

Appendix A

Questions Regarding Substantive Impacts

Gateway Pacific Terminal Expansion
Cherry Point, Washington

1. **Atmospheric Science (NEPA/SEPA Analysis)**. Should the NEPA/SEPA analysis include estimates of whether the activity will contribute to the generation of power plant emissions in Asia that will eventually migrate to North America, thus adding to health hazards and adverse effects on the environment? What are the impacts of the proposal on the Western Climate Initiative targets?

- In their Project Information discussion, the applicant relies on the Council of Environmental Quality rule, generally stating that scientific expertise does not yet exist to make direct ties between some activities and the effects of greenhouse gas emissions.
- That rule does not appear to create a safe haven for air quality impact analysis for the Gateway Pacific Terminal Expansion Project for the following reasons:
 - Unlike the scenarios contemplated by the CEQ rule, the following direct linkage exists between the proposed activity and air quality impacts:
 - The proposed activity is the mining, transport and shipping of coal to China for use in China's coal-fired power plants, based on the applicant's description.
 - The product of the activity will create emissions in quantities that can be calculated, based on the quantities shipped.
 - Scientific, peer-reviewed and published studies demonstrate that emissions from China will travel to North America. For example, one of these studies estimates that an average of 16 percent of the mercury in the environment in North America comes from atmospheric transport of Asian sources. The citation is attached in Appendix C.
 - The CEQ rule is designed to address NEPA review where the link between the activity and the impact is attenuated. This was the case where emission impacts from a particular power plant were alleged to include destruction of polar bear habitat in the arctic. This proposal is not a "polar bear" scenario, trying to tie a particular power plant to the demise of a species. Thus, the CEQ rule does not limit the scope of NEPA and SEPA review.
 - Recent NEPA court decisions support this conclusion, where appellants have alleged that NEPA requires review of the greenhouse gas emission impacts associated with coal mining, and oil/natural gas extraction.

- The idea that a failure to approve this activity will result in exports by others and thus the emissions will occur no matter what, does not absolve this applicant from reviewing the impacts of the proposal.

2. Rail Line Transportation Impacts. The proposed transportation of coal from the Powder River Basin to Cherry Point involves impacts that can and should be regulated by appropriate federal agencies, thus triggering NEPA review of those impacts. These agencies have a duty to review and regulate impacts precluded by the Clean Water Act, the Endangered Species Act, the Clean Air Act, and the Rivers and Harbors Act, among other federal laws and regulations. Rail line transportation impacts are thus within the scope of your review at this time and should be identified by the applicant as part of the JARPA and iMAP review.

We question why the iMAP team would allow only a very narrow discussion of rail line transportation impacts, as set forth in the applicant's Project Information submittal to you. Aren't the impacts of coal transport known along the alternative routes identified for this proposal? Since the routes are known, can't the impacts be identified and quantified?

Public consideration of the following would allow a more informed debate of the merits of the proposal:

- From what we can determine, and as shown on the attached BNSF map and Appendix B from the Whatcom County comprehensive plan, there are only five possible rail line approaches from the mines at the Powder River to the Cherry Point terminal north of Bellingham:
 - (1) Through Spokane, south through the tri-cities, along the Columbia River and up through the Puget Sound coastline, through Bellingham;
 - (2) Through Spokane, west to Wenatchee and Snohomish, then north through Everett and through Bellingham;
 - (3) Through Spokane to the tri-cities and then west over Stampede Pass, through Auburn, Seattle, Everett and then through Bellingham;
 - (4) Through any of the routes 1-3, but switching at Burlington to the Highway 99 route north to Lynden, then across to Custer through a new rail line shown in Appendix B; or
 - (5) Through Canada and then south to Cherry Point, through either Blaine or the new Lynden/Custer route.
- Each of these rail scenarios are alternatives that could be studied during NEPA review. In the Applicant's detailed project information document, the only analysis of impacts to traffic by use of the rails to transport up to nine additional coal trains per day, are localized impacts on 15 intersections. Unfortunately, this small scope does not take into account the impacts the project will have upon our state as a whole and our local communities.

