



COLUMBIA LAW SCHOOL

CENTER FOR CLIMATE CHANGE LAW

# CARBON OFFSHORING: THE LEGAL AND REGULATORY FRAMEWORK FOR U.S. COAL EXPORTS



Report

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## Carbon Offshoring: The Legal and Regulatory Framework for U.S. Coal Exports

July 2011

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## **ACRONYMS AND ABBREVIATIONS**

ACMP	Alaska Coastal Management Program
ANILCA	Alaska National Interest Lands Conservation Act
ARRC	Alaska Railroad Corporation
BNSF	Burlington Northern Santa Fe Railway Company
CAA	Clean Air Act
CEC	Commission for Environmental Cooperation
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)
CEQ	Council on Environmental Quality
CO <sub>2</sub>	Carbon Dioxide
Corps	The Army Corps of Engineers
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
DEIS	Draft Environmental Impact Statement
DEQ	Department of Environmental Quality
DNR	Department of Natural Resources
DOT	Department of Transportation
DS	Determination of Significance
DPSR	Montana Department of Public Service Regulation
DWF	Louisiana Department of Wildlife and Fish
DWPA	Deepwater Ports Act
EA	Environmental Assessment
EFH	Essential Fish Habitat
EIA	Energy Information Administration
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FONSI	Finding of No Significant Impact
FRA	Federal Railroad Administration
FRSA	Federal Railroad Safety Act
FWS	U.S. Fish and Wildlife Service
GHG	Greenhouse Gas
HCP	Habitat Conservation Plan
ICC	Interstate Commerce Commission
ICCTA	Interstate Commerce Commission Termination Act
MAP	Multi-Agency Permit
Mat-Su	Matanuska-Susitna Borough
MBTL	Millennium Bulk Terminals-Longview
MEPA	Montana Environmental Policy Act
MMPA	Marine Mammal Protection Act
MOA	Memorandum of Agreement
NAAEC	North American Agreement on Environmental Cooperation

NAAQS	National Ambient Air Quality Standard
NAFTA	North American Free Trade Agreement
NEMS	National Energy Modeling System
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NMFS	National Marine Fisheries Service
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
NRDC	Natural Resources Defense Council
NWP	Nationwide Permit
ODSL	Oregon Department of State Lands
OEA	STB Office of Environmental Analysis
PATON	Private Aids to Navigation
PRB	Powder River Basin
PSC	Public Service Commission
PUC	Public Utility Commission
RCRA	Resource Conservation and Recovery Act
RHA	Rivers and Harbors Act
SEIS	Supplemental Environmental Impact Statement
SEPA	Washington State Environmental Policy Act
SHPO	State Historic Preservation Office
SIP	State Implementation Plan
SMA	Shoreline Management Act
SSDP	Shoreline Substantial Development Permit
STB	Surface Transportation Board
SWPPP	Storm Water Pollution Prevention Plan
TCAA	Texas Clean Air Act
TCEQ	Texas Commission on Environmental Quality
TEIA	Transboundary Environmental Impact Assessment
U.S.	United States of America

## Introduction

Coal is the most polluting fossil fuel, releasing far higher levels of carbon dioxide (CO<sub>2</sub>) and conventional air pollutants—including sulfur dioxide, nitrogen oxide, and mercury—per unit of energy than either oil or natural gas. New air quality regulations are leading to the closure of many of America’s oldest and dirtiest power plants, reducing demand for coal.<sup>1</sup> At the same time, advanced drilling technologies are unlocking potentially vast supplies of relatively inexpensive methane, making cleaner-burning natural gas an increasingly competitive alternative to coal for electricity generation. As a result, some projections estimate that coal’s share of the total U.S. energy mix will drop to as low as 22 percent over the next two decades.<sup>2</sup>

Anticipating falling domestic demand, coal mining companies (and the railroads which transport nearly all U.S. coal) have begun looking to overseas markets such as China and India, where electricity use is skyrocketing and environmental regulations are still relatively lax.<sup>3</sup> The result is profound: between 2009 and 2010, U.S. coal exports to China increased by a factor of ten,<sup>4</sup> and industry forecasters anticipate a “30-year super cycle in global coal markets,”<sup>5</sup> with rising demand across the Asia-Pacific region met by sharp increases in U.S. exports from the Powder River Basin (PRB) of Wyoming and Montana, an area characterized by unusually high concentrations of coal that can be extracted at relatively low cost.<sup>6</sup>

Because the impacts of CO<sub>2</sub> emissions are global in nature, it makes no difference from a climate change perspective whether coal mined in Wyoming is consumed in Chicago or Shanghai.<sup>7</sup> With coal export volumes poised to increase dramatically in the near- to medium-term,<sup>8</sup> circumstances call for more comprehensive legal and policy response.

This report examines the legal and regulatory framework for U.S. coal exports, focusing in particular on the significant improvements in railroad and port infrastructure that will be necessary in order to boost the volume of overseas coal shipments to the degree anticipated by recent industry projections. While existing railroads and ports have the capacity to handle current coal export volumes, much more infrastructure will be needed to meet surging foreign demand. Changes in global commodity markets are making coal exports (especially PRB coal shipped to Asia) a reality, and a wide variety of new construction projects are under consideration to expand capacity and relieve congestion. These range from double-tracking existing Class I railroad rights of way to dredging harbors and installing a variety of new facilities to load, store, and ship coal from West Coast seaports.

Because the phenomenon of large-scale U.S. coal exports is new, no comprehensive analysis has yet been undertaken to explore the federal, state and local laws applicable to each step in the process. It is our hope that this report will contribute to ongoing debates surrounding this important issue.

The report is divided into four broad sections. Part I deals with railroads, which are the primary means to transport coal from mine sites to ports for onward shipment to foreign markets. If industry projections on coal export volumes are accurate, significant improvements and expansions to existing rail infrastructure will be needed across much of the Western United States. Part II deals with port facilities themselves. Few U.S. ports, particularly those on the West Coast, have the capacity to handle the anticipated volume of new coal shipments. Like railroads, port facilities will need significant upgrades if expanded coal exports are to proceed as planned. Each of these two sections enumerates the federal, state and, where relevant, municipal laws and regulations that apply to the construction of coal export infrastructure. Part III addresses the National Environmental Policy Act (NEPA), an overarching federal statute that applies to many, if not most, of the activities discussed in Parts I and II. Finally, three Appendices provide case studies of proposed coal export projects, a state-by-state analysis of statutes and regulations applicable to coal export infrastructure permitting in eleven key states, and a discussion of the North American Free Trade Agreement (NAFTA), provisions of which may apply to U.S. coal exports routed through Canada to the ports of British Columbia.

At the outset, it is important to distinguish among four types of coal: anthracite, bituminous, subbituminous, lignite—all of which are mined in the U.S. to varying degrees.<sup>9</sup> Anthracite, which has the highest carbon content and a heating value slightly lower than that of bituminous coal, accounts for less than half of one percent of all coal mined in the U.S.<sup>10</sup> It is produced solely in Northeastern Pennsylvania, and used mostly in specialized products such as charcoal filters and briquettes.<sup>11</sup> Bituminous coal has a slightly lower carbon content than anthracite and the highest heating value. It is the most abundant type of coal in the U.S. accounting for roughly half of all coal production nationwide,<sup>12</sup> with West Virginia, Kentucky, and Pennsylvania currently the largest producers of bituminous coal.<sup>13</sup> Subbituminous coal has a lower carbon content and heating value than bituminous coal, and makes up roughly another 44 percent all coal mined in the U.S.<sup>14</sup> Wyoming is the lead producer of this type of coal. Lignite coal has the lowest carbon content, as well as the lowest energy value, and it makes up around seven percent of coal produced in the U.S.<sup>15</sup>

Another key distinction between these types of coal is their end use. Coal serves two primary functions: coking (or metallurgical) coal is used in steel production; steam (or thermal) coal is used in power generation.<sup>16</sup> Coking coal is typically more expensive because it has greater energy content than steam coal.<sup>17</sup> All four types of coal can be used



for power generation, and bituminous coal is used also as a coking coal (whereas lignite and subbituminous do not have enough energy content to be used in steel production).<sup>18</sup>

Currently, the U.S. Energy Information Administration (EIA) estimates that the largest percentage of low-sulfur coal in the U.S. (87 billion short tons out of 100 billion total tons) is in the inland West—especially in Montana and Wyoming.<sup>19</sup> PRB coal in particular, while lower in energy because it is subbituminous, is also typically very low in sulfur content.<sup>20</sup> This is appealing to power-hungry but increasingly clean-air conscious Asian markets such as China, since low-sulfur coal is cleaner when burned.<sup>21</sup>

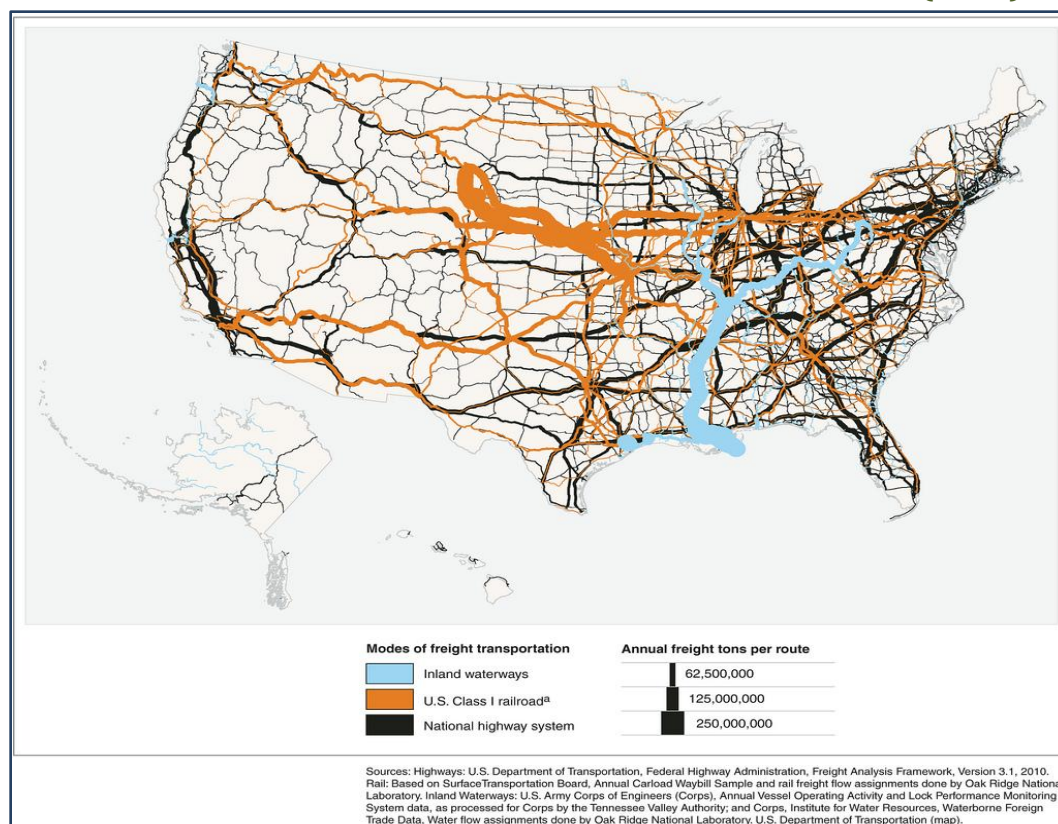
Coking coal has remained the primary type of coal exported by the U.S.—making up 64 percent of coal exports in 2010.<sup>22</sup> Even so, the growth of U.S. coal exports in recent years has been driven primarily by a surge in demand for steam coal, especially from the Asia-Pacific region. Demand for steam coal rose 160 percent in the 1st quarter of 2011 compared to the same time period in 2010, while coking coal exports grew only 21 percent over that period.<sup>23</sup> For these reasons, this report will focus on U.S. steam coal exports.

## **I. Rail Facilities**

A major increase in the volume of U.S. coal exports will require improvements to the infrastructure used to move coal from mines to ports. While coal can be transported using barges, trucks, and even pipelines, the dominant method for transporting coal within the United States is rail.<sup>24</sup> Today the greatest flow of freight anywhere in the United States is PRB coal being transported to the coal-fired power plants of the Midwest (see Figure 1 below).<sup>25</sup> If the coal industry seriously shifts towards an export-oriented business model, a huge volume of coal will need to be transported to West Coast ports for onward shipment to Pacific Rim purchasers. If the volume of overseas coal shipped to Asia in 2010, mostly imported from Australia, was instead satisfied with exports of PRB coal from the U.S., the daily number of coal trains heading west from the PRB would need to increase from ten (primarily servicing domestic coal-fired power plants) to roughly sixty, depending on the number of train cars, in order to export over 100 million short tons of coal via West Coast ports.<sup>26</sup>

Most of the tracks carrying PRB coal westward are currently at or near capacity, and would need to be upgraded to support this new traffic.<sup>27</sup> Furthermore, any mines opened to serve the demand for coal export would likely need entirely new rail connections to the main lines. And new track will also be needed to connect the main lines to export terminals in those areas where such infrastructure does not already exist.

**FIGURE 1: FREIGHT TONNAGE ON HIGHWAYS, WATERWAYS AND RAILROADS (2007)**



Source: U.S. Government Accountability Office, Report, “Surface Freight Transportation: A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers,” Jan. 26, 2011, <http://www.gao.gov/products/GAO-11-134>.

Railroad law makes it difficult for citizens to meaningfully engage in most rail improvement projects. Upgrades to existing rail lines, including laying down a second set of tracks (“double-tracking”), generally do not require federal permitting and thus may not qualify as a federal action triggering NEPA environmental analysis (see Part III below). Additionally, the Interstate Commerce Commission Termination Act (ICCTA) preempts many of the state and local regulatory avenues normally used by citizens to engage in infrastructure development planning. Nevertheless, the Surface Transportation Board (STB) approval process, other federal environmental laws (especially NEPA), and a limited number of non-preempted state and local restrictions may be used to engage in at least some forms of railroad development.

This section will outline the basics of U.S. railroad regulation. It will then explore potential federal law opportunities to engage in the permitting of rail infrastructure, and then similar opportunities available under state and local law. In general the most promising method for influencing the development of rail infrastructure for coal exports is the NEPA analysis process, although many rail improvements will not trigger NEPA.

### **Box 1: THE TONGUE RIVER RAILROAD SAGA**

*For a variety of reasons, the rail industry as a whole has retreated more than it has expanded over the last thirty years,<sup>28</sup> and so there are relatively few examples of citizens using modern legal tools to influence railroad infrastructure planning. One notable example of the power of citizens (and of NEPA) to resist rail development, however, is the ongoing Tongue River Railroad saga.*

*The Tongue River Railroad is a line extension originally intended to connect coal mines in Montana with Midwestern coal plants.<sup>29</sup> The Tongue River Railroad Company submitted its first application to build the line in 1983, a full twelve years before Congress even created the STB. Yet because of vigorous legal and political resistance, project construction had not yet commenced as of July 2011.*

*Allegedly trying to obscure the overall environmental impact of the project,<sup>30</sup> the railroad divided the proposed line into three sections, each of which went through the ICC/STB approval process separately. Tongue River I was submitted to federal railroad regulators in 1983 and approved in 1986. Tongue River II was submitted in 1991 and approved in 1996. Tongue River III was submitted in 1998 and approved in 2007.<sup>31</sup> All three approvals required detailed EIS reports under NEPA, and all three EISs were repeatedly challenged before the federal railroad regulators and in federal court. Each successive EIS provided an opportunity to highlight flaws or shortcomings in previous documents, including the inevitable changes caused by the passing of decades between plan approval and construction.*

*As of 2011, the Tongue River line still needs approval from the Montana Fish, Wildlife and Parks Commission for an easement across a protected fish hatchery.<sup>32</sup> The Commission's reluctance to approve the easement likely stems not just from the urge to protect wildlife, but also from the opposition of Montana landowners. Legally, the railroad can use eminent domain to gain a right-of-way across private property. But politically, public concern over taking land from Montana ranchers may yet convince the state to scuttle the project.*

*Furthermore, after all these years it now appears that much of the Midwest market for coal is evaporating due to stricter air pollution regulations, cheaper natural gas, and other factors. Coal hauled on the Tongue River Railroad may thus be bound for Pacific Rim markets, a fact not analyzed in any of the project's previous EISs.*

*Notably, on July 1, 2011, the railroad filed papers with the Ninth Circuit Court of Appeals (which is hearing the case between the Northern Plains Resource Council and the STB concerning permitting for the project) to disclose the fact that "all of the stock of Tongue River Railroad Company [had been] transferred" to a holding company owned by BNSF, Arch Coal and a private investor.<sup>33</sup> BNSF is a major railroad operator with extensive holdings across the West and a huge interest in expanded coal exports to the Pacific Rim.<sup>34</sup> Arch Coal is the owner/developer of several coal tracts at Otter Creek in the northern PRB, where the company plans to open a major new mine that could produce up to 40 million tons per year, much of it bound for export.<sup>35</sup>*

*Even if the Tongue River Railroad is finally built, the dogged resistance of local landowners organized under the banner of the Northern Plains Resource Council has dragged out the approval process for thirty years. The 'final' EIS includes a long list of mitigation measures that would not have been taken without citizen pressure.*

### **A. The Basic Framework of U.S. Rail Law**

For many years, railroads were closely regulated by the federal Interstate Commerce Commission (ICC). During the second half of the 20th century, however, the industry was thoroughly deregulated, culminating in the 1995 Interstate Commerce Commission Termination Act (ICCTA), through which Congress replaced the ICC with the STB. The STB's

*jurisdiction* over the railroads is even greater than that of the ICC, but its *powers* are much more limited. Essentially, the STB loosely governs rates and licenses some rail activities.

Nevertheless, the STB is the primary government regulator for almost all U.S. railroads. In some parts of the country (including most of the states through which coal exports will pass), federal courts have declared that many state and local regulations affecting railroad operations are preempted by the ICCTA. Recent changes to federal railroad law suggest that state environmental laws probably apply to rail infrastructure, but also emphasize that state restrictions that target railroads specifically are invalid.

The STB is not the only federal agency with authority over the railroads. The Federal Railroad Administration (FRA) is responsible for railroad safety. Unlike the STB, the FRA's authority is not exclusive, and state agencies can impose additional safety requirements on the railroads. Federal environmental laws like the Clean Air Act (CAA) also apply to railroads under most circumstances. Most importantly, so long as there is a qualifying federal action (such as the grant of a permit by the STB), NEPA requirements also apply to railroads. Aside from NEPA, however, concerned citizens may find it difficult to invoke these federal laws until a railroad becomes operational, making them of relatively limited in influencing the planning and construction of coal transport infrastructure.

## **B. Surface Transportation Board Authority**

The ICCTA gives the STB authority over “the construction, acquisition, operation, abandonment, or discontinuance” of railway lines and facilities.<sup>36</sup> This authority does not override other federal laws (most importantly NEPA), but it does preempt state law. Notably, federal appellate courts disagree as to which state and local laws are preempted by the ICCTA, and the Supreme Court has not yet resolved the issue.<sup>37</sup> At the very least, states cannot license major freight railroads.

When Congress passed the ICCTA in 1995, it included language giving the STB exclusive jurisdiction over most elements of rail traffic. In the following years, the Ninth Circuit Court of Appeals (as well as other circuit courts), with jurisdiction over Montana, Idaho, Alaska, Oregon and Washington (but not Wyoming),<sup>38</sup> determined that the ICCTA overrides a broad swath of state law. According to the leading Ninth Circuit case of *Auburn v. United States*, state environmental analysis laws may not be applied to railroad projects.<sup>39</sup> The *Auburn* court reasoned that since many state and local environmental laws can prevent railroad companies from constructing or operating lines, these laws are generally preempted by the ICCTA.<sup>40</sup> This decision removed potential entry points for citizen involvement, and in some fields traditionally governed by state law, may actually prevent regulation altogether. The broad preemption of state law has proven particularly problematic for facilities related to solid waste transport (see Box 2 below).



## Box 2: ICCTA Preemption and Solid Waste Transfer Facilities

*The relationship between solid waste and railroad regulation demonstrates the risks of giving the ICCTA broad preemptive power over state and local laws. While “hazardous waste” is closely regulated by a raft of federal regulations, the handling of other types of solid waste (everything from mining and construction debris to household trash) is governed by state and local regulation. This waste can include dangerous chemicals that, if treated unsafely, can threaten public health and the environment.*

*Transporting and disposing of solid waste necessitates solid waste transfer facilities, large installations for collecting waste from trucks and loading it onto barges or rail cars. After the passage of the ICCTA, multiple federal courts held that regulating solid waste transfer facilities on railroad property falls within the exclusive jurisdiction of the STB.<sup>41</sup> Longstanding state regulations governing solid waste facilities were thus held not to apply to facilities attached to railroads. Meanwhile, no federal agency, including the STB, exercised legal authority to create federal environmental standards for waste transfer facilities. The transfer of trash to rail was thus left essentially unregulated.*

*The result in Bergen, New Jersey was a nightmare: Standing pools of water with high levels of mercury, arsenic, and lead. Flammable material scattered across sites without proper fire safety protocols. When one carload of waste caught fire, the railroad even denied the right of the local fire department to inspect the residue, claiming ICCTA preemption.<sup>42</sup>*

*In the Clean Railroads Act of 2008, Congress closed this loophole by explicitly subjecting railroad solid waste facilities to state regulation unless the STB finds they do not pose an “unreasonable risk.”<sup>43</sup> Notably, however, this new procedure does not apply to facilities and lines for coal transport since coal, whatever its hazards, is not classified as “waste” by the Act.<sup>44</sup>*

In the 2008 Clean Railroads Act, Congress overturned the Ninth Circuit’s broad reading of ICCTA preemption in *Auburn*. After resolving the solid waste facility problem, Congress emphasized “the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers.”<sup>45</sup> This may mean that state environmental laws and local zoning regulations are not preempted by the ICCTA, and that the Ninth Circuit’s application of ICCTA preemption in *Auburn* is obsolete. However, significant uncertainty remains in the absence of future litigation to determine the precise contours of the relationship between the ICCTA and the Clean Railroads Act on this question.

Note also that, under the express language of the Clean Railroads Act, “unreasonably burdensome” state laws remain preempted by the ICCTA. If a state environmental law is strict enough to actually block a railroad expansion, it will potentially be held invalid, at least in the Ninth Circuit.<sup>46</sup> Moreover, any state or local laws *targeted* at railroad operations are very likely preempted by the ICCTA. For example, in the recent case of *American Railroads v. South Coast Air Quality Management District*, the Ninth Circuit struck down a local air pollution law regulating idling locomotives because it applied only to railroads.<sup>47</sup>

Without special federal authorization, then, the ICCTA still preempts state and local environmental laws specifically tailored to the dangers posed by railroads.

### **C. Federal Requirements**

Federal laws governing rail as well as federal environmental statutes apply to plans for the expansion of rail infrastructure to facilitate coal exports. The most relevant federal requirements for rail expansion are the need for STB approval to build or extend railroad lines and, crucially, the NEPA environmental analysis required to issue such a permit.

#### **1) STB Approval of New Construction**

While most rail improvements supporting the expansion of coal exports do not require an STB permit, the STB permitting process for the extension of new lines, where they are needed, provides perhaps the best avenue for influencing coal export plans. Although the standards used by the STB under its organic statute tend to be amenable to railroads, the grant by the agency of a permit triggers environmental analysis under NEPA, providing citizens with the opportunity to engage in the decision making processes regarding rail infrastructure.<sup>48</sup>

An STB permit is required before a railroad “constructs an extension” to a railroad line or “constructs an additional railroad line.”<sup>49</sup> This does not mean that STB approval is required in every instance in which railroad track is placed or moved. New track only needs the STB’s approval if it enters new territory, thus potentially undercutting the economic viability of an existing railroad.<sup>50</sup> Therefore, track improvements along existing routes, including moving track or “double-tracking” to carry increased volumes of coal for export along existing lines, generally do not require STB approval.

The STB is required to issue a construction permit unless issuance would be “inconsistent with the public convenience and necessity.”<sup>51</sup> The STB’s presumption is that every application should be approved, and the Board reads its mandate to focus on “promoting effective competition” and “reducing regulatory barriers.”<sup>52</sup> In theory the public could challenge a STB permit in court by demanding that the agency interpret “public convenience and necessity” to include human factors beyond ensuring a functional freight transport system, but the STB’s reading of its own mandate as encouraging an economically vibrant rail industry would be granted substantial deference under the *Chevron* doctrine.<sup>53</sup>

STB approval is a federal action that triggers NEPA and other impact analysis statutes like the National Historic Preservation Act (NHPA). As demonstrated in the decades-long procedural twists and turns of the Tongue River Railroad case (see Box 1 above), NEPA requirements can transform the STB permitting process from a routine approval into an

adjunct to a longer EIS process characterized by careful scrutiny of all proposed activities and their foreseeable environmental affect.

An STB permit is also required when a rail line changes ownership. In theory, a major, industry-transforming reorientation of PRB coal traffic away from the Midwest and towards the West Coast could prompt the consolidation or sale of many existing rail lines. However, unlike line extensions, the STB presumes that changes in ownership do not have significant enough environmental impact to merit a full EIS.<sup>54</sup> Citizens hoping to use a transfer in ownership as a trigger for in-depth environmental review likely would need to argue that the transfer of the rail lines is directly linked to expanded coal traffic with its heavy environmental consequences.

## **2) NEPA and National Historic Preservation Act (NHPA)**

NEPA is discussed in detail in Part III of this report, and provides the most important method for scrutinizing new railroad lines requiring STB approval. The NEPA process for actions subject to STB approval is controlled by the STB Office of Environmental Analysis (OEA).<sup>55</sup> OEA determines whether an Environmental Assessment (EA) is sufficient or whether a full EIS is required. This determination can be challenged by the public in those cases where plaintiffs can establish standing to sue. STB regulations state that most line constructions and extensions will require full EIS analysis.<sup>56</sup> Notably, other federal actions associated with railroad construction, such as the grant of an easement to cross federal land, may also trigger the EIS requirements imposed by NEPA.

The NEPA analysis process frequently also addresses other federal laws requiring impact analyses of federally funded or permitted projects. The NHPA, for instance, requires the government to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places].”<sup>57</sup> The NHPA is discussed in more detail in Part II(A)(4) below.

## **3) Clean Air Act (CAA) Controls on Trains**

Increased rail traffic to support coal exports will lead to higher emissions of air pollutants regulated under the Clean Air Act.<sup>58</sup> While federal air pollution regulations apply to railroads despite the ICCTA, CAA controls on the construction of track and the operation of trains are relatively scant. CAA regulations for railyards and other associated facilities, on the other hand, may offer a more promising path for citizen engagement in decision making regarding coal export infrastructure, and will be discussed in the next section.<sup>59</sup>

Train locomotives, typically large diesel engines, are significant emitters in and of themselves. Additionally, substantial amounts of coal dust blow off the top of train cars in

transit. According to one rail company, a single car loaded with coal can lose up to a ton of coal dust during its journey.<sup>60</sup>

Under the CAA, states and the federal government jointly share responsibility for maintaining air quality. The federal government is responsible for managing emissions from “mobile sources” including trains.<sup>61</sup> The EPA has created an elaborate system of technology standards for locomotives.<sup>62</sup> The CAA has a broad citizens’ suit provision that would allow private citizens to challenge a railroad’s failure to comply with these standards.<sup>63</sup> However, violations of emissions standards will generally occur after a railroad commences operations, making it all but impossible to use this avenue to influence the construction of new rail lines. CAA locomotive standards can force railroads to use relatively clean engines, but they cannot, in and of themselves, influence the development of coal export infrastructure such as new tracking.

