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VIA EMAIL AND FIRST CLASS MAIL

Colonel Mark A. Geraldi
Seattle District Commander
U.S. Army Corps of Engineers
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Seattle, WA 98124-3755

Michelle (Muffy) Walker
Chief Regulatory Affairs
U.S. Army Corps of Engineers
PO Box 3755
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Re: Status of Millennium Bulk Terminal- Longview's JARPA

Dear Colonel Geraldi and Ms. Walker:

We are writing on behalf of Millennium Bulk Terminals-Longview ("MBT-Longview") to urge the U.S. Army Corps of Engineers ("Corps") to continue to process MBT-Longview's Joint Aquatic Resources Permit Application ("JARPA") for its proposed Coal Export Terminal ("CET") notwithstanding the Washington State Department of Ecology's ("Ecology's) September 26, 2017 decision to deny the company a certification pursuant to Clean Water Act ("CWA") section 401, 33 U.S.C. §1341. *See In the Matter of Denying Section 401 Water Quality Certification*, Order # 15417- Corps Reference #NWS-2010-1225 (September 26, 2017).

The section 401 certification denial is not final and instead, is simply the first step in a multi-pronged state process. MBT-Longview will be appealing that decision to the Pollution Control Hearings Board ("PCHB") by the end of this month and is contemplating other federal and state judicial challenges as well. MBT-Longview will urge the PCHB and/or other courts to invalidate that decision as *ultra vires* because it runs counter to and exceeds the statutory authority Congress granted Washington State under CWA section 401. The decision also violates the Commerce Clause of the U.S. Constitution, U.S. Const. art. I, Section 8, cl.3, the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, section 1983 of the Civil Rights Act, and is otherwise arbitrary and capricious.

Ecology's 401 decision, as the Corps is likely aware, is also squarely inconsistent with the Corp's Draft Environmental Impact Statement ("EIS") issued pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and, perhaps even more surprisingly, expressly contradicts technical water quality findings made by Ecology itself, in the Final EIS Ecology issued under the State Environmental Policy Act ("SEPA"). Ecology used its non-water quality related SEPA findings to deny MBT-Longview certification under CWA section 401 while entirely ignoring its water quality findings unambiguously concluding that the project

would result in no unavoidable and significant adverse impacts. In fact, and more specifically, the SEPA EIS concluded that the project would result in "no unavoidable and significant impacts on fish" (SEPA FEIS at 4.7-41); it further found that "the construction activities associated with the proposed activity would not be expected to cause a measurable effect on water clarity, water quality, or biological indicators or affect designated uses." SEPA FEIS at 4.5-19. And in addressing public concerns associated with coal dust and contamination from coal runoff, it concluded that these impacts "would not be measurable" and that any change in water quality resulting from those activities are "not anticipated to increase turbidity or water temperature or affect marine organism functions." SEPA FEIS at 4.5-25.

In short, Ecology's 401 denial is simply impossible to square with its prior findings, and especially, the conclusion it reached in its own EIS that "coal dust from operation of the Proposed Action is not expected to have a demonstrable effect on water quality." *Id.* Because the 401 denial is also contrary to the plain language of the CWA, is at odds with state and federal case law interpreting section 401, and is the sort of illegal action that Corps regulatory guidance has previously found "clearly unacceptable," the Corps should maintain the path it has forged over these past 6 years and complete its permitting process.

