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Exporting Coal, Importing Pollution: Can the Consumption of Coal Be Ignored under NEPA and SEPA Analysis When Burned Overseas?

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EXPORTING COAL, IMPORTING POLLUTION: CAN THE CONSUMPTION OF COAL BE IGNORED UNDER NEPA AND SEPA ANALYSIS WHEN BURNED OVERSEAS?

Ross Taylor

ABSTRACT: The Millennium Bulk Terminal in Longview, Washington, is one of several proposed locations along the west coast of the United States for a large export facility, which would allow large-scale exportation of domestic coal to Asia. The Millennium Bulk Terminal proposal has garnered significant opposition, yet attention is only recently turning to the specific concern over greenhouse gas emissions associated with such a project. This concern stems not just from operation of the facility or transportation to and from it but from the possibly damaging amount of emissions that would result from the coal's ultimate consumption in Asia.

Implicated by the proposal are both the National Environmental Protection Act (NEPA) and Washington's State Environmental Protection Act (SEPA). Both NEPA and SEPA apply when proposals requiring government approval involve "major actions significantly affecting the quality of the environment." Compliance with these statutes requires in prescribed situations the preparation of an Environmental Impact Statement (EIS). The complication presented by the Millennium Bulk Terminal proposal is that the ultimate consumption of coal exported would be extraterritorial.

Applying NEPA extraterritorially with regard to greenhouse gas emissions raises questions of standing, international commerce, politics, and science. This Comment will primarily discuss how the proximate impacts of exporting coal bring the Millennium Bulk Terminal proposal within the scope of NEPA and SEPA. It will then evaluate the impact of exported coal on the economy and the possibility of domestic pollution as a result of foreign coal consumption. Next explored will be the statutes specifically focusing on territorial limitations, as well as guidance documents issued by government agencies. Recent cases will be examined to determine how the courts are currently addressing extraterritorial elements of an EIS. This Comment provides facts, laws, legal guidelines, and persuasive reasons to consider foreign coal consumption part of the EIS process for the Millennium Bulk Terminal proposal.

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I. INTRODUCTION

The proposal to build several large coal export terminals along the West Coast of the United States with the purpose of exporting coal to Asia has garnered significant opposition.¹ Common concerns about the proposition include, but are not limited to, increases in train and ship traffic, transportation emissions, mining, coal dust, and noise pollution.² Receiving an increasing level of attention is the concern over the greenhouse gas (GHG) emissions associated with such a large project.³ The concern stems not just from the exhaust gases of trains and ships or harmful discharges associated with construction, but to the monumental amount of GHG that

1. See, e.g., Puong Le, *Bulk Cargo Terminal Planned for Whatcom County*, THE SEATTLE TIMES, (March 1, 2011, 10:09 PM) http://seattletimes.com/html/localnews/2014369408_cherrypoint02.html. Oppositional non-profit organizations also exist. See, e.g., *Power Past Coal*, www.powerpastcoal.org (self-described “alliance of health, environmental, clean-energy, faith and community groups and businesses working to stop coal export”) (last visited November 11, 2013); *Coal Train Facts*, www.coaltrainfacts.org (Washington non-profit compiling information) (last visited November 11, 2013).

2. See *Power Past Coal*, *supra* note 1 (“Coal is toxic. It pollutes our air and water, harms our health, snarls our traffic, hurts our local economy and worsens the climate crisis.”).

3. *Id.* See also *Coal Train Facts*, *supra* note 1; Paul R. Epstein et al., *Full Cost Accounting for the Life Cycle of Coal*, 1219 ANN. N.Y. ACAD. SCI. 1219 73, 73-78 (2011) [hereinafter *Full Cost*].

would be released from the inevitable consumption of the coal overseas.⁴

Before discussing the specific issues raised by the proposal to build export terminals, some context to the issue must be given. This will include not just understanding what is being proposed and who is proposing it, but also the regulatory framework and standards by which a proposal will be scrutinized. Specifically, the applicable statutes are the National Environmental Protection Act (NEPA) and Washington's State Environmental Protection Act (SEPA).⁵ Both NEPA and SEPA apply when proposals requiring government approval involve "major actions significantly affecting the quality of the environment."⁶ While Washington's SEPA was largely modeled after NEPA, there are some discernible differences that will be discussed in this Comment.⁷ It is a dynamic time in climate change policy, and there is growing case law to support the necessity of discussing the impacts of emissions when evaluating environmental impacts under both SEPA and NEPA.⁸

Proposed coal terminals along the West Coast would receive coal mined at and delivered from the Powder River Basin in Montana and Wyoming for export to Asian Markets.⁹ One location being considered is the Millennium Bulk Terminal (MBT) in Longview, Washington.¹⁰ Presently, the location operates as a single small dock used to import bulk alumina.¹¹ The coal export facility would be added to the existing alumina operations and would be implemented in two stages. The first

4. See generally *supra* note 3.

5. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, as codified at 42 U.S.C. § 4321 et seq. (2012); Washington State Environmental Policy Act, WASH. REV. CODE § 43.21C (2012).

6. 42 U.S.C. § 4332 (2012); WASH. REV. CODE § 43.21C.031 (2012), WASH. ADMIN. CODE 197-11-330 (2013).

7. William H. Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 34 (1984).

8. Judi Brawer, *The New "Hot" Topic in Environmental Law: Global Warming*, 50 ADVOCATE 17 (2007); Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 U. COLO. L. REV. 473 (2010).

9. See *Power Past Coal*, *supra* note 1; *Coal Train Facts*, *supra* note 1.

10. Millennium Bulk Terminals Longview (MBTL) Proposal, STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, <http://www.ecy.wa.gov/geographic/millennium/index.html> (last visited November 11, 2013) [hereinafter *MBT Proposal*].

11. *Id.*

stage would allow for the exportation of up to 25 million metric tons of coal per year.¹² The second stage would increase the maximum exportation load to 44 million metric tons of coal per year.¹³ For context, burning 44 million metric tons of coal is roughly equivalent to the annual carbon emissions of 16 million cars.¹⁴ Accomplishing both stages would require constructing two new docks, two shiploaders, four coal stockpile pads, and eight rail lines, as well as the associated buildings, facilities, conveyors, and equipment necessary to transport, handle, and ship the coal.¹⁵ It is evident that this enormous project will require an evaluation of environmental considerations at all stages of development and future operation.

The MBT project is in the process of scoping an Environmental Impact Statement (EIS); the period for public comment closed November 18, 2013.¹⁶ It should be noted, however, that MBT had previously applied, begun and then subsequently withdrawn from one permitting process.¹⁷ While the permit was withdrawn, the associated litigation has been illustrative of the issues that will be faced during future (potential) EIS challenges, which might also be reflected in the scoping process. Due to the first round of litigation, no dispute exists over whether an EIS must be prepared; its preparation has been stipulated to on the permit application.¹⁸ Instead, the litigation highlighted the difference of opinion over whether GHG emissions from the foreign consumption of the exported coal should, or even could, be considered in the scope of an

12. Joint Aquatic Resources Permit Application for Millennium Bulk Terminals Longview Proposal, available at <http://millenniumbulk.com/wp-content/uploads/2012/05/JARPA-Application.pdf> [hereinafter JARPA].

13. *Id.*

14. Thomas M. Power, *The Greenhouse Gas Impact of Exporting Coal from the West Coast – An Economic Analysis* SIGHTLINE DAILY, July, 2011, available at <http://www.sightline.org/wp-content/uploads/downloads/2012/02/Coal-Power-White-Paper.pdf> (applying the 110 million tons to 40 million cars ratio, 44 million tons is approximately 16 million cars) [hereinafter *Economic Analysis*].

15. JARPA, *supra* note 12.

16. *MBT Proposal*, *supra* note 10; MILLENNIUM BULK TERMINAL EIS, available at <http://www.millenniumbulkeiswa.gov> (last visited November 11, 2013) [hereinafter MBT EIS].

17. Nicholas Shannon Kulmick, *Letter to the Editor: Just Say No to Coal*, VANCOUVER BUS. J. (Mar. 25, 2011), <http://www.vbjusa.com/home/just-business31/reporters-notebook/3964-letter-to-the-editor-just-say-no-to-coal>.

18. JARPA, *supra* note 12.

EIS.¹⁹ Allies of building the coal terminals alleged that considering the foreign consumption falls outside the scope of an EIS, is too minor to be considered, and even if it could be considered, to do so would be an affront to both the Foreign Commerce Clause and the Dormant Commerce Clause of the U. S. Constitution.²⁰ These same sources even contend that the political question doctrine might be implicated.²¹ If accepted, however, these challenges could render NEPA and SEPA completely powerless in combating climate change by limiting their scope to specific geographic locations. These arguments, however, are based on a flawed understanding of how increased coal consumption will impact global warming and GHG emissions, in addition to how the statutory framework that NEPA and SEPA provide to regulate such projects.