CAA controls on coal dust are less well-developed than engine standards. While the CAA gives the government the authority to regulate coal dust under the CAA as “particulate matter,” there are no federal limits on coal dust blowing off mobile sources. Particulate matter is regulated in the CAA as one of six “criteria pollutants.”<sup>64</sup> This means the EPA sets a national standard (called a “national ambient air quality standard,” or NAAQS). States then create state implementation plans (SIPs) for achieving this national goal. If an air quality region fails to meet the NAAQS for a given criteria pollutant, the EPA can require the state to impose stricter regulation under its SIP. After repeated failures to apply stricter regulation the federal government can take over an inadequate state program.<sup>65</sup>

SIP programs focus on licensing and controlling stationary sources of pollution. Coal plants and coal mines are licensed by state air regulators, while cars and trains are regulated predominantly by federal agencies. SIPs can, however, impose some requirements on vehicles. For instance, Idaho’s SIP for particulate matter requires open-bed trucks carrying coal and other dust-emitting materials to cover the material.<sup>66</sup> Importantly, all SIPs must be approved by the EPA; states may not create and implement SIPs unilaterally.

It seems likely that state regulation of coal dust blowing off moving trains under a CAA SIP—even state regulation that explicitly targets trains—would not be preempted by the ICCTA. Since the CAA is a federal law that calls for state implementation, the courts will seek to “harmonize” the ICCTA with the CAA rather than invoking preemption against state actions mandated by the CAA through the SIP process.<sup>67</sup> Therefore, any state or locality seeking to impose controls on fugitive coal dust from trains (or to impose any air quality control on the rail industry) should strive to work through the SIP process.<sup>68</sup> Using the SIP mechanism also heads off a potential dormant commerce clause challenge. Constitutionally, states are forbidden from passing regulations that impermissibly and without sufficient



justification burden interstate commerce, for instance by requiring trucks or trains operating on interstate lines to adopt a burdensome safety or environmental measure of dubious value.<sup>69</sup> However Congress can waive this power and authorize states to enact such rules through cooperative federalism arrangements like the CAA's SIP program.<sup>70</sup>

Notably, several railroads are presently acting to voluntarily reduce coal dust blow-off from trains. This is because in addition to threatening air quality, coal dust accumulates on railroad tracks. The dust dangerously increases track slickness and the risk of dangerous (and expensive) accidents. Major railroad companies are beginning to demand that coal shippers take expensive actions, such as applying a chemical treatment, to drastically reduce the amount of escaping coal dust.<sup>71</sup> Recently the STB rejected a railroad attempt to pass the costs of these precautions on to coal shippers.<sup>72</sup> But as of this writing, it remains unclear whether the imposition of dust controls will become standard industry practice.

#### **4) Environmental Controls on Railyards**

While trains themselves can be easily analogized to automobiles and other mobile sources of emissions, which face predominantly federal controls, other railroad facilities may be subject to more stringent environmental laws as geographically distinct sources of pollution. Expanded traffic on tracks heading west from the PRB will also mean expanded use of the railyards and maintenance facilities servicing those tracks. Whether due to broad readings of ICCTA preemption or the difficulty of regulating railyards with legal tools designed for factories, only a limited range of federal environmental laws, such as CERCLA, have been brought to bear on railyards. That said, both the CAA and the Resource Conservation and Recovery Act (RCRA) provide somewhat promising avenues for citizen engagement in coal export infrastructure permitting.

The CAA very likely allows states to use the SIP process to regulate the emission of pollutants at railyards. The Ninth Circuit in *American Railroads v. South Coast Air Quality Management District* struck down a local California regulation seeking to limit air pollution of particulate matter by restricting idling locomotives.<sup>73</sup> The court struck down the regulation because it was not associated with the California SIP for particulates, and thus was subject to ICCTA preemption.<sup>74</sup> However, an idling law or other control on railyard operations, if implemented through an EPA-approved SIP, could potentially hold up in court. Unfortunately such air quality regulations do not exist at present, and therefore are not a viable short-term legal strategy. Unlike factories, railyards are not amenable to the "best available control technology" approach that typifies CAA SIPs.

The Resource Conservation and Recovery Act (RCRA) may offer another pathway to influence railyards and associated infrastructure under existing laws and regulations. RCRA governs the disposal of hazardous waste, imposing strict licensing, tracking, and

disposal rules.<sup>75</sup> Large numbers of locomotives operate in railyards, releasing diesel particulate matter into the air that contains numerous materials that normally trigger RCRA (including arsenic and lead).<sup>76</sup> Like the CAA, RCRA has a strong citizens' suit provision.<sup>77</sup> In June 2011 the Natural Resources Defense Council (NRDC) sent a letter to railyard operators in California announcing its intention to sue under RCRA for an injunction against railyard operations causing the collection of hazardous waste in railyards without complying with RCRA.<sup>78</sup> Given that diesel emissions are subject to federal CAA controls, and the petition presented no evidence of the accused railyards violating these established emission limits, the courts may conclude that RCRA does not apply to diesel emissions into the air.<sup>79</sup> However if RCRA *does* apply to diesel emissions in railyards, RCRA would provide another layer of review as train traffic and infrastructure expand to accommodate increased coal exports.

### **5) Federal Railroad Administration (FRA) Standards**

While the STB regulates the economics of the railroad industry, the FRA focuses on rail safety.<sup>80</sup> The FRA, like the STB, is a component of the Department of Transportation. It has the power under the Federal Rail Safety Act (FRSA) to create regulations covering "all areas of railroad safety," ranging from equipment to employee training.<sup>81</sup> Like EPA enforcement of the CAA, FRA safety and noise rules do not present a particularly promising path for influencing decisions on increased traffic due to coal exports. As with the CAA, FRSA violations usually trigger only monetary fines, and can only occur once rail infrastructure has already been built. And unlike the CAA, the FRSA does not have a citizen suit provision, leaving citizens groups little opportunity to force the FRA to pursue potential railroad safety violations.

The FRA also enforces standards for train noise developed by the EPA.<sup>82</sup> Like most FRA rules, noise standards are applied to individual locomotives, not to rail lines. It remains unclear whether the increased number of trains sparked by expanded coal transport would trigger any violation of these noise standards.

Unlike the STB, the FRA explicitly allows some state and local rail regulation. While states cannot impose stricter standards than the FRA (for example setting a lower speed limit or noise limit) they can impose safety rules in regulatory areas untouched by the federal agency.<sup>83</sup> One common type of authorized state regulation governs the distance around rail track that the railroad must keep clear of vegetation in order to prevent fires.<sup>84</sup> The FRSA's acknowledgement of state power to develop new safety rules trumps the ICCTA's general prohibition on state rail laws, including in the Ninth Circuit.<sup>85</sup> Even when federal standards do exist, states can impose stricter standards "to eliminate or reduce an essentially local safety or security hazard."<sup>86</sup> However, the phrase "local safety or security hazard" has been

read very strictly, and courts have specifically stated that a track's location in an environmentally sensitive area does not qualify.<sup>87</sup>

## **6) Department of Transportation Act §4(f)**

Section 4(f) of the Department of Transportation Act<sup>88</sup> provides that the Department of Transportation (DOT), which includes both the STB and the FRA, “shall not approve any program or project” that “requires the use of any publicly owned land” in use as a park or wildlife refuge, or of historical significance, unless there is no feasible and prudent alternative.<sup>89</sup> The STB approval process does not itself trigger Section 4(f), but if a rail project supporting coal exports receives funding from the DOT or is otherwise part of “program or project” that requires DOT approval, Section 4(f) may offer another avenue to influence rail infrastructure decisions.<sup>90</sup>

Unlike NEPA, Section 4(f) imposes clear substantive duties. Not only must the Department consider the impacts of transportation projects on parkland, but it may only use such land if “(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.”<sup>91</sup> The Department must consult with other government officials with authority over the site, and undergo significant procedural steps to establish the lack of a feasible and prudent alternative.<sup>92</sup> Notably, this analysis is frequently incorporated into the NEPA EIS process. As it pertains to rail development to facilitate coal exports, the potential burdens imposed by Section 4(f)—both procedurally and perhaps even by foreclosing the most efficient rail routes—could discourage rail developers from seeking agency financing for routes that pass through or near parks, wildlife refuges or areas of historic significance.

## **D. State and Local Requirements**

With the exception of some safety rules, most state and local regulations directly targeting railroads or imposing truly burdensome costs on rail development likely will be preempted by the ICCTA.<sup>93</sup> However, there are still a few sources of state and local regulation that impose additional procedural requirements on the expansion of rail infrastructure. If a railroad company neglects these requirements, state and local laws may force reconsideration of the project in question.

### **1) State Public Utility Commissions**

Every state has an agency, generally called a Public Utilities Commission (PUC) or a Public Service Commission (PSC), which manages utilities. Many state PUCs have limited authority over railroad operations, particularly railroad safety. In other states, this power is vested in the state transportation agency.

Most state PUC regulation of railroad activity was preempted by the ICCTA, but PUCs still complement the FRA's mandate to ensure rail safety. For example, PUCs are frequently responsible for setting rules for safe clearance around rail lines, and in some states have authority over rail crossings.<sup>94</sup> PUC clearance and crossing regulations impose additional costs on railroad expansion, and may require a railroad seeking to upgrade infrastructure within its own right-of-way to purchase more land or invoke eminent domain.

Moreover, while a PUC cannot tighten safety standards passed down by the FRA, it can pursue railroad companies for noncompliance even if federal regulators choose not to.<sup>95</sup> Therefore, if a citizens' group suspects that a railroad is violating a federal railroad safety standard but cannot sue for enforcement directly, it may consider notifying the state PUC, as well as the FRA, in hopes of spurring enforcement proceedings.

## **2) State Environmental Laws**

State environmental laws generally apply to railroads. So long as a given restriction does not unreasonably burden rail traffic or specifically discriminate against rail, a railroad company can be subjected to the same environmental requirements as a company in any other industry.<sup>96</sup> However, few state environmental laws apply specifically to the expansion of rail infrastructure for coal exports.

This is, in part, because the environmental effects of railroads are not isolated in a concentrated "island" of development as with most heavily-regulated polluting industries. Railroads do share similarities with highways, pipelines, canals and other forms of linear development, but are a distinct source of environmental risks and harms. And environmental laws designed to minimize pollution resulting from train traffic must be targeted at trains specifically, thus triggering preemption under the ICCTA. This dilemma is less pronounced for facilities attached to rail lines, including railyards. A facility for loading or unloading coal can be, and is, the subject of state regulations prohibiting the dumping of dangerous substances,<sup>97</sup> whereas a locomotive engine likely is not. However, it should be noted that a state law specifically addressing *railroad* transfer facilities or railyards will face ICCTA preemption.

State law analogues to NEPA, known collectively as "little NEPAs," provide perhaps the best opportunities for citizens to applying state environmental laws to rail development for coal export. These laws, while not targeted at or unreasonably burdensome for railroads, impose significant procedural requirements on the construction of new rail infrastructure. Of course, since the ICCTA preempts state permitting of railroads, many projects will not qualify for state environmental analysis. Moreover, little NEPAs cannot in and of themselves be used to impose state permitting requirements on railroads.<sup>98</sup> However, state environmental review may be triggered by any *separate* state action necessary for railroad

infrastructure projects. For example, little NEPA requirements will apply when a state land management agency grants an easement for a railroad to cross state-owned land.<sup>99</sup>

### **3) Local Issues**

Local zoning laws, municipal ordinances, construction laws and other general restrictions on industrial development may also apply to certain rail expansion activities associated with coal exports. Local rules may be of special importance in addressing the construction of railyards and other structures associated with rail lines. While there is great variation in such rules from state to state and across municipalities, these permitting processes may be particularly useful to local groups. Furthermore, citizens concerned about the impacts of new infrastructure for coal export may have the ability to lobby for new local laws and regulations to particularly address the environmental and public health effects of such developments.

## **E. Cross Cutting Doctrines**

In addition to the regulatory programs described above, some basic legal doctrines that cross the boundaries between state and federal law offer some limited promise for influencing railroad development associated with coal exports.

### **1) Eminent Domain**

While upgrading existing rail lines to accommodate new traffic may take place entirely on property already owned by railroad companies, significant expansions could require the acquisition of more land. Through eminent domain, a government, or a company authorized by the government, can seize private land for “public use.”<sup>100</sup> The owner is paid for the taken land, but must sell. A railroad company authorized by a state to exercise eminent domain can take land for the “public use” of building or improving a railroad.

The “public use” standard is found in the U.S. Constitution. Developing railroad infrastructure has been an archetypal “public use” for well over a century.<sup>101</sup> Furthermore, in 2005 the Supreme Court in *Kelo v. City of New London*<sup>102</sup> endorsed a very broad understanding of public use under the U.S. Constitution. Post-*Kelo*, the use of eminent domain to build railroads, even railroads built to transport coal for export rather than domestic consumption, would almost certainly be held to be constitutional.

Aside from federal law, some states have also given private railroads general authorization to use eminent domain on behalf of the state government. A court must agree that an authorized public use (e.g. railroad construction) exists under state law, and the owner losing her land must receive a hearing, but no state agency looks at the individual railroad project to weigh its public value. Notably, this limited, non-discretionary review by a court will generally not trigger state laws requiring environmental analysis.<sup>103</sup> Citizens

concerned about rail infrastructure development should always examine whether or not their state laws grant private railroads the power to use eminent domain.

In the past decade, *Kelo* has sparked an intense national backlash against the use of eminent domain to benefit private companies, leading to legislative action in some states. Most legislation confronting the problem has been targeted at the issue in *Kelo* itself: that of a government agency condemning private property for use by another private entity, such as a real estate developer, for the broad purpose of “economic development.” There is no reason, however, that similar scrutiny should not be redirected towards private railroad developers building infrastructure for coal exports that do not benefit local communities. If a state does not want to give broad eminent domain power to the railroads, it does not have to. As with any solution requiring legislative action, however, this may not be a viable tactic to influence specific infrastructure projects.

## 2) Nuisance

The law of nuisance allows a party to file a lawsuit when someone’s actions interfere with the use and enjoyment of either private land or a public right.<sup>104</sup> At first glance, it may appear that the noise and pollution associated with coal trains is a qualifying interference. However, to constitute a nuisance an activity must *unreasonably* interfere with the rights of others. Longstanding Supreme Court precedent states that the typical effects of rail traffic do not qualify as a nuisance.<sup>105</sup> However, federal courts have carved out a narrow exception for train-related activities that cause special and particular damage to a particular piece of property.<sup>106</sup> In the classic case, a train emitting exhaust as it passes by a house would not be considered a nuisance. But if the train travels through a tunnel which vents a huge accumulation of smoke right by a house, the concentrated smoke might rise to the level of a nuisance.<sup>107</sup>

Nuisance is a common law doctrine, created by the courts over time rather than by statutes passed by legislatures. This means that if a law is passed that comprehensively regulates behavior that would otherwise constitute a common law nuisance, then nuisance law can be displaced by the statute, meaning that private parties may no longer avail themselves of the nuisance cause of action.<sup>108</sup> Locomotive regulations under the CAA are likely comprehensive enough to displace any nuisance claim for engine smoke (even smoke with a special effect on a specific piece of property). As of this writing, however, fugitive coal dust regulations appear to be weak enough that a nuisance claim may remain for property owners, such as farmers, whose interests are specially affected by coal dust pollution.

Notably, some states, municipalities, and environmental groups have challenged power plants’ greenhouse gas emissions through the innovative use of nuisance law. In the context of coal exports, the *entirety* of an export plan could, under this approach, constitute an unreasonable interference in the rights of the public through increasing CO<sub>2</sub> emissions and,



thus, global temperatures. The Supreme Court recently considered this sort of argument in *AEP v. Connecticut*, and rejected it.<sup>109</sup> The Court held that the power of the EPA to regulate greenhouse gases under the CAA displaced a nuisance claim under federal common law for global warming related harms.<sup>110</sup> Although the Court did not decide whether CAA regulation precludes state law nuisance claims, *AEP* probably means that nuisance as a route for challenging climate-related harms faces a steep uphill climb.

## **II. Port Facilities**

In 2010 the United States exported roughly 60 million short tons of coal, almost entirely through ports on the East Coast and the Gulf of Mexico,<sup>111</sup> while little coal passed through any West Coast port.<sup>112</sup> Skyrocketing demand in Asia, however, makes rail-accessible West Coast ports particularly attractive targets for expansion. This Part examines a variety of regulatory mechanisms involved at the federal, state, and local level for expansion of such facilities.

### **A. Federal Law**

#### **1) Army Corps of Engineers**

The Army Corps of Engineers (Corps) has broad jurisdiction over structures built in the navigable waters of the United States.<sup>113</sup> Specifically, the Corps has permitting authority over any structure that has the potential to obstruct navigation<sup>114</sup> and any project that involves the discharge of dredged or fill materials into navigable waters.<sup>115</sup> Project developers attempting to expand port facilities for coal export, through either the construction of additional structures or the placement of any fill material, would likely need to obtain from the Corps, before commencing construction, permits under the Rivers and Harbors Act (RHA) and the Clean Water Act (CWA).<sup>116</sup> Section 10 of the RHA prohibits construction of any structure in the navigable waters of the United States without prior approval from the Corps.<sup>117</sup> Section 404 of the Clean Water Act regulates the discharge of fill material into U.S. waters.<sup>118</sup> The Corps will also likely have lead agency status for administering NEPA review processes (see Part III below) for port construction.

Certain specific activities that are deemed to have a minimal impact on the environment can be eligible for a Nationwide Permit (NWP), which allows those activities to be carried out with minimal paperwork and oversight.<sup>119</sup> For example, Private Aids to Navigation (PATON) permits, which regulate the installation of navigational aids or other signage, are covered under NWP 1.<sup>120</sup> Constructing a new port for coal exports, as opposed to modifying an existing port facility, will require several types of activities that are not eligible for general NWPs, as a project of such size will likely have significant impacts on the environment.<sup>121</sup>

## 2) Clean Water Act

For dredge or fill activities not covered by a general NWP, developers must obtain a Section 404 permit under the CWA.<sup>122</sup> Each 404 permit application must undergo formal notice and comment procedures and a process of public interest review,<sup>123</sup> and must also meet the requirements of the CWA Section 404(b)(1) guidelines.<sup>124</sup> Each of these processes incorporates environmental concerns. Public interest review, part of the Corps' permitting process, involves analysis of a broad range of relevant factors, including conservation and wildlife values,<sup>125</sup> and also requires consultation with other government agencies.<sup>126</sup>

The Section 404(b)(1) guidelines mandate that a permit not be issued for a discharge of dredge or fill material if: (1) there is a practicable alternative which would have less adverse impact on the aquatic ecosystem; (2) the discharge will cause or contribute to a significant degradation of the waters of the United States; (3) appropriate and practicable steps have not been taken which will minimize potential adverse impacts on the aquatic ecosystem; or (4) the discharge violates a toxic effluent standard under 33 U.S.C. 1317, causes or contributes to violation of a state water quality standard, or jeopardizes the continued existence of an endangered species or protected marine sanctuaries.<sup>127</sup> In addition to this expansive review by the Corps, issuance of Section 404 dredge and fill permits may also constitute significant federal actions that are subject to environmental review under NEPA.<sup>128</sup> For a detailed discussion of NEPA, see Part III below.

Because Section 404 permits are often issued in connection with large project proposals, one area of controversy is whether the Corps must consider the impact of the entire project in determining whether to grant or deny the permit, or if it merely has to consider the direct impacts of the dredging or filling actions. In general, Corps practice has been to extend the scope of its review over the entire project only where the federal government has sufficient "control and responsibility."<sup>129</sup> Some court cases have read this "control and responsibility" test as limiting the scope of review to only the areas where the Corps would have regulatory jurisdiction. In *Sylvester v. U.S. Army Corps of Engineers*, for instance, the Ninth Circuit held that a Corps decision to limit the scope of an EIS to only the filling activity for the construction of a golf course, rather than including activities on the accompanying golf resort, was not erroneous because the two projects were not "two links of the same chain" and could exist separately, thus falling outside the Corps' regulatory jurisdiction.<sup>130</sup>

Some later court decisions have interpreted the control and responsibility test more broadly, holding that it is met when "the environmental consequences of the larger project are essentially the products of the Corps permit action."<sup>131</sup> More recently, in *White Tanks Concerned Citizens, Inc. v. Strock*, the Ninth Circuit added an additional prong to the jurisdictional test by requiring an analysis of whether the waters that required the Section 404 permit were sufficiently interspersed in the larger project.<sup>132</sup> Since the construction or



expansion of many port facilities likely cannot occur without a dredging permit from the Corps, this judicial precedent suggests the Corps may have a broad scope of review in issuing Section 404 permits for port expansions related to coal exports.

Projects needing CWA permits typically also require state water quality certification under CWA Section 401. For an in-depth discussion of state requirements, see Appendix B below.

### **3) Various Federal Laws Protecting Wildlife**

The Endangered Species Act (ESA), although incorporated into the CWA 404(b)(1) guidelines, further inhibits the Corps or any federal agency from authorizing, funding, or carrying out any activity that is likely to “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined... to be critical.”<sup>133</sup> This restriction may apply to issuance of Section 404 or Section 10 permits for port expansions in areas containing federally listed endangered or threatened species. For example, the Corps would have to consult with either the National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service (FWS) before approving a 404 permit for a project that may impact endangered or threatened Salmon species in Washington State.<sup>134</sup>

If these agencies determine that an endangered species may be present on the port expansion site, the Corps must prepare a biological assessment.<sup>135</sup> If that assessment finds species likely to be affected, the NMFS or the FWS will then issue a biological opinion,<sup>136</sup> which, if it concludes that the planned expansion would jeopardize the species or adversely modify critical habitat, will prevent the commencement of construction unless the developer obtains an additional permit under Section 10 of the ESA.<sup>137</sup> To secure this Section 10 permit, the project developer must either demonstrate that the project will not appreciably reduce the likelihood of the survival of the species in the wild<sup>138</sup> or seek the approval, which is granted exceedingly rarely, of the Endangered Species Committee (known colloquially as the “God Squad”).<sup>139</sup>

Additionally, a Habitat Conservation Plan (HCP) would have to be prepared which would provide an assessment of the impacts likely to result from the grant of the permit, as well as details of measures that the applicant will take to monitor, minimize, and mitigate the impacts.<sup>140</sup> For HCPs that require an EIS, the ESA requires a 90 day public commenting period,<sup>141</sup> which presents a very useful opportunity for public engagement in a project’s permitting and approval process.

Failure to properly account for endangered species in the grant of a permit can give rise to a federal cause of action, enabling citizens to sue the federal government directly. The ESA contains a “citizen suit” provision that allows persons to bring a civil suit “to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to

be in violation of [the ESA].”<sup>142</sup> In the leading case of *National Wildlife Federation v. Coleman*, the Fifth Circuit found that the Federal Highway Administration had violated the ESA when it did not adequately take safety precautions to protect the habitat of nearby endangered species’ habitats, and issued an injunction halting the construction of a stretch of highway.<sup>143</sup> The *Coleman* court also held that the responsible federal agency must also consider indirect and cumulative effects of the construction project, such as increased commercial and residential development as a result of the project.<sup>144</sup>

The ESA, as well as Marine Mammal Protection Act (MMPA), also inhibits private parties from harming aquatic wildlife. The ESA prohibits private parties from “taking” a listed endangered species; notably, “taking” has been defined by the Supreme Court to include both direct physical harm to species and indirect harms such as the destruction of essential habitat.<sup>145</sup> The MMPA similarly forbids the taking of any marine mammal either in the waters of the United States or on the “high seas.”<sup>146</sup> The FWS and the NMFS can authorize some takes of listed species through their permitting authority under Section 104 of the MMPA<sup>147</sup> and, as discussed above, under Section 10 of the ESA.<sup>148</sup> Permits, however, can only be issued for scientific purposes or if the take is incidental to otherwise lawful activity.<sup>149</sup> Several states also have their own state-level ESAs which require state-level permits. For a more in-depth discussion of state requirements, see Appendix B below.

Port developers seeking to expand facilities for coal exports may also be subject to environmental review under the Magnuson-Stevens Act if the planned construction occurs in or around an “essential fish habitat” (EFH).<sup>150</sup> Under this law, all federal agencies must consult with the NMFS for “any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken... that may adversely affect any essential fish habitat identified under this chapter.”<sup>151</sup> For these actions and proposed actions, a written EFH assessment must be conducted which includes, at a minimum: (1) a description of the action, (2) an analysis of the potential adverse effects (3) the federal agency’s conclusion regarding those effects, and (4) proposed mitigation, if applicable.<sup>152</sup> EFH assessments can be conducted as stand-alone assessments or may be incorporated as part of environmental review conducted under other statutes,<sup>153</sup> such as NEPA, discussed in Part III below.

#### **4) National Historic Preservation Act (NHPA)**

Depending on the location of the proposed port, the project may require a Section 106 review under the National Historic Preservation Act (NHPA).<sup>154</sup> Under the NHPA, all federally funded or permitted projects must take into account the effect of the undertaking on historic properties or sites and must give the Advisory Council on Historic Preservation a reasonable opportunity to comment.<sup>155</sup> The Section 106 procedure requires federal agencies to cooperate with state officials to minimize adverse effects and to provide a public commenting process.

The NHPA applies to all proposed federal actions that have the potential to cause adverse effects on historic properties.<sup>156</sup> Adverse effects can include “[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.”<sup>157</sup> Like NEPA, it reserves discretion for the agency to ignore comments made during the NHPA process. If the lead agency does not already have alternative procedures in place for addressing NHPA, then the agency must follow procedures laid out in 36 C.F.R. § 800.<sup>158</sup> Alternative procedures used by agencies, such as the Department of Transportation, can provide stronger safeguards to historical sites by imposing an affirmative duty to minimize impact.<sup>159</sup>

If the federal agency finds that there is a potentially adverse effect to a historical site, the agency official responsible for complying with Section 106 must notify the State Historic Preservation Officer (SHPO).<sup>160</sup> If the SHPO disagrees with the agency’s finding, then the case can be forwarded to the Advisory Council for comment.<sup>161</sup> Often, the SHPO will work with the federal agency to develop a Memorandum of Agreement (MOA) to mitigate and minimize potential impacts to the site. Past claims have been brought in court to make such MOAs legally enforceable when the agreements have been violated.<sup>162</sup> NHPA procedures also require the relevant federal agencies to involve the public by providing information on effects to historical properties and by seeking comments from the public.<sup>163</sup> Certain NHPA procedures are often subsumed in existing procedures under NEPA.<sup>164</sup> However, because Section 106 does not require any specific outcome, court actions are limited to ensuring that federal agencies adequately adhere to NHPA procedures.

## **5) Deepwater Ports Act (DWPA)**

A deepwater port, as defined under federal law, is “any fixed or floating manmade structure other than a vessel, or any group of such structures, that are located beyond state seaward boundaries and that are used or intended for use as a port or terminal.”<sup>165</sup> The DWPA thus applies only to offshore ports or terminals. The Submerged Lands Act defines a state’s seaward boundary as starting three geographical miles from the shoreline.<sup>166</sup> Offshore ports are typically used to provide services for tankers and vessels too large to dock at inland shores. Although these deepwater ports have traditionally been used almost exclusively for oil and natural gas tankers, new coal exports may lead, in some rare circumstances, to the construction of deepwater ports for the transfer of coal from barges to large ships, thus coming under DWPA jurisdiction. Like all major federal actions, issuance of licenses under DWPA is subject to NEPA requirements.

The DWPA provides two primary mechanisms for environmental protection. The first is that “the deepwater port will be constructed and operated using best available technology, so as to prevent or minimize adverse impact on the marine environment.”<sup>167</sup> This requirement does not necessarily mean that deepwater ports would be required to use

marginally superior but prohibitively expensive technology. In a recent Fifth Circuit case, the court held that the “best available technology” clause is not an absolute requirement to use the most environmentally-friendly technology, and that a cost-benefit analysis can be utilized in determining what technology to use.<sup>168</sup>

One other unique roadblock to the construction of a deepwater port is that the adjacent state’s governor can veto the project within 45 days of the final public hearing.<sup>169</sup> This veto power gives the state governor extraordinary power in affecting the construction of deepwater ports. A state governor can also condition the licensing of a deepwater port to ensure compliance with “State programs relating to environmental protection, land and water use, and coastal zone management.”<sup>170</sup> In recent years, state governors have effectively blocked construction of two deepwater ports off the coasts of Louisiana and Alabama over environmental concerns.<sup>171</sup>

## **B. State Implementation of Federal Programs**

Port expansions related to increased coal exports may also require compliance with federally mandated permit programs administered by state authorities. Compliance necessitates the acquisition by project developers of both federally mandated permits and prerequisite certifications or waivers from state authorities.

