Oregon.

A. U.S. ARMY CORPS OF ENGINEERS

All coal export terminals need authorization from the U.S. Army Corps of Engineers under § 404 of the federal Clean Water Act (CWA), which regulates discharges of fill into wetlands or other waters of the United States, and/or § 10 of the Rivers and Harbor Act (RHA), which regulates activities that potentially affect navigation, such as the construction of piers or docks.2 A request for such approval triggers scrutiny by the Corps to ensure that water resources and commerce are not harmed.3 Federal guidelines require a “public interest review” for any Corps permit, and permits cannot be granted if they are “contrary to the public interest.” Standards for such review are broad, balancing “the benefits which reasonably may be expected to accrue from the proposal” with “its reasonably foreseeable detriments.”4 The Corps is required to consider “all factors which may be relevant to the proposal” as well as cumulative effects. The list of relevant considerations includes not just environmental concerns but also economics, flood hazards, navigation, energy needs, safety, and “in general, the needs and welfare of the people.” Additional criteria spelled out in the Corps’ public interest regulation include: “the relative extent of the public and private need” for the project; the practicability of alternatives that accomplish the objective of the project; and “the extent and permanence of the beneficial and/or detrimental effects” of the project.5 The Corps is explicitly empowered to conduct an “independent review of the need for the project from the perspective of the overall national interest.”6

In the event that the Corps grants authorization under these statutes, judicial review is available in federal court by private parties when the underlying permit was issued in violation of the CWA.7 These cases would most likely take place in the federal district court for the Western District of Washington or the District of Oregon. These courts are both part of the Ninth Circuit Court of Appeals and have extensive experience with federal environmental litigation.

Additionally, the U.S. Environmental Protection Agency has an explicit role under the CWA for these permits. Specifically, it has a statutory duty to “veto” §404 permits issued by the Corps that present unacceptable environmental impacts.8 While the EPA’s veto power is exercised sparingly, the agency frequently uses this authority to negotiate with the Corps, resulting in permit denial or in additional measures to ensure that resources are adequately protected.

B. FEDERAL AND STATE ENVIRONMENTAL REVIEW — NEPA/SEPA

Where the Army Corps’ issuance of a CWA or RHA permit has significant environmental effects, the National Environmental Policy Act (NEPA) requires a comprehensive environmental impact statement before the permit can be issued.9 An EIS is not a “permit” in itself. Rather, it is the analysis of environmental impacts (and available alternatives) that must be conducted prior to the issuance of any required federal permit. The purpose of such documentation is: (a) to ensure that permitting officials are fully apprised of the environmental consequences of their decision and accountable to the public for that decision and (b) to inform and engage the public in decisions with significant environmental impacts.

Two characteristics of NEPA review are worth mentioning. First, the process requires several stages and the involvement of multiple agencies. Under even the most optimistic assumptions, an EIS might take several years or more to complete. For example, in 2004, the Ninth Circuit Court of Appeals found that the Army Corps of Engineers needed to prepare a full EIS for another dock project near Cherry Point. Eight years after that decision, the Corps still had not finalized a draft.10 Environmental review of coal terminals—which should include a complex evaluation of rail impacts, mining, and global greenhouse gas emissions, as well as highly technical onsite issues relating to fisheries and wetlands—is expected to move slowly. Second, the NEPA process provides multiple stages for public input and participation, during which citizens can voice their views on the permits. At a recent meeting held in Bellingham simply to explain the public process for
the EIS for the Gateway Pacific Terminal (GPT), more than 800 citizens, virtually all opposed to the project, attended—even though the agencies were not yet accepting public comments. The Army Corps has to date received over 15,000 public comments asking for a comprehensive EIS at the Morrow Pacific Project in Oregon—one of the smallest and most distant of the proposed projects—including comments from multiple agencies, cities and towns, Indian tribes, and public officials.

The failure to adequately disclose the full range of environmental impacts in an EIS, as well as the failure to consider reasonable alternatives to the proposal in an EIS, is judicially reviewable in federal court. Recently, debate has shifted to the need for a single comprehensive process that looks at the cumulative impact from all of the coal terminals. Such a process, known under NEPA as a programmatic, area-wide or overview environmental impact statement (PEIS), would focus on the aggregate or shared impacts of all pending coal terminals in the Northwest. It would run independently of (and in addition to) the terminal-specific EIS processes and would involve the public from the Powder River Basin mining region to the coast. Governor John Kitzhaber of Oregon recently called on the Corps to perform a PEIS for all coal terminals, joining U.S. senators Jeff Merkley (OR) and Patty Murray (WA), the U.S. EPA, the Washington Department of Natural Resources, other sitting members of Congress, and thousands of citizens.