This Comment will discuss why GHG emissions from foreign consumption should be considered in the EIS for the MBT. The extraterritorial application of NEPA in regards to GHG emissions is a significant subject that also raises questions of standing, international commerce, politics, and science. Foundationally, it will discuss how the proximately caused impacts of exporting coal bring the MBT proposal within the scope of NEPA and SEPA. This will involve analyzing the terminal and its proposed capabilities, the destination of the coal it would be exporting, and the effect of exportation on such a large scale. NEPA and SEPA, as well as guidance documents issued by government agencies, will be briefly explored specifically focusing on territorial applications. These discussions cover both the environmental impacts and the economic and policy implications of such large-scale coal exportation. When evaluating these interests, the necessity for consideration, study, and inclusion in an EIS of foreign

19. Respondent's Motion to Dismiss, *Climate Solutions et al., v. Cowlitz County et al.*, S.H.B. No. 10-023 (Shorelines Hearings Bd. January 18, 2011) (raising Commerce Clause, Federal Preemption, Lack of Standing, and Political Question Doctrine challenges); Petitioner's Opposition to Motion to Dismiss, *Climate Solutions et al., v. Cowlitz County et al.*, S.H.B. No. 10-023 (Shorelines Hearings Bd. February 1, 2011); Washington State Department of Ecology's Response to Motion to Dismiss as Intervenor, *Climate Solutions et al., v. Cowlitz County et al.*, S.H.B. No. 10-023 (Shorelines Hearings Bd. February 1, 2011); Respondent's Reply on Motion to Dismiss, *Climate Solutions et al., v. Cowlitz County et al.*, S.H.B. No. 10-023 (Shorelines Hearings Bd. Feb. 10, 2011).

20. *Id.*

21. *Id.*

consumption and of the use of exported coal becomes apparent. This Comment does not allege to be either absolute or exhaustive, but rather provides the facts, the law, and persuasive reasons for considering the foreign consumption of exported fossil fuels as part of the EIS process for the proposed coal terminal.

II. THE MILLENIUM BULK TERMINAL

A. *The Submitted Terminal Proposal*

Located in Longview, Washington, the MBT is a 416-acre bulk handling facility.²² Previously owned by Reynolds Metals Co., it served as the location of an aluminum smelter, which contaminated the environment for decades.²³ The property was first sold in 2000 to Alcoa; then sold again in 2004 to Chinook Ventures.²⁴ After both of these companies failed to adequately remediate the smelter site, it was taken over by an Australian coal company—Ambre Energy—in January 2011.²⁵ The site is now jointly owned by Ambre Energy and Arch Coal, a U.S. company based in St. Louis, Missouri.²⁶ The new owners proposed the bulk handling facility as an ideal location on the Columbia River for a coal export terminal.²⁷ Upon acquiring the facility for this new purpose, Ambre Energy vowed to clean up the site as part of its application process for a Cowlitz County shoreline permit.²⁸ Meanwhile, the facility continues to be used for a number of industrial activities, including the receipt, storage, and transport of alumina from ship to truck and rail.²⁹ The proposed coal facility would operate independently from the current operations, which will continue in their own capacities.³⁰

22. Daniel M. Firger, *Carbon Offshoring: The Legal and Regulatory Framework for U.S. Coal Exports*, Columbia Law School Center for Climate Change Law, 30 (July 2011) [hereinafter *Carbon Offshoring*].

23. *Id.*

24. *Id.*

25. *Id.*

26. JARPA, *supra* note 12.

27. *Carbon Offshoring*, *supra* note 22.

28. *Id.*

29. JARPA, *supra* note 12.

30. *Id.*

The proposed Coal Export terminal would be a dramatic and substantial expansion to the existing facilities.³¹ The proposed facility would cover 100 acres of the land and have areas for rail unloading, storage, reclaiming, and loading ships.³² Additionally, dredging would be necessary to allow larger ships access to the terminal.³³ Stage one of the facility includes building a railway loop for five tracks, one tandem rotary dumper, two coal stockpile pads, two rail mount stackers, two rail mounted reclaimers, two additional docks approximately 1300 feet and 900 feet long, conveyors, transfer stations, a surge bin, in-bound and out-bound sampling stations, and the various support service, utilities and infrastructure.³⁴ Stage two of the facility would include three additional rail tracks, additional conveyors and transfer stations, two additional stockpile pads, two additional stackers, two additional reclaimers, and one additional shiploader.³⁵ The project is valued at \$600 million.³⁶ The operations for each stage would run similarly, but with the second dock becoming operational in stage two, which includes the construction of a second shiploader.³⁷ For the proposed facility, coal would arrive by train and be discharged at a rotary dumper receiving station before moving by conveyor to the stockpile pad or directly to a docked ship.³⁸ The stockpile pads would store coal that is dumped by “stackers” and later retrieved for loading on a ship by “reclaimers.”³⁹ Surge bins would allow for continuous coal reclaiming and transfer that might otherwise be interrupted when the shiploader changes ship hatches.⁴⁰ Each ship, two at a time under stage two, could be fully loaded and dispatched within twenty-four hours of arrival.⁴¹ The coal terminal is designed to operate seven days a week.⁴²

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

After the initial MBT coal export terminal plans were announced, citizen opposition began to build.⁴³ In November 2011, the Cowlitz County commissioners granted MBT a permit to become a major coal export shipping terminal, fanning the flames of public outcry from environmental groups.⁴⁴ The decision was challenged in court by Climate Solutions, Columbia Riverkeeper, the Sierra Club, and the Washington Environmental Council.⁴⁵ Subsequent discovery revealed that Ambre Energy and Arch Coal were actually planning to build a facility fourteen times larger than initially announced.⁴⁶ After several weeks of dispute over the size of the facility, the permit was withdrawn.⁴⁷ On February 22, 2012, Ambre Energy filed another application for permit, stipulating to the preparation of an EIS.⁴⁸ An EIS requires a lead agency, a role often filled by the county where the project is located, in this case Cowlitz County.⁴⁹ The County requested that the Washington Department of Ecology (Ecology) participate as a co-lead agency; Ecology accepted.⁵⁰ Presently, the scoping process is being performed to consider what will be addressed in the EIS; however, there is no set time frame for when the EIS will be completed.⁵¹

B. *“From an American Pacific Coast Port for Export to Asia”*

There is no question as to where coal leaving MBT is headed. The Joint Aquatic Resource Permits Application (JARPA) states, “the purpose of the project is to establish a Coal Export Terminal capable of handling up to 44 million metric tons per year . . . from an American Pacific Coast port for export to Asia.”⁵² The potential profit incentive is clear: international sales are valued at much higher rates as U.S. coal sells for exponentially more in China and other Asian

43. *Carbon Offshoring*, *supra* note 22.

44. *Id.*

45. *Id.* See *Petitioner’s Opposition Brief*, *supra* note 19.

46. *Id.*

47. *Carbon Offshoring*, *supra* note 22.

48. *Id.*; JARPA, *supra* note 12.

49. 40 C.F.R. § 1501.5 (2013).

50. *MBT Proposal*, *supra* note 10; *MBT EIS*, *supra* note 16.

51. *Id.*

52. JARPA, *supra* note 12.

countries than it does domestically.⁵³ This can be partially attributed to American markets having developed alternatives of wind, solar, and other energy sources.⁵⁴ A ton of coal worth about thirteen dollars near the Powder River Basin mines in Wyoming, for example, could sell for about \$1300 in China, minus shipping and other costs.⁵⁵ The demand for coal in Asia is both the motivator and principal factor for the MBT project and therefore is the driving factor behind the need to incorporate foreign GHG emissions into the EIS process.

Worldwide, China is the chief consumer of coal, burning more than the U.S., the European Union, and Japan combined.⁵⁶ In 2006 alone, China added over ninety gigawatts of energy produced by coal-fired power plants—more than the entire fleet of energy generating plants in the United Kingdom.⁵⁷ This trend is expected to continue.⁵⁸ Now the world is facing a “tidal wave” of new coal power plants.⁵⁹ An expert tracking coal power plant construction states, “China and India are building coal-fired capacity as fast as they can.”⁶⁰ In contrast to most developed countries such as the U.S., a substantial portion of China’s coal is used for domestic energy needs.⁶¹ Data suggests the growth trend will continue: it is estimated that eighty-six percent of world coal demand between now and 2030 will come from China and India.⁶² Some believe that estimate is conservative because Chinese and Indian leaders face few political barriers to coal power plant

53. Keith Bradsher, *Cleaner China Coal May Still Feed Global Warming*, N.Y. TIMES, June 17, 2011, <http://query.nytimes.com/gst/fullpage.html?res=9502EFDC153FF934A25755C0A9679D8B63&smid=pl-share> [hereinafter *Cleaner Coal*].