For example, the CWA mandates that dischargers of pollutants from a point source into the waters of the United States must obtain a National Pollutant Discharge Elimination System (NPDES) permit.<sup>172</sup> With the exception of discharges that occur on federal lands and certain Indian territories, the NPDES permit program is operated almost entirely by the states.<sup>173</sup> As such, any coal export-related port expansion activities that would involve discharges from a discrete source into navigable waters would require a NPDES permit issued by the federally authorized state agency.

NPDES permit requirements also apply to storm water runoff from construction projects that disturb more than five acres of land,<sup>174</sup> and to small construction projects that disturb one to five acres of land.<sup>175</sup> Both the states and the federal government require that construction site operators seek coverage under a state construction storm water general permit, which generally entails the submission of a notice of intent (NOI) along with a storm water pollution prevention plan (SWPPP) identifying best management practices to be employed to reduce pollutants in discharges.<sup>176</sup> After construction is completed, the port facility will need to seek coverage under the relevant state or federal general permit for industrial storm water discharges.<sup>177</sup> Similar to construction storm water permits, applicants must submit an NOI as well as an SWPPP.<sup>178</sup>

In order to obtain a NPDES permit or other federal permits such as those required under Section 404 or Section 10, a permit applicant must also receive the prerequisite CWA

Section 401 water quality certification issued by the states. Under Section 401, “any applicant for a federal license or permit to conduct *any* activity including, but not limited to, the construction or operation of facilities, which *may* result in *any discharge* into the navigable water” (emphasis added), must apply for certification from the relevant state authority to ensure that the project will comply with state water quality standards and other aquatic resource protection requirements.<sup>179</sup>

A state has four options when presented with a request for Section 401 water quality certification: it may (i) grant the application; (ii) grant the application with conditions; (iii) deny the application; or (iv) waive the application.<sup>180</sup> Conditions placed on Section 401 water quality certifications may extend beyond matters directly related the potential discharge, and all conditions imposed by states automatically become conditions of the federal permit or license for which certification is sought.<sup>181</sup>

### **Box 3: EPA SmartWay Program**

*In June 2011, the EPA announced an initiative called SmartWay to reduce pollution from the short haul trucks that deliver and receive freight from ports in America.*

*A large number of the large diesel trucks (dray trucks) currently in use were manufactured before 1994. Compared to more recently manufactured dray trucks, these older vehicles can emit as much as 60 times more emissions. Carriers who sign up for the EPA SmartWay initiative will track and reduce emissions by set targets. The EPA hopes to reduce carbon emissions by 16 million metric tons through the SmartWay initiative.<sup>182</sup>*

Permit applicants for projects within the coastal zone must also seek state certification as mandated by the Coastal Zone Management Act (CZMA).<sup>183</sup> Under the CZMA, all coastal states have the authority to ensure that any federal agency activity within that state’s coastal zone is consistent with its federally-approved coastal management plan.<sup>184</sup> Activity that would have reasonably foreseeable effects on any land use, water use, or natural resources within a state’s coastal zone must receive a consistency determination by the designated state authority.<sup>185</sup> This requirement also applies to all federally permitted activity, so federal agencies issuing permits for activity within the coastal zone must seek a consistency determination.<sup>186</sup> For port expansions, this would apply to Section 404 and Section 10 permits issued by the Corps, as well as NPDES permits issued by the EPA.

## **III. The National Environmental Policy Act**

### **A. Introduction**

Federal and state laws mandating environmental review affect a broad range of activities, public and private, that have the potential to affect the environment. At the federal level, the National Environmental Policy Act (NEPA) requires that all federal agencies prepare an environmental impact statement (EIS) for any proposals for “major federal actions

significantly affecting the quality of the human environment.”<sup>187</sup> The term “major federal action” encompasses both direct federal actions such as the implementation of federal programs, policies, or rules, and also private projects that require federal approval and are not categorically excluded.<sup>188</sup> In the coal export context, this category would include rail or port expansion projects that need federal approval. For example, the construction of new rail lines to move trains filled with coal or the expansion of a port to accommodate the shipment of coal may require an EIS.

The core mandate of NEPA is supplemented on the federal level by regulations issued by the Council on Environmental Quality (CEQ), an agency established by NEPA.<sup>189</sup> These regulations are “entitled to substantial deference” by the courts, so they are an important source to consult when determining what requirements judges will impose on agencies.<sup>190</sup>

## **B. Determining Whether an EIS is Required**

The determination of whether a federal action requires the preparation of an EIS depends on the significance of the impacts of that action. Significance depends both on the action’s overall intensity as well as its relative effect within the context of the community or environment in which it occurs.<sup>191</sup> This includes the cumulative or contributory environmental effects actions may have.<sup>192</sup> If the impacts of a federal action are significant according to this metric, they must be exhaustively considered in an EIS. When the significance of an action’s impacts is unclear, an agency often opts to first conduct a less time consuming and costly environmental assessment (EA) in order to determine whether a full EIS is necessary.<sup>193</sup> An EA is a concise public document that contains evidence and analysis that is used to determine whether an EIS is necessary, as well as brief discussions of the necessity of the federal action and of alternatives, as required by NEPA.<sup>194</sup>

## **C. EIS Requirements**

If the lead agency determines that an EIS is required, then the agency must analyze the direct effects, indirect effects, and cumulative effects of the proposed action.<sup>195</sup> Direct effects “are caused by the action and occur at the same time and place.”<sup>196</sup> Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>197</sup> Cumulative effect “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”<sup>198</sup>

In the EIS, the lead agency must also address “mitigation measures not already included in the proposed alternatives.”<sup>199</sup> If the lead agency does not adopt “all practicable means to avoid or minimize environmental harm from the alternative selected,” the agency must state that it did not adopt such means, and explain why.<sup>200</sup>



Finally, the EIS must discuss the impact of the action in comparison to the impacts of a variety of rigorously explored and substantially considered alternatives.<sup>201</sup> The analysis must compare the impact of the action to the impact of “reasonable alternatives not within the jurisdiction of the . . . agency”<sup>202</sup> and the impact of “the alternative of no action.”<sup>203</sup>

## **D. Implementing the Decision**

After the federal agency reaches its decision,<sup>204</sup> the agency may create a program to monitor implementation of its decision to assure that mitigation and other conditions established during its environmental review process are carried out.<sup>205</sup> In January 2011, the CEQ released new guidelines on establishing, implementing, and monitoring mitigation commitments in EAs and EISs.<sup>206</sup> Among other goals, the new guidelines seek to encourage federal agencies to clearly identify the consideration and adoption of mitigation measures. For example, the new guidelines state that lead agencies should clearly identify the commitments to mitigation measures they have adopted.<sup>207</sup> Moreover, mitigation commitments should be carefully specified in terms of measurable performance standards or expected results, so as to establish clear standards.<sup>208</sup>

In the event that mitigation is ineffective or is not actually implemented, the federal agency is encouraged to take action when possible,<sup>209</sup> including by placing conditions on funding, grants, permits, or other approvals.<sup>210</sup> When mitigation has not been implemented or has failed, the agency should consider whether to prepare a supplemental NEPA document.<sup>211</sup>

## **E. How to Get Involved in the Process**

NEPA does not impose substantive requirements upon federal agencies. Rather, “its mandate to the agencies is essentially procedural.”<sup>212</sup> This does not mean that NEPA is toothless. On the contrary, courts are sometimes willing to overturn an agency’s decision for violations of procedural requirements.<sup>213</sup> Moreover, the “procedural” requirement to conduct an environmental review of a proposed project or activity often helps an agency reach better decisions, including quasi-substantive decisions such as whether to condition or even deny approvals based on environmental impacts. However, in order to challenge agency procedural violations in court, individuals and groups must be involved in the assessment process. Failure to raise an issue or introduce evidence at critical points during the agency’s assessment process – for example, in comments on a draft EA or EIS – can result in losing the chance to bring a lawsuit to challenge a violation of NEPA procedural requirements.<sup>214</sup> Under the doctrine of exhaustion of administrative remedies, failure of an individual or group to introduce facts, expert opinions, or raise pertinent issues during the environmental impact assessment process can prevent that individual or group from later bringing a lawsuit to challenge the proposed project.<sup>215</sup>

Under CEQ regulations, it is supposed to be easy for a member of the public to become and stay involved in the environmental impact assessment process. During the entire process,

the responsible agency is required to undertake “diligent efforts to involve the public in preparing and implementing” NEPA requirements.<sup>216</sup> Moreover, the agency is required to “mail notice to those who have requested it in an individual action.”<sup>217</sup>

However, the actual ability of the public to take part in the NEPA process is complicated by the fact that there is no one set of NEPA procedural guidelines to consult. Agencies are authorized to set their own procedures to enforce the CEQ regulations and are granted exceptions from CEQ regulations when compliance is inconsistent with statutory requirements.<sup>218</sup> Thus, it is important to review the relevant agency’s policies and procedures to ensure meaningful involvement in the environmental review process.

### **1) Determining Whether an EIS is Required**

When the need for an EIS is unclear, the agency is required to “involve environmental agencies, applicants, and *the public*, to the extent practicable” in preparing an EA (emphasis added).<sup>219</sup> Even if it is impractical to involve the public, citizens are entitled to receive the agency’s EA.<sup>220</sup> After completion of an EA, if the agency determines that an EIS is not necessary and instead prepares a “finding of no significant impact” (FONSI),<sup>221</sup> the agency is sometimes required to “make the [FONSI] available for *public review* for 30 days” before the agency decides whether to prepare an EIS (emphasis added).<sup>222</sup> Both steps in this pre-EIS process provide opportunities for the public to help shape the environmental impact assessment process.

### **2) Determining the Scope of the Environmental Impact Statement**

Once the need for an EIS is established, the lead agency must “publish a notice of intent in the Federal Register” that an EIS “will be prepared and considered.”<sup>223</sup> The notice of intent (NOI) includes basic information such as the name and address of a contact person within the agency who can answer questions about the action and the EIS.<sup>224</sup> Citizens tracking particular coal export infrastructure projects should therefore carefully monitor the Federal Register in order to be aware of agency plans and timelines.

After a NOI is published, the agency begins the “scoping process,” which is meant to identify “the scope of issues to be addressed” in the project.<sup>225</sup> As part of this process, the agency may decide to hold an early scoping meeting or a series of scoping meetings and hearings, so it is important to be aware of the lead agency’s scoping schedule.<sup>226</sup> The agency is required to notify and invite “affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons.”<sup>227</sup> The term “other interested persons” includes individuals and groups who disagree with the project “on environmental grounds,” so the scoping process is explicitly open to those strongly opposed to the project proceeding as proposed.<sup>228</sup>

The scoping process sets the boundaries of the rest of the environmental impact assessment process, making it a crucial stage during which individuals opposed to or



concerned about the proposed project should intervene. Perhaps most importantly, the scoping process is used to identify the range of issues the EIS will eventually address.<sup>229</sup> In order to ensure that as many potential adverse impacts as possible are analyzed and brought to the attention of the lead agency and the public, concerned parties should argue, at the scoping phase, for the adoption of the broadest possible scope of environmental review.<sup>230</sup>

In addition, the scoping process identifies other environmental analysis duties—such as state “little NEPA” requirements (discussed in Appendix B, below)—that are related to the project.<sup>231</sup> The process also sets the schedule for the subsequent environmental analysis.<sup>232</sup>

### **3) The Draft Environmental Impact Statement**

After completion of the scoping process, a draft EIS (DEIS) is prepared in accordance with the guidelines laid out in the scoping process.<sup>233</sup> After an initial DEIS is prepared, the agency is required to circulate a summary of the DEIS, and the entire statement must be sent to any person, organization, or agency that requests the full DEIS.<sup>234</sup>

After circulation of the DEIS, the lead agency is required to request and obtain comments on the DEIS during a formal public comment period lasting at least 45 days.<sup>235</sup> This is a crucial time for mobilizing those with concerns about the proposed action. As discussed below, the lead agency is required to respond to comments submitted on the DEIS. Thus, it is in the best interest of those concerned by a proposed project to encourage comments from others who share their concerns. Moreover, failure by individuals or groups to comment on the DEIS may prevent them from challenging the lead agency’s final decision, as discussed above.

During the comment period, the agency must request comments from state and local agencies authorized to develop and enforce environmental standards as well as Indian tribes affected by the action.<sup>236</sup> This consultation requirement provides an opportunity for individuals to exert pressure on local governmental bodies to weigh in on proposed projects. Additionally, the agency must request comments from the public and affirmatively solicit comments from persons or organizations that may be interested or affected.<sup>237</sup>

### **4) The Final Environmental Impact Statement (FEIS)**

Comments on the DEIS submitted to the lead agency play a large role in the preparation of the FEIS.<sup>238</sup> In the FEIS, the agency must respond to submitted comments.<sup>239</sup> The agency may modify or correct the DEIS based upon the comments or can “[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position...”<sup>240</sup> Moreover, the agency is required to “discuss...any *responsible* opposing view which was not adequately discussed in the draft statement and...indicate [its] response to the issues raised” (emphasis added).<sup>241</sup>

## 5) Supplemental Environmental Impact Statements

A third type of EIS that the lead agency may be required to prepare is a supplemental EIS (SEIS).<sup>242</sup> A SEIS provides the opportunity for concerned citizens to challenge a federal action after the lead agency has followed all NEPA and CEQ requirements in approving the action, but when circumstances have changed during the process. For example, if the STB had previously approved a railroad company's plan to build railroad tracks to move *two* trains of coal per day, but the railroad company now plans to move *twenty* trains of coal per day, a SEIS may be required.

A SEIS is required when "[t]here are significant new circumstances or information" that raise environmental concerns and are related to the proposed project or its impact.<sup>243</sup> If this information is brought to the attention of the agency by other individuals or groups, then the agency has a duty to take a hard look at the proffered evidence.<sup>244</sup> A SEIS is also required when "[t]he agency makes substantial changes" to the proposed project that raise environmental concerns.<sup>245</sup> If the agency fails to prepare a SEIS, then, subject to the doctrine of exhaustion of administrative remedies, an individual may be able to force the lead agency to prepare one if he or she persuades a court that the agency is required, under NEPA, to prepare such a statement.<sup>246</sup>

## 6) Implementing the Decision

After the agency reaches a decision on the proposed project and prepares its concise public record of decision,<sup>247</sup> there may still be opportunities available for the public to stay involved in the process. Specifically, in its record of decision, the agency may provide for monitoring to assure that its decisions are carried out.<sup>248</sup> Upon request, the agency must provide the results of this monitoring to the public.<sup>249</sup>

As discussed above, new CEQ guidelines address the capability of agencies to monitor the implementation of mitigation commitments.<sup>250</sup> Agencies should not commit to mitigation unless they have sufficient legal authorities and expect that there will be resources available to perform or ensure the performance of the mitigation.<sup>251</sup> For federal actions involving permittees, the permittee may be allowed to perform the monitoring itself, so long as a clear accountability and oversight framework is established.<sup>252</sup>

Beyond the role of federal agencies and permittees, the CEQ mitigation guidelines recognize the importance of public involvement in mitigation monitoring programs.<sup>253</sup> To encourage public involvement, federal agencies are encouraged to consider including public involvement components in their mitigation monitoring programs.<sup>254</sup> Even if official public involvement in monitoring programs is impossible, the guidelines stress that NEPA requires all federal agencies to make information useful for restoring, maintaining, and enhancing the quality of the environment available to States, counties, municipalities, institutions, and individuals; this may include information on mitigation monitoring.<sup>255</sup>

## F. Analyses of Greenhouse Gas Emissions in EISs

Federal and state actions approving the expansion of infrastructure necessary to increase coal export capacity highlight the specific issue of whether and how agencies should consider the global climate change impacts of such actions. Consideration of climate impacts could include both whether and to what extent such impacts resulting from government action should be considered in an EIS, and whether these impacts are sufficient to necessitate preparation of an EIS where one would not otherwise be required.

Several decisions in the federal courts provide support for consideration of climate change impacts for approvals of projects that affect energy consumption.<sup>256</sup> Specifically, the Eighth Circuit in *Mid States Coalition for Progress v. Surface Transportation Board* held that the STB could not approve a rail extension project designed to serve the PRB in Wyoming without first examining the effects that may occur from the reasonably foreseeable increase in coal consumption the project would yield.<sup>257</sup> The court found it “almost certainly true that the proposed project will increase the long-term demand for coal and *any adverse effects* that result from burning coal”<sup>258</sup> (emphasis added), and that, even though the *extent* of these effects was speculative, the *nature* of the effects was not, and therefore had to be considered.<sup>259</sup>

In accordance with the court’s order in *Mid States Coalition*, the STB did later consider the impacts of increased coal consumption by using the Energy Information Administration’s computer-based National Energy Modeling System (NEMS).<sup>260</sup> In a subsequent case, *Mayo Foundation v. Surface Transportation Board*, the Eighth Circuit found the use of NEMS to be adequate in considering these impacts, even though it could only model the impacts at a national and regional level, and not at a local level.<sup>261</sup>

Though neither the *Mid States Coalition* nor the *Mayo Foundation* opinions specifically mention climate change, their reasoning may be relevant to the issue of coal export infrastructure, particularly in light of the EPA’s 2010 endangerment finding for greenhouse gases (GHGs).<sup>262</sup> Even before this finding, the Ninth Circuit directly supported consideration of climate change impacts in its decision in *Center for Biological Diversity v. National Highway Transportation Safety Administration*. In that case, the court held that NHTSA must consider the climate change impacts of proposed changes to the Corporate Average Fuel Economy (CAFE) standards in an EA being composed for a rulemaking.<sup>263</sup>

Notably, the CEQ has issued draft guidance for considering GHG and climate change related impacts in EAs and EISs.<sup>264</sup> In response to the growing pressure to address these impacts in the environmental review process, some federal agencies,<sup>265</sup> together with some states,<sup>266</sup> have also issued their own guidance on addressing these impacts under NEPA or state NEPA analogues, respectively.

## **Appendix A: Case Studies**

### **A. Millennium Bulk Terminals at Longview, WA**

#### **Background**

The current Millennium Bulk Terminals site in Longview, Washington was previously owned by Reynolds Metals Co., where it served as the location of an aluminum smelter, which contaminated the area for decades.<sup>267</sup> In 2000 the site was purchased by Alcoa, then in 2004 by Chinook Ventures. Both companies failed to perform site remediation as required by the state and federal governments. In January 2011 the site was taken over by an Australian coal company, Ambre Energy, and given the name Millennium Bulk Terminals-Longview (MBTL).<sup>268</sup> The area is a 416-acre bulk handling facility and proposed terminal for coal exports located on the Columbia River.<sup>269</sup> Upon acquiring the facility, Ambre Energy vowed to clean up the site as part of its application process for a shoreline permit granted by Cowlitz County.<sup>270</sup> MBTL is owned jointly by Ambre Energy and Arch Coal, a U.S. coal company based in St. Louis, Missouri.<sup>271</sup> With an ever-increasing demand for power in Asian markets, MBTL was envisioned as an important link in a global supply chain moving massive amounts of thermal coal from the PRB in Montana and Wyoming to Chinese and other purchasers.<sup>272</sup>

#### **Local Politics**

After the MBTL terminal plans were announced, citizen opposition began to build.<sup>273</sup> Following the Cowlitz County commissioners decision in November 2011 to grant the MBTL export terminal a permit to become a major coal export shipping terminal, environmental groups protested.<sup>274</sup> Criticism of the project mounted when plans were revealed to build a facility fourteen times larger than initially announced.<sup>275</sup> Disapproval came from many organizations, including the Washington Environmental Council, the Sierra Club (particularly the club's Coal Free Northwest Campaign), Columbia Riverkeeper and Climate Solutions.<sup>276</sup> Earthjustice, representing these four groups, filed an appeal of the permitting decision, focusing in large part on the lack of an EIS under Washington's "little NEPA" law, known as SEPA (see Appendix B below). Notably, the Washington State Department of Ecology intervened in the matter on the organizations' side.

#### **Review and Permitting**

On March 15, 2011, following several weeks of mounting public disputes as to the true size of the planned coal export facility, Ambre Energy withdrew its application for MBTL.<sup>277</sup> While, as of July 2011, the company remains intent on reapplying for a permit, it has made clear that it will only do so once it has completed a more thorough environmental impact

study.<sup>278</sup> This complies with the demands of environmental groups and the Washington State Department of Ecology.<sup>279</sup>

## **B. Gateway Pacific Terminal at Cherry Point, Bellingham, WA**

### **Background**

The Gateway Pacific Terminal at Cherry Point is a proposed deepwater port on Puget Sound in Washington State, located approximately 8 miles from Bellingham.<sup>280</sup> SSA Marine, a privately owned international transportation services company based in Seattle, is seeking permits to build the port. Peabody Energy, the world's largest private sector coal company, has announced its intentions to partner with SSA Marine in an arrangement that would facilitate the large-scale export of coal from U.S. mines to Asian markets.<sup>281</sup> According to company plans, coal would be transported via railroad from the PRB to the Cherry Point port for onward shipment across the Pacific Ocean to Asian markets.

The permitting process for the proposed facility has been underway since the fall of 2010, when SSA Marine quietly began building a base of political support for the project. According to a local newspaper, by the time Bellingham residents became aware of the effort, the project already had support from the local Chamber of Commerce, the Northwest Washington Central Labor Council, three legislators, a group of local mayors, and Congressman Rick Larsen.<sup>282</sup>

Many powerful industry players are involved in pushing for the approval of the Gateway Pacific Terminal. Peabody Energy and Arch Coal, the first and second largest coal companies in the U.S., are both deeply invested.<sup>283</sup> Arch Coal and Ambre Energy, co-owners of port developer Millennium Bulk Terminals, admitted to plans of a deal for the Cherry Point Port's expansion. Goldman Sachs, with its 49% ownership of SSA Marine's parent company, Carrix, has a large financial stake in the success of the proposed project. Additionally, the Burlington Northern Santa Fe (BNSF) Railway Company, which operates the main railways between the Powder River Basin coal mines and northwestern Washington, has a clear interest in the proposed Cherry Point facility. Investment company Berkshire Hathaway's \$30 billion purchase of BNSF in late 2009 was a clear bet on the continued role of coal in the U.S. economy.<sup>284</sup>

### **Local Politics**

For residents of Bellingham and surrounding communities, opposition to the Cherry Point project has as much to do with the local effects of coal transport as it does with the global effects of global warming resulting from coal combustion. According to a report by Climate Solutions, a regional environmental group, out of Cherry Point's proposed 54 million ton annual capacity, up to 48 million metric tons of exports would consist of coal.<sup>285</sup> This volume would mean an additional 18-20 coal trains passing through Whatcom County and

Bellingham every day.<sup>286</sup> For local residents, particular concerns include the health impacts from exposure to coal dust and diesel emissions from trains, noise pollution and degraded quality of sleep, and loss of property value due to foundation damage and proximity to rail lines with increased activity. At a Bellingham community meeting organized by Mayor Dan Pike on June 1, 2011, a doctor presented him with a letter of opposition signed by 80 local physicians. Their concerns included strong evidence of links between coal dust and diesel pollution to rates of childhood asthma, heart disease, and lung cancer.<sup>287</sup> Increased rail traffic also raises concerns about slowed emergency response waits due to longer and much more frequent rail crossings.<sup>288</sup> Some residents worried that this will deter businesses from making investments in waterfront development, and may harm Bellingham's green community image.<sup>289</sup>

### **Review and Permitting**

Permitting for Cherry Point requires approvals from a variety of regulatory agencies. SSA Marine's shoreline permits will be prepared by the U.S. Army Corps of Engineers with help from state agencies responsible for the environmental data needed for those permits.<sup>290</sup> The final decision about both the shoreline permit and final project permit will be made by the Whatcom County Planning Commission.<sup>291</sup> In June 2011, the Commission rejected SSA Marine's application for a Major Project Permit and Substantial Development Permit Revision for the Cherry Point project.<sup>292</sup> If and when completion of an EIS becomes necessary under a new permitting process, the U.S. Army Corps of Engineers and Whatcom County will oversee it to ensure its compliance with NEPA and SEPA. The EIS will be completed by a consultant hired by Whatcom County.<sup>293</sup>

Various county and state level agencies have already begun the initial paperwork for permitting. Specifically, the team of environmental specialists known as the Multi-Agency Permit (MAP) team began meeting privately in November 2010 to review preliminary project proposals, with participation limited to representatives from federal, state, and local agencies.<sup>294</sup>

The secrecy surrounding the project has only fueled public frustration. In response, citizens have been speaking out at community meetings, writing to elected officials at the local and state levels, and signing petitions.<sup>295</sup> Some have even suggested civil disobedience if all else fails.<sup>296</sup> Activists expect to organize opposition in other communities that will be affected by increased rail traffic.<sup>297</sup>

Community opposition to the Cherry Point project convinced Bellingham Mayor Dan Pike to speak out against SSA Marine's plans. At a public forum on May 4th, 2011, he would not declare support or opposition for the Gateway Pacific Terminal.<sup>298</sup> A month later, on June 3, he issued a statement declaring his opposition to the port.<sup>299</sup> Mayor Pike's opposition, while not legally relevant to the approval or denial of project permits, indicates that



Bellingham's public forums and discussions have made a large impact on the position he has taken.<sup>300</sup> Even though Bellingham is not a direct player in the permit-approval process, with 40% of Whatcom County's population, its citizens' stance on the issue will have an impact on the county's final decision.