Washington State has its own version of NEPA, known as the State Environmental Policy Act (SEPA), which applies to any state or local issued permit. Like NEPA, SEPA requires a full EIS for any permit with significant environmental effects, including local building permits. For the Gateway Pacific Terminal project at Cherry Point, the Army Corps, the state Department of Ecology, and Whatcom County are “co-leads” on a single EIS that meets both NEPA and SEPA requirements. This extra level of interagency coordination has already significantly slowed the process, which has yet to formally begin. A similar process is expected for the Longview project.

SEPA provides explicit statutory authority for permitting entities to condition or deny permits that have significant environmental impacts that cannot be mitigated. In other words, even if a permitting agency’s authority is otherwise constrained to reviewing specific statutory criteria, SEPA allows that agency to expand the scope of its consideration and deny projects because of impacts to any environmental value that is recognized in state or local law. This means that either the local permitting entity (e.g. Whatcom or Cowlitz counties) or the state Department of Ecology has explicit authority under state law to deny permits for any Washington-based coal terminal due to concerns about significant and unavoidable global warming, health, or other environmental impacts.

C. WA DEPARTMENT OF NATURAL RESOURCES/ OR DEPARTMENT OF STATE LANDS

In Washington State, any project that involves placing infrastructure on the bed of a river or in marine waters—which are owned by the state in trust for its citizens—requires a lease from the state Department of Public Lands. In deciding whether to grant a requested lease, the Commissioner of Public Lands acts not as a regulator, but as a trustee for the public’s ownership interest in public property. The Commissioner has broad statutory authority to grant, condition, or deny such leases on the basis of the public interest. The Commissioner’s authority is particularly broad in the case of projects, like the Cherry Point terminal, sited within state-designated aquatic reserves.

The Commissioner of Public Lands is an independent elected official, not an appointee. The current commissioner is Democrat Peter J. Goldmark, a molecular scientist and rancher, who was elected in 2008 with strong support from conservation and climate organizations. In 2009, Commissioner Goldmark exercised this lease authority to effectively kill a controversial gravel-mining project in Puget Sound. Recently, Commissioner Goldmark was presented with 40,000 signatures on a petition, from every county in the state, asking him to deny leases for coal terminals in Washington. In a formal comment letter to the Army Corps of Engineers regarding the Morrow Pacific terminal, the Washington Department of Natural Resources (DNR) observed that the terminal could “harm the long-term economic and ecological vitality of Washington state-owned lands” and “threaten public health and impair recreational opportunities for the citizens of Washington.” Commissioner Goldmark will continue to receive heavy pressure from supporters and the public to take a strong stance against leases for coal terminals.

In Oregon, the state owns submerged and submersible lands underlying most waterways. The State Land Board (which includes the Governor, Secretary of State, and State Treasurer) and the Department of State Lands (DSL) are charged with managing state land, including
aquatic land leases. The director of the Department of State Lands is appointed by the governor. Coal companies proposing to build or expand in-water infrastructure, including docks and mooring dolphins, must obtain a lease from the DSL. Before issuing these leases, the DSL evaluates a series of constitutional and statutory requirements, State Land Board directives, and the public trust interests of all Oregonians.

In addition to obtaining the leases, project proponents must also secure “removal-fill” permits from the DSL to build or expand docks, or to conduct any deepening or dredging, for coal export. Before permits are issued, the DSL must determine that the project “[i]s consistent with the protection, conservation, and best use” of the state’s water resources, and “[w]ould not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.” The DSL has broad discretion to deny removal-fill permits based on the state’s policies that favor conservation, fishing, and recreation.

The Oregon public is highly engaged in these processes. For example, the DSL received over 7,000 public comments from Oregonians who opposed one project seeking such a removal-fill permit—the Morrow Pacific project—and the DSL recently decided to delay consideration of this permit for several months and provide more opportunities for public comment. At the State Land Board meeting in April, over 100 business owners, landowners, and citizens urged the State Land Board to exercise its authority to prevent the use of state-owned lands for coal export.

D. COUNTY/CITY GOVERNMENTS

Each terminal will require multiple permits from local governments for any activities such as building, clearing, and grading that are required to construct terminal infrastructure. For example, Whatcom County would issue permits for the Gateway Pacific Terminal, and Cowlitz County would issue permits for the Millennium Terminal in Longview. Permitting will require review not just for local development ordinances but also for the state Shorelines Management Act (SMA), a statewide permitting scheme intended to protect state waterways. As noted previously, these jurisdictions have broad authority under SEPA to condition or deny the requested permits based on a finding that they would have unacceptable environmental impacts. Under the SMA, judicial review of shoreline development permits occurs before an appointed administrative hearings board in a de novo evidentiary hearing. Under state law, the filing of an SMA appeal triggers an automatic injunction against any construction at the site until the appeal is resolved.