- The applicant has proposed that your impact analysis be limited to consideration of 18 trains per day of additional rail traffic (9 trips in, 9 trips out).
- Nothing in the public materials seems to indicate the applicant will limit the proposed use to 18 trains per day. Thus, why would the NEPA/SEPA analysis be limited to those numbers?
- To the contrary, the Project Information analysis of transportation impacts indicates that impacts greater than those estimated for 18 trains per day may require additional mitigation by the time of full build-out in 2026.
- Wouldn't a more useful analysis project the number of trains serving the facility in 2026, at full buildout? Shouldn't agencies require the applicant to quantify the full potential of the facility and utilize those numbers as the worst-case-scenario for purposes of NEPA/SEPA review?
- Along the 5 possible rail routes, conflicts will develop between trains (up to a mile and a half long) and local traffic at local intersections. Shouldn't the analysis assess the possibility that those conflicts might have substantial economic impacts to local businesses dependent on traffic getting through rail crossings?
- What is the impact of 18 or more 1 – 1 ½ mile-long trains on the recovery of local businesses from the recession? What is the impact at full buildout?
- Shouldn't this project and NEPA review include a cumulative impacts analysis for each of the five alternative routes?
- The current application submittal does not appear to include an analysis of cumulative impacts involving: (a) 18 (plus) new trains per day; (b) freight and passenger trains already occupying the route; together with (c) known future expansion of current rail-use.
- The current application submittal does not appear to include an analysis of cumulative impacts that could adversely affect:
 - Sound Transit;
 - Amtrak;
 - The state and federal investment in "freight mobility"; or
 - The federal investment in the "high-speed-rail" program in Washington.
- The current application submittal does not appear to include an analysis of:
 - Conflicts with local, County, and multi-county policies promoting efficient transportation (*See, e.g.*, Appendix B);
 - Risk analysis of accident rates and possible spills into the Puget Sound;
 - Analysis of landslide impacts on trains, idling of locomotives, spills;

- Stormwater impacts along route from coal spillage, effects on local NPDES permit compliance;
- Effects of coal dust pollution and coal pollution on Puget Sound Partnership initiative to clean up the Puget Sound by 2020;
- Noise impacts;
- Diesel exhaust impacts from idling trains (where and for how long?); or
- Impacts from vibration of trains to properties adjacent to railroad tracks (effects of especially heavy coal trains on rail-line wear are well documented).

4. State Shoreline Management Act (SMA) Compliance. We understand that the applicant will attempt to rely on a revision to a 1997 shoreline permit. That approach appears to be based on an administrative determination made by the Whatcom County Planning and Development Services (PDS) Department. Please consider the following as you request more information from the applicant:

- Our examination of Whatcom County's administrative determination regarding the 1997-2000 shoreline permit shows that it relates only to whether the prior application *is still active*.
- The County administrative determination does *not* determine that the prior application covers the new activities proposed in the current Gateway proposal.

In the interests of an accurate review of impacts to the shoreline, we urge you to treat the prior application as a proposal for a different activity that does not include stockpiling of massive quantities of coal in the upland area that drains to Puget Sound. Please consider the following:

- Does the applicant's approach improperly seek to avoid application for a new Shoreline Permit under new shoreline rules adopted by Whatcom County in 2008 supported by best available science?
- Is it appropriate for a project that has changed substantially to be reviewed under a "revision" that technically may not be appealable to the Shoreline Hearings Board?
- Will use of this process by the applicant and Whatcom County result in unnecessary delay, in the event this approach is overturned by a court as inadequate?

We request that the State Department of Ecology examine this issue closely and issue its own determination of whether this proposed approach would comply with the SMA.

5. Impacts from Storage of Coal on the Site. Does the applicant's project information contain an adequate analysis of impacts from storage of coal on the site? Our review of the available public information raises the following questions:

- Are the extremely sensitive marine resources adjacent to the site protected? Is there an analysis of the current economic value of the local fishery?