## **C. Port MacKenzie, Alaska**

### **Background**

Surging demand for coal in East Asia is driving infrastructure decisions in Alaska, where port and rail operators have proposed a range of new projects in and around Port MacKenzie, just outside Anchorage, to facilitate future coal exports as well as the shipment of other bulk commodities.<sup>301</sup> Although infrastructure improvements have been on the agenda in the region for nearly two decades,<sup>302</sup> recent developments indicate new momentum for a rail line which for the first time would extend Alaska Railroad Corporation (ARRC) service to the Port MacKenzie District in Matanuska-Susitna (Mat-Su) Borough, in large part to serve expanded port facilities in the area.<sup>303</sup> The Mat-Su Borough and ARRC are working together on the proposed extension.<sup>304</sup> As of June 2010, construction financing depended on a pending state appropriation in the 2011 fiscal year state capital budget, which was cut down from \$57 million to \$35 million by Governor Sean Parnell.<sup>305</sup> The Governor's FY2012 proposed budget includes \$20 million for the Port MacKenzie rail infrastructure project.<sup>306</sup>

Notably, Usibelli Coal Mine Inc., the only operator of Alaskan coal mines,<sup>307</sup> has been a major player in the proposed rail line extension, as new infrastructure would allow the company to develop a coal deposit at Wishbone Hill. The current alternative—trucking coal from the mine site to the port—is far too costly to be economically feasible at current world coal prices.<sup>308</sup> According to former Anchorage Mayor Rick Mystrom, the rail extension would reduce the cost of Alaskan coal by \$3 per ton.<sup>309</sup> This has not gone unnoticed in the foreign market. In 2010 Usibelli Coal entered into an agreement with J-Power, a Japanese power producer, to assess the development of the Wishbone Hill coal deposit.<sup>310</sup> A feasibility test is underway which assumes that at least 500,000 tons of coal per year (and up to 4 million tons) would be mined from Wishbone and shipped to Japan via new rail and port facilities in the area.<sup>311</sup>

### **Local Politics**

Opposition to the project is widespread among conservation groups and communities that would be affected by a new rail line and related coal shipments. For example, one of the proposed extension routes through the CDP Willow (which is a concentration of population, like a town, but without a separate municipal government) caused an outcry from the community. On March 10, 2008, letters in opposition to the Port MacKenzie rail extension route through Willow were submitted to the STB by the Willow Area Community

Organization, Willow Dog Mushers Association, Mat-Su Parks Advisory Board, Mat-Su Convention and Visitors Bureau, along with many other local and regional organizations.<sup>312</sup> Local concerns include the increase in industrial traffic, the decline in air quality this will cause, and pollution that could result in habitat loss—which has the potential to harm south-central Alaska’s unique salmon runs and outdoor recreation industry.<sup>313</sup> Opponents of Wishbone Hill were unsuccessful in their attempt to petition that the state declare the site unsuitable for mining.<sup>314</sup> One organization, the Mat Valley Coalition (a group of concerned homeowners and residents) has stated that a new mining facility at Wishbone Hill will hurt property values, and that coal dust will harm the health of the community.<sup>315</sup>

### **Review and Permitting**

On March 25, 2011, the FEIS for the proposed rail extension was released by the lead federal agency on the project, the STB.<sup>316</sup> Input from a number of other agencies, including the FRA, the Army Corps of Engineers: Alaska District and the Coast Guard also went into the FEIS. The FEIS stipulates that, except for a No Action Alternative, all possible routes for the rail extension would have likely negative impacts on surface waters and wetlands, on parks and recreational resources, and on the cultural and historic lands along the proposed route.<sup>317</sup> The route chosen and studied in the FEIS runs through the Port MacKenzie Agricultural District to the main rail line near Houston.<sup>318</sup> The ARRC has applied for a Section 404 permit under the CWA, the comment deadline for which was set for July 13, 2011 (as this report was being finalized for publication). A number of groups filed extensive comments, which are available on the STB’s public docket.<sup>319</sup>

One assembly member, Cindy Bettine, said that the affected communities are working with the ARRC to ensure that protective crossings are built at officially-recognized recreational trails.<sup>320</sup> According to Mat-Su Borough Mayor, Larry DeVilbiss, "this is a project that's already started in the Port District, but we're now ready to move forward."<sup>321</sup>



## Appendix B: State-by-State Analyses

### A. West Coast Exports

#### 1) Washington

##### *Ports*

Developers seeking to commence construction in Washington on state-owned land must obtain an Aquatic Lease Agreement from the Washington Department of Natural Resources (DNR).<sup>322</sup> Washington law provides for court review of the state's permitting decisions for any person whose property rights will be adversely affected.<sup>323</sup> This may provide affected persons with a cause of action to challenge the grant of a lease if the relevant state agency did not have authority to grant the lease or if the lease was granted without proper environmental considerations.<sup>324</sup>

Aside from the rare instance of construction on state-owned land, Washington's Shoreline Management Act (SMA) requires a permit to be obtained prior to *any* substantial development on Washington state shorelines.<sup>325</sup> The term "substantial development" refers to any development of which the total cost exceeds \$5,000, or if the development materially interferes with normal public use of the water or shoreline.<sup>326</sup> Developers seeking to construct a port in Washington must obtain a Shoreline Substantial Development Permit (SSDP).<sup>327</sup> Although the permit is required by State law, it is the local governments who are responsible for establishing a master program for the regulation of uses on the shoreline and also for review and approval of the SSDP.<sup>328</sup> Exact procedures vary by municipality, but the SMA requires these local master programs to develop policies and regulations to minimize adverse environmental impacts for shoreline projects.<sup>329</sup>

A port expansion could potentially only require revision in lieu of a completely new permit if the proposed expansion falls within the "scope and intent" of the original permit.<sup>330</sup> An expansion will not qualify for a permit revision if the revision will cause "adverse environmental impact", or if there is any additional over water construction beyond a certain amount.<sup>331</sup> Developers will clearly prefer permit revisions over new permit applications, as the permit revision process typically requires less oversight and environmental review.<sup>332</sup>

In the Pacific Northwest, builders on coastal waterways are required under state law to ensure that construction projects do not interfere with local or migratory fish life. Washington State, for instance, requires a Hydraulic Project Approval before construction or performance of any "hydraulic project" commences.<sup>333</sup> "Hydraulic Project" is defined broadly, and includes the types of activities associated with port expansions for coal exports.<sup>334</sup> Applications for hydraulic projects must include both specific plans for the

actual construction taking place below the mean high tide line as well as a plan for the protection of fish life.<sup>335</sup> Once submitted, the Washington Department of Fish and Wildlife has the option to approve or deny the plans, or attach additional conditions to provide proper protection for fish life.

### ***State Environmental Policy Act***

Washington's State Environmental Policy Act (SEPA) imposes an EIS requirement that is functionally equivalent to federal NEPA requirements.<sup>336</sup> Under SEPA, an EIS is required for "major actions significantly affecting the quality of the environment"<sup>337</sup> which include those taken by "any state or local governmental body, board, commission, department, or officer authorized to make law."<sup>338</sup> The Washington Department of Ecology is empowered to adopt rules and regulations,<sup>339</sup> which are given substantial deference by courts.<sup>340</sup>

### **Determining Whether an EIS is Required**

An EIS is required under Washington law when a "major action" would have "a probable significant, adverse environmental impact."<sup>341</sup> The word "action" is broadly defined, and includes "activities... entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies."<sup>342</sup> An impact is "significant" when there is a reasonable possibility that the proposed project will have more than a "moderate adverse impact" on the environment.<sup>343</sup> In weighing the significance of an impact, the agency should consider the severity of the impact upon the environment.<sup>344</sup> Thus, a severe environmental impact may be "significant" even if it is unlikely to occur.<sup>345</sup>

In determining whether a proposal requires an EIS, a Washington state agency must use the Department of Ecology's environmental checklist "to help the agency decide whether an EIS is required."<sup>346</sup> However, the agency does not need to use the checklist if the lead agency has already decided to prepare an EIS or the proposal is submitted under the Growth Management Act (see below).<sup>347</sup>

### **Exceptions to the EIS Requirement**

Washington state law does not require an EIS when an *adequate* EIS has already been prepared pursuant to NEPA.<sup>348</sup> An EIS is also not required when the reviewing local government has completed an adequate project review under Washington's Growth Management Act.<sup>349</sup> To be adequate, the project review must address the specific probable adverse environmental impacts of the proposed project and must reach the conclusion that these impacts are sufficiently addressed by its Growth Management Act plans.<sup>350</sup>

### **Required Contents of an EIS**

The required content of an EIS depends upon whether the project is public or private. If the EIS is for a private project on a specific site, then the lead agency is "required to evaluate

only the no action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site.”<sup>351</sup> This evaluation must include a sufficiently detailed analysis of each reasonable alternative to facilitate a comparative evaluation of the alternatives and the proposed project.<sup>352</sup> Most coal export projects will likely be contained within this category of private projects.

Regardless of whether a project is public or private, the comparison of alternatives and the proposed action must contain three elements. First, the EIS must “describe the existing environment” that will be impacted by the project.<sup>353</sup> The Department of Ecology defines “environment” very broadly.<sup>354</sup> Of particular interest, “environment” includes climate, air quality, releases or potential releases into the environment of materials that affect public health, and aesthetics.<sup>355</sup> Discussion of these elements may be combined in an EIS for simplicity's sake.<sup>356</sup>

Second, the EIS must describe the “significant impacts” of the proposed project and alternatives<sup>357</sup> and the principal features of the environment that would be affected or created by the proposed project and the alternatives.<sup>358</sup> Agencies are instructed to consider impacts that are direct, indirect, or cumulative.<sup>359</sup>

Finally, the EIS must “clearly indicate” and “discuss reasonable mitigation measures that would significantly mitigate” the impacts of the proposed project and each alternative.<sup>360</sup> These measures must be analyzed in detail if they: (1) won't be analyzed at a later point under SEPA and (2) involve substantial changes to the proposed project that would cause significant adverse impacts to the environment or involve new information regarding significant impacts.<sup>361</sup>

Of particular note, the Washington State Department of Ecology has issued guidance for considering GHGs and climate change impacts in SEPA decisions. Like the CEQ guidance at the federal level, this guidance requires quantitative analysis of operational and construction GHG emissions and qualitative consideration of embodied/lifecycle emissions for all EISs prepared under SEPA.<sup>362</sup>

#### **Box 4: The Dilemma of Phased Review**

*One aspect of the Washington Department of Ecology rules that potentially favors coal export infrastructure proponents is the ability of lead agencies to conduct phased review.<sup>363</sup> Phased review is meant to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready to be decided.<sup>364</sup> However, proposals or parts of proposals that are closely related enough to essentially be one single proposal should be evaluated in the same environmental document.<sup>365</sup> Nonetheless, courts sometimes approve of agency decisions on a proposed action that did not combine similar proposals into one document and thus avoided discussing cumulative impacts of the proposal.<sup>366</sup> In order to prevent agencies from splintering the environmental review process in this manner, it is important for citizens and watchdog groups to get involved in the scoping process (as discussed below and in Part III, above) to ensure that the scope of the EIS is as broad as possible.*

### Agency Decisions

In reaching a decision on whether to approve a project proposal under SEPA, the decision maker must have access to the relevant environmental documents, comments, and responses so that he or she can use them in making the decision.<sup>367</sup> The decision maker must consider the alternative courses of action discussed in the relevant environmental documents.<sup>368</sup> The decision maker is empowered to impose mitigation measures on the applicant or even deny the project outright.<sup>369</sup> In order to impose mitigation measures, the measures must be based upon policies, plans, rules, or regulations in place at the time the draft EIS is issued<sup>370</sup> and must address specific, adverse environmental impacts that are clearly identified in an environmental document related to the proposed project.<sup>371</sup> In order to deny the proposed project under SEPA, the agency must find that the project would be likely to result in significant adverse environmental impacts and that reasonable mitigation measures are insufficient to mitigate the impact.<sup>372</sup>

### How to Get Involved in the EIS Process

#### *Commenting on the Determination of Significance*

The first opportunity to become involved in the EIS process in Washington is after the determination of significance (DS) and the initiation of scoping,<sup>373</sup> a process which is used to determine the issues that the EIS will seek to address.<sup>374</sup> Once the agency determines that a proposed project will have a significant impact on the environment, the agency must circulate copies of the DS to the applicant, agencies with jurisdiction and experience, any affected tribes, and to *the public*.<sup>375</sup> The agency is required to give notice that the DS is available using reasonable means.<sup>376</sup> Each agency is directed to specify its method of public notice in its SEPA procedures.<sup>377</sup> If the agency does not specify its method of public notice, then the agency is required to post notice of the availability of the DS on the affected property when the proposal is site-specific and also publish notice of the availability of the DS in a generally-circulated newspaper in the area where the proposed project is located.<sup>378</sup> Since the method of notice varies by agency, it is important to be familiar with the various methods of notice because involvement in the scoping process is crucial to the rest of the EIS process.

The scoping process is an important step at which the opposition to a proposed project must be mobilized because the DEIS must be prepared in accordance with the scope decided upon during the scoping process.<sup>379</sup> As a result, it is crucial to take advantage of the requirement that the lead agency invite affected tribes' and public comment on the DS by submitting as many comments as possible so as to force the lead agency to adopt a broad a scope for the DEIS as possible.<sup>380</sup> From the date that the DS is publicly available, the public has 21 days to comment on the DS.<sup>381</sup> However, if the agency or local body issued the DS under the Growth Management Act, then the commenting period lasts just 14 days.<sup>382</sup>

### *Commenting on the Draft Environmental Impact Statement*

After the completion of the scoping process, the next critical step for public involvement is following the issuance of the DEIS. The lead agency is not required to send notice of availability of the draft EIS or a copy of the DEIS to any person who has expressed interest in the proposed project;<sup>383</sup> however, the lead agency is required to send a copy of the DEIS to any person *requesting* a copy of the DEIS from the lead agency, so it's important to be aware of any ongoing environmental impact assessments and specifically request a copy of draft EISs from the relevant agencies.<sup>384</sup>

Following the issuance of the DEIS, the public has 30 days to review and comment upon the DEIS.<sup>385</sup> It is critical to comment upon the DEIS because the lead agency is required to consider and respond to all comments in its final EIS.<sup>386</sup> At the very least, the response must explain why a comment does not warrant further agency response, citing to sources, authorities, or reasons in support of its conclusion.<sup>387</sup> If the agency chooses this type of response, it must also indicate circumstances that would force a further agency response, if applicable.<sup>388</sup>

### *Challenging an Agency Decision*

Once the agency reaches a decision based upon the EIS, it may be possible to appeal the decision. If a local nonelected official acting under SEPA made the decision, and the lead agency did not eliminate appeals through a rule, ordinance, or resolution, then a person can appeal the decision to the local legislative body.<sup>389</sup> Additionally, a person may appeal for judicial review of an agency's actions under SEPA.<sup>390</sup> However, it is important to launch this appeal within the time period required to appeal the underlying governmental action, if the action possesses a time limitation.<sup>391</sup>

## **2) Oregon**

### ***Ports***

In Oregon, the state owns nearly all of the land below the mean low tide line.<sup>392</sup> Within organized port districts, a developer seeking to acquire or construct any sort of structure must obtain permission from the authorized port.<sup>393</sup> Outside of port districts, a builder would have to seek approval from the state in the form of a lease or a Temporary Use Permit.<sup>394</sup> There is additionally a registration requirement for wharves "used to accommodate any ships, boats or vessels engaged exclusively in the receipt and discharge of goods or merchandise."<sup>395</sup>

Similar to Army Corps of Engineers Section 404 permitting for dredge and fill activities, construction in Oregon waters requires a "Removal-Fill" permit from the Oregon Department of State Lands (ODSL).<sup>396</sup> The ODSL must issue the permit only if the proposed project has already considered the necessary precautions to minimize environmental impact.<sup>397</sup> Permits for removal and fill activities can be rescinded under a determination

that the activities covered by the permit “would result in unacceptable individual or cumulative environmental effects or long-term harm to the water resources of this state.”<sup>398</sup> In granting removal-fill permits, the ODSL will consider public need and benefit of the proposed project, costs to the public, effect on public health and safety, and appropriate mitigation measures for reducing adverse environmental impacts.<sup>399</sup> Prior to the issuance of any removal-fill permits, the ODSL must give notice to the public and other related government agencies.<sup>400</sup>

Any artificial construct in the waters of Oregon are subject to fish passage requirements if the construction prevents or precludes the migration of native fish such as salmon, trout, sturgeon, etc.<sup>401</sup> The statute requires a determination on the presence of these native fish prior to the construction of any new ports or the expansion of existing ones.<sup>402</sup> Any party seeking to build a port in Oregon waters that have historically had migratory fish present must either submit a proposal for alternative fish passage or obtain a waiver from the Oregon Department of Fish and Wildlife.<sup>403</sup> A waiver may be granted if the lack of fish passage is effectively mitigated, or if there is “no appreciable benefit to provide fish passage.”<sup>404</sup> In approving a passage proposal, the Department of Fish and Wildlife must consider the geographic scope of alternatives, the type and quality of the fish habitat, standards for monitoring and data collection, and various other factors.<sup>405</sup>

### ***ELS Requirements***

Oregon has not passed a “little NEPA” statute.<sup>406</sup>

## **3) Alaska**

### ***Rail***

Unlike the railroads of the continental U.S., freight rail lines in Alaska are owned and operated by a state-run corporation. Therefore, in Alaska more than in other states, political action is a more promising route for citizens to engage in decision making regarding the expansion of rail infrastructure for coal exports.

The drive to expand rail lines in Alaska for coal exports (including the ongoing Port MacKenzie project—see Appendix A above) is a project of the state-owned Alaska Railroad Corporation (ARRC). While the public nature of Alaska’s rail system eliminates some points of legal pressure (for instance eminent domain is even more clearly available to the state itself than to private railroads), it opens significant political opportunities for engagement. For instance, ARRC may not extend a rail line without legislative approval.<sup>407</sup> And ARRC’s board of directors is appointed by the governor.

While the Railroad does currently operate at a profit,<sup>408</sup> a line expansion would almost certainly involve substantial appropriations by the state legislature. For the Port MacKenzie rail extension, for instance, the Alaska Legislature appropriated over \$25



million just to fund the STB licensing process and the associated NEPA analysis.<sup>409</sup> The full project is projected to cost \$218 million, most of which will come from state appropriations.<sup>410</sup> Yearly appropriations fights can provide useful opportunities for citizens' groups to engage in the approval process for such infrastructure projects.

### ***EIS Requirements***

Similar to many other states, there is no Alaska "little NEPA" statute, so there are no state-mandated environmental impact reviews of state agency decisions.<sup>411</sup> However, there are many Alaskan environmental and land use programs that require some form of environmental review.<sup>412</sup>

#### **Alaska Coastal Management Program**

Chief among these programs has been the Alaska Coastal Management Program (ACMP), which imposes a comprehensive environmental review requirement on many permit or authorization requests.<sup>413</sup> However, the ACMP expired on July 1, 2011,<sup>414</sup> and the Alaska state legislature had not yet passed legislation implementing a new coastal management program as this report was being finalized.<sup>415</sup>

The ACMP as it existed prior to July 2011 empowers the Department of Natural Resources (DNR) to review many proposed projects in coastal areas that require approval from more than one state resource agency in order to ensure that the projects are consistent with state coastal land and water use standards.<sup>416</sup> In requiring the DNR to solicit reviews from coastal resource districts affected by the proposed project and other interested parties, the ACMP gives a voice to local and environmental concerns.<sup>417</sup> The ACMP also provides coastal resource districts with authority to develop land and water use development plans,<sup>418</sup> which are "administered through local zoning ordinances and land use controls."<sup>419</sup>

#### **Land Conveyances**

Besides the ACMP requirements which expired in July 2011, all DNR approvals of the conveyance of state lands or interests in state lands to private parties are subject to a written finding that the land transfer will serve the best interests of the state, a process which requires "at least a limited environmental review."<sup>420</sup> In the finding, the DNR can only address reasonably foreseeable, significant effects of the proposed uses of the land.<sup>421</sup> The written finding must also address applicable statutes and regulations as well as material facts about the land, resources, property, or interest in the property.<sup>422</sup> At least 21 days before the conveyance of land – unless the land is to be used for oil and gas production – the director must make the written finding publicly available.

This written finding requirement does not seem to apply to permits or other authorizations that are revocable by the DNR,<sup>423</sup> although the statutory language is somewhat ambiguous on this point. The written finding exemption for revocable authorizations is located within the subsection that requires the director to make the finding publicly available, but only

states that “a written finding is not required before the approval of . . . a permit or other authorization revocable by the commissioner.”<sup>424</sup> Thus, there are two plausible ways to interpret this exemption. First, the exemption applies to the entire section on written findings. Under this interpretation, no written finding on the effects of coal export would be required before granting a revocable permit. Second, the exemption only applies to the subsection in which it is located. Under this interpretation, the DNR must complete a written finding, but is exempted from the requirement that it make public the written finding on the grant of a permit.<sup>425</sup> Either way, the public does not have much say in the decision of the DNR to grant a permit.

#### Alaska National Interest Lands Conservation Act

Federal decisions to permit the use, occupancy, or disposal of public lands in Alaska are subject to the environmental review requirements of the Alaska National Interest Lands Conservation Act (ANILCA).<sup>426</sup> ANILCA requires the responsible federal agency to evaluate the impact that the use, occupancy, or disposal of land would have on traditional uses by rural Alaska residents of wild, renewable resources.<sup>427</sup> Thus, if a proposed coal export project requires the use of public land, then the responsible federal agency must evaluate at least some of the project’s impacts.

Unlike the limited DNR environmental review requirements discussed above, ANILCA imposes substantial requirements upon the federal government when the proposed project would significantly restrict traditional uses of the land.<sup>428</sup> First, the federal agency must give notice of the proposed project to the appropriate state agency, local committees, and regional councils.<sup>429</sup> Second, it must give notice of and hold a hearing in the vicinity of the area involved.<sup>430</sup> Finally, the federal agency must determine that the restriction upon the traditional uses of land is necessary, the project will involve the minimal amount of land necessary to achieve the desired use, and that reasonable mitigation steps will be taken.<sup>431</sup>

## **4) Montana**

### ***Rail***

Some coal already travels by rail from Montana to the West Coast. Although some basic infrastructure already exists, railroad companies seeking increased coal traffic may need to upgrade track and add relatively short lines linking new coal mines such as Arch Coal’s proposed mine at Otter Creek (see Box 1 above) to their trunk lines. A fairly standard array of state laws in Montana affects railroad construction and operation. The most notable feature of Montana Law is the Montana Environmental Policy Act (MEPA), a “little NEPA.”

Montana’s Tongue River Railroad project (see Box 1 above) has been met with an effective legal and advocacy campaign waged by Montana landowners adversely affected by the railroad and the new surface mines that it would engender. These affected citizens have raised their concerns before the STB by contesting the project’s EISs. Most of the action has

revolved around challenges to the railroad company's attempts to secure land for the project. The fight is ongoing, as the railroad still needs an easement in a state-owned fish hatchery.<sup>432</sup>

Montana's eminent domain law lists railroads as a public use without any qualification.<sup>433</sup> The state legislature recently changed Montana law to emphasize that even private companies can exercise eminent domain for public use.<sup>434</sup>

If changes to Montana's rail infrastructure would require state action, most likely by intruding on state land, such action could trigger environmental analysis requirements under MEPA.<sup>435</sup> MEPA's requirements are analogous to those imposed by NEPA at the federal. Notably, however, the analysis is limited to environmental effects within Montana.<sup>436</sup> So while the NEPA analysis for a Montana rail line would by law include the wide-ranging consequences of the coal export endeavor,<sup>437</sup> the MEPA analysis would only discuss impacts within Montana (coal dust, engine exhaust, noise, etc.)

### ***Montana Environmental Policy Act***

Montana has a state environmental policy act (MEPA) that is roughly comparable to NEPA.<sup>438</sup> On May 12, 2011, a new version of MEPA became law in Montana.<sup>439</sup> Under the new MEPA, all state agencies must prepare an environmental impact statement for all major actions of state government agencies significantly affecting the quality of the human environment in Montana, subject to certain exceptions.<sup>440</sup> In addition to MEPA requirements, state agencies must also abide by Department of Environmental Quality (DEQ) rules.<sup>441</sup>

### **Determining Whether an EIS is Required**

In determining whether an EIS is required under MEPA, it is necessary to first understand the separate components of the core MEPA provision.<sup>442</sup>

#### ***Major Action Requirement***

Under MEPA, the first requirement is that a major action significantly affecting the environment took place.<sup>443</sup> Actions include any project, program, or activity directly undertaken by a state agency. This includes any activity involving the issuance by the state agency of a lease, permit, license, or certificate allowing a private party to undertake an action.<sup>444</sup> In the coal export context, a state agency's decision to grant a permit to build new railroad tracks to accommodate an increase in coal trains could theoretically be subject to MEPA.

However, this broad definition of *action* is subject to several exceptions. First, some actions may be categorically excluded and thus automatically do not require an EIS or an environmental assessment (EA).<sup>445</sup> Second, actions that involve no discretion on the part of the agency, but rather involve the agency acting upon information in a prescribed manner

do not require an EIS or EA.<sup>446</sup> Finally, actions that involve minor repairs, operations, or maintenance of existing equipment or facilities do not require an EIS or an EA.<sup>447</sup>

### *State Agency Requirement*

The second requirement is that a *state agency* must act in a way that significantly affects the environment.<sup>448</sup> A state agency is defined as an entity within the executive branch of state government.<sup>449</sup> However, there are two large exceptions to this category. First, under MEPA, local governments are generally not considered to be state agencies.<sup>450</sup> Thus, a local government's decision to grant a permit or undertake some other action is not subject to MEPA requirements. Second, the Department of Public Service Regulation (DPSR) is exempt from the requirements of MEPA, insofar as the major action involved an exercise of its regulatory authority over rates and charges of railroads.<sup>451</sup>

### *Impact upon the Human Environment*

The third requirement is that the action must significantly affect the *quality of the human environment*,<sup>452</sup> which is defined as biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment.<sup>453</sup> An action that significantly affects some of these environmental factors likely will require an EIS, subject to the exception that actions that would only have adverse social and economic effects do not require an EIS.<sup>454</sup>

### Preparation of an EA

If an action is not categorically excluded under MEPA and it is unclear whether or not the action will have a significant effect on the environment, then a state agency may decide to prepare an EA to enable it to determine whether an EIS is required.<sup>455</sup> An EA must include an evaluation of the impacts of the proposed project, including cumulative and secondary impacts, on the physical environment and the human population in the area.<sup>456</sup> The term "cumulative impact" includes the collective impacts on the environment of the proposed project when considered in conjunction with other past, present, or future projects related to the proposed project by local or type.<sup>457</sup> Secondary impacts include indirect impacts of the proposed project, or in other words impacts that may result from the direct impacts of the project.<sup>458</sup> If the agency determines, on the basis of the EA, that an EIS is required, the EA must clearly state this.<sup>459</sup> If the agency determines that an EIS is not required, the agency must explain in the EA why an EA is the appropriate level of analysis.<sup>460</sup>

## Box 5: Geographic Scope

*Notably, under the new MEPA, the range of impacts that may be considered in an EA (and an EIS) is greatly curtailed. Any environmental document prepared pursuant to MEPA cannot include a review of any impacts beyond Montana's borders or that are regional, national, or global in nature.<sup>461</sup> In the coal export context, this limitation likely prevents consideration of the greenhouse gas impact of coal exports. However, the new MEPA does allow for certain exceptions to this broad prohibition. If review of non-Montana environmental impacts is (1) required by law, rule or regulation, (2) required by a federal agency, or (3) conducted by the Department of Fish, Wildlife, and Parks for the management of wildlife and fish, then the environmental document can include a consideration of non-Montana impacts.<sup>462</sup>*

### Required Content of an EIS

The new MEPA requires that an EIS discuss a range of considerations similar to that of the NEPA. First, the EIS must discuss the environmental impact of the proposed action<sup>463</sup> and adverse effects on Montana's environment that cannot be mitigated if the proposed action is implemented.<sup>464</sup> This analysis of impacts and effects must include primary, secondary, and cumulative impacts, as those terms are defined above.<sup>465</sup>

Second, under the new MEPA, the EIS must analyze reasonable alternatives to the proposed action, including a no-action alternative.<sup>466</sup> However, the range of reasonable alternatives that must be considered is limited. Alternatives must be economically feasible when compared only to the economic viability for similar projects with similar conditions and physical locations.<sup>467</sup> When the proposed project involves the issuance of a permit, license, or certificate to a private party, the alternatives analysis does not need to analyze alternative facilities or an alternative to the proposed project itself.<sup>468</sup> However, the economic strength of the project's sponsor cannot be a consideration.<sup>469</sup> With regard to the no-action alternative, the analysis must include both the projected beneficial and adverse environmental, social, and economic impact of the project's non-completion.<sup>470</sup>

### Agency Decisions

Montana agencies cannot withhold, deny, or impose conditions on a permit based on MEPA's environmental review requirements.<sup>471</sup> However, if the sponsor of the proposed project and the state agency in charge of the environmental review mutually agree to incorporate measures—such as mitigation measures—into a permit or other authority to act, then those measures may be placed into the permit.<sup>472</sup>

### How to Get Involved in the Process

#### *Public Review of the Environmental Assessment*

Only after an EA is completed can the public start to engage in the environmental review process. However, besides making the EA available to members of the public upon

request,<sup>473</sup> there are no mandatory public review obligations placed upon the agency. DEQ rules require only that the agency provide additional opportunities for public review.<sup>474</sup>

These additional opportunities for public review vary in relation to the seriousness and complexity of a proposed project's environmental impacts as well as the level of public interest in the proposed project. Given Montana agencies' broad powers to determine how to conduct the public review process, it is important for interested members of the public to contact the agency preparing the EA and register their interest in the particular environmental review process. Besides expressing interest, it is also crucial to remain vigilant and aware of developments in the environmental review process.

