

MEMORANDUM OF UNDERSTANDING  
Between  
THE U.S.ARMY CORPS OF ENGINEERS  
Seattle District regulatory Branch  
And  
WHATCOM COUNTY  
Planning and Development Services  
And  
WASHINGTON STATE  
Department of Ecology  
Regarding the  
DEVELOPMENT OF AN  
ENVIRONMENTAL IMPACT STATEMENT  
FOR THE GATEWAY PACIFIC TERMINAL PROJECT  
And The  
BNSF CUSTER SPUR MODIFICATIONS PROJECT

**I. PARTIES**

This Memorandum of Understanding (MOU) is entered into by and between the United States Army, Corps of Engineers Seattle District Regulatory Branch (Corps), Whatcom County Planning and Development Services Department (County), and the Washington State Department of Ecology (Ecology), collectively "Parties".

**II. PURPOSE**

The purpose of this MOU is to establish and describe a collaborative effort between the Parties for the development and preparation of a joint document to address the Corps' statutory responsibilities set forth in the National Environmental Policy Act (NEPA) and the County and Ecology's statutory responsibilities set forth in Washington State Environmental Policy Act (SEPA). This MOU is limited to the proposed Gateway Pacific Terminal dry bulk commodities export and import facility and the Burlington Northern Santa Fe (BNSF) Railway Custer Spur line both located at Cherry Point in Whatcom County. This MOU establishes the Corps as the federal lead agency and the County and Ecology as the local and State lead agencies in a joint NEPA/SEPA document and establishes procedures for how the Parties will work collaboratively.

**III. INTRODUCTION AND BACKGROUND**

The joint document will assess the environmental impacts for NEPA/SEPA and the social and economic impacts for NEPA only associated with the proposed construction of a deepwater wharf and causeway and associated upland facilities, including material handling and rail facilities, and evaluate a number of alternatives to determine the least damaging alternative. The joint NEPA/SEPA document will support the decision by the Corps, Ecology, the County, and any other Washington State agencies with permitting authority to issue, condition, or deny authorizations for the proposed project. The Parties will be co-lead agencies for this effort, with possible participation of cooperating agencies.

#### **IV. AUTHORITIES**

A. Corps Authority: The National Environmental Policy Act (42 U.S.C. § 4321-4347) and its implementing regulations..

B. County Authority: The Washington State Environmental Policy Act (RCW 43.21C) and Whatcom County Code Chapter 16.08.

C. Ecology Authority: The Washington State Environmental Policy Act (RCW 43.21C) and its implementing regulations.

The EIS will be developed in accordance with both the National Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA). Although NEPA and SEPA have overlapping requirements, the Parties acknowledge that there may be instances where legal requirements differ between the two laws. The Parties further acknowledge that the Corps has sole authority to determine what needs to be included in the EIS under NEPA whereas Ecology and the County have joint authority to determine what needs to be included in the EIS under SEPA.

#### **V. PRINCIPLES OF AGREEMENT**

A. The Parties mutually agree to:

1. Work together through an interagency working group, involving pertinent federal and state agencies, to coordinate, share, and/or combine resources and data in conducting environmental and resource analyses to assist in the development and preparation of a joint NEPA/SEPA document.

2. Work together to ensure consistency and coordination in the development and preparation of a joint NEPA/SEPA document.

3. Work together to ensure involvement of other state and federal agencies, local governments and agencies, Indian tribes, non-governmental organizations, and other interested parties in public meetings of benefit to the process of developing and preparing a joint NEPA/SEPA document.

4. Work together in apprising each other, as far in advance as possible, of any related actions or problems that might affect the environmental analyses and documentation process or that might affect any of the Parties.

B. General Duties

1. The Parties will jointly accept, review, and rank bids from prospective Third Party Consultants for preparation of the EIS. Under NEPA, the Corps must retain ultimate decision-making authority over the choice of the Third Party Consultant. If the County or Ecology disagrees with the Corps' choice, their recourse is to initiate the dispute resolution process given in section VI of this MOU.

2. In all other respects, the Parties shall act as equal partners in meeting their respective responsibilities under NEPA and SEPA.
3. The Parties will work together to develop an appropriate Communications Protocol to be implemented between the Parties and the Third Party Contractor.
4. The Parties will develop and approve an EIS work plan and schedule describing key dates, issues, milestones, and process steps that is subject to revision upon agreement by the Parties as needed to respond to emerging issues.
5. The Parties will coordinate with the applicants to obtain all relevant information regarding the proposals, environmental impacts, and potential mitigation including any studies that are in progress or that have been completed related to the Projects.
6. The Parties will jointly direct the work of the Third Party Consultant throughout the process of EIS preparation. However, the Parties may unanimously agree among themselves to take primary responsibility for reviewing and directing the work of the Third Party Consultant on various pieces of the analysis depending on each Party's expertise and areas of concern.
7. Through a joint scoping process, the Parties will scope the issues to be included in the EIS.
8. Each Party shall review the environmental analysis and documentation prior to issuance of the draft and final EIS. As required by SEPA, a responsible official from the County and a responsible official from Ecology shall sign the final EIS prior to issuance. The signature of the SEPA responsible officials shall represent approval of the document, including the adequacy of the environmental analysis it contains.

