

MEMORANDUM OF UNDERSTANDING
Between
THE U.S. ARMY CORPS OF ENGINEERS
Seattle District Regulatory Branch
And
COWLITZ COUNTY
Department of Building and Planning
And
WASHINGTON STATE
Department of Ecology
Regarding the
DEVELOPMENT OF AN ENVIRONMENTAL IMPACT STATEMENT
FOR THE MILLENNIUM BULK TERMINALS LONGVIEW, LLC 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), Cowlitz County Department of Building and Planning (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 Millennium Bulk Terminals Longview, LLC’s coal export terminal at Longview, in Cowlitz County, Washington. 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 associated with the proposed construction of dock facilities and associated upland facilities, including material handling and rail facilities, and evaluate a number of alternatives. The joint NEPA/SEPA document will support decisions by the Corps, County, Ecology, and any other Washington State agency 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. The County will be the nominal lead for the SEPA process.

IV. AUTHORITIES

A. Corps Authority: The National Environmental Policy Act (42 U.S.C. § 4321-4347); the Council on Environmental Quality’s NEPA implementing Regulations (40 C.F.R. parts 1501 – 1508); the Corps’ NEPA implementing regulations (33 C.F.R. parts 230 and 325, appendix B).

B. County Authority: The Washington State Environmental Policy Act (RCW 43.21C) and Cowlitz County Code Chapter 19.11.

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

The Environmental Impact Statement (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 to ensure consistency and coordination in the development and preparation of a joint NEPA/SEPA document.
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 public meetings of benefit to the process of developing and preparing a joint NEPA/SEPA document.
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.

B. General Duties

1. The Parties will jointly accept, review, and rank bids from prospective Third Party Consultants for preparation of the EIS.
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. These are subject to revision upon agreement by the Parties as needed to respond to emerging issues.
5. The Parties will coordinate with the applicant to obtain all relevant information regarding the proposal, environmental impacts, and potential mitigation, including any studies that are in progress or that have been completed related to the project.

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. Coordinate with the County and Ecology to ensure that all Parties are apprised of current events in relation to the joint NEPA/SEPA document.
2. Coordinate with the County and Ecology in identifying issues and defining the scope of the joint NEPA/SEPA document.
3. 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.
4. Coordinate with the County and Ecology as needed to help identify and assess alternatives for the joint NEPA/SEPA document.
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.
8. Facilitate meetings and provide venues for meetings of the co-lead agencies as determined jointly by the co-lead agencies.

D. The County agrees to:

1. Coordinate with the Corps and Ecology to ensure that all Parties are apprised of current events in relation to the joint NEPA/SEPA document.
2. Coordinate with the Corps and Ecology in identifying issues and defining the scope of 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 as needed to help identify and assess alternatives for 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. In cooperation with Ecology, ensure compliance with all requirements of SEPA as they relate to the preparation of the EIS, serving as co-lead agency for preparing the EIS.
8. Facilitate meetings and provide venues for meetings of the co-lead agencies as determined jointly by the co-lead agencies.

E. Ecology agrees to:

1. 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.
2. Coordinate with the Corps and the County in identifying issues and defining the scope of 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 Ecology's responsibility as the SEPA co-lead agency.
4. Coordinate with the Corps and the County as needed to help identify and assess alternatives for 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. In cooperation with the County, ensure compliance with all requirements of SEPA as they relate to the preparation of the EIS, serving as co-lead agency for preparing the EIS.
8. Facilitate meetings and provide venues for meetings of the co-lead agencies as determined jointly by the co-lead agencies.

VI. DISPUTE RESOLUTION

A. The Parties agree to try and 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.

B. 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.

C. If at any time this 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 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 a joint NEPA/SEPA document 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 allow the Parties to appropriately discuss pre-decisional materials during the draft process.

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 regarding general public outreach efforts and the proactive release of documents to the public. Any Party may post final documents on its respective website if the Parties agree that such

documents are publicly releasable. This section shall not be construed as limiting each Party's authority to maintain a website that posts information and documents for public informational purposes.

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 Corps¹, 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 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 agreements 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.

¹ 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 jurisdictional rights, or property boundaries.

IX. CONTACTS

For the Corps:

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For Ecology:

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X. SIGNATURES

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.

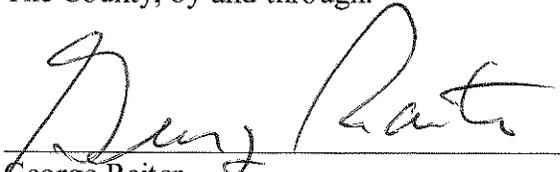
The Corps, by and through:



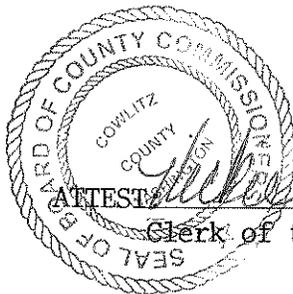
Michelle Walker
Chief, Seattle District Regulatory Branch
U.S. Army Corps of Engineers

10/3/12
(Date)

The County, by and through:

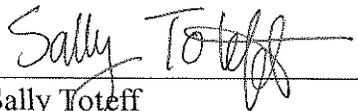


George Raiter
Chairman, Board of County Commissioners
Cowlitz County



Clerk of the Board

Ecology, by and through:



Sally Toteff
Southwest Regional Office Director
Washington State Department of Ecology

9/28/2012
(Date)