DEQ rules set out three separate situations that govern the expansiveness of the public's involvement following the preparation of the EA. First, if the proposed project would have more than a limited environmental impact or if there is great public interest in the proposed project, then examples of methods of public review may include: (1) publishing a news release or legal notice to announce the availability of an EA, summarizing its content and soliciting public comment; (2) holding public meetings or hearings; (3) maintaining mailing lists of persons interested in a particular action or type of action and notifying them of the availability of EAs on such actions; or (4) distributing copies of EAs for review and comment.<sup>475</sup>

Second, if the proposed project will not have a significant impact upon the environment due to the adoption of mitigation measures, then the additional opportunities must include (1) the opportunity for public comment, (2) a public meeting or hearing, and (3) adequate notice.<sup>476</sup> Finally, if the proposed project would have limited environmental impact and will generate little public interest, then the agency is not required to provide an opportunity for public review.<sup>477</sup>

The importance of participating in the public review of the EA is underscored by the fact that the agency must consider substantive comments it receives in response to the EA when determining its next step. Based upon the comments, the agency may determine that an EIS is necessary,<sup>478</sup> that its EA was inadequate and a new EA is required,<sup>479</sup> or that no further environmental review is required.<sup>480</sup> If the agency decides that no further environmental review is necessary, then it must release a final decision on the proposed project, with appropriate modification to its decision based in part upon an analysis of the public comments it receives.<sup>481</sup>

#### *Determining the Scoping of an EIS*

If the agency determines that an EIS is required for a proposed project, it must then initiate a scoping process to identify which issues the EIS will analyze in depth and which possible alternatives will be considered in the EIS.<sup>482</sup> As part of this process, the agency must invite



interested persons and groups.<sup>483</sup> Since the scoping process sets the guidelines for the rest of the environmental review process, it is crucial to encourage as many individuals and groups as possible to participate in the scoping process. In order to ensure that all of the adverse effects of the proposed project are sufficiently analyzed, citizens should seek to persuade the lead agency to set the scope of issues to be analyzed as widely as possible.

#### *Public Comments on the Draft Environmental Impact Statement*

After completing a draft environmental impact statement (DEIS), the agency must distribute the DEIS to certain government bodies and to individuals who have requested copies of the DEIS.<sup>484</sup> Following the distribution, there is a 30-day commenting period, which can be extended by another 30 days at the agency's discretion for individuals that ask for an extension.<sup>485</sup>

Alerting property owners and concerned citizens who may be affected by the proposed decision on the DEIS is of utmost importance because the agency is required to respond to any comments it receives.<sup>486</sup> Such mobilization may force the agency to prepare a separate final environmental impact statement (FEIS), instead of adopting the DEIS, without significant modification, as the FEIS.<sup>487</sup> If the agency prepares a FEIS, the FEIS must include the agency's response and evaluation of the comments received as well as the disposition of the issues involved in the comments.<sup>488</sup> Even if the agency adopts the DEIS as the FEIS, it must explain why the issues raised do not require the preparation of a FEIS.<sup>489</sup> Moreover, failure to provide evidence or raise issues can preclude judicial recourse challenging the agency's final decision because courts are required to disregard evidence that was available before the agency's decision but was not brought to the agency's attention.<sup>490</sup>

#### *Court Challenges to Agency Decisions*

One of the most substantive changes in the new MEPA pertains to the ability of individuals to challenge agency decisions. Though the judicial review process has been significantly modified, several similarities remain between the new and the old versions of MEPA. Challenges may only be brought against final agency actions and must be brought within 60 days of the action that is the subject of the challenge.<sup>491</sup> Moreover, information that was not first presented to the agency for the agency's consideration prior to the agency's decision or within the time allowed for comments may not be considered by the court.<sup>492</sup> Finally, there is still a high standard of proof required before a court can overturn an agency's decision and force the agency to reconsider its decision.<sup>493</sup> These last two similarities underscore the importance of mobilizing public awareness and active involvement around a proposed project well before an appeal to the judicial system becomes the only option.

Under the new MEPA, there is still an exception to the "no additional information" rule, discussed above, for information that is new, material, significant, and relevant to the decision or adequacy of the agency's environmental review.<sup>494</sup> However, the information

cannot have been publicly available before the agency's decision.<sup>495</sup> This "public availability" provision of the new MEPA, although untested, may yet prove to be another means for courts to decline to force an agency to reconsider its decision.

The most impactful change to MEPA is the fact that the new statute strips courts' ability to change a permit, license, lease or other authorization issued by an agency to a private party.<sup>496</sup> Under the new MEPA, even if a court forces a lead agency to rewrite or complete an environmental review, that court has no power to void, nullify, revoke, modify, suspend, or enjoin a permit, license, lease, or other authorization issued by an agency to a private party while the agency fulfills its court-ordered obligations.<sup>497</sup> As a result, even a favorable court decision for concerned and affected citizens opposed to a project will not significantly modify, improve or stop the project.

The final significant change to the judicial review process affects the financial ability of concerned citizens and affected landowners to challenge agency decisions. Under the new MEPA, courts are not allowed to award attorney fees or costs to prevailing parties.<sup>498</sup> Without the possibility of recouping these expenses, citizens will need to take into consideration this limitation when deciding which projects to challenge in court.

## 5) Wyoming

### *Rail*

As discussed above in the Montana section, trunk lines for carrying coal west from Wyoming mines in the PRB already exist. These lines may need to be expanded to accommodate increased traffic for coal exports, and new track could be added to link new mines to the western routes. Wyoming state law provides few opportunities for affected landowners and others to weigh in on such rail development.

Wyoming eminent domain law both identifies railroads as a public use, and explicitly grants railroad companies the right to exercise eminent domain power in the Wyoming state code.<sup>499</sup> Post-*Kelo* changes have not limited this power granted to the railroads under state law.

While the Wyoming Transportation Commission does have an established procedure for managing crossings of highways and railroads,<sup>500</sup> railroads are not required to obtain permission before crossing a road. Of course, as a matter of property law, the railroad must still acquire an easement from a property owner (including the state) in order to cross her land.

Some other potential state tools for addressing rail development are absent in Wyoming. The state PUC does not impose any safety standards on Wyoming rail (federal standards of course apply). Wyoming does not have a state equivalent of NEPA, so state action (for

instance an easement across state land) would not trigger an environmental analysis process.

### ***EIS Requirements***

Wyoming does not have any statutes analogous to NEPA and does not have any statewide requirement that environmental impacts of proposed projects must be considered before state or local governmental actions are taken.<sup>501</sup>

## **6) Idaho**

### ***Rail***

Idaho state law provides few opportunities for affected landowners and citizens to address concerns and issues presented by rail development to service expanded westward transport of PRB coal. Neither the ports nor the mines needed for coal exports are located within the state, so there is no need to build new lines targeting specific locations crucial to the expansion of coal exports. Instead, railroads will likely concentrate on upgrading the existing lines crossing the state. This means no STB approval, no need for NEPA analysis, and, depending on the width of existing right-of-way, no need to use eminent domain or even create new highway crossings.

Notwithstanding these limitations, several regulations may hold out some promise for citizens to engage in decision making. The Idaho PUC, for instance, has a comprehensive set of rules for railroad clearance.<sup>502</sup> If a railroad tries to lay double-track within a relatively narrow right-of-way, it could run afoul of these regulations. Idaho also has general regulations limiting fugitive dust emissions, which would include coal dust, but does not impose any defined limits that would meaningfully impair train travel.<sup>503</sup> Furthermore, if new railroad construction crosses a highway in Idaho, the crossing must be approved by the Idaho Transportation Board.<sup>504</sup> The railroad must obtain written crossing approval.

The Idaho constitution specifically authorizes the eminent domain for the public use of building railroads associated with mining.<sup>505</sup> While any use of eminent domain by the railroads might be politically problematic, it is almost surely legal.

### ***EIS Requirements***

Idaho does not have a state “little NEPA” statute or any other state requirements for performing an environmental review before commencing a project,<sup>506</sup> so state action (for instance an easement across state land) would not trigger state environmental analysis.

## B. East Coast Exports

### 1) Maryland

#### *Rail*

As of 2011, the Chesapeake region is the site of the greatest volumes of coal exported from the United States.<sup>507</sup> The Lamberts Point coal terminal in Norfolk, Virginia is the largest export facility in the nation, currently capable of exporting more than 45 million tons per year.<sup>508</sup> Although coal exports in the region are projected to increase in both the short and long term,<sup>509</sup> the basic infrastructure for coal export from the major ports of Norfolk and Baltimore already exists and already has been legally authorized. There are thus few avenues available to engage with the issue of coal exports from currently operational terminals in Virginia or Maryland. However if the market for coal exports from the region expands well beyond current levels, a standard set of port permits and regulations would apply for the construction and operation of new terminals.

The Virginia and Maryland coal export markets differ fundamentally from those the coal and rail companies anticipate serving via West Coast ports. Norfolk and Baltimore, for instance, receive coal from the Appalachian region, not the PRB. Appalachian thermal coal is used domestically, while only high quality metallurgical coal (“met coal”) has been exported, almost exclusively to European markets.<sup>510</sup> Although met coal combustion releases CO<sub>2</sub>, unlike thermal coal there is no adequate substitute for its use in steel production. This raises difficult questions about the production and export of met—as opposed to steam—coal.<sup>511</sup> Notably, foreign demand for Appalachian thermal coal recently has increased, but industry analysts still project that total 2011 exports from the East Coast will consist of 70 percent met coal.<sup>512</sup>

The Chesapeake Region is also marked by a highly integrated coal transport system. The region’s two main railroads, CSX and Norfolk Southern, own and operate the primary coal export terminals in Baltimore and Norfolk respectively. Unlike western railroads such as those owned by BNSF running out of the PRB, the eastern railroads stretching from coal mines to coal export terminals are currently operating at only 15-20 percent of their capacity. Therefore they will not need to undergo significant changes to support an expanded coal export market in the short-to-medium-term.<sup>513</sup> Similarly, existing capacity at licensed, operational ports is sufficient to meet projected export demand.<sup>514</sup>

CSX has recently taken a number of steps suggesting it believes coal exports from the East Coast (particularly new thermal coal demand) will eventually exceed existing coal terminal capacity. For example, CSX plans to begin exporting a limited amount of coal from the existing Fairless Hills terminal in Pennsylvania by the end of 2011.<sup>515</sup> The shift from merchandise container traffic to coal at the Philadelphia terminal will likely not trigger new permit requirements unless the facility must be expanded, an unlikely scenario over the

near term given the current weakness of non-coal port traffic.<sup>516</sup> CSX has also engaged in a number of recent infrastructure improvements at its Baltimore facilities.<sup>517</sup>

There is little reason to believe major construction is likely to be undertaken in Virginia or Maryland for the purpose of expanding capacity for coal exports. The coal industry has experienced a number of major booms and busts over the last forty years<sup>518</sup> and, unlike the proposed ports in the Pacific Northwest (with ties to the PRB), East Coast ports do not have a clear path to servicing the booming Pacific Rim market for thermal coal. Of more immediate concern, there is simply very little available space for the expansion of existing terminals or the construction of new infrastructure at the main East Coast ports.<sup>519</sup>

Perhaps for this reason, one expert has recommended a CSX-owned site in Newport News that functioned for over a century as a coal export facility before being shuttered as the most promising site for new terminal construction in the region.<sup>520</sup> Of course, such a new terminal would be subject to state and federal permitting requirements. However, it seems very unlikely that the railroads or coal companies will seek to invest in such a major project until existing capacity is substantially more stressed and unless current met coal demand and high thermal coal prices endure.

### ***EIS Requirements***

Maryland has passed a “little NEPA” statute, but it is limited in its scope in comparison to other state environmental policy statutes.<sup>521</sup> An “environmental effects report” is required for proposed state actions significantly affecting the quality of the environment.<sup>522</sup> However, “proposed state actions” only encompasses legislative actions.<sup>523</sup> Thus, state agencies are not required to prepare an environmental effects report for their actions.<sup>524</sup>

## **2) Virginia**

### ***Rail***

See discussion in the Maryland section above.

### ***EIS Requirements***

Virginia’s “little NEPA” statute creates a Department of Environmental Quality (DEQ) to protect the environment of Virginia in order to promote the health and well-being of Virginia citizens.<sup>525</sup> All state agencies, boards, authorities, commissions, and any branch of state government are required to prepare and submit an environmental impact report to DEQ for every major state project.<sup>526</sup>

However, the reporting requirement is limited under Virginia law. First, a “branch of state government” includes counties, cities, and towns only in connection with highway construction, reconstruction, or improvement projects affecting highways or roads undertaken by the county, city or town and estimated to cost more than \$500,000.<sup>527</sup> Thus, in the coal export context, a municipality would only be required to submit an

environmental impact in connection with a project costing more than \$500,000 and affecting roadways. Second, a “major state project” does not include the granting of permits for private party projects. A major state project is defined as the acquisition of land for the construction of a state facility, the construction of a state facility, or the expansion of an existing state facility by any of the entities listed above.<sup>528</sup>

Assuming that the limited “major state project” requirement is met, the environmental impact report must address many of the same issues as those covered by NEPA. The report must discuss the environmental impact of the project, adverse effects which cannot be mitigated, mitigation measures, and any irreversible environmental changes.<sup>529</sup> The report should also address alternatives to the proposed project and why the alternatives were rejected.<sup>530</sup> If alternatives are not considered, then the report must explain why alternatives were not considered.<sup>531</sup>

## **C. Gulf Coast Exports**

### **1) Texas**

#### ***Ports***

##### Air Quality

In Texas, the Texas Commission on Environmental Quality (TCEQ) is empowered to issue a permit for the construction of a new facility or the modification of an existing facility that may emit air contaminants.<sup>532</sup> In order to understand whether a port project to accommodate coal export requires a permit, it is necessary to analyze what is a “facility,” a “modification of an existing facility,” and an “air contaminant.”

All three terms are defined in the Texas Clean Air Act (TCAA), which provides the statutory authority for the TCEQ to regulate air quality. First, “facility” is loosely defined as a discrete or identifiable structure, device, item equipment or enclosure that is a stationary source of air contaminants or contains a stationary source of air contaminants.<sup>533</sup> The only entities explicitly excluded from the definition of “facility” are mines, quarries, well tests, and roads.<sup>534</sup> Second, the term “modification of existing facilities” encompasses physical changes to a facility or changes in the method of operation of a facility that results in: (1) an increase in the amount of any air contaminant emitted by the facility or (2) the emission of any air contaminant not previously emitted by the facility.<sup>535</sup> Finally, particulate matter, dust, fumes, gas, and odor, among other items, are considered “air contaminants.”<sup>536</sup> Since ports are not automatically exempted from being a “facility,” if a Texas port decides to export coal—or decides to export *more* coal—in a way that increases the volume of contaminants released into the air, then the port will be subject to the TCAA requirements.



Before an entity constructs a new facility that may emit air contaminants or modifies an existing facility that may release a significant amount of air contaminants into the atmosphere, the company must obtain a permit or a permit amendment from the TCEQ.<sup>537</sup> The TCEQ must grant the permit or permit amendment if the TCEQ finds that new facility will use “at least the best available control technology,”<sup>538</sup> which is defined as air pollution control technology that is “technically practical” and “economically reasonable” for the facility,<sup>539</sup> and does not find any indication that the new facility’s emissions will contravene the intent of the TCAA.<sup>540</sup> Upon a determination that the new facility does not meet one of these requirements, the TCEQ must deny the permit and explain its specific objections to the project in a report to the permit applicant.<sup>541</sup> If the permit applicant modifies its new facility proposal to meet the TCEQ’s specific objections, the TCEQ must then approve the permit or amended permit.<sup>542</sup>

There are several opportunities for the public to get involved in the application process for new permits and for amended permits that will result in a significant increase of new emissions.<sup>543</sup> First, the permit applicant must fulfill public notice requirements.<sup>544</sup> A permit applicant must publish a notice of intent to construct the new facility or modify the existing facility twice in a newspaper in general circulation in the municipality where the facility is located or to be located.<sup>545</sup> The applicant must also place a sign at the site of the proposed facility that declares the filing of a permit application and contact information for the TCEQ.<sup>546</sup>

Following the second notification, there is a public comment period on the permit application.<sup>547</sup> Information about the comment period must be detailed in the newspaper notice.<sup>548</sup> In addition, the TCEQ and the permit applicant must hold a public meeting in order to inform the public and obtain public input if the TCEQ determines that there is a significant degree of public interest in the permit application or if the member of the legislature who represents the area requests a public meeting be held.<sup>549</sup> In determining whether or not to issue the permit, the TCEQ must consider all written comments that it receives.<sup>550</sup>

During the public comment period, an individual may request, within the time period specified in the public notice, that the TCEQ hold a public hearing on the permit application.<sup>551</sup> However, in order to obtain a public hearing before the TCEQ, the individual must qualify as an “affected person,” a category which includes only those individuals whose legal rights are affected by the permit application differently than the general public.<sup>552</sup>

### Water Quality

In addition to control over air quality, TCEQ is generally in charge of maintaining the state’s water quality.<sup>553</sup> Without TCEQ authorization, nobody is allowed to discharge industrial

waste into or next to any groundwater and most bodies of surface water that are at least partly within or bordering the state or engage in any other activity that will pollute these bodies of water.<sup>554</sup> Industrial waste is defined broadly as any waterborne liquid, gaseous, or solid substance that is the result of industrial, manufacturing, trade, or business processes.<sup>555</sup> Since a port that exports coal can likely be considered an industrial, trade, or business process and will likely discharge industrial waste into a body of surface water, any port that seeks to export coal will need authorization from TCEQ.

Of particular importance, TCEQ may choose to issue a general permit to authorize the discharge of waste into bodies of water by categories of waste dischargers, instead of requiring each discharger to apply for its own permit.<sup>556</sup> On August 14, 2006, TCEQ issued a general permit authorizing the discharge of storm water containing waste and associated with industrial activity.<sup>557</sup> Included in this general permit was coal mining and coal mining-related facilities, which includes “all coal handling areas.”<sup>558</sup> Thus, any coal export facilities that will discharge storm water into bodies of water containing waste may apply for authorization to discharge waste under this general permit.<sup>559</sup> However, since general permits expire every five years, TCEQ must issue a new general permit to authorize industrial wastewater discharges in August 2011.<sup>560</sup>

#### Approval of Dredging and Filling Projects

When a project involves dredging and filling, the project must be approved by the U.S. Army Corps of Engineers (Corps) and potentially certified by the TCEQ.<sup>561</sup> Responsibility for review of dredging and filling projects is performed through a two-tier system.<sup>562</sup> Tier 1 401 Certifications require only Corps approval before a permit is granted,<sup>563</sup> whereas Tier 2 Certifications require Corps and TCEQ approval.<sup>564</sup> Tier I Certification is allowed for small projects that: (1) affect less than 1,500 linear feet of stream and/or three acres of “waters of the United States,” (2) incorporate best management practices,<sup>565</sup> and (3) don’t impact rare and ecologically significant wetlands.<sup>566</sup> Tier II Certification is required whenever one of these circumstances is not met.<sup>567</sup>

The Tier II Certification procedure allows for more public involvement in the approval process. Unless certification of the project is required to counteract an emergency situation,<sup>568</sup> a joint public notice is issued by the Corps and TCEQ “to inform the public and other government agencies” about the proposed project.<sup>569</sup> Following the notice, a 30 day comment period takes place.<sup>570</sup> During this period, the TCEQ may provide for “a public hearing to consider the potential adverse impacts of the proposed project on water quality.”<sup>571</sup> After the commenting period, the TCEQ issues a final certification decision.<sup>572</sup> TCEQ can decide to deny certification, grant certification, grant certification subject to certain conditions or waive its authority to certify.<sup>573</sup> From the perspective of those concerned about coal export projects, it is important to mobilize citizens during the commenting period in order to persuade TCEQ to deny certification.

## *EIS Requirements*

### Transportation Infrastructure and Excavation Projects

While Texas does not have a “little NEPA” statute, the state legislature has imposed a range of environmental documentation and review requirements that could be used to oppose coal exports projects. For a transportation project, government agencies are not allowed to seize land under their eminent domain power until all environmental documentation – including a final environmental impact statement or a record of decision – required by federal or state law is completed.<sup>574</sup> For an underground excavation, any environmental assessment or environmental impact statement that includes an analysis of the environmental impacts of the excavation and is required by a federal or state agency must be submitted to the TCEQ as part of the permit application.<sup>575</sup>

The Commission must make the environmental document available for public review and comment for a period of not less than 30 days before the application for the permit is considered.<sup>576</sup> If a coal export project involves taking land to improve transportation infrastructure or requires any underground excavations, the relevant state agencies may be required to submit environmental documents to the state, presenting a potentially useful avenue for public involvement.

### Leasing of State Land by Local Governments

Texas law also requires environmental documentation whenever local government bodies seek to lease state land.<sup>577</sup> When a navigation district—a district that owns and operates wharves, docks, or other marine port facilities—applies to lease any land belonging to the state that is covered or partly covered by the water of any of the bays or “other arms of the sea,” it must, if certain circumstances are met, fulfill environmental reporting requirements before its application is complete.<sup>578</sup> When the proposed use of the leased land involves dredging, filling, or bulkheading, a draft environmental impact statement (DEIS) that generally conforms to the requirements of NEPA must be produced by the local government or by a federal agency.<sup>579</sup> Thus, if a proposed coal export project is to take place in a Texas navigation district and requires the leasing of state land, then a DEIS may be required depending upon the environmental impact of the project, as discussed below.

After state agencies are given 30 days to review and comment upon the DEIS, the DEIS must be submitted for a public hearing in the county in which the land proposed to be leased is located.<sup>580</sup> Notice of the hearing must be published in the daily newspaper with the greatest circulation in the county for at least three days two to four weeks before the date of the hearing.<sup>581</sup> At the hearing, any party can offer evidence in support of or in opposition to the application. Once all evidence from this hearing and other parts of the application process is submitted, the supervising agency can authorize or deny the

proposed lease.<sup>582</sup> As discussed below, since a local government can potentially transfer this state land to private parties for port development without any further applications or documentation, it is imperative that citizens concerned about coal exports use the hearing to engage in the decision making process regarding the lease of state land.<sup>583</sup>

If the lease is approved, the local government can later sublease the land to private parties for activities such as marine commerce, port development, or channel construction and maintenance.<sup>584</sup> The sublease doesn't need to be approved by the supervising agency if the sublease is for the same purpose as the original lease.<sup>585</sup> Additionally, the local government does not need to complete an EIS unless the sublease would have a substantial impact upon the environment or the sublease requires substantial dredging, filling, or bulkheading.<sup>586</sup> Thus, if a navigation district seeks to sublease land to a private party for a coal export project and the project entails dredging, filling, or bulkheading, it is important for those concerned about the project to argue that such dredging, filling, or bulkheading is "substantial" and therefore requires environmental review.

## **2) Louisiana**

### ***Ports***

#### Air Quality

Under Louisiana law, a person must have the appropriate DEQ-required permit or license in order to conduct any activity that results in the discharge of air contaminants.<sup>587</sup> However, the DEQ is not allowed to require permits to construct or operate any facility that emits less than five tons per year of every pollutant regulated under the federal Clean Air Act (CAA), less than fifteen tons of all the CAA-regulated pollutants combined, and less than the minimum emission rate for each toxic air pollutant regulated under Louisiana Law.<sup>588</sup> Thus, a coal export project at a port that would emit more than the minimum amount of pollutants would require a permit from the DEQ.

#### Water Quality

##### *Water Pollution*

Under Louisiana law, a person must have the appropriate DEQ permit, variance, or license in order to conduct any activity that results in the discharge of any substance into the "waters of the state."<sup>589</sup>

##### *Coastal Management*

Projects that affect the coastal zone (coastal use projects) must first receive a permit from either the state or the local government operating at the parish level.<sup>590</sup> Coastal use projects that: (1) involve any dredge or fill activity which interests with more than one water body, (2) involve the use of state owned lands or water bottoms, (3) would occur in

more than one parish, or (4) are a dredge and fill use associated with mineral activities must be approved by the DEQ.<sup>591</sup> Coastal use projects that: (1) are not uses of state concern, (2) are dredge or fill projects not intersecting more than one water body, or (3) is maintenance dredging must be approved by the relevant local government when the local government has a state-approved coastal use program.<sup>592</sup>

The coastal use program provides opportunities for public involvement. Within 10 days of receiving an “apparently complete” permit application, the DEQ must issue public notice.<sup>593</sup> There are several components of the public notice requirement. First, DEQ must mail a description of the application that indicates where a copy of the application can be inspected to any person who has filed a request to be notified of such permit applications.<sup>594</sup> Second, DEQ must post a copy of the application at the location of the proposed use.<sup>595</sup> Third, DEQ must send notice of the application to all appropriate news media in the parish where the project would be located.<sup>596</sup> Fourth, DEQ must publish notice of the application in the official journal of the state.<sup>597</sup> In the 25 days following official journal publication, the public is allowed to submit comments to the DEQ or the government body reviewing the permit.<sup>598</sup> The government body reviewing the permit must consider the comments received in response to the public notice in all subsequent actions on the permit application.<sup>599</sup>

In addition to the public comment period, DEQ or the reviewing government body may hold a public hearing.<sup>600</sup> During the public comment period, a member of the public can request a public hearing.<sup>601</sup> Even without a request, a public hearing is appropriate when: (1) there is significant public opposition to a proposed use, (2) when a local government official requests a public hearing, or (3) when the project is a controversial case involving significant economic, social, or environmental issues.<sup>602</sup> If a public hearing is scheduled, the DEQ or reviewing body must give public notice.<sup>603</sup>

### Historic and Scenic River System

The Louisiana Department of Wildlife and Fisheries (DWF) is charged with protecting the rivers that the Louisiana legislature determines are historic and scenic.<sup>604</sup> “All activities that may detrimentally affect or significantly degrade the wilderness quality, aesthetic values, or ecological integrity” of a historic and scenic river require a permit before they can be undertaken.<sup>605</sup> In determining whether to grant a permit, the DWF must consult with a number of specific government agencies and allow them to submit written comments.<sup>606</sup>

The DWF must also involve the public in the permit application review process. The DWF must allow all interested parties and the public the opportunity to comment on the permit application during a 45-day comment period.<sup>607</sup> The comment period begins when notice of the permit application is published in the official state journal.<sup>608</sup> In addition, if more

than 25 members of the public or a group representing at least 25 members of the public requests a public hearing, then the DWF must hold a public hearing on the permit, during which the public may submit comments and recommendations.<sup>609</sup> The DWF must give notice at least 30 days before the hearing<sup>610</sup> and must “give special notice...to all readily identifiable landowners with property adjacent to” the affected river as well as all interested parties who have requested such notifications.<sup>611</sup>

### ***EIS Requirements***

Louisiana does not have a “little NEPA” statute or any other state requirements for performing an environmental review before commencing a project.<sup>612</sup>

## **3) Alabama**

### ***EIS Requirements***

Alabama does not have a “little NEPA” statute or any other state requirements for performing an environmental review before commencing a project.<sup>613</sup>



## **Appendix C: U.S.-Canada Exports under NAFTA**

### **A. The NAFTA**

The North American Free Trade Alliance (NAFTA) presents a unique mechanism for ensuring enforcement of environmental laws in its three member nations.<sup>614</sup> NAFTA is an international treaty designed to eliminate barriers to trade and promote investments between its signatories, Canada, Mexico and the United States. Negotiated in the early 1990s, the agreement entered into force on January 1, 1994. A number of significant environmental concerns arose during the trilateral treaty negotiations. Among other concerns, environmental groups feared that free trade could lead to the relocation of American industry to Mexico, where environmental laws and their enforcement were purportedly less rigorous.<sup>615</sup> As a result, some groups feared, there would be downward pressure on the U.S. to relax environmental standards.<sup>616</sup>

### **B. The Commission for Environmental Cooperation**

Environmental concerns led to the adoption of the North American Agreement on Environmental Cooperation (NAAEC), a supplemental agreement to NAFTA.<sup>617</sup> The NAAEC created the Commission for Environmental Cooperation (CEC), which was established to implement the provisions of the NAAEC.<sup>618</sup> The NAAEC calls for compliance with and enforcement of environmental laws and regulations, as well as the promotion of transparency and public participation on environmental matters relating to international trade and investment.<sup>619</sup> Notably, NAAEC Article 14 allows for submissions to the CEC by non-governmental agencies or person that allege that a NAFTA party is not adequately enforcing its environmental laws or regulations.<sup>620</sup> If the submission is accepted, then a factual record must be made to investigate the allegations. Similar to NEPA in the U.S. domestic context, the Article 14 procedure does not mandate any particular result; it only requires that the issues in question be investigated sufficiently and be brought to the attention of the public and the NAFTA party governments.<sup>621</sup>

### **C. The Keystone XL Pipeline Project**

In recent years, environmental groups have been actively opposing the Keystone XL project, a major new oil pipeline being developed by Transcanada, a Canadian firm, which would, if approved, bring huge volumes of Canadian heavy crude across the Great Plains to refineries in Oklahoma and Texas. As part of an effort to block the production of oil from Canadian tar sands, a group of petitioners led by the U.S.-based Natural Resources Defense Council (NRDC) and Canadian-based Environmental Defense submitted a petition to the CEC alleging that the Canadian government had systematically failed to enforce a provision of the Canadian Fisheries Act.<sup>622</sup> The petition alleges that the extraction of mined oil sand deposits in Canada has resulted in tailings and wastewater ponds that have contaminated

both surface waters and groundwater. As this report was being finalized for publication, the petition was still under review by the CEC.<sup>623</sup>

## **D. Coal Exports**

Notably, many of the environmental goals surrounding the implementation of NAFTA and the NAAEC have yet to be realized. The drafters of the NAAEC considered these factors, and set out requirements in Article 10(7) of the NAAEC to set forth a procedure to address transboundary environmental effects.<sup>624</sup> In 1997, the CEC produced a draft of recommendations to implement a mechanism for Transboundary Environmental Impact Assessments (TEIA).<sup>625</sup> In the 14 years that have passed since then, there has been no further progress in implementing a legally binding mechanism. The fact that there are no obligations by any of the member countries to develop TEIAs limits the types of claims that can be brought under Article 14 of the NAAEC. Although coal exports may create a trade distortion since the negative effects of burning coal are externalized beyond national borders, the U.S. is not under any obligation to consider these externalities in NEPA EISs.