C. The Corps agrees to:

1. Actively participate in the interagency working group.
2. Coordinate with the County and Ecology to ensure that all Parties are apprised of current events in relation to the joint NEPA/SEPA document.
3. Coordinate with the County and Ecology in identifying issues and defining the scope of the joint NEPA/SEPA document.
4. Coordinate with the County and Ecology to the maximum extent possible in the development and preparation of the joint NEPA/SEPA document, consistent with legal requirements and the Corps' responsibility as the federal lead agency.
5. Provide information and analyses as may be needed in the preparation of the joint NEPA/SEPA document.
6. Encourage other Federal agencies to consult with the County and Ecology in regard to actions under their jurisdiction and on any decisions resulting from the joint NEPA/SEPA document.

7. Coordinate the comments and analyses of other federal agencies.

D. The County agrees to:

1. Actively participate in the interagency working group.
2. Coordinate with the Corps and Ecology to ensure that all Parties are apprised of current events in relation to the joint NEPA/SEPA document.
3. Coordinate with the Corps and Ecology to the maximum extent possible in the development and preparation of the joint NEPA/SEPA document, consistent with legal requirements and the County's' responsibility as the SEPA co-lead agency.
4. Coordinate with the Corps and Ecology in identifying issues and defining the scope of the joint NEPA/SEPA document.
5. Provide information and analyses as may be needed in the preparation of the joint NEPA/SEPA document.
6. Coordinate the comments and analyses of other state and local agencies.
7. Provide Geographical Information Systems (GIS) products to assist the Corps and Ecology and the interagency working group in the development of the joint NEPA/SEPA document.
8. Facilitate meetings of the NEPA/SEPA interagency working group.

E. Ecology agrees to:

1. Actively participate in the interagency working group.
2. Coordinate with the Corps and the County to ensure that all Parties are apprised of current events in relation to the joint NEPA/SEPA document.
3. Coordinate with the Corps and the County to the maximum extent possible in the development and preparation of the joint NEPA/SEPA document, consistent with legal requirements and the County's' responsibility as the SEPA co-lead agency.
4. Coordinate with the County and Ecology in identifying issues and defining the scope of the joint NEPA/SEPA document.
5. Provide information and expertise as needed to help identify and assess alternatives for the joint NEPA/SEPA document.
6. Provide information and analyses as may be needed in the preparation of the joint NEPA/SEPA document.

7. In cooperation with the County, ensure compliance with all requirements of SEPA as they relate to the preparation of the EIS, serving as a co-lead state agency for preparing the EIS.

8. Provide venue for meetings of the NEPA/SEPA interagency working group.

## **VI. DISPUTE RESOLUTION**

1. The Parties agree to try to make decisions by consensus throughout the EIS process in regards to scope, content, and timing. The Parties recognize that the EIS must contain sufficient environmental analysis for decision-making of all agencies with jurisdiction. Therefore, areas of environmental concern, potential mitigation, and reasonable alternatives suggested by any Party shall be included in the analysis.

2. If the Parties cannot agree on an issue that would prevent their approval of the EIS or otherwise prevent them from sharing lead agency duties, any Party may withdraw from this MOU following notification to the other Parties in writing of the issue under dispute, including a suggested resolution. The other Parties receiving such a letter shall have the option to agree to the suggested resolution, offer an alternative resolution, or agree to dissolve the MOU after the 30 day notification required in Section VIII, Item 9.

3. If at any time the MOU is dissolved, any two Parties to this Agreement may enter into a subsequent MOU for the purpose of continuing in the joint preparation of an EIS. If the MOU is dissolved and Ecology and the County do not enter into a subsequent MOU, the County as the nominal lead shall acquire full responsibility as the SEPA lead agency for the proposal.

## **VII. TREATMENT OF DELIBERATIVE DOCUMENTS**

1. The Parties to this MOU acknowledge that there will be some notes, drafts, and other deliberative documents produced during the course of drafting a joint NEPA/SEPA document that are exempt from public disclosure under RCW 42.56.280 of the State Public Records Act or under 5 U.S.C. § 552(b)(5) of the Freedom of Information Act (FOIA). Generally, during the drafting of a NEPA EIS, the Corps has exercised its deliberative process exemption pursuant to 5 U.S.C. § 552(b)(5) for, but not limited to, the following documents: preliminary draft EIS chapters, comments to preliminary draft EIS chapters, draft documents relating to ESA consultation, and correspondences regarding ESA consultations.