I. MBT-Longview's Extraordinary Investment In Regulatory Excellence Over 6 Years

As you know, MBT-Longview has been working with the Corps to obtain a permit to construct two new docks and to dredge and fill wetlands in connection with its proposal to construct a CET on the Columbia River in Longview, Washington, since 2011. During these past 6 years, MBT-Longview and permitting agencies including the Corps have devoted countless hours and tens of millions of dollars in efforts toward completing the protracted and multi-level regulatory process associated with obtaining a joint CWA section 404 dredge and fill/ Rivers and Harbors Act section 10 permit from the Corps. In so doing, the Applicant has worked with the Corps to complete a (i) Draft Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, (ii) a Memorandum of Agreement between the company and federal, state, local, tribal entities (in addition to the Advisory Council on Historic Preservation) under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; (iii) formal consultation with both NOAA Fisheries and the U.S. Fish and Wildlife Service ("FWS") under section 7 of the Endangered Species Act, 16 U.S.C. §1536; in addition to (iv) a concurrence from the Portland District of the Corps under section 14 of the Rivers and Harbors Act of 1889, as codified at 33 U.S.C. §408.

In conversations with the Seattle District, we have been led to understand that the Corps has all but completed a Final EIS and is simply awaiting input from its sister federal agencies, including NOAA Fisheries and the FWS. At this stage of this extraordinary level of effort, it would be

wasteful of public and private resources as well as imprudent for the Corps to do anything but proceed with completing its federal permitting efforts. Thus, while MBT-Longview expeditiously appeals its section 401 denial, the Corps should proceed to finalize its regulatory obligations associated with this project. Any other decision would be counter to the Corps' own interests in conserving scarce regulatory resources- resources which include the tens of thousands of hours of Corps' staff time devoted to processing MBT-Longview's permit application since 2011.[1]

II. Ecology's Ultra Vires Actions

The Corps' self-interest in preserving its resources should be reason enough to continue to finalize MBT-Longview's permit application. But there are other reasons, as well. For example, the Corps has interpreted CWA section 401 to enable it to reject state decisions when clearly contrary to the CWA or the Corps' own interests. Under Regulatory Guidance Letter ("RGL") 92-04, the Corps gave itself authority to not accept illegal state conditions inserted into a CWA section 401 certification that are "clearly unacceptable." Such conditions were defined to include those where the condition itself would result in a violation of law or regulation or require that the Corps take an illegal action.[2] The RGL further explained that an unacceptable condition would be one "that would require the Corps to take an action that it would not otherwise take or choose to take." *Id.*

Here, Ecology would have its 401 decision lead the Corps to deny MBT-Longview's permit application on the basis of state findings of fact and conclusions of law that are totally unrelated to the CWA. In this case, Ecology purported to use its SEPA "supplemental authority"—RCW 43.21C.060—as a basis to expand its rationale for certification denial. Using findings included in its Final EIS dated April 28, 2017, Ecology asserted that the possibility (however remote, and speculative) that trains and vessels in interstate commerce serving the CET would lead to "significant unavoidable adverse impacts" concerning air quality, vehicle transportation, noise

[1] This situation is different, in both context and posture, from Ambre Energy's application to build a coal export terminal, where the Corps dismissed a pending permit application without prejudice in response to a state permit denial. Additionally, the Oregon Department of State Lands' decision on Ambre Energy's proposed CET is not binding on the Seattle District and is otherwise clearly distinguishable. That decision revolved around a finding that the company had not comprehensively evaluated alternatives that would not impact tribal fishing opportunities. That case did not involve a clearly *ultra vires* application of a state's 401 certification authority.

[2] Although this RGL expired on January 21, 1997, the sentiments expressed therein hold true today and demonstrate Corps authority to refuse to accept state action that is "clearly unacceptable" and otherwise illegal.

and vibration, social and community resources, rail transportation and safety, and cultural and tribal resources, and, in a novel 401 interpretation, that these alleged impacts were sufficient grounds to deny the CWA certification under SEPA.