Even in the absence of TEIAs, NRDC and Environmental Defense Canada have shown in the Keystone XL case that Article 14 of the NAAEC can be used to ensure that both Canada and the United States are complying with relevant domestic environmental laws that are applicable to the export of PRB coal to Canada for onward shipment to Asian markets. In order for a submission to be considered, it must provide a threshold level of information, including documentary evidence, regarding the case.<sup>626</sup> The submission must also be aimed at the enforcement of environmental laws, rather than “harassing” particular industries.<sup>627</sup>

However, because the CEC will not accept Article 14 submissions unless petitioners have exhausted domestic remedies, such submissions should be viewed as a last resort option.<sup>628</sup> Furthermore, the lack of an effective enforcement mechanism diminishes the effectiveness of CEC citizen submissions. On June 22, 2011, environment ministers from the United States, Canada, and Mexico have agreed to a trilateral review of the CEC submission process to determine if the process can be improved.<sup>629</sup> If approved, the review could lead to revisions in the CEC submission process by the end of 2012.<sup>630</sup> Until such revisions are implemented, CEC submissions remain an interesting, if perhaps ineffective, mechanism for environmental protection related to coal exports.

## Endnotes

<sup>1</sup> See Credit Suisse, Research Note, Growth from Subtraction: Impact of EPA Rules on Power Markets, Sept. 23, 2010, available at [http://op.bna.com/env.nsf/id/jstn-8actja/\\$File/suisse.pdf](http://op.bna.com/env.nsf/id/jstn-8actja/$File/suisse.pdf) (We think the proposed and expected rules from the EPA to lower coal plant emissions of sulfur dioxide (SO<sub>x</sub>), nitrogen oxide (NO<sub>x</sub>), mercury (Hg), and other hazardous air pollutants (HAPs) will be a significant turning point in the outlook for both merchant power plants and vertically integrated regulated utilities.”).

<sup>2</sup> In an influential report issued in November 2010, Deutsche Bank analysts projected that coal’s share of overall U.S. power generation, currently 47 percent, will drop by over half, to 22 percent, over the next two decades. Deutsche Bank Climate Change Advisors, Natural Gas and Renewables: A Secure Low Carbon Energy Plan for the United States (2010), available at [http://www.dbcca.com/dbcca/EN/\\_media/NaturalGasAndRenewables.pdf](http://www.dbcca.com/dbcca/EN/_media/NaturalGasAndRenewables.pdf).

<sup>3</sup> See, e.g., Elisabeth Rosenthal, Nations that Debate Coal Use Export it to Feed China’s Need, N.Y. Times, November 21, 2010, at A1.

<sup>4</sup> U.S. coal exports to China surged from 2009 to 2010, jumping from 387,000 tons (January-September) to over 4 million tons the following year. U.S. Energy Information Admin., Quarterly Coal Report – 3d Quarter 2010 (2011) [hereinafter Quarterly Coal Report], available at <http://www.eia.doe.gov/cneaf/coal/quarterly/html/t7p01p1.html>.

<sup>5</sup> Mario Parker & Noah Buhayar, Peabody Energy Sees Global Coal Demand at the Beginning of a ‘Super Cycle’, Bloomberg News, June 21, 2010, available at <http://www.bloomberg.com/news/2010-06-24/peabody-energy-sees-global-coal-demand-at-the-beginning-of-a-super-cycle-.html>.

<sup>6</sup> The president of Peabody Energy, the largest coal producer in the United States, stated at a June 2010 investor conference that coal shipments to the Asia-Pacific region could reach 140 million metric tons per year by 2015, citing rising energy needs in the region coupled with decreasing U.S. demand for coal. Rick Navarre, Presentation on Expanding Markets and Peabody Growth Opportunities, Analyst and Investor Forum, at 42 (2010), at <http://www.peabodyenergy.com/pdfs/Session%202%20-%20Navarre.pdf>. At another industry conference, Peabody CEO Gregory Boyce added, “The real goal here is to see if we can’t get large volumes of Powder River Basin coal to Asia.” Parker & Buhayar, *supra* note 5. The PRB, spanning large parts of Montana and Wyoming, is the largest source of coal in the United States. The two states are among the top five producers of coal in the country, with Wyoming ranking first. The two states also top the list in recoverable reserves: Montana has roughly 75 billion tons of reserves, the most in the U.S., while Wyoming has the second most reserves, at 39 billion tons. U.S. Energy Information Admin., Annual Coal Report, Table 14: Recoverable Coal Reserves and Average Recovery Percentage at Producing Mines by State (2010), available at <http://www.eia.doe.gov/cneaf/coal/page/acr/table14.html>.

<sup>7</sup> Of course, local and regional air pollution from coal burning power plants is still a major concern. See Conrad Schneider & Jonathan Banks, The Toll from Coal: An Updated Assessment of Death and Disease from America’s Dirtiest Energy Source, Clean Air Task Force (2010), at [http://www.catf.us/resources/publications/files/The\\_Toll\\_from\\_Coal.pdf](http://www.catf.us/resources/publications/files/The_Toll_from_Coal.pdf).

<sup>8</sup> Industry plans for increasing coal exports from the PRB have coincided with the announcement by Department of the Interior officials of several huge new lease sales. See News Releas, Bureau of Land Management, Salazar Announces Coal Lease Sales in Wyoming (Mar. 22, 2011, at [http://www.blm.gov/wo/st/en/info/newsroom/2011/march/NR\\_03\\_22\\_2011.html](http://www.blm.gov/wo/st/en/info/newsroom/2011/march/NR_03_22_2011.html)). Secretary Salazar’s announcement was met with howls of protest from environmental groups, who called the move a “step backward” on energy policy. Bobby McEnaney, Obama Decision on Coal Mining is a Step Backward, Not Forward, NRDC Blog, Mar. 28, 2011, available at [http://switchboard.nrdc.org/blogs/bmcenaney/obama\\_decision\\_on\\_coal\\_mining.html](http://switchboard.nrdc.org/blogs/bmcenaney/obama_decision_on_coal_mining.html).

<sup>9</sup> See Energy Kids Coal Basics (2010), at [http://www.eia.gov/KIDS/energy.cfm?page=coal\\_home-basics](http://www.eia.gov/KIDS/energy.cfm?page=coal_home-basics).

<sup>10</sup> National Energy Technology Laboratory: Gasification [hereinafter NETL: Gasification], at [http://www.netl.doe.gov/technologies/coalpower/gasification/gasifiedia/7-advantages/7-3-1\\_coalranks.html](http://www.netl.doe.gov/technologies/coalpower/gasification/gasifiedia/7-advantages/7-3-1_coalranks.html) (last visited June 30, 2011).

<sup>11</sup> See Energy Kids Coal Basics, *supra* note 9.

<sup>12</sup> NETL: Gasification, *supra* note 10.

<sup>13</sup> Energy Kids Coal Basics, *supra* note 9.

<sup>14</sup> NETL: Gasification, *supra* note 10.

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<sup>15</sup> *Id.*

<sup>16</sup> Homeland Energy Group Ltd., Comment on Coking Coal vs. Thermal Coal, at [http://www.homelandenergygroup.com/s/Coal.asp?ReportID=338859&\\_Title=Comment-on-Coking-Coal-vs-Thermal-Coal](http://www.homelandenergygroup.com/s/Coal.asp?ReportID=338859&_Title=Comment-on-Coking-Coal-vs-Thermal-Coal) (last visited June 30, 2011).

<sup>17</sup> James DeLong, Thermal Coal as U.S. Export Industry, SeekingAlpha.com, Sept. 15, 2010, at <http://seekingalpha.com/article/225244-thermal-coal-as-u-s-export-industry>.

<sup>18</sup> Different Types of Coal, at <http://www.global-energy-crisis.com/education/coal/types-of-coal.html> (last visited June 30, 2011).

<sup>19</sup> Energy Information Admin. Office of Coal, Nuclear, Electric, and Alternative Fuels, US Coal Reserves: An Update by Heat and Sulfur Content, DOE/EIA-0529 (1993), available at <http://large.stanford.edu/publications/coal/references/docs/052992.pdf>.

<sup>20</sup> See State of Wyoming Geological Survey, Wyoming's Low Sulfur Coal, <http://www.wsgs.uwyo.edu/coalweb/WyomingCoal/sulfur.aspx>.

<sup>21</sup> EPA Clean Air Market Programs, Acid Rain Program Benefits Exceed Expectations, at <http://www.epa.gov/capandtrade/documents/benefits.pdf> (last visited June 30, 2011).

<sup>22</sup> Energy Information Admin., US Coal Exports at Highest Level Since 1992, Today in Energy, June 22, 2011, at <http://205.254.135.24/todayinenergy/detail.cfm?id=1910>.

<sup>23</sup> *Id.*

<sup>24</sup> Barges and pipelines are often cheaper than rail, but require huge flows of water not available in the American West and are vigorously opposed by the railroad companies.

<sup>25</sup> Dep't. of Transp., Freight Facts and Figures 2008, available at [http://ops.fhwa.dot.gov/freight/freight\\_analysis/nat\\_freight\\_stats/docs/08factsfigures/index.htm](http://ops.fhwa.dot.gov/freight/freight_analysis/nat_freight_stats/docs/08factsfigures/index.htm).

<sup>26</sup> Western Organization of Research Councils (WORC), Exporting Powder River Basin Coal: Risks and Costs (2011), available at [http://www.worc.org/userfiles/file/Coal/Exporting\\_Powder\\_River\\_Basin\\_Coal\\_Risks\\_and\\_Cost.pdf](http://www.worc.org/userfiles/file/Coal/Exporting_Powder_River_Basin_Coal_Risks_and_Cost.pdf). Note that the WORC report cites public statements by coal industry executives to arrive at an estimate of 140 million tons of coal bound for export. A more conservative number would be 110 million tons, which is based on internal company documents uncovered in the Millennium Bulk Terminals-Longview and Cherry Point port expansion application processes. See Appendix 1 below.

<sup>27</sup> See Cambridge Systematics, Inc., National Rail Freight Infrastructure Capacity and Investment Study prepared for Association of American Railroads (September 2007), available at [http://www.aar.org/~media/aar/Files/natl\\_freight\\_capacity\\_study.ashx](http://www.aar.org/~media/aar/Files/natl_freight_capacity_study.ashx)

<sup>28</sup> See, e.g., Frank J. Dooley & William E. Thoms, Railroad Law a Decade after Deregulation, 1 (1994).

<sup>29</sup> Final EIS Tongue River I, Doc. 30186, at 5 (1985), available at <http://www.stb.dot.gov/stb/docs/TongueRiver1/TRI-8%20Final%20EIS%20-%20Sections%201-3.pdf>.

<sup>30</sup> The Tongue River Railroad: White Paper for the Montana Environmental Quality Council, at 2 (2007), available at [http://leg.mt.gov/content/committees/interim/2007\\_2008/environmental\\_quality\\_council/meetings/minutes/eqc09142007\\_ex11.pdf](http://leg.mt.gov/content/committees/interim/2007_2008/environmental_quality_council/meetings/minutes/eqc09142007_ex11.pdf).

<sup>31</sup> STB, Key Cases: Tongue River Railroad, available at [http://www.stb.dot.gov/stb/environment/key\\_cases\\_tongueriver.html](http://www.stb.dot.gov/stb/environment/key_cases_tongueriver.html) (last visited June 30, 2011).

<sup>32</sup> See Eve Byron, FWP meeting on Tongue River Railroad Easement Canceled, Billings Gazette, Mar. 10 2011, available at [http://billingsgazette.com/news/state-and-regional/montana/article\\_ebee1606-a67c-5c12-88fa-a3fec56aea1c.html](http://billingsgazette.com/news/state-and-regional/montana/article_ebee1606-a67c-5c12-88fa-a3fec56aea1c.html).

<sup>33</sup> See Tongue River Railroad Company, Inc., Four-Month Report to the Surface Transportation Board, July 8, 2011, [http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/8422ed74fa03e6f5852578c7005da4c4/\\$FILE/230586.PDF](http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/8422ed74fa03e6f5852578c7005da4c4/$FILE/230586.PDF).

<sup>34</sup> See Peter Gartrell, "Tripling of BNSF export coal volumes plays role in new US port moves," Platts.com, December 3, 2010, <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/Coal/6645998>.

<sup>35</sup> Arch Coal, Inc., About Us: History, <http://archcoal.com/aboutus/history.aspx>.

<sup>36</sup> 49 U.S.C. § 10901(b) (2006).

<sup>37</sup> For a comprehensive analysis arguing that little state regulation should be preempted and that state environmental laws should universally apply to railroads), see Carter H. Strickland Jr., Revitalizing the

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Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations, 34 Ecology L.Q. 1147 (2007).

<sup>38</sup> Wyoming falls within the 10th Circuit which has not directly confronted ICCTA preemption issues.

<sup>39</sup> *City of Auburn v. U.S.*, 154 F.3d 1025 (9th Cir. 1998).

<sup>40</sup> *Id.* at 1031.

<sup>41</sup> Strickland, *supra* note 37 at 1172.

<sup>42</sup> *Id.* at 1156-59 has a fuller account of the absurd dangers of the New Jersey Solid Waste Transfer site.

<sup>43</sup> Pub. L. 110-432, Div. A, Title VI, § 604(a), 122 Stat. 4903 (2008) (codified at 49 U.S.C. § 10909(c)).

<sup>44</sup> *Id.* at § 10908.

<sup>45</sup> Pub. L. 110-432, Div. A, Title VI, § 605(a), 122 Stat. 4905 (2008).

<sup>46</sup> See *Assoc. American Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010) (“What matters is the degree to which the challenged regulations burden rail transportation.”).

<sup>47</sup> *Id.* at 1098.

<sup>48</sup> See, e.g., *Village of Barrington v. STB*, 636 F.3d 650 (D.C. Cir. 2011) (upholding STB’s decision to require railroad company to pay for expensive grade separations). See also *Indiana & Ohio Railway Company—Construction and Operation—Butler, Warren, and Hamilton Crys, OH*, 9 I.C.C.2d 783 (S.T.B. 1993) (denying railroad company application for new line under public convenience test where public safety concerns outweigh transportation benefits of proposed line).

<sup>49</sup> 49 U.S.C. § 10901(a).

<sup>50</sup> This logic is set out in some detail in *Detroit v. Canadian Natl. Railway Co.*, 9 I.C.C.2d 1208 (S.T.B. 1993).

<sup>51</sup> 49 U.S.C. § 10901(a).

<sup>52</sup> See §10901(c) (stating the STB “shall” issue permits); *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003).

<sup>53</sup> *Chevron U.S.A., Inc v. Natural Resources Defense Council*, 467 U.S. 837 (1987).

<sup>54</sup> 49 C.F.R. § 1105.6 (2010).

<sup>55</sup> The Office of Environmental Analysis has a fairly detailed website at <http://www.stb.dot.gov/stb/environment/sea.html> (last visited June 30, 2011).

<sup>56</sup> 49 C.F.R. § 1105.6 (“Environmental Impact Statements will normally be prepared for rail construction proposals other than those described in paragraph (b)(1) of this section. (b) Environmental Assessments will normally be prepared for the following proposed actions: (1) Construction of connecting track within existing rail rights-of- way, or on land owned by the connecting railroads.”)

<sup>57</sup> 6 U.S.C. § 470(f) (2006).

<sup>58</sup> 42 U.S.C. §§ 7401-7671q (2006).

<sup>59</sup> See *infra* Part I.C.4.

<sup>60</sup> BNSF Coal Dust FAQ, <http://bnsf.com/customers/what-can-i-ship/coal/coal-dust.html#4> (last visited June 30, 2011).

<sup>61</sup> 42 U.S.C. § 7547(a).

<sup>62</sup> EPA Locomotives Information, at <http://www.epa.gov/oms/locomotives.htm> (last visited June 30, 2011).

<sup>63</sup> 42 U.S.C. § 7604.

<sup>64</sup> For a wealth of information concerning EPA regulation of particulate matter, see the EPA website on particulates at <http://www.epa.gov/air/particlepollution/basic.html> (last visited June 30, 2011).

<sup>65</sup> See 42 U.S.C. § 7410.

<sup>66</sup> Idaho Admin. Code 58.01.01.650 (2011).

<sup>67</sup> *American Railroads*, 622 F.3d 1094, 1098 (9th Cir. 2010).

<sup>68</sup> *Id.*

<sup>69</sup> See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-530 (1959).

<sup>70</sup> See *Western and Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652-653 (1981).

<sup>71</sup> BNSF Railway Statement on STB Coal Dust Decision (2011), available at <http://www.bnsf.com/customers/what-can-i-ship/coal/coal-dust.html>.

<sup>72</sup> *BNSF Railway Co. v. STB*, 604 F.3d 602 (D.C. Cir. 2010).

<sup>73</sup> 622 F.3d 1094, 1097.

<sup>74</sup> *Id.*

<sup>75</sup> 42 U.S.C. §§ 6901 et seq. (2006).

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<sup>76</sup> See Letter from NRDC Re: 90-Day Notice of Intent to Initiate Action Under the Resource Conservation and Recovery Act, June 21, 2011[hereinafter NRDC Letter], available at [http://docs.nrdc.org/air/files/air\\_11062101a.pdf](http://docs.nrdc.org/air/files/air_11062101a.pdf).

<sup>77</sup> 42 U.S.C. § 6972(a)(1)(B).

<sup>78</sup> See NRDC Letter, *supra* note 76.

<sup>79</sup> Transportation Sector Targeted in Legal Action Over Diesel Emissions, O'Melveny & Myers Newsroom, June 23, 2011, at <http://www.omm.com/newsroom/publication.aspx?pub=1118>.

<sup>80</sup> The FRA's basic authority is outlined in the Department of Transportation Act of 1966, 49 U.S.C. 103, Section 3(e)(1).

<sup>81</sup> 49 U.S.C. §20103.

<sup>82</sup> 49 C.F.R. 210 (2010).

<sup>83</sup> 49 U.S.C. § 20106.

<sup>84</sup> Clearance regulations in key states are discussed in Appendix B, *infra*.

<sup>85</sup> *Union Pacific Railroad Co. v. California Public Utilities Comm.*, 346 F.3d 851, 862 (9th Cir. 2003) (analyzing FRSA preemption without invoking ICCTA preemption).

<sup>86</sup> 49 U.S.C. § 20106(a)(2)(A).

<sup>87</sup> *Union Pacific*, 346 F.3d 851, 862.

<sup>88</sup> See 23 C.F.R. 774 (2010).

<sup>89</sup> 23 U.S.C. § 138(a).

<sup>90</sup> For a discussion of section 4(f) in the context of an actual coal export rail project, see *Alaska Railroad Corp. Construction and Operation of a Rail Line Extension to Port MacKenzie, Alaska*, Draft Environmental Impact Statement, 2010 WL 1266781 (S.T.B.).

<sup>91</sup> 23 U.S.C. §138(a).

<sup>92</sup> For a historical example of how burdensome these obligations can be, see Peter L. Strauss, *Citizens to Protect Overton Park v. Volpe: Of Politics and Law, Young Lawyers, and the Highway Goliath* 258 *in* *Administrative Law Stories* (Peter Strauss ed., 2006).

<sup>93</sup> See *supra* notes 8-15 and accompanying text.

<sup>94</sup> For the role of PUCs in select states, see *infra* Appendix.

<sup>95</sup> 42 U.S.C. §§ 20106, 20113 (2006).

<sup>96</sup> See *supra* notes 8-15 and accompanying text.

<sup>97</sup> See *American Railroads*, 622 F.3d 1094, 1097 (9th Cir. 2010).

<sup>98</sup> See *City of Auburn v. U.S.*, 154 F.3d 1025, 1028 (9th Cir. 1998).

<sup>99</sup> There is no case law establishing the lawfulness of applying state environmental analysis statutes to non-permitting state actions enabling railroad action. However a state law imposing general conditions on that state's decision to allow the use of state land by anyone, including railroads, seems to clearly fall within the realm of state "laws of general applicability," which are not preempted by the ICCTA. See *American Railroads*, 622 F.3d 1094, 1097 (9th Cir. 2010) ("Generally speaking, ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce.").

<sup>100</sup> See *Kelo v. City of New London* 545 U.S. 469, 477 (2005).

<sup>101</sup> See, e.g., *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U.S. 211 (1914).

<sup>102</sup> 545 U.S. 469.

<sup>103</sup> See *infra* Part III. Even if a state NEPA was triggered, there is a good chance the application of the law to a railroads use of eminent domain would be preempted by the ICCTA. See *In re Metropolitan Transp. Auth.*, 851 N.Y.S. 2d 63 (2d Dep't. 2006).

<sup>104</sup> See Restatement (Second) of Torts § 821A (1979).

<sup>105</sup> *Richards v. Washington Terminal Co.* 233 U.S. 546, 553-54 (1914).

<sup>106</sup> *Id.* at 557.

<sup>107</sup> *Id.*

<sup>108</sup> See *American Electric Power v. Connecticut*, 564 U.S. \_\_ at \*9 (2011).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at \*9-\*15.

<sup>111</sup> Energy Information Admin, U.S. Coal Exports: Third Quarter 2010, at <http://www.eia.gov/cneaf/coal/quarterly/html/t7p01p1.html>.



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<sup>112</sup> See Energy Information Admin., Table 14: Coal Exports by Customs District (2010), available at <http://eia.gov/cneaf/coal/quarterly/html/t13p01p1.pdf>. Domestic consumption of coal in 2009, by contrast, totaled around a billion short tons, over 18 times as much. See Energy Information Admin., Annual Energy Review (2010), available at <http://www.eia.doe.gov/aer/txt/ptb0703.html>.

<sup>113</sup> The term “navigable waters” means any body of water that is subject to the ebb and flow of the tide, or any body of water that has been used or could be used for the transportation of interstate or foreign commerce. See 33 C.F.R. §329.4 (2010). While any port will be in “navigable water” by definition, there are a number of listed bodies of water that have been declared “non-navigable” for the purposes of the statute. They can be found at 33 U.S.C. §§ 1-59Kk (2006).

<sup>114</sup> 33 U.S.C. § 403.

<sup>115</sup> § 1344.

<sup>116</sup> §§ 403, 1344.

<sup>117</sup> § 403.

<sup>118</sup> §§ 1251 et seq.

<sup>119</sup> 33 C.F.R. § 330.1 et seq. (2010).

<sup>120</sup> Melissa Gross-Arnold, Private Aids to Navigation: Regulatory and Statutory Requirements for Aids to Navigation and Other Signage, University of Florida Center for Government Responsibility Memo (1999), available at <http://www.law.ufl.edu/conservation/pdf/privaid.pdf>. See also 33 C.F.R. § 66.

<sup>121</sup> Procedures for NWP are outlined at 33 C.F.R. §§ 330.1 et seq. Most NWPs would not apply to port expansion activities. NWP 25 and 28, covering structural discharges and modifications of existing marinas respectively, appear the most relevant, but do not seem to cover projects as large as a major port overhaul.

<sup>122</sup> 33 C.F.R. §§ 320.4 et seq.

<sup>123</sup> 33 C.F.R. § 320.4.

<sup>124</sup> 33 U.S.C. § 1344(b); 40 C.F.R. § 230.10

<sup>125</sup> These factors include conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, consideration of property ownership, and the general needs and welfare of the people. 33 C.F.R. § 320.4.

<sup>126</sup> Depending on the scope and location of the project these agencies can include the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, the National Marine Fisheries Service, the Department of the Interior, the National Oceanic and Atmospheric Administration, the Department of Agriculture, and state environmental and resource agencies. *Id.*

<sup>127</sup> 40 C.F.R. § 230.10

<sup>128</sup> See *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir. 1986); see also 40 C.F.R. § 1508.18(b)(4) (defining federal action for the purpose of NEPA as including “actions approved by permit or other regulatory decision”).

<sup>129</sup> Matthew C. Porterfield, Rippling Puddles, Small Handles and Links of Chain: The Scope of Environmental Review for Army Corps of Engineers Permit Decisions, 10 Tul. Envtl. L. J. 31, 48 (1996). See also Environmental Quality; Procedures for Implementing the National Environmental Policy Act (NEPA), 53 Fed. Reg. 3120-01 (Feb. 3, 1988).

<sup>130</sup> *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989). Although presumably there would be no reason to build a golf resort at the site if there was no accompanying golf course, the court determined that it was possible for the resort to exist absent the golf course, even if it was economically illogical.

<sup>131</sup> See, e.g., *Save Our Sonoran, Inc. v. Flowers*, 381 F.3d 905, 913 (9th Cir. 2004), opinion amended and superseded on denial of reh'g, 408 F.3d 1113 (9th Cir. 2005).

<sup>132</sup> *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040-41 (9th Cir. 2009); see also Jeslyn Miller, Clarifying the Scope of NEPA Review and the Small Handles Problem, 37 Ecology L.Q. 735 (2010).

<sup>133</sup> 16 U.S.C. § 1536(a)(2) (2006).

<sup>134</sup> See Fish & Wildlife Service Species Report for Washington (2011), at [http://ecos.fws.gov/tess\\_public/pub/stateListingAndOccurrenceIndividual.jsp?state=WA](http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=WA).

<sup>135</sup> 16 U.S.C. § 1536(c)(1).

<sup>136</sup> § 1536(b).

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<sup>137</sup> § 1539.

<sup>138</sup> § 1539(a)(2)(B)(iv).

<sup>139</sup> § 1536(e).

<sup>140</sup> Fish & Wildlife Service Endangered Species Program, Habitat Conservation Plans Under the Endangered Species Act (2011), available at <http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>.