In Whatcom County, terminal permits are already a matter of extraordinary public interest and were an election issue in 2011 for both county executive and Bellingham mayor. The coal terminal will likely be a key issue in county elections that will occur prior to the issuance of any permits. With four seats on the seven-member council, project opponents could deny permits outright as an exercise of legislative discretion. Cowlitz County, WA, has just three commissioners—only two votes would be required to deny construction permits.

E. NORTHWEST INDIAN TRIBES

Most proposed coal terminals will be sited within the “usual and accustomed” fishing areas of Pacific Northwest Indian tribes, which have a sovereign government-to-government relationship with the U.S. federal government. For example, the Cherry Point project would be built within historic shell-fishing areas of the Lummi and Nooksack tribes—and on top of the spawning grounds of a critically important population of Puget Sound herring, which in turn sustains the local salmon population on which the tribes rely. While the tribes do not have a clearly defined regulatory role, they wield considerable influence over decisions that affect salmon and other fishing resources under federal court precedent that makes them “co-managers” of these resources along with the state. Simply put, if an effected tribe asks the Army Corps or state to deny a §404 or Rivers and Harbors Act permit due to demonstrated harm to salmon or other tribal resources, the issuance of such a permit becomes substantially less likely.

Northwest tribes have already begun to weigh in against the coal terminals. In a comment letter to the Army Corps regarding the Morrow project in Boardman, the Yakama Nation characterized coal export proposals in the Columbia as a “new front… in the war on the Yakama way of life,” describing in detail the risks to salmon, the safety of tribal fishermen, human health, water quality, and cultural resources. The Lummi Nation has emphasized publicly that it will review project impacts closely before making its own decision on the GPT project, recognizing that it would be the largest development in the region and “substantially impact the ability of Lummi fishermen to exercise their treaty rights.” A recent survey of the Lummi Nation’s members found that opponents outweighed supporters by almost 7 to 1. The Nez Perce have also commented on the Morrow project, requesting that the Army Corps...
perform an EIS and assess cumulative impacts, citing concerns about “Tribal treaty rights, ESA-listed fish and lamprey and their habitat, Tribal traditional use areas along the coal transportation corridor, tribal cultural resources, and Tribal member health arising from coal dust and diesel pollution.”

The Columbia River Intertribal Fish Commission (CRITFC), which represents four sovereign tribal nations (the Warm Springs, Confederated Tribes of Umatilla Indian Reservation, Yakama Nation, and Nez Perce) with treaty rights to salmon and other fish on the Columbia River, has also expressed opposition to the coal export proposals. In a comment letter on the Morrow Pacific Project, CRITFC stated that it has heard “significant concerns from our member tribes about the project’s potential effects on tribal treaty fisheries.” CRITFC noted that “the proposed project area is currently used for fishing by tribal members exercising their treaty fishing rights” and the area “is also within lands designated as Traditional Cultural Property (TCP) and may contain significant cultural resources.” On May 7, 2012, Paul Lumley, director of CRITFC, joined Robert F. Kennedy, Jr. as a featured speaker during a rally in downtown Portland opposing coal export proposals in the Pacific Northwest.

F. NATIONAL MARINE FISHERIES SERVICE AND U.S. FISH AND WILDLIFE SERVICE

Under § 7 of the Endangered Species Act, federal agencies are prohibited from taking any action that jeopardizes the survival or recovery of federally listed endangered species or adversely modifies designated critical habitat. The U.S. Supreme Court has declared this provision to be “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Every terminal proposed thus far will affect several federally protected species, including multiple populations of salmon, eulachon (Pacific smelt), and orcas. Indeed, several terminals—including the GPT, Kinder Morgan, and Millennium projects, would be built within designated critical habitat of these species.

Where agency actions potentially harm listed species, the ESA requires a comprehensive scientific review with federal wildlife scientists to ensure that the ESA’s substantive standards are satisfied. This process, known as formal consultation, will likely be required for each coal export terminal due to potential species impacts. For projects that are unusually complex or contentious, this process can take several years. Should the National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (FWS) find that any project cannot meet the substantive standards of the ESA, then the process cannot go forward without approval from a cabinet-level committee following a comprehensive public process. The conclusion of the NMFS or the FWS that a project meets the ESA’s protective standards is judicially reviewable in federal court, as is any approval from the Endangered Species Committee to proceed in the face of harm to protected species. Such cases are common in the Pacific Northwest.