- Aren't eel grass beds within the adjacent Aquatic Reserve important to the survival of herring, which in turn are an important source of food for threatened Chinook and endangered Orca?
- Could that habitat and the herring fishery be adversely affected by coal dust and stormwater runoff from coal piles that end up in Puget Sound and the Salish Sea?
- Does this analysis take into account the known impacts to marine ecosystems from coal dust and runoff at the Canadian port near Tsawwassen? Is close scrutiny occurring, in light of the recent Tennessee coal dust disaster involving devastating impacts on local communities and streams?

6. Impacts of Global Warming ON the Project, i.e., Sea Level Rise. We have seen no indication that the agencies or the applicant are studying the impacts of global warming on the project, as required under Ecology's guidelines for review of SEPA impacts related to global warming. Much of the rail line is at or near the shoreline along the Salish Sea, or in the floodplain. Are the agencies participating in the iMAP process considering the following:

- Whether the BNSF will have the right to build bulkheads in the event of sea level rise, given that the state has jurisdiction over much of the tidelands and navigable waters and in light of impacts to littoral habitat important to spawning and migrating marine species;
- Whether anticipated heavier rainfall events will increase the incidence of mudslides along the BNSF route, thus increasing the severity of conflicts arising between coal traffic and other rail uses, idling coal trains and local communities, and blockages of rail crossings; or
- Whether rising sea levels will increase the severity of impacts to the pier and loading ships from wave action.

7. Inventory of Adopted Waterfront Development Plans Along the Route and the Possible Impacts to Economic Viability.

Our clients include business owners concerned with the future economic viability of cities along this rail route that are currently relying on future waterfront development. In gathering information for them about this proposal, we have the following questions about what information the applicant is providing:

- Are there any application materials that describe current economics of waterfront uses in these communities along the rail route?
- Are there any application materials that describe possible future impacts from the proposed mile-long trains on these waterfront businesses?
- If there is an analysis, is it based on the current estimate of 18 trains per day rather than the likely increases in numbers at full buildout (in year 2026)?

- Does the analysis quantify local revenues from waterfront seaside restaurants, housing developments, and new mixed use developments that depend on access to the Puget Sound as part of their viability?
- Is there any analysis of the number of potential new developments west of the rail lines that could be negatively impacted by this project and the scope of such impacts?
- Has the applicant conducted any inventory of adopted waterfront redevelopment plans by cities or ports along the Salish Sea route?

In conclusion, we urge the applicant and iMAP team to develop answers to the questions posed in the above seven sections of this Appendix A. This missing information will begin to provide the public and agencies with the basic information necessary to accurately assess the cumulative and long-term impacts of the proposal.

A key issue for local communities is whether the alleged economic benefit of the proposal in Whatcom County, as advertised by the applicant, outweighs the economic impacts that may result throughout the state and affected communities. We believe that local jurisdictions and other special districts, as well as the thousands of business and property owners with significant investments that could be affected by this project (not to mention interested citizens), have a right to be informed about one of the largest industrial projects in the state in recent history.

A student of the iMAP team process might conclude, sadly, that the exercise lacks perspective and grounding in reality, when it excludes the majority of affected jurisdictions, businesses, property owners, and citizens along the affected transportation corridor. Public confidence can be restored in the iMAP review if it is quickly revised to include a broader base, allowing these affected entities to participate in the discussion about project design, impacts, and scope of agency review to come. Without that change, this post-application, pre-NEPA/SEPA review process behind closed doors seems skewed in favor of the applicant. The affected public is left with the impression that the review is well underway, while they are being left outside as showpieces in an agency environmental review process that is already pre-determined in many important respects.

