

AMENDMENT TO THE 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

ENVIRONMENTAL IMPACT STATEMENTS

FOR THE GATEWAY PACIFIC TERMINAL PROJECT

And The

BNSF CUSTER SPUR MODIFICATIONS PROJECT

I. PARTIES

This Amended 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”. This document supersedes the original MOU executed between the Parties.

II. PURPOSE

The purpose of this MOU is to establish and describe a collaborative effort between the Parties for the synchronized development and preparation of two separate documents by the current 3rd Party Contractor (CH2MHILL) to address: (1) the Corps’ statutory responsibilities set forth in the National Environmental Policy Act (NEPA), and (2) the County and Ecology’s statutory responsibilities set forth in Washington State Environmental Policy Act (SEPA); and (3) to enable the sharing of information and data that is relevant to both the NEPA and SEPA documents and enable collaborative coordination with CH2MHILL so that two environmental documents maybe prepared consistent to the extent possible according to each agency’s respective decision-making authorities. 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 for the proposed project’s NEPA document, and the County and Ecology as the local and State lead agencies in the SEPA document and establishes procedures for how the Parties will work collaboratively to produce these two documents.

III. INTRODUCTION AND BACKGROUND

These NEPA and SEPA documents will each assess the environmental impacts of the proposed construction of a deepwater wharf and causeway and associated upland facilities, including material handling and rail facilities, as well as other associated project impacts. The NEPA and SEPA documents will also evaluate a number of alternatives associated with this proposed project. The NEPA document will support permit decisions by the Corps. The SEPA document will support 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 agencies¹ 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 NEPA EIS will be developed in accordance with the National Environmental Policy Act (NEPA) and the SEPA EIS will be developed in accordance with 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 NEPA EIS whereas Ecology and the County have joint authority to determine what needs to be included in the SEPA EIS.

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 the separate NEPA and SEPA documents.

2. 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

¹ For the purpose of this MOU, “co-lead agencies” refers to the collaborative effort by the County, Ecology, and the Corps to produce two separate documents to meet each agency’s respective SEPA or NEPA responsibilities. Pursuant to WAC 197-11-944, the County and Ecology agree to share the responsibilities of being SEPA co-lead agencies for this SEPA document. The Corps is the sole lead agency for the NEPA document.

public meetings of benefit to the process of developing and preparing the separate NEPA and SEPA documents.

3. 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.

4. Subject to the dispute resolution process outlined below, the Corps retains exclusive determination of what should be included in the NEPA document, and the County and State retain exclusive determination of what should be included in SEPA document.

B. General Duties

1. The Parties will work together to execute the Communications Protocol between the Parties and the Third Party Contractor.

2. The Parties will develop and approve work plans and schedules describing key dates, issues, milestones, and process steps for the separate NEPA and SEPA documents that are subject to revision upon agreement by the Parties as needed to respond to emerging issues. Schedules and respective decision-making milestones, such as publication of separate draft EISs, will align to the maximum extent possible.

3. 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.

4. Through the project's scoping processes, the Parties have independently determined their scopes of analysis for inclusion in their respective separate NEPA document and SEPA document. Where there is overlap, the Parties will collaborate and share information for the NEPA document and SEPA document and will work together collaboratively with the goal of ensuring consistency in the development, preparation, and content of the overlapping portions of their respective NEPA and SEPA documents. Subject to the dispute resolution process outlined below, the Parties may provide independent technical input to the 3rd Party Contractor for their respective documents.

5. The Corps shall independently review the environmental analysis and documentation exclusive to the draft and final NEPA document. The County and Ecology shall independently review the environmental analysis and documentation exclusive to the draft and final SEPA document. Where there is overlap, the Parties will coordinate review of the environmental analysis and documentation. As required by SEPA, a responsible official from the County and a responsible official from Ecology shall sign the final SEPA 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 collaborative process.

2. Coordinate with the County and Ecology to ensure that all Parties are apprised of current events in relation to the NEPA document and SEPA document.
3. Coordinate with the County and Ecology in identifying issues that are relevant to the Corps review under NEPA and the County/Ecology's review under SEPA.
4. Coordinate with the County and Ecology, as needed, to help identify and assess alternatives.
5. Coordinate with the County and Ecology to the maximum extent possible in the development and preparation of a federal NEPA document and SEPA document, consistent with legal requirements and the Corps' responsibility as the federal lead agency.
6. Provide information and analyses as may be needed in the preparation of the NEPA document and SEPA document.
7. 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 NEPA document and SEPA document.
8. Coordinate the comments and analyses of other federal agencies.