G. CLEAN WATER REGULATORY AGENCIES

Discharges of industrial wastewater and polluted runoff into any water of the United States require a permit that meets the protective standards of the federal Clean Water Act and associated state laws. All coal export terminals will need such permits for their wastewater discharges as well as to control storm-water runoff. Permits must ensure application of the most rigorous technology-based pollutant controls available, and also that discharges do not interfere with designated “beneficial uses” of waters, which include protection of salmon and shellfish, as well as fishing, recreation, water supply, and other uses. In both Washington and Oregon, the EPA has delegated permitting authority to state environmental agencies (Washington Department of Ecology, Oregon Department of Environmental Quality). Permits can be appealed by affected citizens for review by state administrative appeals boards in de novo, trial-type proceedings.

H. CLEAN AIR REGULATORY AGENCIES

Coal export facilities are potential sources of significant amounts of particulate matter. Particulate-matter emissions, along with other emissions, will likely require that coal export facilities obtain air permits in Washington and Oregon. These site-specific permits will impose emissions limitations and standards on the facilities and will be subject to public review and comment. A particularly important requirement for new projects is that they must demonstrate that the proposed facility will comply with applicable standards that limit the concentration of air pollution in the outside air to levels set by the EPA. The fugitive coal dust and other particulates associated with a coal export terminal will likely make it difficult for these facilities to show that they do not contribute to violations of the current EPA standards for particulate-matter concentrations. Furthermore, these standards are likely to become more stringent soon. The EPA has completed a scientific review of the ambient air-quality standard for particulate matter that indicates a more stringent standard is needed. The EPA will shortly be under a court order to
publish a new, final particulate matter standard based on its most recent scientific review.

Similarly, recent emission standards for nitrogen oxides and sulfur dioxide pose a permitting challenge for facilities, such as coal export terminals, that require diesel engines to power emergency backup machinery. Even if the diesel-fired equipment is principally intended for emergencies, it will be difficult to make it compliant with ambient air-quality standards because it must be operated routinely to ensure availability. Additionally, the standards are short-term and more stringent than past standards, and there will already be significant background concentrations of these pollutants from barges and trains.

The coal export facilities will also be subject to permit limitations for greenhouse gases if their total greenhouse gas emissions exceed the thresholds specified by Oregon and Washington law. Few (if any) facilities have been fully permitted under these new provisions in Oregon and Washington. Both Oregon and Washington have adopted specific, substantive greenhouse-gas reduction goals. By way of comparison, a permitting agency in Kansas denied permits in 2007 for construction of two coal-fired power plants due to concerns about greenhouse gas emissions.43 The plants have still not been built.

I. PRIVATE ENTITIES AND EXISTING BUSINESS INTERESTS

Private business entities may also factor as a risk to proposed coal export facilities. Depending on where a proposed coal export facility would be located, private entities and existing tenants and lessees may also have some say in whether it is allowed to be built on neighboring property. Recently, the utility Portland Gas and Electric (PGE) denied a requested sublease for a coal export facility proposed by Kinder Morgan at the Port of St. Helens. PGE cited business concerns that coal dust would interfere with its power generation equipment (it operates two natural gas plants at the site) and that rail traffic would block access to its facilities. A PGE representative said the project was not compatible with PGE’s natural gas power plant located nearby: “The concern is that the coal dust could interfere with our equipment at the plant, and with operations of that equipment, which involves various kinds of air intake and so forth. Our plants there represent an investment of literally hundreds of millions of dollars and are an important component of service to our customers.”44

Business partners on the mining side of proposed export projects may also play a role. Recently, a subsidiary of Cloud Peak Energy (Western Minerals, LLC), which co-owns a mine with an Ambre Energy subsidiary (KCP, Inc.), sued Ambre in U.S. District Court in Montana. The suit alleges that Ambre had made plans to export coal from the Decker mine without Cloud Peak’s approval, had abused its role as a mine manager, and had engaged in self-dealing transactions. 45 As such, Cloud Peak is asking the court for damages of an unspecified amount and for injunctive relief to remove Ambre as the mine’s manager.46

THE POLITICAL ENVIRONMENT

The Pacific Northwest has a reputation for progressive, environmentally aware, and civically engaged citizens. Proponents of coal export terminals face a rapidly evolving political environment in which opponents of the projects are gaining strength on a daily basis and elected officials are increasingly calling for a “time out” on permitting and a comprehensive review of impacts. Millennium’s well-publicized effort to streamline the permitting process in Longview by lying about the intended size of the project poisoned the atmosphere and branded terminal proponents as untrustworthy.47 Similarly, GPT’s efforts to pursue its project as a “modification” to a 1997 non-coal pier rather than as a new terminal—which was rejected by Whatcom County—was widely perceived as an effort to circumvent full environmental analysis and public review.48

What follows is a brief discussion of the relevant political environment and where key players are lining up on this divisive issue. It will be increasingly difficult for any statewide official, or local official with a stake in these projects, to remain on the sidelines.