54. *Id.*

55. *Id.*

56. *Full Cost*, *supra* note 3, at 74.

57. *Coal Quick Facts*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, www.c2es.org/science-impacts/basics/fact-sheets/coal-facts (Last visited March 30, 2013) [hereinafter *Coal Facts*].

58. *Id.*

59. *Id.*

60. Mark Clayton, *New Coal Plants Bury ‘Kyoto’*, CHRISTIAN SCIENCE MONITOR, December 23, 2004, available at <http://www.csmonitor.com/2004/1223/p01s04-sten.html> [hereinafter *Kyoto*].

61. Robert B. Finkleman et al., *Health Impacts of Domestic Coal Use in China*, 96 PROC. NATL. ACAD. SCI. USA Vol. 3427 (1999).

62. *Coal Facts*, *supra* note 57.

construction due to high demand for more power.⁶³ Nevertheless, it is clear that foreign markets are a perfect fit for the vast reserves of U.S. coal. This demand requires the construction of facilities that can transport, process, store, and ship the coal overseas.

The consumption of coal is taking its toll. China surpassed the U.S. as the world's top emitter of carbon dioxide, the most significant man-made gas in regard to climate change.⁶⁴ In 2009, China contributed a quarter of the world's total carbon dioxide from energy consumption, according to the U.S. Energy Information Administration.⁶⁵ Another substantial pollutant produced by the consumption of coal is nitrous oxide. China's nitrous oxide emissions have mirrored those of carbon dioxide, increasing fifty-five percent between 2001 and 2006.⁶⁶ Coal consumption also releases mercury, and China now accounts for one third of the world's mercury pollution.⁶⁷

The outlook for future emissions is not encouraging. In 2006 alone, China's new plants added about 500 million tons of carbon dioxide to their annual emissions.⁶⁸ That figure accounts for approximately thirteen percent of China's current coal-fired emissions, and five percent of the world total.⁶⁹ Due to sheer size and rapid economic growth, China's emissions are likely to surge over coming years, increasing worry that Chinese pollution will undercut other country's efforts to achieve environmental regulations.⁷⁰

III. BASIC ECONOMIC PRINCIPALS PERTAINING TO COAL IN ASIA

Apparent in the early litigation over the MBT proposal was a lack of understanding of the precise effect exported coal

63. *Kyoto*, *supra* note 60.

64. *Coal Facts*, *supra* note 57.

65. *Id.*

66. Craig Simons, *China's Rise Creates Clouse of U.S. Pollution*, ALICIA PATTERSON FOUNDATION, <http://aliciapatterson.org/stories/china%E2%80%99s-rise-creates-clouds-us-pollution> (last updated January 6, 2013) [hereinafter *Rise*].

67. *Id.*

68. *Coal Facts*, *supra* note 57.

69. *Id.*

70. *Rise*, *supra* note 66.

would have on the Asian coal market.⁷¹ The effects are typically misstated in two ways. First, proponents of the MBT proposal argue that refusal, delay, or decrease of exported coal would not change the amount of coal burned; only the source would change. Whatever was not exported by the U.S. would have been made up for in supply from Australia, the Philippines, or by China's domestic sources.⁷² Second, supporters argue that if there were an impact from the export of coal, it would be inconsequential and possibly even immeasurable.⁷³ Both of these theories can be refuted as "incorrect, and inconsistent with both the basic principles of economics as well as the abundant literature regarding energy use and consumption patterns in Asia."⁷⁴ This finding is discussed in great detail in an article titled *The Greenhouse Gas Impact of Exporting Coal from the West Coast, An Economic Analysis*.⁷⁵ The article was written by Dr. Thomas M. Power, a Professor of Economics at The University of Montana and Chairman of the Economics Department for thirty years.⁷⁶ His article finds the following, the details of which will be explored below:

. . . [T]he proposed coal export facilities in the Northwest will result in more coal consumption in Asia and undermine China's progress towards more efficient power generation and usage. Decisions the Northwest makes now will impact Chinese energy habits for the next half-century; the lower coal prices afforded by Northwest coal exports encourage burning coal and discourage the investments in energy efficiency that China has already undertaken.⁷⁷

The theory advanced has two factors to consider: First, how will the supply of large volumes of U.S.-supplied coal affect the price and accessibility of coal in Asia. Second, the subsequent

71. See *supra* note 19 and accompanying text.

72. See *Respondent's Motion*, *supra* note 19.

73. *Id.*

74. *Economic Analysis*, *supra* note 14, at 1.

75. See *generally Economic Analysis*, *supra* note 14.

76. Faculty Profile of Thomas M. Power, UNIVERSITY OF MONTANA, <http://www.cas.umt.edu/econ/faculty/facultyDetails.php?id=974> (last visited May 7, 2014).

77. *Economic Analysis*, *supra* note 14, at 1.

impact that those changes will have on both short and long term coal consumption.

A. *The Effects of a Price Drop in the Price of Coal*

The price of coal is a significant factor in understanding the ramifications that a port like MBT would have. “U.S. coal companies have emphasized to their investors that they believe that they can deliver western U.S. coal to East Asia more cheaply than Australia can and more cheaply than northern and western domestic Chinese coal can be delivered to China’s southeastern coastal population and industrial centers.”⁷⁸

Cost analysis of U.S. coal shows that the foreign value is exponentially higher; as such they can export the low domestic value coal abroad for less than other sources and still achieve a profit.⁷⁹ Thus, the strategy behind large export terminals such as MBT hinges on undercutting the existing price of coal in or deliverable to China. Increased competition could drive the price even lower.⁸⁰

The price of coal has a significant impact on coal usage. As recently as 2008, foreign sourced coal was too expensive to be feasible.⁸¹ By late 2009 however, this had changed. Indonesian coal had become as much as forty dollars per ton cheaper and Australian coal as much as twenty-nine dollars per ton cheaper than Chinese domestic sources.⁸² The result was a skyrocket in demand for coal by China in 2010.⁸³ The U.S. coal that would be exported would have a similar effect: it would lower coal prices even further than they otherwise would be and diversify supply.⁸⁴ Lowering prices, even dramatically, may not be reason for concern in and of itself, but a recent study found that a ten percent reduction in coal cost would result in a twelve percent increase in Chinese coal consumption.⁸⁵ Another study found that over half of the gain

78. *Economic Analysis*, *supra* note 14, at 4.

79. *Cleaner Coal*, *supra* note 53.

80. *Economic Analysis*, *supra* note 14, at 4.

81. *Id.* at 11.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 8.

in China's energy consumption during the 1990s was in response to a decrease in prices.⁸⁶ In other words, coal exports will mean cheaper coal in Asia, and cheaper coal has been demonstrated to increase the amount of coal burned. The experts have labeled China's coal buying behavior as that of a "cost minimizer."⁸⁷ As Professor Powers states, "Chinese coal imports are simply tied to a comparison of the delivered cost of coal to these southern coastal cities from alternative sources of supply."⁸⁸ So, by increasing the export capabilities, prices are lowered; lowering the price and diversifying supply to China unavoidably provides a positive economic signal to expand coal combustion by a factor greater than the decrease in price.

Concerns center on the introduction of a large, steady supply of inexpensive coal and the ramifications of that influx. The impact of a large, reliable supply of lower-priced coal is neither short-term nor limited to the period while the cheaper supply is available; rather, the effect would be long-lasting and resistant to future price increases.⁸⁹ Undercutting the price of coal and backing that low price with a reliable source and infrastructure designed to supply a large amount of coal to China, combined with the atmospheric rise in energy demand will result in Chinese investment in coal-burning facilities that will emit GHG for thirty to fifty years.⁹⁰ In 2006, China reportedly added over ninety gigawatts of new coal-fired power plant capacity; this is the equivalent of approximately two new large coal power plants a week.⁹¹ Lower prices would encourage the rapid construction of plants as well as the associated infrastructure, increasing dependence on coal power. In addition to the immediate response to a price drop, lower coal prices and guaranteed supply sources also reduce incentives to retire older, inefficient, coal plants.⁹² Finally, a price drop discourages additional investments in the energy efficiency of new and existing enterprises with high energy

86. *Id.*

87. *Id.*

88. *Id.* at 11.

89. *Id.* at 18.

90. *Id.*

91. *Coal Facts*, *supra* note 57.

92. *Economic Analysis*, *supra* note 14, at 14.

demands.⁹³ The lower cost of coal as a direct result of export means new coal-burning facilities in Asia—which in turn create a long-term demand for coal.

B. *The No-Change Scenario*

Beyond increasing demand and coal-dependent infrastructure, consideration must be given to what would happen if prices did not drop. The evidence indicates that China responds to higher prices by improving their energy efficiency.⁹⁴ Prior concerns over rising energy costs have led the Chinese government to develop tighter energy efficiency standards throughout many different sectors of their economy.⁹⁵ This has been documented during previous increases in world oil prices.