D. The County agrees to:

1. Actively participate in the collaborative process.
2. Coordinate with the Corps and Ecology to ensure that all Parties are apprised of current events in relation to the NEPA document and SEPA document.
3. Coordinate with the Corps and Ecology to the maximum extent possible in the development and preparation of the NEPA document and SEPA document, consistent with legal requirements and the County's responsibilities.
4. Coordinate with the Corps and Ecology, as needed, to help identify and assess alternatives.
5. Coordinate with the Corps and Ecology in identifying issues that are relevant to the Corps review under NEPA and the County/Ecology's review under SEPA.
6. Provide information and analyses as may be needed in the preparation of the NEPA document and SEPA document.
7. Coordinate the comments and analyses of other state and local agencies.
8. Provide Geographical Information Systems (GIS) products to assist the Corps, Ecology and the 3rd Party Contractor in the development of the NEPA document and SEPA document.
9. Facilitate meetings between the Parties.

10. Modify the CH2MHill contract to reflect the provision of this Amended MOU and the deliverables of a separate federal NEPA EIS and a separate County/Ecology SEPA EIS. This modification to the 3rd Party Contractor contract will include language that requires the Corps to review and approve the scope of work specific to the NEPA document prior to the County agreeing to the commencement of the deliverables.

E. Ecology agrees to:

1. Actively participate in the collaborative process.
2. Coordinate with the Corps and the County to ensure that all Parties are apprised of current events in relation to the NEPA document and SEPA document.
3. Coordinate with the Corps and the County to the maximum extent possible in the development and preparation of the NEPA document and SEPA document, consistent with legal requirements and the County's responsibility as the SEPA agency.
4. Coordinate with the Corps and the County, as needed, to help identify and assess alternatives.
5. Coordinate with the Corps and the County in identifying issues that are relevant to the Corps review under NEPA and the County/Ecology's review under SEPA.
6. Provide information and analyses as may be needed in the preparation of the NEPA document and 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. Facilitate meetings between the Parties.

VI. DISPUTE RESOLUTION

A. The Parties agree to try and make decisions by consensus throughout the process in regards to scope, content, and timing for the separate NEPA and SEPA documents. In the event the parties cannot agree on a particular issue, the dispute shall be referred for discussion between the District Engineer, the Director of Ecology, and a County Executive. Those three shall meet and confer with each other and attempt to reach consensus. In the event those three cannot reach consensus, the Corps retains authority to determine the scope, content and timing of the NEPA EIS, and the County and Ecology jointly retain authority to determine the scope, content and timing of the SEPA EIS.

B. The Parties shall attempt to agree on data, issues, and methodologies to be used in areas where the NEPA and SEPA analyses and documents overlap. If they cannot agree, then the Parties shall follow the dispute resolution process described in A above.

C. If Ecology and the County cannot agree on an issue that would prevent their approval of the SEPA EIS or if Ecology or the County are otherwise prevented from sharing lead agency duties, either of them may withdraw from this MOU following notification to the other Parties in writing of the issue under dispute, including a suggested resolution. The other Party 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.

D. 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 this collaborative process. 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 DOCUMENTS

A. Treatment of deliberative documents in response to a public disclosure request. The Parties to this MOU acknowledge that there will some notes, drafts, and other deliberative documents produced during the course of drafting the NEPA and SEPA documents that may be 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).

1. 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 correspondence 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 applicable to that Party, to the extent consistent with law, to allow the Parties to appropriately discuss pre-decisional materials during the draft process. The parties acknowledge that the Washington courts have interpreted the state deliberative process exemption to be narrow.

3. When any Party determines that all or portions of potentially 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 other Parties of this MOU timely notice prior to the release of the documents.

B. Coordination amongst the co-leads regarding public outreach and the proactive release of documents to the public. The Parties agree to coordinate with each other and seek consensus, as much as possible, regarding general public outreach efforts for the NEPA document and the SEPA document.

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 Corps², 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 latter of either the Corps making its final decision regarding the applicant's Department of the Army permit application or the County and Ecology making final decisions on the applicant's shoreline permit applications unless the MOU was terminated in accordance with Section VI.

² 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 10th Street, Suite 102
Bellingham, Washington 98225-7028
(360) 734-3156 (office)
(360) 393-2867 (cell)
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

For Ecology:

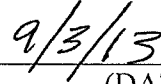
Alice Kelly
Department of Ecology
Northwest Regional Office
3190 160th Ave SE
Bellevue, WA 98008
(425) 649-7128 (office)
(425) 681-6236 (cell)
Alice.kelly@ecy.wa.gov

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 document.

The Corps, by and through:



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



(DATE)

The County, by and through:



Jack Louws
County Executive
Whatcom County Planning and Development Services Department

9/4/13

(DATE)

Ecology, by and through:



Josh Baldi
Northwest Regional Office Director
Washington State Department of Ecology

9.18.13

(DATE)