A. WASHINGTON STATEWIDE OFFICIALS

Washington State is a leader in the fight against global warming and in the transition to a clean-energy economy, having passed some of the nation’s most progressive climate and energy legislation.49 In 2011, it passed legislation to close the only remaining coal-fired power plant in the state.50 Washington Governor Christine Gregoire (D) has remained publicly neutral on the question of coal export, but has emphasized the importance of the full public and environmental review process.51 Governor Gregoire appears to have placed primary responsibility for overseeing this review on Department of Ecology Director Ted Sturtevant, whose
agency bears primary responsibility for implementing the state’s climate change strategies, and who will co-lead the EIS process for the GPT and Longview terminals. In late 2011, thirteen Washington State senators wrote to state and Whatcom County officials expressing concern about the environmental and economic impacts of the GPT proposal and asking for a broadly scoped EIS.53 Governor Gregoire will retire at the end of her current term. In November 2012, Washington State citizens will choose between Republican Attorney General Rob McKenna and former U.S. Representative Jay Inslee. Washington has not elected a Republican governor since 1981.54

B. OREGON STATEWIDE OFFICIALS

Like Washington, Oregon is a national leader on climate-related legislation and, as of 2020, will close its only coal-fired power plant.55 On April 25, 2012, Oregon Governor John Kitzhaber publicly called for a thorough, programmatic review of all pending Pacific Northwest coal terminals, expressing significant concern about the economic and environmental effects of coal export terminals and calling for a time-out on permitting decisions until an evaluation was complete.56 Governor Kitzhaber’s letter emphasized that he had heard from many citizens and elected officials who are concerned about the impact of these projects, and that he “shared their concerns.” The governor’s letter and accompanying speech received front-page coverage in The Oregonian newspaper as well as broad regional and national news coverage. A representative for the Morrow Pacific Project was quoted as saying that the review sought by the governor would take years and “significantly delay” the project.57

C. FEDERAL DELEGATION AND CONGRESSIONAL COMMITTEES

Oregon Senator Ron Wyden has explicitly called for a “time-out” on permitting energy export projects (including both liquefied natural gas and coal) until further review is conducted and a national policy developed.58 All four Pacific Northwest senators are Democrats elected with strong environmental support and have been hearing from constituents who are opposed to the projects. Washington Senator Patty Murray and Oregon Senator Jeff Merkley have each written the Corps asking for close scrutiny of the cumulative effects of the various coal terminal proposals.59 Washington Senator Maria Cantwell has written the Washington Department of Transportation asking a series of questions about the impact of coal export terminals on rail.60 Two members of the Pacific Northwest congressional delegation (Representative Adam Smith and Representative Jim McDermott) have also joined the call for a thorough programmatic review of all pending coal terminals.61 One member of the delegation (Representative Rick Larsen) has taken a supportive position on the coal export terminals.62 On April 24, 2012, ranking member of the House Natural Resources Committee, Representative Edward Markey, formally requested a Government Accountability Office (GAO) report examining federal coal leasing practices in light of the recent shift to develop federally owned coal resources for export.63 The letter emphasized that the determination of coal “fair market value” needed to be reviewed in light of declining estimates of economically recoverable reserves and the substantially higher prices potentially obtained by the export market. It is our understanding that the GAO has agreed to author such a report, and that work will soon commence.

D. RAIL COMMUNITIES

The majority of the coal trains moving from the Powder River Basin into the Pacific Northwest would follow a single route from Montana, through the Idaho Panhandle and eastern Washington, and along the Columbia River. Communities along that rail line are quickly waking up to the threat posed by as many as 60 new coal trains each day. Many communities have passed resolutions objecting to the coal export terminals and seeking a more thorough study of potential impacts.

For example, the towns of Spokane, Longview, Edmonds, Camas, Washougal, and Bainbridge Island (WA); Sand Point (ID); Helena and Missoula (MT); and Portland and Hood River (OR) have all passed formal resolutions objecting to coal export and/or calling for comprehensive study before permits are issued.64 They recently were joined by the City of Seattle, whose city council voted unanimously to “oppose the establishment of coal export terminals in Washington State.”65 Less-formal written statements by rail-line communities have been made by city councils and mayors in many other cities (including Olympia and Bellingham), as well as King County, Skagit County, and San Juan County, all jurisdictions that would be heavily affected by the projects.66 Citizens in Bellingham are organizing to put on the ballot an initiative that would block the transport of coal through their city.67 The “Coal-Free Bellingham” movement is currently gathering signatures to place the initiative on the November 2012 ballot. If it passes, initiative proponents argue that the GPT project will not
be able to certify to its insurers that it complies with all local laws.68 Should the initiative pass, a lengthy legal fight is expected.