For example, during a previous price increase, the Chinese government announced strict five-year energy conservation goals, including limiting the growth of coal consumption to about four percent per year, a figure that fell far below their expected economic expansion for the time.⁹⁶ The Chinese have massive room for improvement as energy usage per unit of GDP across the Chinese economy is almost four times that of the U.S. and almost eight times that of Japan.⁹⁷ The Chinese government and the large state-owned enterprises that produce, distribute, and use larger amounts of energy are well aware of the burden that high and ever rising energy cost can impose on the economy.⁹⁸ The energy policies embodied in the last several five-year plans have focused heavily on improving overall energy efficiency in order to effectively control energy costs.⁹⁹ Lowering coal costs to China would undermine these valuable efforts at energy efficiency.¹⁰⁰

The other economy that is impacted by the exportation of coal to China is that of the state of Washington. The proposed facility could increase investment, employment, citizen income,

93. *Id.*

94. *Id.* at 9–11.

95. *Id.*

96. *Id.* at 11.

97. *Id.* at 13.

98. *Id.* at 12.

99. *Id.*

100. *Id.*

and the tax base.¹⁰¹ However these impacts are small, local, and short-lived, whereas the potential implications of coal exportation are global and long-lasting.¹⁰² Relatively few jobs would be created at the expense of combusting tens of millions of tons of coal per year.¹⁰³ Furthermore, the ownership of MBT lies outside of Washington; so, like the coal, the bulk of the profits also would be “exported.”¹⁰⁴ Washington has only one remaining coal-fired electric generator, and the state has mandated by law that it be shut down beginning in 2025.¹⁰⁵ In the meantime, this one coal plant consumes only seven million metric tons per year.¹⁰⁶ MBT alone would export more than six times what is presently being used in Washington, virtually frustrating the State’s effort to eliminate coal.¹⁰⁷ Moreover, a timeframe or lifetime of operations of MBT does not exist, leaving it open-ended how long exports would thwart local abstinence.

IV. FOREIGN POLLUTION REACHING DOMESTIC SOIL

It is undisputed that China has a significant pollution problem and that coal is both a direct and significant cause of that pollution.¹⁰⁸ China’s decades-long spurt of unprecedented economic growth has not only made it the world’s top consumer of many commodities, but also its top producer of pollutants.¹⁰⁹

101. MILLENNIUM BULK TERMINALS-LONGVIEW, <http://millenniumbulk.com/> (last visited Nov. 11, 2013).

102. *Economic Analysis*, *supra* note 14, at 18.

103. Erik Olson, *Millennium Bulk Terminals Files Paperwork with County for \$600 Million Coal Terminal*, THE DAILY NEWS (Feb. 23, 2012, 9:00 PM), http://tdn.com/news/local/millennium-bulk-terminals-files-paperwork-with-county-for-million-coal/article_c90b544c-5dbd-11e1-9fae-0019bb2963f4.html.

104. *Id.*

105. Josh Feit, *Breaking: TransAlta Agrees to Phase Out Coal Plant, Senate Approves Deal with 36-13 Vote*, SEATTLE MET (March 5, 2011, 12:00 PM), <http://www.seattlemet.com/news-and-profiles/publicola/articles/transalta-agrees-to-phase-out-coal-plant> (last visited Nov. 11, 2013).

106. *Coal Power Plant Database*, NATIONAL ENERGY TECHNOLOGY LABORATORY, available at <http://www.netl.ecology.gov/energy-analyses/pubs/cppd/XLS%20CPPDB%202005%20-%20Public.zip> (last visited November 11, 2013).

107. JARPA, *supra* note 12 (44 million metric tons proposed to be exported, divided by the 7 million presently consumed, which equals 6.285).

108. *Rise*, *supra* note 66.

109. *Id.*

What is not largely recognized, however, is the domestic effect of foreign pollution, specifically originating from Asia, and its effects on the West Coast of the United States. In the litigation regarding the first permit application, the environmental assessment did not consider the domestic pollution impacts from burning coal.¹¹⁰ There are two issues to consider in future challenges in this regard. First, Chinese air pollution extends beyond geographic boundaries.¹¹¹ Second, GHG emissions contribute to global warming, which by the nature of being a global issue will have significant domestic effects.¹¹²

Recent studies have shown that China's coal combustion has had profound adverse effects on the environment and the health of millions of people worldwide.¹¹³ While Chinese smog is infamous, attention is only recently being shifted to the extraterritorial effect of that pollution.¹¹⁴ As recently as 1994, atmospheric scientists had stated, "no one thought that Asian pollution could be a problem. . . they thought it was just too far away."¹¹⁵ In 1997, however, it was noted for the first time "that there was a real difference when the air was coming out of Asia."¹¹⁶ Computer modeling has supported this research and shows that the typical westerly wind flows across the mid-latitudes of the Northern Hemisphere, meaning that air pollution from China is often carried over the Pacific Ocean.¹¹⁷ If the weather conditions are right, contaminants including mercury, ozone, sulphur, nitrogen oxides, and black carbon dust can reach the west coast of the US within days.¹¹⁸ A

110. See *Respondent's Motion to Dismiss*, *supra* note 19.

111. Tom Levitt, *US Cities Suffer Impact of Downwind Chinese Air Pollution*, CHINA DIALOGUE (Jan. 17, 2013), <https://www.chinadialogue.net/article/show/single/en/5615-US-cities-suffer-impact-of-downwind-Chinese-air-pollution>.

112. *Id.*

113. *Id.*

114. *Rise*, *supra* note 66.

115. *Rise*, *supra* note 66.

116. Dan Krotz, *Lead Isotopes Yield Clues to How Asian Air Pollution Reaches California*, LAWRENCE BERKELEY NATIONAL LABORATORY (Dec. 1, 2010), <http://newscenter.lbl.gov/feature-stories/2010/12/01/lead-isotopes-air-pollution/> [hereinafter *Isotopes*].

117. *Rise*, *supra* note 66.

118. Stan Abrams, *Beijing Smog Could be Making Its Way Over to California*, BUSINESS INSIDER, (Jan. 18, 2013, 2:53 AM), <http://www.businessinsider.com.au/californians-hacking-up-lungs-due-to-china-pollution-2013-1>. See also *Isotopes*, *supra* note 116.

California study of lead in the air found that that approximately a third of the pollutants came from China.¹¹⁹

When the conclusion was reached that pollution was crossing the Pacific Ocean, scientists regarded the news as more interesting than concerning; however, with China's rapid growth in the following twenty years the situation has become alarming.¹²⁰ A 2006 study of Oregon's Willamette River found that one fifth of the mercury in it had come from foreign sources, principally China.¹²¹ The EPA supported this conclusion with a report entitled "Global Sources of Local Pollution," the first large-scale attempt by the agency to quantify the problem.¹²² The principal conclusion of that report was that foreign pollution into the U.S. will increase and officials should work with foreign nations to understand and control the growth.¹²³

In addition to direct harm from pollutants, coal consumption is a significant source of carbon dioxide and other GHG emissions that contribute to global climate change.¹²⁴ Global warming is unmistakably attributable to the increase in GHG emissions.¹²⁵ In addition to the substantial release of GHG emissions, coal produces soot, also known as black carbon, which is considered a 'heat-trapping agent' that contributes significantly to global warming.¹²⁶ The theory of climate change has been widely accepted at this point, but scientists are concerned that even in the light of widespread recognition, the pace of the environmental impacts is being underestimated.¹²⁷ Climate change is also identified as a factor in the rise of extreme weather events.¹²⁸

119. *Isotopes*, *supra* note 116.

120. *Id.*

121. *Id.*

122. NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, GLOBAL SOURCES OF LOCAL POLLUTION: AN ASSESSMENT OF LONG-RANGE TRANSPORT OF KEY AIR POLLUTANTS TO AND FROM THE U.S., (2009), *available at* http://www.nap.edu/catalog.php?record_id=12743.

123. *Rise*, *supra* note 66.

124. *Full Cost*, *supra* note 3, at 87.

125. *Full Cost*, *supra* note 3, at 88.