But as established above, Ecology's Final EIS otherwise expressly found that the project will not result in significant adverse effects on water quality, wetlands, or fish, and that any effects it would generate in these areas can be fully mitigated. http://millenniumbulkeiswa.gov/sepa-eishtml. *Id.* Vol. III.B (SEPA Water Quality Technical report). *See* MBT-Longview's September 20, 2017 submission to Ecology (attached as Exhibit A). Ecology therefore appears to assert that its authority under SEPA allowed it to bootstrap sufficient state authority to deny MBT-Longview's certification upon a finding of significant and unavoidable adverse effects un-related to water quality, and bearing no relevance to the expressly limited certification authority granted it under CWA section 401(a)(1) (state's certification decision is limited to whether the "discharge" for which the certification is required "will comply with the applicable provisions of [CWA] sections [301, 302, 303, 306, and 307]," which include state water quality standards approved by EPA pursuant to CWA section 303.). *See infra* at 5-6 (statutory analysis and explanation of case law establishing that statute limits state denial authority to the actual on-site discharge). [3] Ecology's attempt to broaden its denial authority to extend to effects generated by other actors including interstate railroads or vessels is contrary to section 401. [4]

Ecology's denial of a certification pursuant to CWA section 401 is *ultra vires*, runs afoul of 42 U.S.C. § 1983, and violates the United States Constitution's Commerce Clause, 14th Amendment, and Supremacy Clause. Ecology is tasked with certifying whether a project will comply with Washington's water quality standards, effluent, and other CWA limitations. As

[3] For purposes of section 401, a "discharge" is limited to a discharge from a "point source," *i.e.*, "any discernible, confined, and discrete conveyance." *See* 33 U.S.C. § 1362(14) (defining "point source"); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) ("The term 'discharge' in § 1341 [CWA section 401] is limited to discharges from point sources."). The only point source discharges associated with Millennium's proposed coal terminal are those for which it will need a National Pollutant Discharge Elimination System (NPDES) permit from Ecology under CWA section 402 or a CWA section 404 permit from the Corps.

[4] Ecology's attempt to use its SEPA authority to deny the section 401 certification based on concerns about railroad safety, congestion, noise, and pollution is similarly barred under the federal preemption doctrine. The Ninth Circuit has held that the federal Surface Transportation Board has "exclusive jurisdiction" over rail line operations and that state environmental regulation of railroads is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998). Likewise, the Washington Supreme Court found that ICCTA preempts local regulation of railroads. *City of Seattle v. Burlington N. R. Co.*, 145 Wash. 2d 661, 669, 41 P.3d 1169, 1172 (2002)

described above, Ecology has exceeded the certification process proscribed by the CWA. Moreover, Ecology's abrupt decision was issued just six days after it received voluminous materials submitted in response to its water quality-related inquiries; these inquiries followed years of delay. *See* September 20, 2017 letter from Beth S. Ginsberg to Loree Randall and Thomas J. Young, (attached as part of Exhibit A.).[5]

MBT-Longview will seek the public documents that will allow it to understand how Ecology arrived at its decision. At a minimum, however it is clear that Ecology reached a decision that is directly and unambiguously contrary to the unchallenged Final SEPA EIS that concluded the project will not result in significant adverse effects on water quality, wetlands, or fish. Simply put, Ecology's Final and unchallenged EIS water quality findings preclude it as a matter of law from denying MBT-Longview a section 401 certification.

In light of Ecology's overreaching, illegal, and *ultra vires* CWA section 401 certification decision, the Corps' safest course of conduct is to proceed with processing MBT-Longview's permit. While others may clamor for a different result, the rule of law, due process considerations, and principles of fairness strongly counsel against any Corps decision to stop work on MBT-Longview's permit application because of Ecology's *ultra vires* actions. Simply put, a federal agency cannot rely on the unlawful actions of a state agency to deny a permit application. *See also* RGL 92-04 (same). Postponement or denial of MBT-Longview's permit application on the basis of a state's *ultra vires* action, is itself an unlawful, and arbitrary and capricious action under the Administrative Procedure Act. 5 U.S.C. §706. Although the Corps must rely on a lawful state certification, it must not rely on a denial of state certification that is clearly outside of Washington's authority under the CWA.

