

AMENDMENT TO THE 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 ENVIRONMENTAL IMPACT STATEMENTS  
FOR THE MILLENNIUM BULK TERMINALS LONGVIEW, LLC 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), Cowlitz County Department of Building and Planning (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 Third Party Contractor ICF Jones & Stokes, Inc. (ICF) to address: (1) the Corps’ statutory responsibilities set forth in the National Environmental Policy Act (NEPA) (2) the County and Ecology’s statutory responsibilities set forth in Washington State Environmental Policy Act (SEPA); (3) to enable the research, collection, and analysis of information and data that is relevant to both the NEPA and SEPA documents; and (4) to enable collaborative coordination with ICF so that the two environmental documents may be prepared consistent with each agency’s respective authorities. This MOU is limited to Millennium Bulk Terminals Longview, LLC’s (MBTL) shipping terminal for coal export (proposed project) at Longview, in Cowlitz County, Washington. Under this MOU the Corps is the federal lead agency for the proposed project NEPA review, and the County and Ecology are co-lead agencies for the proposed project SEPA review. The County is the nominal lead agency under SEPA. This MOU establishes procedures for how the Parties will work collaboratively to conduct this review and produce environmental impact statements.

**III. INTRODUCTION AND BACKGROUND**

These NEPA and SEPA documents will each assess the environmental impacts of the proposed construction of dock facilities and associated upland facilities, including material handling and rail facilities, and evaluate a number of alternatives associated with this proposed project. The NEPA document will support permit decisions by the Corps to issue, condition, or deny

authorization for the proposed MBTL project. The SEPA document will inform future permit decisions made by the County, Ecology, and any other Washington State agency with permitting authority. The Parties will be co-lead agencies<sup>1</sup> 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 its implementing regulations, WAC 197-11 and Cowlitz County Code Chapter 19.11.

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

The NEPA Environmental Impact Statement (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 acknowledge that the Corps has sole authority to determine what needs to be included in the NEPA document pursuant to its responsibilities under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act whereas Ecology and the County have joint authority to determine what needs to be included in the SEPA document.

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

A. The Parties mutually agree to:

1. Work together collaboratively to ensure consistency and coordination in the development and preparation of their respective 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 public meetings of benefit to the process of developing and preparing the 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.

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<sup>1</sup> 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.

4. If the Corps, County, and Ecology have reason to believe that information being developed or analyzed would overlap in the NEPA document and SEPA document, then the parties will meet to discuss and seek consensus on how the data collection and analyses will be done and used in their respective documents. Subject to the dispute resolution process outlined in Section VI below, the Corps retains exclusive determination of what should be included in the NEPA document, and the County and Ecology retain exclusive determination of what should be included in SEPA document.

**B. General Duties**

1. The Parties shall act to meet their respective responsibilities under NEPA and SEPA in a coordinated and efficient manner.

2. The Parties shall work together collaboratively to ensure consistency and coordination in the development and preparation of their respective NEPA and SEPA documents.

3. The Parties will utilize the Communications Protocol between the Parties and the Third Party Contractor, ICF.

4. 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 and final EISs, will align to the maximum extent possible.

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. Through the project's scoping processes, the Parties will independently determine their scopes of analysis for inclusion in the 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. Subject to the dispute resolution process outlined in Section VI below, the Parties may provide independent technical direction to the Third Party Contractor for their respective documents.

7. 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.

8. As the nominal lead agency under SEPA, the County shall have sole authority to enter into a professional services agreement with ICF. The County contract for professional services with ICF is not on behalf of the Corps or Ecology and nothing in this agreement will be construed to establish a contractual obligation to maintain the ICF professional services agreement or confer any third party rights or benefits of any kind on the Corps, Ecology or the applicant with respect to the maintenance or implementation of the agreement. The Corps and Ecology expressly acknowledge that the County is not an agent or representative of the Corps or Ecology with respect to the ICF professional services agreement. The Corps and Ecology expressly waive all claims against the County with respect to the ICF professional services agreement. The Corps and Ecology further acknowledge that the County may with or without cause terminate the professional services agreement with ICF at any time with notice to the Corps and Ecology and without liability of any kind to the Corps and Ecology.

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 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.
5. Provide information and analyses as may be needed in the preparation of the NEPA document and 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 NEPA document and 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. 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 Ecology in identifying issues and defining the scope of the SEPA document.
4. 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 as a SEPA co-lead agency.
5. Provide information and analyses as may be needed in the preparation of the NEPA documents and 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.
9. Subject to express acknowledgments and waivers in Section V(B)(8) above, administer the ICF professional services agreement consistent with the terms of this amended MOU.

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 County in identifying issues and defining the scope of the SEPA document.
4. 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 Ecology's responsibility as a SEPA co-lead agency.
5. Provide information and analyses as may be needed in the preparation of the NEPA document and 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 a co-lead state 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 process in regards to scope, content, and timing for the separate NEPA and SEPA EISs. 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 the Chairman of the Cowlitz County Board of Commissioners. 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. A 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.

B. The County and Ecology recognize that the SEPA 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 either the County or Ecology shall be included in the analysis for the SEPA EIS. If the County and Ecology 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 follow the dispute resolution process described in A above.

C. Where the content of NEPA and SEPA documents may overlap, the Parties shall seek consensus on data collection, study areas, methodologies and other issues to be used in preparing the NEPA and SEPA documents. If they cannot agree, the Parties shall follow the dispute resolution process described in A above. If a consensus resolution cannot be reached, then the Parties may direct the Third Party Contractor on analyses or content in the separate NEPA or SEPA documents. Any changes to the scope of work caused by one of the Parties giving separate direction to the Third Party Contractor must be provided in writing to the other Parties and coordinated with the County for contracting changes.

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 Washington courts have construed the deliberative process privilege under state law to be narrow.

When any Party determines that all or portions of potentially deliberative documents should be released, that Party will consult with the Parties to 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.

3. Nothing in this agreement shall be construed to alter or modify the statutory obligations of a Party to respond to a request for public records.

B. Coordination amongst the Parties 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, 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 Corps<sup>2</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 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.

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<sup>2</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 jurisdictional rights, or property boundaries.

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 (1) the Corps making its final decision regarding the applicant's Department of the Army permit application or (2) the County and Ecology making final decisions on the applicant's shoreline permit applications.

## **IX. CONTACTS**

### For the Corps:

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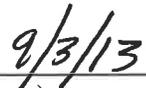


**X. SIGNATURES**

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 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:

Michael A. Karnofski

Michael Karnofski  
Chairman, Board of County Commissioners  
Cowlitz County

Oct. 1, 2013  
(Date)

**ATTEST:**

Jackie M. Musgrove

**CLERK OF THE BOARD**

**DATE:** Oct. 1, 2013





Ecology, by and through:

*Sally Toteff*

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Sally Toteff  
Southwest Regional Office Director  
Washington State Department of Ecology

*9-19-2013*

\_\_\_\_\_  
(Date)