126. *Id.*

127. *Id.*

128. *Id.*

These studies establish that not only will increased coal consumption in China produce significant pollution locally, but that the pollution will also affect the U.S. and Washington in two ways. First, the pollution from consumption can cross the ocean and directly impact the local climate.¹²⁹ Second, the pollution will continue to play a huge role in global warming, which, in turn, will affect the U.S. and Washington.¹³⁰

V. LEGAL AUTHORITY GOVERNING THE MBT PROPOSAL

A. *The National Environmental Policy Act*

NEPA should need no introduction. The statute, known as the “Magna Carta” of environmental law, was enacted in 1969 to “use all practicable means and measures. . . to create and maintain conditions under which man and nature can exist in productive harmony”¹³¹ and, “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”¹³² Despite its broad and ambitious goals, NEPA has been reduced to a procedural device.¹³³ The statute may be best described as just a framework for informed and responsible government decision-making based on public input.¹³⁴ The heart of the procedural requirements is the production of an EIS. The statutory language of NEPA triggers performance on federal agency activities; however, its reach is actually broader.¹³⁵ Specifically, non-federal actions that are regulated, licensed, permitted, or approved by federal agencies generally are considered federal actions for NEPA purposes.¹³⁶ This

129. *Isotopes*, *supra* note 116.

130. *Rise*, *supra* note 66.

131. 42 U.S.C. § 4331(a) (2012).

132. 42 U.S.C. § 4321 (2012).

133. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

134. ROGER G DREHER, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, GEORGETOWN UNIVERSITY LAW CENTER, *NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT*, 1–2 (2005).

135. *Davis v. Morton*, 469 F.2d 593, 596–597 (10th Cir. 1972).

136. *Id.*

provision is what brings MBT within the scope of analysis.¹³⁷ MBT has stipulated to completing an EIS; therefore, this comment will focus on what must be included in an EIS.

The Supreme Court has stated that the requirement to prepare an EIS serves the purposes of ensuring that federal agencies will have available, and carefully consider detailed information on significant environmental impacts.¹³⁸ Further, it requires that the information will be made available to the public and other stakeholders so they may also play a role in the decision-making process.¹³⁹ The EIS should be a detailed statement concerning the impacts, adverse environmental effects, and alternatives to all proposed “major federal actions significantly affecting the quality of the human environment.”¹⁴⁰ Thus, an EIS must consider (1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources involved in the proposed action should it be implemented.¹⁴¹

The required alternatives analysis has been dubbed the “heart of the EIS.”¹⁴² Alternatives analysis covers: (1) a rigorous explanation and evaluation of all reasonable alternatives, (2) substantial treatment of each so reviewers may compare the alternatives, (3) reasonable alternatives outside the jurisdiction of the lead agency, (4) the no-action alternative, (5) the agency’s preferred alternative, and (6) appropriate mitigation measures not included in the proposed action or alternative.¹⁴³ For each alternative, the agency must

137. Lowell Rothschild, Dana Nifosi, & Margaret Strand, *CEQ issues draft NEPA Climate Change Guidance*, VENABLE LLP NEWS ALERT (2010) <http://www.lexology.com/library/detail.aspx?g=6d378e71-bae0-4e15-801d-138ee652ef4f> (last visited November 26, 2013).

138. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)).

139. *Id.*

140. 42 U.S.C. § 4332(2)(C) (2012).

141. 42 U.S.C. § 4332(C)(i–v) (2012).

142. 40 C.F.R. § 1502.14 (2013).

143. 40 C.F.R. § 1502.14(a–f) (2013).

also assess the direct, indirect, and cumulative impacts of the proposed action, as well as the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions.¹⁴⁴ Cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time.¹⁴⁵

In addition to laying out the procedural requirements for reviewing decisions significantly impacting the environment, NEPA also created the Council of Environmental Quality (CEQ), a three-member board appointed by the president and confirmed by the Senate to administer NEPA.¹⁴⁶ The primary responsibility of the CEQ is to issue guidelines to federal agencies for the preparation of EISs and other NEPA-related reports.¹⁴⁷ These guidelines include defining key terms, procedures to be implemented, and guidance documents for new issues.¹⁴⁸

As previously stated, NEPA has been reduced by the Supreme Court to a procedural statute.¹⁴⁹ Once the procedural requirements of NEPA have been met by a federal agency, a court cannot substitute its own judgment for the federal agency's judgment as to what action the agency should take.¹⁵⁰ This makes satisfying each of the procedural requirements all the more important. With no substantive components, the procedural requirements must be relied upon to achieve environmental protection.¹⁵¹

144. 40 C.F.R. § 1508.25 (2013).

145. 40 C.F.R. § 1508.7 (2013).

146. 42 U.S.C. § 4321 (2012).

147. James R. Holcomb, IV, *NEPA and Climate Change: After the CEQ's Draft Guidance*, 41 TEX. ENVTL. L.J. 259, 261 (2011).

148. Lauren Giles Wishnie, Comment, *NEPA for a New Century: Climate Change and the Reform of the National Environmental Policy Act*, 16 N.Y.U. ENVTL. L.J. 628, 633 (2008).

149. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

150. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980).

151. RONALD E. BASS ET AL., *THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT* 54–56 (2nd ed. 2001).

B. *Washington's State Environmental Policy Act*

NEPA has been so influential that many states have adopted State Environmental Policy Acts (SEPA) with varying degrees of similarity. These are often referred to as 'little NEPAs.'¹⁵² Washington's SEPA is patterned closely after its federal counterpart.¹⁵³ The language in Washington's SEPA repeats verbatim major parts of NEPA.¹⁵⁴ This has allowed for cross-jurisdictional interpretation and use of precedents.¹⁵⁵ In other words, Washington courts may look to federal NEPA jurisprudence for guidance.¹⁵⁶ Similar to NEPA, Washington's SEPA is applicable to all government actions, which include not only government projects, but also governmental approvals of most private actions not specifically exempted.¹⁵⁷ The most striking departure, however, is the law's statutory requirement "that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."¹⁵⁸ This makes Washington's SEPA a 'rare breed' of state SEPAs with a distinctive substantive bite.¹⁵⁹ This bite provides the discretionary power of agencies to say "no" or to qualify their "yes" on environmental grounds.¹⁶⁰ Thus, Washington's SEPA provides an additional, more substantive layer of environmental protection that must be considered in the EIS for the MBT proposal.

152. David Sive & Mark A. Chertok, "Little NEPA's" and their Environmental Impact Assessment Procedures, AG026 ALI-ABA 197 (2001).

153. Rodgers, *supra* note 7, at 34.

154. *Id.*

155. *Id.* See, e.g., *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897, 902 (1974) (en banc); followed in *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 705-06, 601 P.2d 501, 514-15 (1979).

156. E.g., *West 514, Inc. v. County of Spokane*, 53 Wn.App 838, 845, 770 P.2d 1065, 1069 (Div. 3 1989); *SEAPC v. Cammack II Orchards*, 49 Wash App 609, 614, 744 P.2d 1101, 1104 (Div. 3 1987).

157. WASH. ADMIN. CODE § 197-011-704 (2013).

158. WASH. REV. CODE § 43.21C.020(3) (2012).

159. See Rodgers, *supra* note 7, at 58.

160. *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 117, 508 P.2d 166, 171 (1973); *Polygon Corp. v. City of Seattle*, 90 Wn2d 59, 65, 578 P.2d 1309, 1313 (1978).

C. *The Council for Environmental Quality's Guidance Regarding GHG Emissions*

In 2010, CEQ issued a draft guidance memorandum discussing the ways in which federal agencies can improve their consideration of GHG emissions.¹⁶¹ The guidance document (Guidance) affirmed the requirements of NEPA and its applicability to considering GHG emissions and climate change impacts.¹⁶² The document continued with several notable provisions of both how and why GHG emissions fall under the purview of NEPA and how these emissions should be considered.¹⁶³ The backbone of the Guidance is the same as that of NEPA—to demand an informed and realistic decision-making process.

The first aspect is whether GHG emissions should be considered in an EIS. Realizing the incredible breadth of the consideration of all GHG emissions, the Guidance establishes a threshold figure of 25,000 metric tons or more of carbon dioxide equivalent emissions per year.¹⁶⁴ Addressing another practical consideration, that many times there may not be a dominating source of the emissions, the document requires that the EIS be aware that global climate change is not the result of only large dominating sources, but also of numerous minimal sources.¹⁶⁵ Agencies should consider the specific effects of the proposed action (including the proposed action's effect on the vulnerability of affected ecosystems), the nexus of those effects with projected climate change impacts on the same aspects of our environment, and the implications for the environment to adapt to the projected effects of climate change.¹⁶⁶ When assessing the impacts of climate change on a proposed action, an agency typically starts with an identification of the reasonably foreseeable future condition of

161. Memorandum from Nancy H. Sutley, Chair, Council of Environmental Quality, Draft NEPA Guidance on Consideration of the effects of Climate Change and Greenhouse Gas Emissions, (Feb. 18, 2010) available at http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf.

162. *Id.* at 1.

163. *Id.* at 3–11.

164. *Id.* at 4.

165. *Id.* at 2.