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[5] Ecology also acted patently arbitrarily in demanding that MBT-Longview submit reams of technical water quality data, engineering and water treatment information pertinent to project stormwater and process wastewater discharges only to refuse to evaluate that data. *Indeed, Ecology summarily denied the certification less than one week after receiving that voluminous information pursuant to a September 20, 2017 deadline established by Ecology.* The record will show that Ecology waited months, if not years, to request additional water quality information from MBT-Longview, and instead of working with the company to assimilate that information, decided instead to utterly ignore it. Finally, the record will also show that there is nothing unique about the proposed CET that could possibly prevent Ecology from obtaining "reasonable assurance" that project discharges would meet water quality standards. Ecology, in fact, recently issued a CWA section 402 NPDES permit to the TransAlta coal-fired generating facility in Centralia, Washington. The TransAlta plant generates stormwater and process wastewater discharges from a similarly sized coal stockpile as that proposed by MBT-Longview. *See* Ginsberg letter attached as Exhibit A. In short, to the extent Ecology attempts to cloak aspects of its denial on water quality grounds, that attempt will be found arbitrary and capricious and utterly unsupportable under the State Administrative Procedure Act.

III. The Corps Should Continue to Process the Permit Application

The CWA, case law applying section 401, and the Corps' regulations and regulatory guidance letters all exhort against any agency action to further postpone or deny the joint section 404/10 Corps permit process and review. First, the CWA grants states the ability to deny a section 401 certification only upon a finding that a discharge would violate requirements under CWA sections 301, 302, 303, 306 and 307. 33 U.S.C. §1341(a)(1)(applicant must obtain a state certification" that any discharge will comply with applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."). The enumerated sections of the statute listed in section 401(a)(1) are exclusive and do not provide states with plenary power to deny water quality certifications on other grounds. While states have authority to *condition* certification on "other appropriate requirements of state law" under CWA section 401(d), that authority is constrained and must bear direct relationship to water quality.

Indeed, that was the express holding of the Oregon Court of Appeals in *Arnold Irr. Dist. v. Oregon Dept. of Envt'l Quality*, 717 P.2d 1274 (Or. App. 1986)(invalidating certification denial by Oregon Department of Environmental Quality ("DEQ") because denial was issued on grounds other than the five specified sections under CWA section 401). There, the Oregon Court of Appeals expressly rejected DEQ's attempt to attach state land use conditions to its section 401 certification authority. The Court interpreted DEQ's conditioning authority under section 401(d) on the basis of other "appropriate requirements of State law" to be limited to requirements that bear "relationship to water quality."

Denying the permit application is also premature because it is likely that Washington state courts will find that Ecology exceeded its authority in issuing the certification denial. State courts have rejected state denials of CWA section 401 certifications when the state has based its denial on grounds other than that the discharge would fail to comply with the five CWA statutory sections expressly enumerated under section 401(a). *Arnold Irr. Dist*, 717 P.2d 1274. Significantly, the Washington State Court of Appeals (Div II) expressly adopted the reasoning in *Arnold. See State v. Public Utility Dist. No. 1*, 121 Wash.2d 179, 192 (Wash. 1993) *aff'd by PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) (in stream flow condition imposed by Ecology constituted an "appropriate requirement of State law.").

In fact, as held by the D.C. Circuit, the Corps is uniquely positioned to assert its authority to continue processing MBT-Longview's permit application where, as here, a state acts in a manner that exceeds its authority under the plain language of section 401. *City of Tacoma v. FERC*, 460 F.3d 53, 67-69 (D.C. Cir. 2006). While the *City of Tacoma* Court acknowledged that a federal agency in most cases is required to adhere to a state's 401 decision, the statute compels the agency to be mindful of the "outer limits" of section 401 which are bounded by water quality

standards. *Id.* The Court held that when a state acts under section 401, the federal agency has an obligation to confirm that the state complied with the statutory limitations imposed under section 401. *Id.* (requiring FERC to ensure that state acted within the statute of limitations required by section 401). Accordingly, the Corps should follow suit and ensure that any action it takes on the basis of Ecology's denial, is lawful and within the bounds of section 401(a)(1). See RGL 92-04 (requiring Corps to determine if state action is legal under section 401).