<sup>141</sup> *Id.*

<sup>142</sup> § 1540(g). Recently, the District Court of Maryland granted injunctive relief to halt the construction of additional wind turbines over concerns that it would result in the deaths of a local endangered bat species. The court held that the wind energy project could constitute a “taking” under the ESA. The court also held that wholly future potential violations of the ESA constituted sufficient grounds for jurisdiction under the citizen-suit provision. See *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009).

<sup>143</sup> See *Nat’l Wildlife Fed’n v. Coleman*, 529 F.2d 359, 373 (5th Cir. 1976). See also Michael A. DiSabatino, *Validity, construction, and application of Endangered Species Act of 1973*, 32 A.L.R. Fed. 332 (1977).

<sup>144</sup> *Coleman*, 529 F.2d 359, 373.

<sup>145</sup> 16 U.S.C. § 1538(a); *Babbitt v. Sweet Home*, 515 U.S. 687 (1995).

<sup>146</sup> 16 U.S.C. § 1372.

<sup>147</sup> § 1374.

<sup>148</sup> § 1539.

<sup>149</sup> §§ 1374, 1539.

<sup>150</sup> Procedures for identifying Essential Fish Habitats are required by 16 U.S.C. § 1855(b)(1).

<sup>151</sup> § 1855(b)(2). This requirement applies to newly issued permits by federal agencies, as well as renewals or substantial revisions that occur after the designation of the fish habitat. See 50 C.F.R. § 600.920(a) (2010).

<sup>152</sup> 50 C.F.R. § 600.920(e)(1)-(3).

<sup>153</sup> § 600.920(f). Other methods of satisfying the mandatory EFH requirement are listed in § 600.920(g)-(j).

<sup>154</sup> 36 C.F.R. § 800.1.

<sup>155</sup> *Id.*

<sup>156</sup> § 800.3.

<sup>157</sup> § 800.5.

<sup>158</sup> *Id.*

<sup>159</sup> See Melissa A. MacGill, *Old Stuff Is Good Stuff: Federal Agency Responsibilities under Section 106 of the National Historic Preservation Act*, 7 Admin. L. J. Am. U. 697, 700 (1994).

<sup>160</sup> 36 C.F.R. § 800.5

<sup>161</sup> *Id.*

<sup>162</sup> See MacGill, *supra* note 159 at 700.

<sup>163</sup> 36 C.F.R. § 800.2.

<sup>164</sup> Concerns relating to NHPA can be addressed in the EIS prepared under NEPA. See *infra* Part III. Public comments can be sought at the same time at town meetings for both NEPA and NHPA. See 36 C.F.R. § 800.2.

<sup>165</sup> 33 U.S.C. § 1502(9) (2006).

<sup>166</sup> 43 U.S.C. § 1301. Although three geographical miles is the general rule, there can be exceptions to this general rule depending on the State. A geographical mile is defined as an arc minute along the equator of the Earth, or 1855.4 meters.

<sup>167</sup> 33 U.S.C. § 1503(c)(5).

<sup>168</sup> *Gulf Restoration Network v. U.S. Dep’t. of Transp.*, 452 F.3d 362, 373 (5th Cir. 2006). A similar cost-benefit analysis has been used in the promulgation of other environmental regulations that require “best available technology.” See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1506 (2009).

<sup>169</sup> 33 U.S.C. § 1503(c)(6).

<sup>170</sup> 33 U.S.C. § 1508(b).

<sup>171</sup> See Kevin A. Ewing & Erik Petersen, *Significant Environmental Challenges to the Development of LNG Terminals in the United States*, 2 Tex. J. Oil Gas & Energy L. 5, 12 (2007).

<sup>172</sup> 33 U.S.C. §§ 1311, 1342.

<sup>173</sup> The only states that do not administer their own NPDES programs are Massachusetts, Idaho, New Hampshire, and New Mexico. See *NPDES State Program Status* (2003), at <http://cfpub.epa.gov/npdes/statestats.cfm>.

<sup>174</sup> 40 C.F.R. § 122.26(a) (2010).

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<sup>175</sup> § 122.26(a)(9)(i)(B); § 123.25.

<sup>176</sup> Id. See also, NPDES Stormwater Discharges From Construction Activities (2009), at <http://cfpub.epa.gov/npdes/stormwater/const.cfm>; California Construction Storm Water Program (2011), at [http://www.swrcb.ca.gov/water\\_issues/programs/stormwater/construction.shtml](http://www.swrcb.ca.gov/water_issues/programs/stormwater/construction.shtml); Washington Construction Stormwater General Permit, at <http://www.ecy.wa.gov/programs/wq/stormwater/construction/> (last visited June 30, 2011); N.Y. Dep't. of Envtl. Conservation, Instruction Manual for Stormwater Construction Permit (2004), available at [http://www.dec.ny.gov/docs/water\\_pdf/instr\\_man\\_1.pdf](http://www.dec.ny.gov/docs/water_pdf/instr_man_1.pdf).

<sup>177</sup> 40 C.F.R. § 122.26(a), (b)(14). The SIC industry codes for industries requiring industrial storm water permit coverage include both rail transportation and water transportation sectors. Printers' Nat'l Envtl. Assistance Ctr., Industrial Stormwater Permit Guide: SIC Codes Covered by the Multi Sector General Permit Program (2011), at <http://www.pneac.org/stormwater/sic-codes.cfm>.

<sup>178</sup> See Printers' Nat'l Envtl. Assistance Ctr., Industrial Stormwater Permit Guide (2011), at <http://www.pneac.org/stormwater/>; see also Port of Olympia: Marine Terminal Stormwater Management, at <http://www.portolympia.com/about/stormwater> (last visited June 30, 2011) (describing the storm water management practices undertaken by the Port of Olympia in Washington State).

<sup>179</sup> 33 U.S.C. § 1341(a)(1) (2006).

<sup>180</sup> Id.; EPA Office of Wetlands, Oceans, and Watersheds, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (2010) [hereinafter CWA 401 Handbook], 9-11, available at

[http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA_401_Handbook_2010_Interim.pdf). ("States and tribes are authorized to waive §401 certification, either explicitly, through notification to the applicant, or by the certification agency not taking action. If action is not taken on a certification request, 'within a reasonable time (which shall not exceed one year),' the state or authorized tribe has waived the requirement for certification.")

<sup>181</sup> Jefferson County PUD v. Washington Dep't. of Ecology, 511 U.S. 700, 712 (1994); 33 U.S.C. § 1341(d); CWA 401 Handbook, *supra* note 180 at 10.

<sup>182</sup> <http://yosemite.epa.gov/opa/admpress.nsf/1e5ab1124055f3b28525781f0042ed40/b7ced46b3f5bc6b5852578bd005521fc!OpenDocument>.

<sup>183</sup> 16 U.S.C. § 1456.

<sup>184</sup> Id.

<sup>185</sup> 15 C.F.R. §§ 930.1 et. seq. (2010); see also NOAA Office of Ocean and Coastal Resource Mgmt. Federal Consistency Overview (2011), at <http://coastalmanagement.noaa.gov/consistency/welcome.html>.

<sup>186</sup> 16 U.S.C. §1456(c)(3).

<sup>187</sup> 42 U.S.C. § 4332.

<sup>188</sup> See 40 C.F.R. § 1508.18, defining "major federal action" as including "actions with effects that may be major and which are potentially subject to Federal control and responsibility." Some federal actions have been "categorically excluded" from NEPA, and as such, are not subject to environmental review. § 1508.4.

<sup>189</sup> 42 U.S.C. § 4342.

<sup>190</sup> Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 334 (1989).

<sup>191</sup> 40 C.F.R. § 1508.27.

<sup>192</sup> Id.

<sup>193</sup> § 1508.9; §1501.4.

<sup>194</sup> §1508.9.

<sup>195</sup> §1502.16(a)-(b); §1508.8.

<sup>196</sup> §1508.8(a).

<sup>197</sup> §1508.8(b).

<sup>198</sup> §1508.7.

<sup>199</sup> §1502.14(f).

<sup>200</sup> §1505.2

<sup>201</sup> § 1502.14; 42 U.S.C. § 4332(C)(i)-(iii) (2006)

<sup>202</sup> 40 C.F.R. §1502.14(c).

<sup>203</sup> §1502.14(d).

<sup>204</sup> §1505.2.

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<sup>205</sup>§1505.3.

<sup>206</sup> Council on Env'tl. Quality, Exec. Office of the President, Memorandum for Heads of Federal Departments and Agencies: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (2011) [hereinafter FONSI Memorandum], available at [http://ceq.hss.doe.gov/current\\_developments/docs/Mitigation\\_and\\_Monitoring\\_Guidance\\_14Jan2011.pdf](http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf).

<sup>207</sup> Id. at 3.

<sup>208</sup> Id. at 8.

<sup>209</sup> Id. at 15.

<sup>210</sup> Id.

<sup>211</sup> Id.

<sup>212</sup> Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

<sup>213</sup> Jameson Tweedie, Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement, 63 Wash. & Lee L. Rev. 849 (2006).

<sup>214</sup> See, e.g., Grand Canyon Trust v. U.S. Bureau of Reclamation, 623 F. Supp. 2d 1015, 1030 (D. Ariz. 2009) (finding that plaintiff waived its argument that defendant should have considered the effects of the proposed project on certain species by not raising the issue in its comments on the draft EA); High Sierra Hikers Ass'n v. U.S. Forest Serv., 436 F. Supp. 2d 1117, 1146-48 (E.D. Cal. 2006) (holding that plaintiffs' failure to challenge defendant's consideration of reasonable alternatives during the comment period on the DEIS barred plaintiffs from litigating their claim based upon defendant's consideration of reasonable alternatives).

<sup>215</sup> See, e.g., Nevada v. Dep't of Energy, 475 F.3d 78, 88 (D.C. Cir. 2006) (holding that the state of Nevada waived its argument that the Department of Energy failed to consult with the Surface Transportation Board because it did not raise the claim during administrative proceedings); NRDC v. F.A.A., 564 F.3d 549, 559 (2d Cir. 2009) (finding that failure of the plaintiff to bring to the attention of the lead agency while they were conducting the environmental impact assessment process certain environmental impacts barred plaintiff from litigating claims based upon those impacts). For more information on the doctrine of exhaustion of remedies, see Daniel R. Mandelkar, NEPA Law and Litigation § 4:27.1 (2010).

<sup>216</sup> 40 C.F.R. §1506.6(a) (2010).

<sup>217</sup> §1506.6(b)(1).

<sup>218</sup> §1507.3.

<sup>219</sup> §1501.4(b).

<sup>220</sup> §1506.6; §1508.10.

<sup>221</sup> §1501.4(e).

<sup>222</sup> §1501.4(e)(2) (emphasis added).

<sup>223</sup> § 1501.7; § 1508.22.

<sup>224</sup> § 1508.22(c).

<sup>225</sup> § 1501.7.

<sup>226</sup> §1501.7(b)(4).

<sup>227</sup> §1501.7(a)(1).

<sup>228</sup> Id.

<sup>229</sup> § 1501.7(a); § 1502.9(a).

<sup>230</sup> For an example of an EIS with a very broad scope, see, e.g., Michael Gerrard et al., 1 Environmental Impact Review in New York, § 3.19(5)(c) (3d ed. 1990).

<sup>231</sup> 40 C.F.R. § 1501.7(a)(5)-(6).

<sup>232</sup> § 1502.9(a).

<sup>233</sup> § 1502.9(a).

<sup>234</sup> § 1502.19; § 1502.19(c).

<sup>235</sup> § 1503.1(a); § 1506.10. The comment period officially begins on the date of publication of the draft EIS by the EPA. §1506.10. The EPA list of draft EISs and final EISs published the preceding week is available at EISs With Open Comment/Review Period, at <http://yosemite.epa.gov/oeca/webeis.nsf/viEIS03> (last visited June 30, 2011).

<sup>236</sup> 40 C.F.R. § 1503.1(a)(2).

<sup>237</sup> §1503.1(4).

<sup>238</sup> § 1503.4(a).

<sup>239</sup> Id., § 1502.9(b).

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<sup>240</sup> § 1503.4(a).  
<sup>241</sup> § 1502.9(b).  
<sup>242</sup> § 1502.9(c).  
<sup>243</sup> § 1502.9(c)(1)(ii).  
<sup>244</sup> *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 384 (1989).  
<sup>245</sup> 40 C.F.R. § 1502.9(c)(1)(i).  
<sup>246</sup> *Mandelkar*, *supra* note 215, § 4:27.  
<sup>247</sup> 40 C.F.R. § 1505.2.  
<sup>248</sup> § 1505.3.  
<sup>249</sup> §1505.3(d).  
<sup>250</sup> FONSI Memorandum, *supra* note 206.  
<sup>251</sup> *Id.* at 3.  
<sup>252</sup> *Id.* at 11.  
<sup>253</sup> *Id.* at 13.  
<sup>254</sup> *Id.*  
<sup>255</sup> *Id.* at 13-14, citing 42 U.S.C. 4332(2)(G) (2006).  
<sup>256</sup> See *Ctr. for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008); *Mid States Coalition for Progress v. STB*, 345 F.3d 520 (8th Cir. 2003).  
<sup>257</sup> *Mid States Coalition*, 345 F.3d at 549-50. It is important to note here that the court states “We find it significant that when the Board was defining the contours of the EIS, it stated that SEA would ‘[e]valuate the potential air quality impacts associated with the increased availability and utilization of Powder River Basin Coal.’ DEIS Appendix C at C-73. Yet, the DEIS failed to deliver on this promise.” *Id.* at 550. This raises the question as to whether the case might have come out differently if the agency had not planned to evaluate secondary air impacts in its original scoping document.  
<sup>258</sup> *Id.* at 549.  
<sup>259</sup> *Id.* at 548-49.  
<sup>260</sup> *Dakota, Minn. & E. R.R. Corp. Constr. into the Powder River Basin*, S.T.B. Finance Docket No. 33407, 7 (2006).  
<sup>261</sup> *Mayo Found. v. STB*, 472 F.3d 545, 555-56 (8th Cir. 2006).  
<sup>262</sup> *Endangerment and Cause or Contribute Findings for Greenhouse Gasses*, 74 Fed. Reg. 66496 (Dec. 15, 2009).  
<sup>263</sup> *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172.  
<sup>264</sup> CEQ, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (Feb. 18, 2010) available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>.  
<sup>265</sup> See, e.g., Federal Highway Administration, Climate Change – Model Language in Transportation Plans (2010), available at <http://climatechange.transportation.org/pdf/climate%20change%20and%20planning%20-%20model%20language%205-13-10.pdf>; US Forest Service, Climate Change Considerations in Project Level NEPA Analysis (2009) available at [http://www.fs.fed.us/emc/nepa/climate\\_change/includes/cc\\_nepa\\_guidance.pdf](http://www.fs.fed.us/emc/nepa/climate_change/includes/cc_nepa_guidance.pdf).  
<sup>266</sup> See e.g. N.Y. Dep’t. of Envtl. Conservation, Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements (2009), available at [http://www.dec.ny.gov/docs/administration\\_pdf/eisghgpolicy.pdf](http://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf); CA Natural Resources Agency, CEQA Guidelines Amendments (Dec. 30, 2009), available at [http://ceres.ca.gov/ceqa/docs/Adopted\\_and\\_Transmitted\\_Text\\_of\\_SB97\\_CEQA\\_Guidelines\\_Amendments.pdf](http://ceres.ca.gov/ceqa/docs/Adopted_and_Transmitted_Text_of_SB97_CEQA_Guidelines_Amendments.pdf); Wash. Dep’t. of Ecology, State Environmental Policy Act (SEPA) Guidance on Addressing Greenhouse Gas Emissions (GHG) Draft (2010) available at [http://www.ecy.wa.gov/climatechange/docs/sepa\\_guidancedraft.docx](http://www.ecy.wa.gov/climatechange/docs/sepa_guidancedraft.docx). For a complete list, see NEPA & State NEPA EIS Resource Center, at <http://www.law.columbia.edu/centers/climatechange/resources/eis> (last visited June 30, 2011).  
<sup>267</sup> Barbara LaBoe, Coal Terminal Opponents Make New Push Following Fire, *Daily News*, June 8, 2011, available at [http://tdn.com/news/local/article\\_bff73378-9241-11e0-bc2c-001cc4c002e0.html](http://tdn.com/news/local/article_bff73378-9241-11e0-bc2c-001cc4c002e0.html).

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- <sup>268</sup> Id.
- <sup>269</sup> Ambre Energy, Millennium Bulk Terminal, at <http://ambreenergy.com/what/us-operations/millennium-terminal> (last visited July 11, 2011).
- <sup>270</sup> LaBoe, *supra* note 267.
- <sup>271</sup> Ambre Energy, *supra* note 269.
- <sup>272</sup> Nicholas Shannon Kulmick, Letter to the Editor: Just Say No to Coal, *Vancouver Bus. J.*, Mar. 25, 2011, available at <http://www.vbjusa.com/2011/03/25/letter-to-the-editor-just-say-no-to-coal>.
- <sup>273</sup> Joel Millman, Coal Foes Claim Victory Over Export Terminal, *Wall St. J.*, Mar. 15, 2011, <http://online.wsj.com/article/SB10001424052748704164204576203331020856282.html>.
- <sup>274</sup> Id.
- <sup>275</sup> Kim Murphy, Fight intensifies over West Coast coal exports to Asia, *L.A. Times Greenspace Blog*, Mar. 15, 2011, available at <http://latimesblogs.latimes.com/greenspace/2011/03/coal-export-longview-washington-millennium.html>.
- <sup>276</sup> Climate Solutions, Press Release: Millennium Withdraws Permit Application for Coal Export Mega-Terminal in Longview, WA, Mar. 15, 2011, available at <http://climatesolutions.org/press-room/press-releases/millennium-withdraws-permit-application-for-coal-export-mega-terminal-in-longview-wa>.
- <sup>277</sup> Kulmick, *supra* note 272.
- <sup>278</sup> Millman, *supra* note 273.
- <sup>279</sup> Associated Press, Millennium Bulk Terminals Says it Will Start Over on Longview Coal Export Terminal, Mar. 15, 2011, available at [http://www.oregonlive.com/environment/index.ssf/2011/03/millennium\\_bulk\\_terminals\\_says\\_1.html](http://www.oregonlive.com/environment/index.ssf/2011/03/millennium_bulk_terminals_says_1.html).
- <sup>280</sup> The project's sponsors have established a promotional website, available at <http://www.gatewaypacificterminal.com/> (last visited June 30, 2011).
- <sup>281</sup> Joel Kirkland, Peabody Defends Asian Coal Shipments in West Coast Port Battle, *ClimateWire*, Mar. 2, 2011, available at <http://www.eenews.net/climatewire/2011/03/02/archive/5?terms=Cherry+Point>.
- <sup>282</sup> Floyd McKay, Coal-for-China debate burns its way into Bellingham's mayor race, *CrossCut*, June 2, 2011, available at <http://crosscut.com/2011/06/02/bellingham/20975/Coal-for-China-debate-burns-its-way-into-Bellingham-s-mayor-race-/?pagejump=1>.
- <sup>283</sup> See Kirkland, *supra* note 281.
- <sup>284</sup> Id.
- <sup>285</sup> Id.
- <sup>286</sup> Climate Solutions, Will Whatcom County Cave in to Dirty Coal? (2011), available at <http://climatesolutions.org/nw-states/washington/no-coal/cherry-point>.
- <sup>287</sup> Jared Paben, "Whatcom County: Gateway Pacific Cargo Terminal Needs New Permit," *Bellingham Herald*, June 23, 2011, available at <http://www.bellinghamherald.com/2011/06/23/2073486/whatcom-county-gateway-pacific.html>.
- <sup>288</sup> See Climate Solutions, *supra* note 286.
- <sup>289</sup> Associated Press, Coal Terminal Foes Dominate Bellingham Hearing, June 2, 2011.
- <sup>290</sup> See McKay, *supra* note 282.
- <sup>291</sup> Id.
- <sup>292</sup> Whatcom County Planning and Development Services: Gateway Pacific Terminal Project [hereinafter Whatcom County Project], at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/index.jsp> (last visited June 30, 2011).
- <sup>293</sup> See Whatcom County Project, *supra* note 292.
- <sup>294</sup> McKay, *supra* note 282.
- <sup>295</sup> Climate Solutions, Sample Letter: We don't want our communities to be gateways for coal to China, at <http://climatesolutions.org/nw-states/washington/no-coal/no-gateway-for-coal-to-china> (last visited June 30, 2011).
- <sup>296</sup> See Paben, *supra* note 287.
- <sup>297</sup> McKay, *supra* note 282.
- <sup>298</sup> Marta Helpenstell, Pike Takes Heat from Anti-Coal Community, *Western Front*, May 6, 2011, at <http://westernfrontonline.net/news/13455-pike-takes-heat-from-anti-coal-community>.



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- <sup>300</sup> McKay, *supra* note 282.
- <sup>301</sup> Rindi White, Port MacKenzie Expansion to Increase Jobs, Anchorage Daily News, October 20, 2009, available at <http://www.adn.com/2009/10/20/980684/port-mackenzie-expansion-to-increase.html>.
- <sup>302</sup> James MacPherson, Mat-su Rail Spur Faces Opposition, Alaska J. Commerce, June 24, 2002, available at [http://www.alaskajournal.com/stories/062402/loc\\_matsu\\_rail.shtml](http://www.alaskajournal.com/stories/062402/loc_matsu_rail.shtml).
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- <sup>304</sup> Tim Bradner, Usibelli May Have Buyer for Wishbone Coal; Plan Tests from MacKenzie, Alaska J. Commerce, June 24, 2010, available at [http://www.alaskajournal.com/stories/060410/loc\\_11\\_002.shtml](http://www.alaskajournal.com/stories/060410/loc_11_002.shtml).
- <sup>305</sup> Sean Manget, Usibelli Tests Coal Export Possibilities from Port MacKenzie, Alaska J. Commerce, June 18, 2010, available at [http://www.alaskajournal.com/stories/061810/loc\\_utc.shtml](http://www.alaskajournal.com/stories/061810/loc_utc.shtml).
- <sup>306</sup> Governor Sean Parnell Fiscal Year 2012 Budget Announcement, available at <http://gov.alaska.gov/parnell/press-room/full-press-release.html?pr=5600>.
- <sup>307</sup> Shigeru Sato & Michio Nakayama, J-Power May Buy U.S. Coal to Cut Reliance on Australia, Bloomberg News, Dec. 9, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=anVfM5hQgzN0>.
- <sup>308</sup> Manget, *supra* note 305.
- <sup>309</sup> Andrew Wellner, Mystrom Updates Business Leaders on Valley Rail extension, Mat-Su Valley Frontiersman, Feb. 19, 2011, available at [http://www.frontiersman.com/articles/2011/02/25/local\\_news/doc4d60a2ee5f9d0427265842.txt](http://www.frontiersman.com/articles/2011/02/25/local_news/doc4d60a2ee5f9d0427265842.txt).
- <sup>310</sup> Bradner, *supra* note 304.
- <sup>311</sup> *Id.*
- <sup>312</sup> Willow Area Community Organization, Port MacKenzie Rail Extension EIS Comments, available at [http://www.stb.dot.gov/ect1/ecorrespondence.nsf/PublicIncomingByDocketNumber/B359EB848C2C7F5885257459004B2F4A/\\$File/EI-7365.pdf?OpenElement](http://www.stb.dot.gov/ect1/ecorrespondence.nsf/PublicIncomingByDocketNumber/B359EB848C2C7F5885257459004B2F4A/$File/EI-7365.pdf?OpenElement).
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- <sup>314</sup> *Id.*
- <sup>315</sup> Mat Valley Coalition, Wishbone Hill Proposed Coal Mine, <http://matvalley.org/wishbone-hill> (last visited June 30, 2011).
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- <sup>317</sup> Surface Transp. Board, Key Cases: Alaska Railroad - Port Mackenzie Rail Extension, available at [http://www.stb.dot.gov/stb/environment/key\\_cases\\_alaska\\_PortMacKenzie.html](http://www.stb.dot.gov/stb/environment/key_cases_alaska_PortMacKenzie.html) (last visited June 30, 2011).
- <sup>318</sup> Rhonda McBride, Route for Port MacKenzie Rail Extension Approved, KTUU-TV, March 25, 2011, at <http://www.ktuu.com/news/ktuu-route-for-port-mackenzie-rail-extension-approved-20110325,0,4332262.story>.
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- <sup>320</sup> *Id.*
- <sup>321</sup> *Id.*
- <sup>322</sup> Wash. Rev. Code § 79.105 et seq. (2011).
- <sup>323</sup> § 79.105.160.
- <sup>324</sup> See *Echo Bay Cmty. Ass'n v. State*, Dept. of Natural Res., 139 Wash. App. 321, 160 P.3d 1083 (Wash. Ct. App. 2007).
- <sup>325</sup> Wash. Rev. Code § 90.58.140.
- <sup>326</sup> § 90.58.030.
- <sup>327</sup> § 90.58.140(2).
- <sup>328</sup> §§ 90.58.080, 90.58.140.
- <sup>329</sup> § 79.105.20.
- <sup>330</sup> Wash. Admin. Code § 173-27-100 (2011).

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<sup>331</sup> Id.

<sup>332</sup> A proposed port expansion in Whatcom County was recently dealt a setback when the county found that the port expansion was not eligible for a SSDP permit revision would require a new permit. See Jared Paden, Whatcom County: Gateway Pacific cargo terminals need new permit, Bellingham Herald, June 23, 2011, available at <http://www.bellinghamherald.com/2011/06/23/2073486/whatcom-county-gateway-pacific.html>.

<sup>333</sup> In addition to the Washington example provided in this paragraph, Oregon also has a “fish passage requirement.” Or. Rev. Stat. § 509.585 (2009).

<sup>334</sup> Wash. Rev. Code § 77.55.021. “Hydraulic Project” is defined by statute broadly, as “the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.” § 77.55.011(8).

<sup>335</sup> § 77.55.021(2).

<sup>336</sup> § 43.21C.030(c).

<sup>337</sup> § 43.21C.030(c).

<sup>338</sup> Wash. Admin. Code §§ 197-11-704, 197-11-714 (2011).

<sup>339</sup> Wash. Rev. Code § 43.21C.110.

<sup>340</sup> § 43.21C.095.

<sup>341</sup> § 43.21C.031(1).

<sup>342</sup> Wash Admin. Code § 197-11-704. An agency is “any state or local governmental body, board, commission, department, or officer authorized to make law, hear contested cases, or otherwise” approve actions under SEPA. § 197-11-714(1).

<sup>343</sup> § 197-11-794(1).

<sup>344</sup> § 197-11-794.

<sup>345</sup> Id.

<sup>346</sup> §§ 197-11-315, 197-11-960.

<sup>347</sup> § 197-11-315.

<sup>348</sup> Wash. Rev. Code § 43.21C.150 (2011).

<sup>349</sup> §§ 43.21C.031.RCW, 43.21C.240; Wash. Admin. Code § 197-11-158. Note that Department of Ecology requirements passed pursuant to §43.21C.110 must still be met. Wash. Rev. Code § 43.21C.240(1).

<sup>350</sup> Wash. Rev. Code 43.21C.240(2).

<sup>351</sup> Wash Admin. Code § 197-11-440(5)(d). A “[r]easonable alternative” is an “[a]ction[ ] that could feasibly attain or approximate a proposal’s objectives, but at a lower environmental cost or decreased level of environmental degradation.” § 197-11-440(5)(b).

<sup>352</sup> § 197-11-440(5)(c)(v).

<sup>353</sup> § 197-11-440(a).

<sup>354</sup> § 197-11-444.

<sup>355</sup> Id.

<sup>356</sup> Id.

<sup>357</sup> §§ 197-11-440(b)(i), 197-11-440(a).

<sup>358</sup> § 197-11-440(c)(i).

<sup>359</sup> § 197-11-192(c).

<sup>360</sup> §§ 197-11-440(6)(c)(iii), 197-11-440(a).

<sup>361</sup> § 197-11-440(6)(c)(iv).