166. *Id.* at 7.

the affected environment for the “no action” alternative based on available climate change measurements, statistics, observations, and other evidence.¹⁶⁷ The obligation of an agency to discuss particular effects turns on “a reasonably close causal relationship between the environmental effect and the alleged cause.”¹⁶⁸ It concludes:

By statutes, Executive Orders, and agency policies, the Federal government is committed to the goals of energy conservation, reducing energy use, eliminating or reducing GHG emissions, and promoting the deployment of renewable energy technologies that are cleaner and more efficient. Where a proposal for Federal agency action implicates these goals, information on GHG emissions (qualitative or quantitative) that is useful and relevant to the decision should be used when deciding among alternatives.¹⁶⁹

If there were any doubts remaining as to the Guidance’s applicability to coal, they specifically list a coal power plant as an example of when GHG emissions should be considered.¹⁷⁰

The next step is to answer how GHG emissions should be considered. Whenever possible, the document states that it is preferable to quantify the emissions.¹⁷¹ To aid in this effort, the Guidance lists various methods of quantification used by the government, including how to measure from large direct emitters and from federal facilities.¹⁷² When these methods fail to produce accurate figures, “agencies should use NEPA’s provisions for inter-agency consultation with available expertise to identify and follow the best available procedures for evaluating comparable activities.”¹⁷³ So, either by direct measurement or like comparison, the EIS will include GHG emissions and allow for informed decision making on the proposed action.

The most significant question in the analysis is what should be considered when including GHG emissions as part of an evaluation. The Guidance cites directly to NEPA: what

167. *Id.*

168. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004).

169. *See Sutley*, *supra* note 161.

170. *Id.* at 3.

171. *Id.*

172. *Id.* at 4.

173. *Id.*

should be included is the information needed “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”¹⁷⁴ In assessing direct emissions, an agency should look at the consequences of actions over which it has control or authority.¹⁷⁵ When a proposed federal action meets an applicable threshold for quantification and reporting, as discussed above, CEQ proposes that the agency also consider mitigation measures and reasonable alternatives to reduce proposed action related GHG emissions.¹⁷⁶ Analysis of emissions sources should take account of all phases and elements of the proposed action over its expected life, subject to reasonable limits based on feasibility and practicality.¹⁷⁷

D. *Washington State Department of Ecology’s Guidance on GHG Emissions*

Similar to its federal counterpart, Washington’s SEPA has also been subject to a guidance document. The document is narrower than its federal counterpart and was prepared by the Department of Ecology.¹⁷⁸ It applies only when Ecology is the lead agency, or is an agency with jurisdiction.¹⁷⁹ The motivation however, is similar to CEQs and is based on the finding that “greenhouse gas emissions adversely affect the environment by contributing to global climate change. In turn, global climate change results in environmental impacts in Washington such as rising sea levels and changes in water supply. These changes can impact the built environment, and SEPA requires these types of impacts to be disclosed, too.”¹⁸⁰ The report follows a similar format to the CEQ Guidance addressing, when, how and what should be considered.

174. 40 C.F.R. § 1500.1(c) (2013).

175. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004).

176. *See* Sutley *supra* note 161.

177. *Id.* at 5.

178. Washington State Department of Ecology, *Draft Guidance for Ecology: Including Greenhouse Gas Emissions in SEPA Reviews*, June 06, 2003. [hereinafter *Ecology Guidance*] http://www.ecy.wa.gov/climatechange/docs/sepa/20110603_SEPA_GHGinternalguidance.pdf (last visited November 11, 2013).

179. *Id.* at 1.

180. *Id.* at 1.

While addressing GHG emissions in general, the primary focus is on carbon dioxide.¹⁸¹ The carbon dioxide equivalent is the preferred measure for determining GHG emissions rates for any combination of these GHGs.¹⁸² Emissions of greenhouse gases are typically expressed in a common metric so that their impacts can be directly compared, as some gases have a higher global warming potential (GWP) than others.¹⁸³ The document also notes that these emissions can come from a vast number of sources, “in amounts ranging from trivial to massive.”¹⁸⁴ Ecology also sets a threshold value for consideration of GHG: 10,000 tons of carbon dioxide a year.¹⁸⁵ However, two standards are used to clarify this value: (1) that the emissions are new, and (2) that they are proximately caused by the action.¹⁸⁶ New emissions that are expected to average 10,000 metric tons or more of carbon dioxide equivalent per year and that are proximately caused by the proposal should be disclosed.¹⁸⁷ The guidance document expects a majority of projects to be below this level of emissions.¹⁸⁸ New emissions are any emissions that will result from the project that are additional emissions.¹⁸⁹ To clarify, this does not mean the total emissions of a project, but instead measures the level that emissions increased from previous output to present output.¹⁹⁰ The second factor is proximate cause, which is defined as a “reasonably close causal relationship between the environmental effect and the alleged cause.”¹⁹¹ Proximate cause requires a showing that the proposal is the cause of the emissions in a direct sequence, unbroken by any superseding cause.¹⁹² The courts have further defined proximate cause as whether the action and the

181. *Id.* at 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 3.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

emissions are “two links of [the same] chain.”¹⁹³ If the environmental impact is linked to the action, then it should be considered under SEPA.

Ecology’s guidance document retains a high bar for potentially significant GHG emissions, establishing a five-part analysis.¹⁹⁴ In determining what constitutes significant emissions, the following questions are considered: (1) Is the project exempt from SEPA? (2) Will the project emit less than 10,000 metric tons per year? (3) Will the project emit less than 25,000 tons per year? (4) Is the project subject to legal requirements to reduce or mitigate? (5) And, has the project incorporated GHG mitigation measures to reduce GHG emissions eleven percent or more?¹⁹⁵ Only when the answer to every question is “no” are the emissions deemed significant.¹⁹⁶

The guidance document explicitly discusses the extraterritoriality that an EIS should cover.¹⁹⁷ It recognizes that GHG emissions mix rapidly and uniformly in the atmosphere, contributing equally to global concentrations no matter where they are emitted.¹⁹⁸ The document continues, “unlike many conventional air pollutants, local concentrations of GHGs are not greater near large sources than they are in areas far away.”¹⁹⁹ For establishing boundaries, the guidance document references a Washington statute, which reads “In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal’s impacts only to those aspects within its jurisdiction, including local or state boundaries.”²⁰⁰ In other words, if the emissions are proximately caused by the project, they should be disclosed regardless of their location.²⁰¹

193. *Id.* No citation is offered in the Ecology document, but the language is similar to that in *Sylvester v. U.S. Army Corps of Engineers*, 871 F.2d 817, 823 (9th Cir. 1989) *amended and superseded on denial of rehearing by* 884 F.2d 394, 400 (9th Cir. 1989) (retaining “chain” language).

194. *Ecology Guidance*, *supra* note 178, at 4–7.

195. *Id.*

196. *Id.*

197. *Id.* at 2.

198. *Id.*

199. *Id.*

200. WASH. ADMIN. CODE § 197–11–060(4)(b) (2013).

201. *Id.*

E. *Significant Common Law Cases*

Whether due to the ongoing scientific debate, or perhaps due to politics, climate change policy has been slow to develop in the courts. Recent history has shifted this trend however, making it a dynamic period in climate change law.²⁰² The U.S. Supreme Court has had few opportunities to handle the issue directly, but federal appellate courts are issuing opinions on an increasing basis. The Supreme Court has articulated some very basic provisions, which impact the EIS process for the MBT proposal. In addition, a decision by the Ninth Circuit Court of Appeals, *Friends of the Earth v. Mosbacher*, has significant bearing on the EIS process and on the issues presented in this comment.²⁰³

Before evaluating this case, however, it is important to note that the Supreme Court has had few occasions to discuss NEPA in great detail. Nevertheless, the Court has established some key factors that impact the EIS process.²⁰⁴ In *Department of Transportation v. Public Citizen*, the Court concluded that there must exist “a reasonably close causal relationship between the environmental effect and the alleged cause.”²⁰⁵ Significantly, in *Massachusetts v. EPA*, the Supreme Court found that climate change from GHG emissions are (1) well documented, (2) actual or at least imminent, and (3) caused, at least in part by human conduct. Thus, the EPA must regulate the pollutants.²⁰⁶ In addition, the Court reaffirmed in *Baltimore Gas & Electric Company v. Natural Resources Defense Council, Inc.*, that its primary role in the NEPA review process is to ensure that an agency has taken a “hard look” at the environmental consequences of a proposed action and that the Court will not reverse agency decisions under NEPA unless they are “arbitrary and capricious.”²⁰⁷ Although helpful,

202. Brawer, *supra* note 8.

203. *Friends of the Earth v. Mosbacher (Mosbacher II)*, 488 F.Supp.2d 889 (N.D. Cal. 2007) (Settled 2009).

204. Matthew P. Reinhart, *The National Environmental Policy Act: What Constitutes an Adequate Cumulative Environmental Impacts Analysis and Should it Require and Evaluation of Greenhouse Gas Emissions?*, 17 U. BALT. J. ENVTL. 145, 162 (2010).

205. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 753 (2004).

206. *Massachusetts v. EPA*, 549 U.S. 497, 504–05, 521–23, 534–36 (2007).

207. *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97–98 (1983).

these cases do not definitively establish how climate change should be considered in an EIS; the door remains open as to what considerations must be evaluated with regard to climate change cases.

1. *Friends of the Earth v. Mosbacher*

A recent case addressing the application of NEPA to global climate change is *Friends of the Earth v. Mosbacher*.²⁰⁸ The case is comprised of two separate decisions from the U.S. District Court for the Northern District of California: *Friends of the Earth v. Watson* (Mosbacher I) and *Friends of the Earth v. Mosbacher* (Mosbacher II).²⁰⁹ Taken together, the cases addressed both standing and the sufficiency of the relationship between climate change and the proposed federal action.²¹⁰ Mosbacher I was primarily focused on standing, whereas Mosbacher II addressed standing and the more substantive issues of NEPA and global warming. This comment will focus more closely on Mosbacher II.²¹¹

The case involved two quasi-governmental agencies—the Export-Import Bank (Ex-Im) and the Overseas Private Investment Corporation (OPIC).²¹² Ex-Im is an independent governmental agency and a wholly-owned government corporation that provides financing and support for exports from the United States.²¹³ OPIC is an agency of the U.S. created “[t]o mobilize and facilitate the participation of the U.S. private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market

208. *Mosbacher II*, 488 F.Supp.2d 889.

209. No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. 2005). Mosbacher I addressed defendants Overseas Private Investment Corporation and Export-Import Bank’s motion for summary judgment. *Id.* at *1. *Mosbacher II*, 488 F. Supp. 2d 889. Mosbacher II addressed plaintiffs’ and defendants’ motions for summary judgment. *Id.* at 891. The named defendant in Mosbacher II, Robert Mosbacher, Jr., replaced Peter Watson, named defendant in Mosbacher I, as President and Chief Executive Officer of Overseas Private Investment Corporation. *See id.*

210. Mosbacher I focused almost exclusively on the standing issue. Mosbacher I, 2005 WL 2035596, at 3. Mosbacher II addressed more systematically the nature of the projects purportedly requiring environmental review and the role federal agencies played in supporting those projects. *Mosbacher II*, 488 F. Supp. 2d 889.

211. *Id.*

212. *Mosbacher II*, 488 F.Supp.2d 889.

213. *See* 12 U.S.C. § 635 (2012).

economies.”²¹⁴ OPIC and Ex-Im both followed their own internal standards for appraising environmental impacts, but did not conform to NEPA requirements, believing they were exempt.²¹⁵ The trial court rejected their arguments, stating that both OPIC and Ex-Im are subject to NEPA’s procedural requirements.²¹⁶ Between 1990 and 2001, Ex-Im allegedly provided over \$25 billion in loans and financial guarantees to 474 fossil-fuel projects.²¹⁷ Between 1990 and 2006, OPIC allegedly provided financial support to sixty-four fossil-fuel projects that will contribute nearly eighty tons of carbon dioxide emissions annually.²¹⁸ In its March 30, 2007 decision, the district court held that NEPA requires OPIC and Ex-Im to address the impacts of GHG emissions from fossil-fuel projects the agencies support in developing countries where such projects constitute “major federal actions” for NEPA purposes.²¹⁹

Interestingly, the plaintiffs proceeded not on the grounds that this was a case of the extraterritorial application of NEPA, but instead focused on the domestic effect of the defendant’s actions.²²⁰ In other words, plaintiffs sought to apply NEPA because the projects that defendants support purportedly affect the domestic environment.²²¹ Therefore, the Court stated it must consider carefully the nature of defendants’ involvement in these projects and particularly what conditions, if any, the agencies impose in connection with financing.²²² The Court stopped short of finding that the actions were in fact major federal actions and subsequently that a cumulative impacts analysis could not be found.²²³

The Court’s decision to effectively defer consideration of the “major federal action” has been criticized given the clarity of

214. See 22 U.S.C. § 2191 (2012).

215. *Mosbacher II*, 488 F.Supp.2d 906.

216. *Id.* at 908.

217. See Plaintiffs’ Motion for Summary Judgment, *supra* note 19, at 10; *Mosbacher II*, 488 F. Supp. 2d 889 (N.D. Cal. 2007) (No. 02-4106), 2005 WL 3971170.

218. *Id.*

219. *Mosbacher II*, 488 F.Supp.2d at 909–10.

220. *Id.* at 908.

221. *Id.*

222. *Id.* at 916–17.

223. *Id.* at 919.

precedent on the issue.²²⁴ Under NEPA's implementing regulations, "major federal action" is defined to include not only projects "approved" by a federal agency, but also projects that are "entirely or partly financed, assisted, conducted, regulated or approved" by the federal entity.²²⁵ However, the Ninth Circuit has made clear that a "federal funding contribution alone" cannot transform an entire project into a major federal action.²²⁶ Where final decision-making authority remains at all times with a non-federal entity, the provision of financial or other assistance to that entity does not constitute "discretionary involvement or control over" a project sufficient to render it a "major federal action" under NEPA.²²⁷ The requisite elements of discretionary involvement and control identified in these cases are simply not present in *Mosbacher*.²²⁸

The Court left one significant question open: given that projects supported by OPIC and Ex-Im emit GHGs and GHGs contribute to global warming, are the agencies' actions a "but for" cause of the emissions from such projects?²²⁹ The *Mosbacher II* court failed to answer even this question for the specific fact pattern presented, stating that since it could not determine whether the viability of the projects depended upon defendants' support or whether defendants could exercise significant control over the projects they support, it could not determine whether defendants are a legally relevant cause of the alleged effects on the domestic environment."²³⁰

2. *Mid-States Coalition for Progress v. Surface Transportation Board*

Another recent case addressing the application of NEPA to global climate change comes from a Ninth Circuit case

224. Kevin T. Haroff & Katherine K. Moore, *Global Climate Change and the National Environmental Policy Act*, 42 U.S.F. L. REV. 155 (2007).

225. In *Ka Makani 'O Kohala Ohana, Inc. v. Water Supply (Ka Makani)*, 295 F.3d 955 (9th Cir. 2002).

226. *Id.*

227. *Id.* at 961.

228. Haroff & Moore, *supra* note 224.

229. *Id.* (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004), concluding that, where an agency has limited authority over the relevant action to prevent a certain effect, the agency "cannot be considered a legally relevant 'cause' of the effect").

230. *Mosbacher II*, 488 F.Supp.2d at 918 n.19.

stemming from the Surface Transportation Board's approval of the construction of approximately 280 miles of new rail line which would provide a shorter and less expensive method to ship coal mined from Wyoming's Powder River Basin.²³¹ An EIS was prepared and subsequently challenged, instigating this case.²³² A bulk of the public objection and litigation focused on the increase in train traffic and concerns over noise from the tracks, trains, horns, and vibration.²³³ Other concerns included groundwater contamination, disproportionate impact on minorities, delay of emergency vehicles, and failure to consider alternative routes, as well as doubting the techniques and methods employed by the EIS.²³⁴

Perhaps the most significant challenge was that the EIS, "wholly failed to consider the effects on air quality that an increase in the supply [of coal]. . . would produce."²³⁵ It was alleged that improving and shortening the train route would increase the availability and use of coal and thus, increase the emissions of nitrous oxide, carbon dioxide, particulates, and mercury.²³⁶ This was supported by evidence that an increase in supply would discourage the shift away from coal to alternative power sources.²³⁷ The Surface Transportation Board argued that either the change would not have an impact on price; if it did, it would be too speculative.²³⁸ The Court rejected this argument, citing to NEPA and CEQ regulations stating that "any adverse environmental effects"²³⁹ must be considered, and that "effects" includes both direct and indirect effects.²⁴⁰ The Court contends that an environmental effect is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in

231. *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 532 (8th Cir. 2003).

232. *Id.* at 533.

233. *Id.* at 533–38.

234. *Id.* at 533–44.

235. *Id.* at 548.

236. *Id.*

237. *Id.*

238. *Id.* at 550.

239. 42 U.S.C. § 4332(C) (2012).