### E. EDITORIAL BOARDS

The issue of coal export terminals has received extensive coverage in regional and local newspapers in the Pacific Northwest. As the story unfolds, editorial boards are starting to weigh in, usually in the context of expressing concerns and calling for more study of the projects before they proceed. For example:

- A *Seattle Times* editorial writer mocked the GPT proposal as an opportunity for Whatcom County to “revisit the 19th century.”69 More recently, the same writer joined the call for thorough environmental review of all of the export projects.70
- *The Olympian* has called for a programmatic EIS on all coal terminal proposals, observing that they would undermine the region’s reputation as a clean energy leader and make it a global hub of coal.71
- *The Vancouver Columbian* called for rigorous study of coal export projects: “How big is this issue, really? Actually, it’s huge.”72
- *The Daily Astorian* predicted that the coal export issue would “dwarf” the contentious multiyear battle over liquefied natural gas.73
- *The Bozeman Daily Chronicle* predicted “ill effects” to Montana residents and urged citizens to become engaged.74

### F. “POWER PAST COAL” COALITION

A large and growing coalition of national, regional, and local conservation and clean-energy organizations has come together under the “Power Past Coal” banner to oppose the construction of any new coal export terminals on the west coast of the U.S. and Canada.75 The coalition includes many of the nation’s largest and most influential advocacy organizations (such as the Sierra Club, Greenpeace, National Wildlife Federation, Earthjustice, NRDC, and multiple Riverkeeper groups) as well as state organizations from Montana, Washington, and Oregon with close ties to statewide elected officials (Western Organization of Resource Councils, Climate Solutions, Washington Environmental Council). The coalition has multiple staff dedicated full-time to the coal export issue, including professional legal, lobbying, media, and grassroots teams. The Power Past Coal coalition has recently expanded to include Canadian organizations that seek to oppose terminal expansions in British Columbia.

Many other grassroots organizations are springing up in response to terminal proposals. For example, a group of 160 Whatcom County physicians generated significant media coverage when it issued a statement outlining the health threats of coal export terminals and has remained vigorously engaged in advocacy.76 Student groups have also opposed coal export facilities by passing campus resolutions.77 Separately, activist organizations associated with the Occupy movement recently halted a Canada-bound coal train and disrupted a campaign event for Congressman Rick Larsen due to his support for the GPT. On May 5, activists blocked multiple Canada-bound coal trains at the U.S.-Canada border.78

### CLOSING WORDS

In a recent radio interview, an associate editor for Platts (which covers the coal industry) was quoted as follows:

> I’m probably in the minority on this, but I think at least one of [the coal terminals] will get approved and will ship coal. A lot of people don’t think any of them will. Now, when that happens, I have no idea. I mean, it’s going to be a long process. As you know there’s a lot of environmental interest. There’s a lot of reviews. I don’t think they could all coexist, I think that would create, first of all, a huge bottleneck as far as rails going into Oregon and Washington and then coming out of the Powder River Basin. So, I don’t think they can all coexist, nor do I think they can all ship as much as the maximum they propose, but I think there will be maybe some incremental amounts. Maybe one or two. But I know a lot of people who think it’ll just never happen.79

### ENDNOTES

1 The four projects with pending applications include the Gateway Pacific Terminals (GPT) site at Cherry Point, Washington; the Millennium Bulk Logistics (MBL) site in Longview, Washington; the Oregon Gateway Terminal at the Port of Coos Bay, Oregon; and the Morrow Pacific project (which includes the Coyote Island Terminal barge terminal at the Port of Morrow, Oregon as well as a barge/cargo vessel transloading facility at the Port of St. Helens, Oregon). Other projects that have been disclosed publicly include a RailAmerica proposal at the Port of Gray’s Harbor, Washington; and a Kinder Morgan terminal at the Port of St. Helens, Oregon. Three existing terminals in Canada are also contemplating significant expansions.


3 33 C.F.R. § 320.1-.4 (general regulatory policies); id. § 230.1-.97 (guidelines for fill permits).

4 33 C.F.R. § 320.4(a)(1).

5 33 C.F.R. § 320.4(a)(2).
6 33 C.F.R. § 320.4(q).

7 See Alliance to Save the Mattaponi v. U.S. Army Corps, 606 F. Supp. 121 (D.D.C. 2009) (setting aside Corps’ determination that permit application met CWA standards and was in the public interest).

8 33 U.S.C. § 1344(c).