In addition, there are at least two other compelling reasons that the Corps should continue to process MBT-Longview's permit. *First*, federal agencies conditionally grant permits to applicants on the requirement to obtain a section 401 certification. *See, e.g., Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 397 (D.C. Cir. 2017) (upholding agency's conditional permit approval preventing project construction until applicant obtained section 401 certification); *Millennium Pipeline Company, LLC*, CP16-17-000, 160 FERC ¶ 61,065 (Sept. 15, 2017) (same).

MBT-Longview is confident that Washington Courts will remand Ecology's certification denial with instructions for the agency to follow the plain language of section 401(a)(1). Once the agency properly adheres to the plain language of section 401 in making its remanded certification decision, it will be incumbent on Ecology to grant MBT-Longview a certification as the record will demonstrate that "reasonable assurance" exists to certify the proposed CET under CWA section 401. 40 C.F.R. §121.2(a). Prematurely denying the JARPA at this time would be fundamentally unfair to MBT-Longview in light of the extraordinary time and effort invested by the Company and the Corps in this process, and the significant progress the Corps has made to date in completing the permitting process.

Second, section 401 and Corps implementing regulations permit, and arguably, require the Corps to find that Washington State has waived its right to certification under section 401. The Corps' regulations and regulatory guidance letters make clear that unreasonable delays in processing a request for certification justify finding waiver, and the Corps has established that anything beyond 60 days is unreasonable, unless expressly authorized by the district engineer (which is not the case here). 33 U.S.C. § 1341(a)(1); 33 C.F.R. § 325.2(b)(ii); 401 Water Quality Certification, Army Corps Regulatory Guidance Letter 87-03, April 14, 1987 ("Corps regulation 33 C.F.R. § 325.2(b)(1)(ii) defines this period to be 60 days unless the district engineer" determines a different "period is reasonable for the state to act"). Moreover, the Executive Order "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" calls for "timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years," and includes projects, "public and private . . . that are designed to provide or support services" including "ports, including navigational channels . . . energy production and

generation, including from fossil" fuels. Exec. Order No. 13,807, 82 Fed. Reg. 40,463-40,469 (August 24, 2017). The Executive Order provides a framework for agency accountability and streamlining environmental reviews for major projects so that the reviews no longer go on for years and years. It also establishes a federal policy to apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible. *Id.*

MBT-Longview submitted a certification application to Ecology three times: February 23, 2012 (withdrawn on January 28, 2013 at the Corps' urging to allow the agency to seek public comment on the JARPA when the Corps completed its Draft EIS); July 18, 2016 (withdrawn on June 22, 2017 at the request of the Department of Ecology); and June 22, 2017 (denied with prejudice on September 26, 2017). In each of these pending application periods, the Corps' 60-day limit elapsed without Ecology action. Finding waiver is therefore appropriate given Ecology's unreasonably delayed certification decision, and the unquestionably spurious and illegal means used to reach that decision. *See, e.g., Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 79–80 (1st Cir. 1993) (state agency's failure to render a certification decision within EPA's 60-day regulatory deadline justifies waiver); *Millennium Pipeline Company, LLC*, 160 FERC ¶ 61,065 (finding that the New York Department of Environmental Conservation waived its water quality certification authority).

IV. Summary

In summary, MBT-Longview requests that the Corps continue to process the JARPA and examine whether Ecology's delay amounts to a waiver of its section 401 authority. At the very least, the Corps should continue its review, publish its FEIS, and certainly not deny MBT-Longview's JARPA application on the basis of Ecology's *ultra vires* actions. We are available to discuss any questions this letter raises and thank you in advance for your serious consideration of this matter.

Very truly yours,

Beth S. Ginsberg