



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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By Electronic (Steven.K.Gagnon@usace.army.mil) Mail

May 3, 2012

Steve Gagnon
Regulatory Project Manager
U.S. Army Corps of Engineers
Portland District
PO Box 2946
Portland, OR 97208

Re: Nez Perce Tribe's comments on the March 6, 2012 Public Notice for Permit Application NWP-2012-56

Dear Mr. Gagnon:

The Nez Perce Tribe appreciates the opportunity to comment on the above-captioned Permit Application. The Tribe is concerned that this project may negatively affect 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. For the reasons below, the Tribe requests that the Corps prepare an Environmental Impact Statement under NEPA as part of its review of the project. The Tribe also requests government-to-government consultation with the Corps on this project consistent with Executive Order 13175, President Obama's November 2009 Memorandum on Consultation and Coordination with Tribal governments, and the Corps' implementing regulations.

Since time immemorial members of the Nez Perce Tribe have used and occupied the lands and waters of north-central Idaho, southwest Washington, northeast Oregon, and portions of western Montana for subsistence, ceremonial, commercial and religious purposes. In Article 3 of the 1855 Treaty with the United States, the Nez Perce Tribe reserved, and the United States secured, the right to take fish and at all usual and accustomed fishing places, and to hunt, gather and pasture on open and unclaimed lands. Treaty of June 9, 1855, with the Nez Perce Tribe, 12 Stat. 957 (1859). The waters within the Tribe's aboriginal territory continue to be used by the Nez Perce. Tribal members exercise their treaty-reserved rights, as well as observe ceremonial, cultural and religious practices within the Columbia River Basin, including usual and accustomed fishing places located within or adjacent to the project area on the Columbia River.

I. Project Description

According to the Public Notice, Coyote Island Terminals, LLC, and John Thomas, Ambre Energy North America are seeking a Corps Section 10 Rivers and Harbors Act permit to construct a new transloading facility for bringing coal in from Montana and Wyoming by rail and transferring it to barges on the Columbia River at the Port of Morrow. The purpose of the project is to “[s]hip coal mined from Wyoming and Montana overseas to Asia.” The coal would be shipped down the Columbia to Port Westward and loaded onto ocean-going vessels to be shipped to Asia. Initially, approximately 3.85 million tons of coal would be shipped through the facility to Asia each year. At maximum capacity, the facility would be able to handle 8.8 million tons. That would translate to approximately 5 trains to Port of Morrow, 5.5 loaded barge tows from Port of Morrow to Port Westward, and one ship to Asia per week initially, increasing to 11 trains, 12 loaded barge tows, and three ships per week to Asia at full build out.

II. Comments

A. Impacts to Tribal treaty rights

The Tribe is concerned that this project will negatively affect tribal treaty rights. The Tribe reserves treaty-fishing rights at all usual and accustomed fishing places, including those places along the Columbia and Snake Rivers and their tributaries. As noted above, the permit application contemplates a significant increase in barge and rail traffic. The Tribe believes that the increase in barge traffic has the potential to directly interfere with tribal treaty fisheries. For example, drifting has become a major component of the commercial fishing in Zone 6 (between Bonneville and McNary Dams). Driftnetting downstream of the Port of Morrow would likely be affected by the increased barge traffic. In addition, the increased rail traffic may affect Tribal member access to usual and accustomed fishing places and other traditional use areas as well as interfere with Tribal member use of those places through increased noise disturbances, coal dust, and diesel pollution.

B. Impacts to ESA-listed fish and lamprey

According to the permit application, preliminary determinations indicate that the described activity may affect an endangered or threatened species or its critical habitat. There are several ESA-listed fish in the project corridor including Lower Columbia River Chinook Salmon ESU, Upper Willamette River Chinook Salmon ESU, Snake River Fall Chinook ESU, Columbia River chum salmon ESU, middle Columbia River steelhead DPS, and lower Columbia River steelhead DPS. These species are of critical importance to subsistence and culture of the Tribe.

In addition, lamprey, although currently are not a listed species, are also located in the project corridor.

C. Impacts to Tribal member health

Given the large amount of coal that is contemplated to be transported by barge and rail in connection with the project, the Tribe is very concerned of the project’s potential impacts to Tribal member health. Coal dust and diesel emissions are known to cause respiratory disease, particularly affecting sensitive populations such as children and the elderly. In addition, the coal dust that settles on the water can have adverse environmental consequences to the river corridor.

Coal dust can affect natural biological processes and can potentially affect fish and other biota that reside in the rivers.

D. Indirect/Cumulative Impacts

Agencies conducting NEPA review must also consider the indirect effects of the proposed project. Indirect effects are those effects “caused by the [agency] action [that] are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Such effects “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.” *Id.*

Cumulative impacts are “the impact[s] on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future can actions regardless of what agency...or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.27(b)(7).

The Corps needs to analyze the indirect and cumulative effects associated with the increased barge and rail traffic the project will create. The Corps should analyze whether and how much dredging needs to occur on the river corridor to accommodate the increased traffic and how this dredging may affect the environment. In addition, the agency should assess the potential effect of accidents on the river caused by the increase in barge traffic. Finally, the Corps needs to analyze the cumulative effect of this project relative to the other coal export or similar projects that are proposed in the region.

E. Environmental Impact Statement

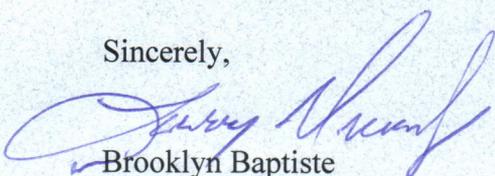
Given the potential impacts to tribal treaty rights, ESA-listed species, Tribal member health, and the indirect and cumulative effects that may result in Columbia River basin and the region, the Tribe requests that the Corps perform a full Environmental Impact Statement under NEPA. All of these issues cannot be properly assessed through an environmental assessment.

F. Conclusion

For the reasons above, the Tribe requests the Corps evaluate the project with an EIS so that a full exploration of the impacts of this controversial project can be thoroughly vetted. As part of this review, the Tribe looks forward to consulting with the Corps on a staff-to-staff and governmental basis before any formal action is taken on the proposal.

Please contact Mike Lopez, Nez Perce Tribal staff attorney, at (208) 843-7355 with any questions.

Sincerely,



Brooklyn Baptiste
Chairman