10 Ocean Advocates v. Corps of Engineers, 402 F.3d 846 (9th Cir. 2005).


12 Alternatively, these reviews are called “area-wide” or “overview” EIAs.


14 RCW Ch. 43.21C.

16 RCW Ch. 43.21C.

18 Cherry Point Aquatic Reserve, Washington Department of Natural Resources, http://www.dnr.wa.gov/ResearchScience/Topics/AquaticHabitats/Pages/aqr_rsv_cherry_point.aspx

19 Commissioner Peter Goldmark, Washington Department of Natural Resources, http://www.dnr.wa.gov/AboutDNR/Pages/commissioner.aspx


23 Or. Const. art. VIII, § 5(2) (“The [State Land] board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.”); ORS 274.005 et seq. (describing DSL’s authority to manage and lease state-owned aquatic lands).; ORS 274.005 et seq. (describing DSL’s authority to manage and lease state-owned aquatic lands).


25 Morse v. Dep’t of Ecology, 125 Wn.2d 196 (Wash. 1994) (“de novo review accords the local government’s decision no particular deference”)


27 Buechel v. Dep’t of Ecology, 125 Wn.2d 196 (Wash. 1994) (setting aside Corps’ determination that permit application met CWA standards and was in the public interest).

28 RCW 90.58.140(5).


30 Cowlitz County Board of Commissioners, http://www.co.cowlitz.wa.us/commissioners/


37 Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) (“Congress intended endangered species to be afforded the highest of priorities....The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”) (emphasis added)

38 16 U.S.C. § 1536(a)(2). The National Marine Fisheries Service (NMFS) has jurisdiction over marine and anadromous species including orcas and salmon; the U.S. Fish and Wildlife Service (FWS) has jurisdiction over terrestrial and freshwater species.


41 33 U.S.C. § 1342; RCW Ch. 90.48; ORS Ch. 468b.

42 See, e.g., RCW 90.48.520; OAR 340.045.


48 Key decision expected this week by Whatcom County on cargo terminal, Bellingham Herald, June 20, 2011, http://www.bellinghamherald.com/2011/06/20/20688044/key-decision-expected-from-whatcom.html


50 Transalta Bill is Finally Law, Of Paramount Importance Blog, May 1, 2011, http://ofparamount.blogspot.com/2011/05/trans-alta-bill-is-finally-law.html


52 Climate Change, Department of Ecology, http://www.ecy.wa.gov/climatechange/


62 Democrat Rick Larsen, whose district includes the GPT terminal in Bellingham, came out early to support the project before it was known that the proponents intended to ship coal. His more recent statements have been less supportive.


66 See Appendix A for a list of statements, letters and resolutions, and http://www.powerpastcoal.org/voices-in-opposition/electedofficials/statements/


75 Power Past Coal Coalition, http://www.powerpastcoal.org/category/toolkit-info/doctors


APPENDIX A

SUMMARY OF STATEMENTS OF CONCERNS/OPPOSITION TO COAL EXPORT

As of July 20, 2012

PUBLIC OFFICIALS
U.S. Senators Patty Murray and Maria Cantwell (WA)
U.S. Senator Ron Wyden and Jeff Merkley (OR)
U. S. Representative Adam Smith (WA)
U.S. Representative Jim McDermott (WA)
EPA Region 10
Oregon Governor John Kitzhaber
WA Dept. of Ecology Director Ted Sturdevant
King County Executive Dow Constantine
Multnomah County Chair Jeff Cogen
Clark County Commissioners
Skagit County Board of Commissioners
San Juan County Council
Thurston County Councilors Romero, Wolfe, Valenzuela*
King County Councilmember Larry Phillips
Letter signed by 13 WA State senators
Oregon State Rep. Mitch Greenlick*
Washington State Representatives Billig, Takko, Dunshree, Hudgins

CITY RESOLUTIONS PASSED
Seattle, WA
Edmonds, WA
Bainbridge Island, WA
Marysville, WA
Camas, WA
Washougal, WA
Stevenson, WA
Longview, WA
Spokane, WA
Vancouver, WA
Hood River, OR
Missoula, MT
Sandpoint, ID

CITY STATEMENTS, ADDITIONAL LETTERS
Seattle - Mayor McGinn and City Council members
Washougal, WA - Mayor Guard
Bellingham, WA - Mayor Linville, Council members
Burlington, WA - Mayor Brunz
Mukilteo, WA - Mayor Marine, CC President
Dallesport, WA - Community Council
Mount Vernon, WA - City Council Members
Olympia, WA - Mayor Buxbaum, CM Hawkins
Cheney, WA - Mayor Tom Trulove
Lacey, WA - Mayor Clarkson, CM Pratt, Lawson*
Elma, WA - Mayor David Osgood
Tumwater, WA - Councilor Joan Cathey*
Portland, OR - Mayor Sam Adams
Roseburg, OR - Councilmember Tuchscheler*
Mosier, OR - Mayor Rogers and City Council
Eugene, OR - Councilor Alan Zelenka
Helena, MT - City Council