240. 40 C.F.R. § 1508.8 (2013); *See also Mid States Coalition for Progress*, 345 F.3d 520 at 550.

reaching a decision.”²⁴¹ The Court also rejected the Board’s argument that they would need to know where future coal plants would be and how much coal they would use, arguing this would show only the extent and not the nature of the effect.²⁴² Specifically, it stated “it is almost certainly true that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.”²⁴³ The Court continued that, “when the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect.”²⁴⁴ It concluded, “[w]e believe that it would be irresponsible for the Board to approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.”²⁴⁵

3. *Center for Biological Diversity v. NHTSA*

Another significant case is *Center for Biological Diversity v. NHTSA*.²⁴⁶ This case has received significant attention for both its Environmental and Administrative Law holdings. This comment will focus exclusively on the environmental concerns. The case originated from a challenge by eleven states, the District of Columbia, City of New York, and four public interest organizations to a rule promulgated by the National Highway Traffic Safety Administration (NHTSA).²⁴⁷ The NHTSA did not prepare an EIS, but instead decided to conduct a less rigorous Environmental Assessment (EA), which concluded that there would be no significant impact.²⁴⁸ The challenge alleged that NHTSA’s EA was inadequate under NEPA because it failed to sufficiently examine the implications of GHG emissions.²⁴⁹ The challengers also claimed that the EA

241. *Mid States Coalition for Progress*, 345 F.3d 520 at 550 (citing *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

242. *Id.* at 549.

243. *Id.*

244. *Id.*

245. *Id.* at 550.

246. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

247. *Id.*

248. *Id.* at 1215.

249. *Id.* at 1216.

failed to analyze a reasonable range of alternatives or examine the rule's cumulative impact.²⁵⁰ Additionally, petitioners argued that NEPA requires that an EIS be prepared as opposed to the less exhaustive EA, because a properly performed EA would have shown "significant impacts," which would then trigger the requirement of an EIS.²⁵¹

The decision was unanimous, finding the EA inadequate and that significant questions had been raised as to the environmental impact.²⁵² The Court reiterated that the "impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires agencies to conduct."²⁵³ The Court reaffirmed the idea that to take a true "hard look" the agency must satisfy a "reasonably thorough discussion of the significant aspects of the probable environmental consequences."²⁵⁴ The next logical question is what constitutes a significant aspect. The Court set two parameters for determining this: context and intensity.²⁵⁵ They explain, "context. . . delimits the scope of the agency's action, including the interests affected. . . Intensity refers to the 'severity of impact,'" or in other words the degree to which the proposed action affects public health or safety.²⁵⁶ The opinion also stated that while these effects are likely to be highly controversial and the degree of their possible effects uncertain or unknown, they must be considered both in their individual capacity and with other cumulatively significant impacts.²⁵⁷ Applying these standards to the EA prepared by NHTSA, the Court found that it failed to properly consider the incremental impact that the emissions would have on climate change.²⁵⁸ Aptly summarizing their position in the case, the Court stated:

"[t]hus, the fact that 'climate change is largely a global phenomenon that includes actions that are outside of

250. *Id.* at 1181.

251. *Id.* at 1215.

252. *Id.*

253. *Id.* at 1218.

254. *Id.* at 1194.

255. *Id.* (citing *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001)).

256. *Id.* at 1220.

257. 40 C.F.R. § 1508.27(b)(2), (4), (5), (7) (2013); *Center for Biological Diversity* at 1185–86.

258. *Center for Biological Diversity* at 1216.

[the agency's] control. . . does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming."²⁵⁹

Thus, when there is a significant impact, contribution to the global problem of climate change is a consideration that must be made on an EIS.

VI. CONCLUSION: EXPORTING COAL, IMPORTING POLLUTION

Much has been said regarding NEPA, SEPA, guidance documents, and common law precedent without actually applying these standards to the MBT proposal. To reiterate, this is not a situation involving the extraterritorial application of NEPA; rather, this is a situation that concerns domestic actions triggering domestic damage, with just one link of the proximate cause chain taking place abroad. The effect that MBT would have is not immeasurable, unforeseeable or uncontrollable. The effect will be ascertainable in both economic and environmental sciences. The analysis could be limited in one or both of two framing methods: looking only to the amount of pollution that could be expected domestically, or considering only the GHG emissions from consumption. These effects fall directly under the guise of NEPA, SEPA, their respective guidance documents, and common law precedent established in various U.S. Federal Courts.

The economics are a solid appraisal of what will happen with increased supply of coal to China. While a pragmatic EIS could look at all the proposed coal export facilities and measure their impacts collectively, this is not necessary to see the problem that such terminals present. MBT alone would have a measurable impact on coal consumption in China.²⁶⁰ Establishing a port for large-scale operations intended to operate for decades will have real and appreciable impacts on China's domestic coal use. Both the decrease in price and increase in reliable supply will encourage a significant increase in foreign consumption.²⁶¹ History has shown that lowering

259. *Id.* at 1217.

260. *See supra* Section III.

261. *Id.*

price and guaranteeing reliable supply will increase coal consumption by a factor even greater than the drop in cost.²⁶² This will create decades more of pollution.

The pollution created by the foreign consumption of domestic coal will have significant effects in the U.S.²⁶³ These effects, better understood by modern science, are not immeasurable, unforeseeable or uncontrollable. Preliminary studies have found mercury, ozone, sulphur, nitrogen oxides, and black carbon dust can and do cross the Pacific in a matter of days.²⁶⁴ These contaminants thus pollute domestically even when the coal is consumed abroad.²⁶⁵ Furthermore, GHG emissions released from burning coal will increase the threat of global warming.²⁶⁶ Burning the amount of coal that is currently proposed to be shipped from MBT would measurably increase worldwide GHG emissions.²⁶⁷ By permitting a large export facility, Washington would, in effect, be cancelling out any efforts of local environmental improvement.

To proceed with the plans to build and operate the MBT without sufficiently investigating the environmental impact is an affront to both NEPA and Washington's stricter standards under SEPA. An EIS in compliance with either should consider the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided, alternatives to the proposed action, the relationship between local short-term uses of the environment contrasted with long term productivity, and any irreversible commitments of resources.²⁶⁸ The MBT proposal's most significant impact involves consumption overseas; however, the geographic location is a link in the proximate cause chain and should not be allowed to serve as reason to ignore the purpose of NEPA and SEPA.

The guidance documents from CEQ and Washington State Department of Ecology support considering the consumption of coal in China in any EIS performed for the MBT proposal.²⁶⁹

262. *Id.*

263. *See supra* Section IV.

264. Abrams, *supra* note 118.

265. *See supra* Section IV.

266. *Full Cost*, *supra* note 3, at 87.

267. *See supra* Section III.

268. 42 U.S.C. § 4332(2)(c) (2012); WASH. REV. CODE § 43.21C (2012).

269. *See supra* Sections V.C and V.D.

The expected emissions will be far in excess of the threshold figures established by the respective guidance documents.²⁷⁰ The effects of consumption are part of a reasonably close causal relationship to use the language of the CEQ.²⁷¹ Turning to the Ecology guidance document, the burning of coal is a “link” of the same “chain.”²⁷² This analysis should not be ignored simply because of geographic boundaries when the effects have either domestic impacts or, at the very least, equally contribute to global concentrations of harmful substances.

The consideration of the consumption of coal overseas is also supported by legal precedent. *Mosbacher II* speaks directly to GHG emissions; the court accepted the reasoning that significant contributions to global GHG levels were an adequate impact on the domestic environment that the EIS required inclusion.²⁷³ *Center for Biological Diversity v. National Highway Traffic Safety Administration* had a similar holding, stating that incremental emissions should be considered and that climate change is a global phenomenon.²⁷⁴ Even if an action is out of an agency’s control, it does not insulate that topic from consideration: in *Mid-States Coalition for Progress v. Surface Transportation Board*, the court held that the EIS was insufficient because it failed to consider the effects on the environment that an increase in the supply of coal would produce.²⁷⁵ There was no geographical limitation articulated by the Court, which instead stated only that the effect be reasonably foreseeable and that a person of ordinary

270. The threshold figures are 25,000 metric tons for CEQ, *see* Memorandum from Nancy H. Sutley, *supra* note 161, and 10,000 metric tons for Ecology, *see Ecology Guidance, supra* note 178. MBT proposes to export 44 million metric tons of coal, *see* JARPA, *supra* note 12. One ton of coal produces 2.86 tons of carbon dioxide, *see* B.D. Hong, E.R. Slatick, *Carbon Dioxide Emission Factors for Coal*, QUARTERLY COAL REPORT, January–April 1994, at 1, available at www.eia.gov/coal/production/quarterly/co2_article/co2.html. Thus, MBT could directly contribute to more than 125 million tons of carbon dioxide; far eclipsing the requisite levels.

271. Memorandum from Nancy H. Sutley, *supra* note 161.

272. *Ecology Guidance, supra* note 178.

273. *Mosbacher II*, 488 F.Supp.2d 889.

274. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

275. *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 548 (8th Cir. 2003).

prudence would consider it.²⁷⁶ Taken together, and applied to the MBT proposal, the environmental impact of the foreign consumption of coal exported is fully within the purview of EIS required before the MBT project can proceed.

²⁷⁶ *Id.* at 550.