2. Any Party that receives a public records or FOIA request that relates to documents that may be protected as deliberative process will invoke the deliberative process exemption to the maximum extent possible.

When any Party determines that all or portions of deliberative documents should be released, that Party will consult with the Parties of this MOU to discuss and inform them of the documents that are to be released. After the consultation, if the Party subject to the request maintains its determination that the documents are to be released, then the Party will provide the Parties of this MOU timely notice prior to the release of the documents.

## VIII. OTHER PROVISIONS

1. Nothing in this MOU shall be construed as limiting or affecting in any way the authority or legal responsibilities of the Corps<sup>1</sup>, the County, or Ecology.
2. Nothing in this MOU binds the Parties to perform beyond their respective authorities.
3. Nothing in this MOU requires the Parties to assume or expend any funds in excess of available appropriations, authorized by law.
4. The mission requirements, funding, personnel, and other priorities of the Parties may affect their ability to fully implement all the provisions identified in this MOU.
5. This MOU is neither a fiscal nor a funds obligation document. Specific activities that involve the transfer of money, services, or property between the Parties shall require execution of separate agreements or contracts.
6. Nothing in this MOU restricts the Parties from participating in similar activities or arrangements with other public or private agencies, organizations, or individuals.
7. Each and every provision in this MOU is subject to the laws of the State of Washington, the laws of the United States of America, and to the delegated authority assigned in each instance.
8. Amendments or supplements to this MOU may be proposed by the parties and shall become effective upon written approval of all Parties.
9. In addition to the dispute resolution mechanism in Section VI of this agreement, any of the Parties may terminate its participation in this MOU at any time through written notification to the other Parties at least 30 days prior to termination.
10. This MOU shall become effective upon signature by all Parties. This MOU may be executed in one or more counterparts, each of which will be considered an original document.
11. This MOU shall remain in effect until the completion of the EIS or three years after the effective date of this MOU, terminating on the earliest of the two options.

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<sup>1</sup> Signing this MOU shall not be construed as diminishing or affecting in any way the Corps' authority under Section 10 of the Rivers and Harbors Act (33 U.S.C. 401, et seq.), Section 404 of the Clean Water Act (33 U.S.C. 1344), or other relevant federal statutes and regulations, nor does such signing alter or affect any tribal treaty rights, jurisdictional rights, or property boundaries.

## **IX. CONTACTS**

The primary points of contact for carrying out the provisions of this MOU are:

### For the Corps:

Randel Perry  
Seattle District Regulatory Branch  
Northwest Field Office  
1440 10<sup>th</sup> Street, Suite 102  
Bellingham, Washington 98225-7028  
(360) 734-3156 (office)  
(360) 393-2867 (cell)  
[Randel.j.perry@usace.army.mil](mailto:Randel.j.perry@usace.army.mil)

### For the County:

Tyler R. Schroeder - Planning Supervisor  
Whatcom County Planning and Development Services  
5280 Northwest Drive  
Bellingham, Washington 98225  
(360) 676-6907 ext. 50202  
[Tschroed@co.whatcom.wa.us](mailto:Tschroed@co.whatcom.wa.us)

### For Ecology:

Alice Kelly  
Department of Ecology  
Northwest Regional Office  
3190 160<sup>th</sup> Ave SE  
Bellevue, WA 98008  
(425) 649-7128 (office)  
(425) 681-6236 (cell)  
[Alice.kelly@ecy.wa.gov](mailto:Alice.kelly@ecy.wa.gov)

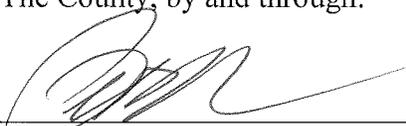
**X. Signature:** The parties hereto have signed this MOU as of the dates shown below. The effective date of this MOU is the date of the signature last affixed to this page.

The Corps, by and through:

  
\_\_\_\_\_  
Michelle Walker  
Chief, Seattle District Regulatory Branch  
U. S. Army Corps of Engineers

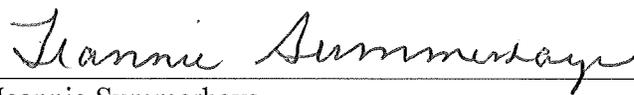
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The County, by and through:

  
\_\_\_\_\_  
Pete Kremen  
County Executive  
Whatcom County Planning and Development Services Department

10-6-11  
\_\_\_\_\_  
(DATE)

Ecology, by and through:

  
\_\_\_\_\_  
Jeannie Summerhays  
Northwest Regional Office Director  
Washington State Department of Ecology

10/10/11  
\_\_\_\_\_  
(DATE)