ECONOMIC ENTITIES
Port of Skagit
Port of Skamania County
Port of Edmonds
Burlington Chamber of Commerce
Edmonds Chamber of Commerce
Gibson Traffic Consultants have analyzed traffic impacts in the cities of Burlington, Marysville, Mt. Vernon, Seattle and Edmonds
Portland General Electric, opposed coal lease over concerns of coal dust on its operations in St. Helens, OR
Columbia Gorge Windsurfing Association

HEALTH ENTITIES
Spokane Regional Health District Board of Health
Washington Academy of Family Physicians
King County Academy of Family Physicians
Bob Elliott, executive director of the Southwest Clean Air Agency
Whatcom Docs - 160 physicians in Whatcom County and 200 physicians in Oregon

NORTHWEST TRIBES AND TRIBAL ORGANIZATIONS
Nez Perce Tribal Executive Committee (Port of Morrow)
EPA Region 10 Tribal Operations Committee
Confederated Tribes and Bands of the Yakama Nation
Columbia River Inter-Tribal Fish Commission

RELIGIOUS LEADERS
Bishop Greg Rickel, Episcopal Diocese of Olympia (Western Washington)
Bishop Jim Waggoner, Episcopal Diocese of Spokane (Eastern Washington)
Bishop Chris Boerger, Evangelical Lutheran Church in America, Northwest Washington Synod
Rev. Mike Denton, Conference Minister, United Church of Christ Pacific Northwest Conference
Rev. Dr. Marcia Patton, Executive Minister, Evergreen Association of American Baptist Churches
Bishop Martin D. Wells, Evangelical Lutheran Church in America (East Washington/Idaho Synod)

COMMUNITY LEADERS STATEMENTS
Robert F. Kennedy, Jr.
Bellingham, WA – former mayor Dan Pike (2011)
San Juan Marine Resources Committee
Northwest Straits Commission
Washington State Democrats
Cheney Public Schools Assoc. superintendent
Cliff Mass, PhD, Professor, Department of Atmospheric Sciences, University of Washington
Associated Students of Western WA Univ.
Univ. of Washington Student Body Resolution
Bob Apple, former Spokane City councilmember

* signed programmatic environmental impact statement sign-on letter
EDITORIALS

The Eugene Register-Guard, “Merkley calls for coal study: A senator joins the governor in seeking federal review,” July 2012
Tracy Warner, Wenatchee World, “Coal trains are coming this way,” July 2012
The Eugene Register-Guard, “Oppose coal exports: Eugene has much to lose, little to gain,” July 2012
The Olympian, “A burning question: Should Northwest be coal-export hub?” June 2012
The Eugene Register-Guard, “Study coal export projects, Federal officials should heed Kitzhaber’s concerns,” May 2012
The Oregonian, “Oregon and northwest neighbors must decide wisely on coal export proposals,” April 2012
Vancouver Columbian, “In Our View: Coal Trains Rumbling? ” April 2012
Lance Dickie, Seattle Times, “Huge coal-export terminal needs rigorous environmental, health and traffic reviews,” Mar 2012
Bend Bulletin, “Coos Bay port’s demands defy records laws,” April 2012
Heather Acheson, Camas-Washougal Post Record, “Potential local impacts of coal trains need to be taken seriously,” Mar 2012
The Daily Astorian, “Coal will dwarf the LNG debate,” Feb 2012
The Spotlight, (Columbia County, OR), “Port approach on coal lease disappointing, but not surprising,” Feb 2012
Bozeman Daily Chronicle, “Train traffic could have ill effects for Bozeman,” April 2012

OP-EDS

“Rails can’t handle extra,” Diane Dick, The Daily News (Longview), July 2012
“Coal train plans need careful study,” Amber Waldref, Spokane City Councilmember and Dr. Robert Truckner, Pediatric emergency physician, Spokesman Review, June 2012
“Reject plan for coal export terminals – it’s the neighborly thing to do,” Kevin O’Brien, professor of Christian Ethics, Pacific Lutheran University, Tacoma News Tribune, June 2012
“Gregoire needs to weigh in on proposed coal-terminal,” Stephan Michaels, Seattle Times, April 2012
“Visualize Edmonds – without coal trains, please,” Strom Peterson, Edmonds City Council member, Edmonds Beacon, March 2012
“Stopping coal at the coast,” Bill McKibben, Los Angeles Times, March 5, 2011