<sup>362</sup> See Columbia Center for Climate Change Law, NEPA and State NEPA EIS Resource Center, <http://www.law.columbia.edu/centers/climatechange/resources/eis>.

<sup>363</sup> § 197-11-060(5)(b).

<sup>364</sup> Id.

<sup>365</sup> § 197-11-060(3)(b).

<sup>366</sup> Keith H. Hirokawa, The Gap Between Informational Goals and the Duty to Gather Information: Challenging Piecemealed Review Under the Washington State Environmental Policy Act, 25 Seattle U. L. Rev. 343, 361 (2001).

<sup>367</sup> Wash. Admin. Code § 197-11-655(2).

<sup>368</sup> § 197-11-655(3).

<sup>369</sup> § 197-11-660.

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<sup>370</sup> § 197-11-660(1).  
<sup>371</sup> § 197-11-660(1)(b).  
<sup>372</sup> § 197-11-660(1)(f).  
<sup>373</sup> § 197-11-360(3).  
<sup>374</sup> § 197-11-408(1).  
<sup>375</sup> § 197-11-360(3).  
<sup>376</sup> § 197-11-510(1).  
<sup>377</sup> § 197-11-510(2).  
<sup>378</sup> *Id.*; § 197-11-510(1).  
<sup>379</sup> § 197-11-408(6).  
<sup>380</sup> § 197-11-408(2)(a).  
<sup>381</sup> § 197-11-408(2)(a)(iii).  
<sup>382</sup> § 197-11-408(2)(a)(ii).  
<sup>383</sup> § 197-11-455(2).  
<sup>384</sup> § 197-11-455(1)(g).  
<sup>385</sup> § 197-11-455(6).  
<sup>386</sup> § 197-11-560(1).  
<sup>387</sup> § 197-11-560(1)(e).  
<sup>388</sup> *Id.*  
<sup>389</sup> § 197-11-680(2).  
<sup>390</sup> § 197-11-680(4).  
<sup>391</sup> § 197-11-680(4)(c); Wash. Rev. Code § 43.21C.075(2)(b) (2011).  
<sup>392</sup> Or. Rev. Stat. §§ 274.025, 274.005(7) (2009). Virginia is another example of a state that where most of the land below the mean low tide mark is owned by the state. Va. Code. Ann. §§ 28.2-1200.1, 1202 (20\_\_). The VMRC permit described in the paragraph below is also a type of use permit for state owned submerged land.  
<sup>393</sup> Or. Rev. Stat. § 777.210(c).  
<sup>394</sup> Or. Admin. R. § 141-082-0030(20\_\_).  
<sup>395</sup> § 141-082-0030(2)(d).  
<sup>396</sup> Oregon Water-Related Permits Process Improvement Team, State Water Related Permits Water Guide, 13 [hereinafter “Oregon Permits Guide”] (2008), available at [http://www.oregonstatelands.us/DSL/PERMITS/docs/WRPPIT\\_guide\\_2008\\_lms.doc](http://www.oregonstatelands.us/DSL/PERMITS/docs/WRPPIT_guide_2008_lms.doc).  
<sup>397</sup> Or. Rev. Stat. § 196.817.  
<sup>398</sup> *Id.*  
<sup>399</sup> Oregon Permits Guide, *supra* note 396 at 13.  
<sup>400</sup> Or. Rev. Stat. § 196.850.  
<sup>401</sup> § 509.585; Oregon Permits Guide, *supra* note 396.  
<sup>402</sup> Or. Rev. Stat. § 509.585.  
<sup>403</sup> § 509.585.  
<sup>404</sup> Or. Admin. R. § 635-412-0025 (20\_\_).  
<sup>405</sup> Or. Rev. Stat. § 509.585.  
<sup>406</sup> Environmental Law Practice Guide, § 79.03 (Michael B. Gerrard ed., Matthew Bender 2008).  
<sup>407</sup> Alaska Stat. § 42.40.285 (2010).  
<sup>408</sup> Alaska Railroad 2010 Annual Report Narrative, Alaska Railroad, available at [http://alaskarailroad.com/Portals/6/pdf/corp/2011\\_04\\_01\\_Annual\\_Rpt\\_Narrative\\_2010\\_CORP.pdf](http://alaskarailroad.com/Portals/6/pdf/corp/2011_04_01_Annual_Rpt_Narrative_2010_CORP.pdf) (2011).  
<sup>409</sup> Port MacKenzie Rail Extension Cost and Funding, available at <http://www.portmacrail.com/cost.html>.  
<sup>410</sup> Alaska Railroad Tenders Port MacKenzie Railroad Works, Railway Gazette International, April 4, 2011, at <http://www.railwaygazette.com/nc/news/single-view/view/alaska-tenders-port-mackenzie-extension-works.html>.  
<sup>411</sup> Environmental Law Practice Guide, § 43.03 (Michael B. Gerrard ed., Matthew Bender 2008).  
<sup>412</sup> *Id.*  
<sup>413</sup> *Id.*, §§ 43.03, 43.09.  
<sup>414</sup> 2005 Alaska Sess. Laws ch. 31, sec. 22. For NOAA approval of the revised ACMP, see Record of Decision and Approval Findings, available at <http://coastalmanagement.noaa.gov/assessments/docs/akrodandapproval2.pdf> (last visited July 6, 2011).

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<sup>415</sup> Patti Epler, Alaska Coastal Management Special Session? Not yet, Alaska Dispatch, June 17, 2011, available at <http://www.alaskadispatch.com/article/alaska-coastal-management-special-session-not-yet>.

<sup>416</sup> Alaska Stat. §§ 46.40.040(a), 46.40.096(a), 46.40.210(6)-(7) (2010).

<sup>417</sup> Alaska Stat. § 46.40.096(d)(1) (2010); Alaska Admin. Code tit. 11, § 110.510 (2011).

<sup>418</sup> Alaska Stat. § 46.40.030(a)(4) (2010).

<sup>419</sup> Environmental Law Practice Guide, § 43.09(1) (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>420</sup> *Id.*

<sup>421</sup> Alaska Stat. § 38.05.035(e)(1)(A) (2010).

<sup>422</sup> Alaska Stat. § 38.05.035(e)(6) (2010).

<sup>423</sup> Alaska Stat. § 38.05.035(e)(6) (2010).

<sup>424</sup> Alaska Stat. § 38.05.035(e)(6) (2010).

<sup>425</sup> Alaska Stat. § 38.05.035(e)(6) (2010).

<sup>426</sup> Environmental Law Practice Guide, §§ 43.03, 43.11[3] (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>427</sup> 16 U.S.C. § 3113 (2006).

<sup>428</sup> 16 U.S.C. § 3113; 16 U.S.C. § 3120.

<sup>429</sup> 16 U.S.C. § 3120(1); 16 U.S.C. § 3115.

<sup>430</sup> 16 U.S.C. § 3120(2).

<sup>431</sup> 16 U.S.C. § 3120(3).

<sup>432</sup> Eve Byron, FWP Meeting on Tongue River Railroad Easement Cancelled, Billings Gazette, Mar. 10, 2011, available at [http://billingsgazette.com/news/state-and-regional/montana/article\\_ebee1606-a67c-5c12-88fa-a3fec56aea1c.html](http://billingsgazette.com/news/state-and-regional/montana/article_ebee1606-a67c-5c12-88fa-a3fec56aea1c.html).

<sup>433</sup> Mont. Code Ann. § 70-30-102-30 (2011).

<sup>434</sup> For a thorough description of Montana Eminent Domain Procedures, see Krista Lee Evans, Eminent Domain in Montana, Montana Environmental Quality Council, available at <http://leg.mt.gov/content/publications/environmental/2007eminentdomain.pdf> (2007).

<sup>435</sup> See *infra* “Montana Environmental Policy Act”.

<sup>436</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(2)(a).

<sup>437</sup> See *supra* Part III(C).

<sup>438</sup> 2011 Mont. Laws ch. 396.

<sup>439</sup> *Id.*

<sup>440</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv).

<sup>441</sup> Mont. Code Ann. §2-15-104(p); Mont. Admin. R. 17.1.101(4)(a).

<sup>442</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv).

<sup>443</sup> *Id.*

<sup>444</sup> Mont. Admin. R. 17.4.603(1) (2010).

<sup>445</sup> Mont. Admin. R. 17.4.607(5)(a) (2010).

<sup>446</sup> Mont. Admin. R. 17.4.607(5)(e) (2010).

<sup>447</sup> Mont. Admin. R. 17.4.607(5)(c) (2010).

<sup>448</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv).

<sup>449</sup> Mont. Admin. R. 17.4.603(19) (2010).

<sup>450</sup> Environmental Law Practice Guide, § 68.03[1] (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>451</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(3).

<sup>452</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv).

<sup>453</sup> Mont. Admin. R. 17.4.603(12) (2010).

<sup>454</sup> Mont. Admin. R. 17.4.607(5)(f) (2010).

<sup>455</sup> Mont. Admin. R. 17.4.607(3)(a) (2010).

<sup>456</sup> Mont. Admin. R. 17.4.609(3)(e); (f) (2010).

<sup>457</sup> Mont. Admin. R. 17.4.603(7) (2010).

<sup>458</sup> Mont. Admin. R. 17.4.607(18) (2010).

<sup>459</sup> Mont. Admin. R. 17.4.609(3)(j) (2010).

<sup>460</sup> *Id.*

<sup>461</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(2)(a).

<sup>462</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(2)(b).

<sup>463</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv)(A).

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<sup>464</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv)(B).  
<sup>465</sup> Mont. Admin. R. 17.4.603(7) (2010); Mont. Admin. R. 17.4.607(18); 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(2)(a); 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(2)(b).  
<sup>466</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv)(C)(I)-(II).  
<sup>467</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv)(C)(I).  
<sup>468</sup> 2011 Mont. Laws ch. 396, sec. 5, §75-1-220(1), (8)(b).  
<sup>469</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(1)(iv)(C)(I).  
<sup>470</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(1)(b)(iv)(C)(III).  
<sup>471</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(4)(a).  
<sup>472</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(4)(b).  
<sup>473</sup> Mont. Admin. R. 17.4.610(2) (2010).  
<sup>474</sup> Mont. Admin. R. 17.4.610(3).  
<sup>475</sup> Id.  
<sup>476</sup> Mont. Admin. R. 17.4.610(4).  
<sup>477</sup> Id.  
<sup>478</sup> Mont. Admin. R. 17.4.610(6)(a).  
<sup>479</sup> Mont. Admin. R. 17.4.610(6)(b).  
<sup>480</sup> Mont. Admin. R. 17.4.610(6)(c).  
<sup>481</sup> Id.  
<sup>482</sup> Mont. Admin. R. 17.4.615(1)(b)-(e).  
<sup>483</sup> Mont. Admin. R. 17.4.615(1)(a).  
<sup>484</sup> Mont. Admin. R. 17.4.620(1).  
<sup>485</sup> Mont. Admin. R. 17.4.620(2).  
<sup>486</sup> Mont. Admin. R. 17.4.618(2); Mont. Admin. R. 17.4.619(3).  
<sup>487</sup> Mont. Admin. R. 17.4.618(1).  
<sup>488</sup> Mont. Admin. R. 17.4.619(3).  
<sup>489</sup> Mont. Admin. R. 17.4.618(2). The rule does not make clear what the “issues raised” refers to, but the plain language seems to indicate that “issues raised” refers to the issues raised in the comments to the DEIS.  
<sup>490</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(6)(a)(ii).  
<sup>491</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(5)(a)(i).  
<sup>492</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(6)(a)(ii).  
<sup>493</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(6)(a)(i).  
<sup>494</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(6)(b)(i).  
<sup>495</sup> Id.  
<sup>496</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(6)(d).  
<sup>497</sup> Id.  
<sup>498</sup> 2011 Mont. Laws ch. 396, sec. 6, §75-1-201(6)(f).  
<sup>499</sup> Wyo. Stat. Ann. § 1-26-810 (2010).  
<sup>500</sup> Wyo. Stat. Ann. § 37-10-102.  
<sup>501</sup> Environmental Law Practice Guide, § 93.03 (Michael B. Gerrard ed., Matthew Bender 2008).  
<sup>502</sup> Idaho Admin. Code r. 31.71.01 (2011).  
<sup>503</sup> Idaho Admin. Code r. 58.01.01.650.  
<sup>504</sup> Idaho Code Ann. § 62-307 (2011).  
<sup>505</sup> Idaho Const. art. I, § 14.  
<sup>506</sup> For more information, see Environmental Law Practice Guide, § 54 (Michael B. Gerrard ed., Matthew Bender 2008).  
<sup>507</sup> Bruce Nichols, Factbox: Proposed, Existing Capacity for US Coal Exports, Reuters, June 9, 2011, available at <http://www.reuters.com/article/2011/06/09/usa-coal-exports-idUSN0915182220110609>.  
<sup>508</sup> Lambert’s Point Coal Terminal, Norfolk Southern website, at [http://www.nscorp.com/nscportal/nscorp/Customers/Coal/Transload/lamberts\\_point.html](http://www.nscorp.com/nscportal/nscorp/Customers/Coal/Transload/lamberts_point.html) (last visited July 8, 2011).  
<sup>509</sup> MacQuarie Equity Research, 2011 CSX Coal Market Call (hereinafter CSX Coal Call), at 8, available at <http://phx.corporate->

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ir.net/External.File?item=UGFyZW50SUQ9NDE4MDU0fENoaWxkSUQ9NDMwODg0fFR5cGU9MQ==&t=1 (last visited July 8, 2011).

<sup>510</sup> See *supra* Part I.

<sup>511</sup> See *id.*

<sup>512</sup> CSX Coal Call, *supra* note 509 at 12.

<sup>513</sup> CSX Q1 2011 Earnings Call Q&A Transcript, SeekingAlpha.com (Apr. 20, 2011)(hereinafter CSX Q&A), available at <http://seekingalpha.com/article/264586-csx-s-ceo-discusses-q1-2011-results-earnings-call-transcript?part=qanda>.

<sup>514</sup> *Id.*

<sup>515</sup> CSX eyes at least two more eastern export terminals, Argus Media, May 24, 2011, available at <http://www.argusmedia.com/pages/NewsBody.aspx?id=752343&menu=yes>.

<sup>516</sup> CSX Q&A, *supra* note 513.

<sup>517</sup> Michael Dresser, Coal Exports through Port Booming, Baltimore Sun, June 11, 2011, available at [http://articles.baltimoresun.com/2011-06-11/features/bs-bz-coal-port-20110608\\_1\\_coal-exports-coal-terminals-coal-facilities](http://articles.baltimoresun.com/2011-06-11/features/bs-bz-coal-port-20110608_1_coal-exports-coal-terminals-coal-facilities).

<sup>518</sup> *Id.*

<sup>519</sup> *Id.*

<sup>520</sup> See Argus Media, *supra* note 515.

<sup>521</sup> Environmental Law Practice Guide, § 62.03 (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>522</sup> Md. Code Ann., Nat. Res. § 1-304(a) (2011).

<sup>523</sup> Md. Code Ann., Nat. Res. § 1-301(d).

<sup>524</sup> For more information on Maryland's environmental impact review requirements, see Environmental Law Practice Guide, § 62.03 (Michael B. Gerrard ed., Matthew Bender).

<sup>525</sup> Va. Code Ann. § 10.1-1183 (2011).

<sup>526</sup> Va. Code Ann. § 10.1-1188(A).

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> *Id.* For more information on Virginia's environmental impact review requirements, see Environmental Law Practice Guide, § 89.03 (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>530</sup> Va. Code Ann. § 10.1-1188(A).

<sup>531</sup> *Id.*

<sup>532</sup> Tex. Health & Safety Code Ann. § 382.051(a) (West 2011); Tex. Health & Safety Code Ann. §382.003(4); 30 Tex. Admin. Code § 3.2(8) (2011).

<sup>533</sup> Tex. Health & Safety Code Ann. § 382.003(6).

<sup>534</sup> *Id.*

<sup>535</sup> Tex. Health & Safety Code Ann. § 382.003(9).

<sup>536</sup> Tex. Health & Safety Code Ann. § 382.003(3).

<sup>537</sup> Tex. Health & Safety Code Ann. § 382.0516(a); Tex. Health & Safety Code Ann. § 382.057(a); For a list of the specific air contaminant levels at which a modified facility must apply for a permit or permit application, see 30 Tex. Admin. Code § 106.4.

<sup>538</sup> Tex. Health & Safety Code Ann. § 382.01518(b)(1).

<sup>539</sup> 30 Tex. Admin. Code § 116.10(1).

<sup>540</sup> Tex. Health & Safety Code Ann. § 382.0518(b)(2).

<sup>541</sup> Tex. Health & Safety Code Ann. § 382.0158(d).

<sup>542</sup> Tex. Health & Safety Code Ann. § 382.0158(e).

<sup>543</sup> Tex. Health & Safety Code Ann. § 382.0518(h); Tex. Health & Safety Code Ann. § 382.056.

<sup>544</sup> Tex. Health & Safety Code Ann. § 382.056.

<sup>545</sup> 30 Tex. Admin. Code § 116.130(a) (2011); 30 Tex. Admin. Code § 116.132(a).

<sup>546</sup> 30 Tex. Admin. Code § 116.133(a).

<sup>547</sup> 30 Tex. Admin. Code § 116.132.

<sup>548</sup> 30 Tex. Admin. Code § 116.132(a)(8)-(9).

<sup>549</sup> 30 Tex. Admin. Code § 55.154(c).

<sup>550</sup> 30 Tex. Admin. Code § 116.136(b).



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<sup>551</sup> Tex. Health & Safety Code Ann. § 382.056(g) (West 2011); 30 Tex. Admin. Code § 116.132(a)(10); 30 Tex. Admin. Code § 116.136(a); 30 Tex. Admin. Code § 55.21(e).

<sup>552</sup> 30 Tex. Admin. Code § 55.3.

<sup>553</sup> Tex. Water Code Ann. § 26.011 (West 2011). For more information on regulation of water quality in Texas, see Environmental Law Practice Guide, § 86.24 (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>554</sup> Tex. Water Code Ann. § 26.001(5); Tex. Water Code Ann. § 26.121(a)(1); Tex. Water Code Ann. § 26.121(a)(3).

<sup>555</sup> Tex. Water Code Ann. § 26.001(11).

<sup>556</sup> Tex. Water Code Ann. § 26.040(a).

<sup>557</sup> Tex. Comm’n on Env’tl. Quality, TPDES General Permit No.TXR050000, (Aug. 14, 2006), at 1, available at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/attachments/stormwater/txr050000.pdf>

<sup>558</sup> Tex. Comm’n on Env’tl. Quality, TPDES General Permit No.TXR050000 (Aug. 14, 2006), at 67, available at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/attachments/stormwater/txr050000.pdf>

<sup>559</sup> Tex. Comm’n on Env’tl. Quality, TPDES General Permit No.TXR050000 (Aug. 14, 2006), at 22, available at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/attachments/stormwater/txr050000.pdf>

<sup>560</sup> Tex. Water Code Ann. § 26.040(i).

<sup>561</sup> Environmental Law Practice Guide, § 86.24 (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>562</sup> Id.; Tex. Comm’n on Env’tl. Quality, 401 Certification Reviews, at <http://www.tceq.texas.gov/waterquality/assessment/401certification> (last visited June 28, 2011); Tex. Natural Res. Conservation Comm’n & U.S. Army Corps of Engineers, Memorandum of Agreement Between the U.S. Army Corps of Engineers and the Texas Natural Resource Conservation Commission on Section 401 Certification Procedures (Aug. 17, 2000), available at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/attachments/401certification/MOA2.pdf>

<sup>563</sup> Tex. Comm’n on Env’tl. Quality, Tier I 401 Certification, at [http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification\\_tier1.html](http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification_tier1.html), (last visited June 28, 2011).

<sup>564</sup> Tex. Comm’n on Env’tl. Quality, Tier II 401 Certification, [http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification\\_tier2.html](http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification_tier2.html), (last visited June 28, 2011).

<sup>565</sup> Tex. Comm’n on Env’tl. Quality, Description of BMPs, (Apr. 12, 2004), at 1, available at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/attachments/401certification/401tier1des.pdf>.

<sup>566</sup> Tex. Comm’n on Env’tl. Quality, State Water Quality Certification of Section 404 Permits, (Apr. 12, 2004), at 2, at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/attachments/401certification/401cov.pdf>; Tex. Comm’n on Env’tl. Quality, Tier I 401 Certification, at [http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification\\_tier1.html](http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification_tier1.html), (last visited June 28, 2011).

<sup>567</sup> Tex. Comm’n on Env’tl. Quality, Tier II 401 Certification, [http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification\\_tier2.html](http://www.tceq.texas.gov/waterquality/assessment/401certification/401certification_tier2.html), (last visited June 28, 2011).

<sup>568</sup> 30 Tex. Admin. Code § 279.5(e) (2011).

<sup>569</sup> Tex. Comm’n on Env’tl. Quality, Tier II Certification Questionnaire and Alternatives Analysis Checklist, (Apr. 4, 2004), at 1, at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/forms/20229.pdf>.

<sup>570</sup> Tex. Commission on Env’tl. Quality, Tier II Certification Questionnaire and Alternatives Analysis Checklist, (Apr. 4, 2004), at 1, at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/forms/20229.pdf>.

<sup>571</sup> Tex. Commission on Env’tl. Quality, Tier II Certification Questionnaire and Alternatives Analysis Checklist, (Apr. 4, 2004), at 1, at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/forms/20229.pdf>.

<sup>572</sup> Tex. Commission on Env’tl. Quality, Tier II Certification Questionnaire and Alternatives Analysis Checklist, (Apr. 4, 2004), at 1, at <http://www.tceq.texas.gov/assets/public/permitting/waterquality/forms/20229.pdf>.

<sup>573</sup> 30 Tex. Admin. Code §279.11(d).

<sup>574</sup> Tex. Transp. Code Ann. § 370.164(c) (West 2011).

<sup>575</sup> Tex. Water Code § 31.015 (West 2011); Tex. Water Code § 31.001(1).

<sup>576</sup> Tex. Water Code § 31.015.

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<sup>577</sup> Tex. Water Code § 61.116.

<sup>578</sup> Tex. Water Code § 61.116(a); Tex. Water Code § 61.116(c). For a map of Texas navigation districts, see <http://koordinates.com/layer/816-texas-navigation-districts-line/#@nc=&z=10&c=29.84898%2C-93.95645&e=&l=816&mt=MAP>.

<sup>579</sup> Tex. Water Code § 61.116(c)(3).

<sup>580</sup> Tex. Water Code § 61.116(d); Tex. Water Code § 61.116(e).

<sup>581</sup> Tex. Water Code § 61.116(e).

<sup>582</sup> Tex. Water Code § 61.116(f).

<sup>583</sup> Tex. Water Code § 61.116(h).

<sup>584</sup> Tex. Water Code § 61.116(h); Tex. Water Code § 61.116(b).

<sup>585</sup> Tex. Water Code § 61.116(h).

<sup>586</sup> Tex. Water Code § 61.116(h).

<sup>587</sup> La. Rev. Stat. Ann. § 30:2004(4) (2010); La. Rev. Stat. Ann. § 30:2055. Particulate matter, dust, fumes, and smoke, among other items, resulting from non-natural processes are considered air contaminants. La. Rev. Stat. Ann. § 30:2053(1). For more information on the regulation of air quality in Louisiana, see Environmental Law Practice Guide, § 60.06 (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>588</sup> La. Rev. Stat. Ann. § 30:2054B(2)(b)(ix) (2011).

<sup>589</sup> La. Rev. Stat. Ann. § 30:2075.

<sup>590</sup> La. Rev. Stat. Ann. § 49:214.23(8); La. Rev. Stat. Ann. § 49:214.30A(1). Louisiana state law lays out Louisiana's coastal zone in detail. La. Rev. Stat. Ann. § 49:214.24.

<sup>591</sup> La. Rev. Stat. Ann. § 49:214.25A(1); La. Rev. Stat. Ann. § 49:214.30A(1).

<sup>592</sup> La. Rev. Stat. Ann. § 49:214.25A(2); La. Rev. Stat. Ann. § 49:214.30A(1).

<sup>593</sup> La. Admin. Code tit. 43:I § 723(C)(4)(d) (2010).

<sup>594</sup> La. Admin. Code tit. 43:I § 723(C)(5)(a)(i).

<sup>595</sup> La. Admin. Code tit. 43:I § 723(C)(5)(a)(ii).

<sup>596</sup> La. Admin. Code tit. 43:I § 723(C)(5)(a)(iii).

<sup>597</sup> La. Admin. Code tit. 43:I § 723(C)(5)(a)(iv).

<sup>598</sup> La. Admin. Code tit. 43:I § 723(C)(5)(c).

<sup>599</sup> La. Admin. Code tit. 43:I § 723(C)(5)(e).

<sup>600</sup> La. Admin. Code tit. 43:I § 723(C)(6).

<sup>601</sup> La. Admin. Code tit. 43:I § 723(C)(6)(b).

<sup>602</sup> La. Admin. Code tit. 43:I § 723(C)(6)(c).

<sup>603</sup> La. Admin. Code tit. 43:I § 723(C)(d).

<sup>604</sup> La. Admin. Code tit. 76:IX § 103 (2011); La. Admin Code tit. 76:IX § 117(A). For a list of historic and scenic rivers, see Louisiana Natural and Scenic Rivers' Description, Department of Wildlife and Fisheries, <http://www.wlf.louisiana.gov/wildlife/louisiana-natural-and-scenic-rivers> (last visited June 29, 2011).

<sup>605</sup> La. Admin. Code tit. 76:IX § 117(A).

<sup>606</sup> La. Admin. Code tit. 76:IX § 117(G).

<sup>607</sup> La. Admin. Code tit. 76:IX § 117(H)(1).

<sup>608</sup> La. Admin. Code tit. 76:IX § 117(H)(3).

<sup>609</sup> La. Admin. Code tit. 76:IX § 117(H)(2).

<sup>610</sup> La. Admin. Code tit. 76:IX § 117(H)(2).

<sup>611</sup> La. Admin. Code tit. 76:IX § 117(H)(3).

<sup>612</sup> For more information, see Environmental Law Practice Guide, § 60 (Michael B. Gerrard ed., Matthew Bender 2008).

<sup>613</sup> *Id.*, § 42.

<sup>614</sup> See Barry Appleton, NAFTA: Text and Selected Documents §§ 2:1 et seq. (2007 ed.).

<sup>615</sup> Ignacia S. Moreno et al., Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future, 12 Tul. Envtl. L. J. 405, 411 (1999).

<sup>616</sup> *Id.* at 411-412.

<sup>617</sup> *Id.* at 420-421.

<sup>618</sup> *Id.* at 423.

<sup>619</sup> Appleton, *supra* note 614 at §§ 2:1 et seq.

<sup>620</sup> *Id.*

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<sup>621</sup> Jameson Tweedie, Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement, 63 Wash. & Lee L. Rev. 849, 903 (2006).

<sup>622</sup> Env'tl. Defence Canada et. al, Submission to the Commission for Environmental Cooperation Pursuant to Article 14, North American Agreement on Environmental Cooperation (2010), available at [http://environmentaldefence.ca/sites/default/files/report\\_files/CECsubmissionTarSands.pdf](http://environmentaldefence.ca/sites/default/files/report_files/CECsubmissionTarSands.pdf).

<sup>623</sup> See Comm. for Env'tl. Cooperation, Alberta Tailings Ponds (2010), at [http://www.cec.org/Page.asp?PageID=2001&ContentID=2864&SiteNodeID=621&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2864&SiteNodeID=621&BL_ExpandID=).

<sup>624</sup> Appleton, supra note 614 at §§ 2:1 et seq.

<sup>625</sup> Tweedie, supra note 213 at 903-04.

<sup>626</sup> Appleton, supra note 614 at §§ 2:1 et seq.

<sup>627</sup> Id.

<sup>628</sup> Id.

<sup>629</sup> Id.

<sup>630</sup> Id.