Appendix B

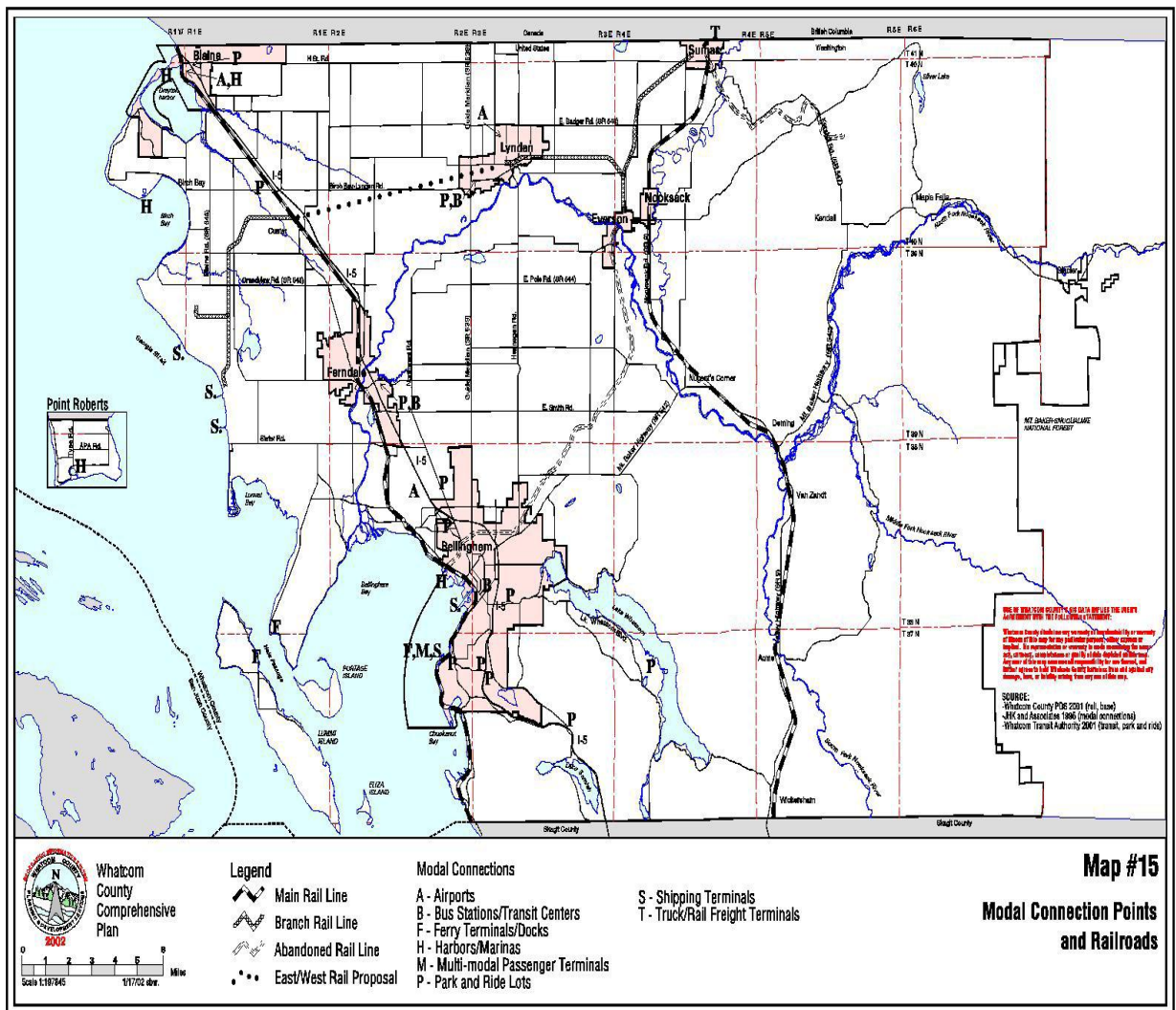
Whatcom County Comprehensive Plan Policies

A. Policies Requiring Study of Proposed Lynden/Custer Rail Extension

Policy 6P-2:

Consider proposals for an east/west rail freight corridor.

Map #16 Shows the location of the Lynden/Custer proposed freight corridor



From: Whatcom County Comprehensive Plan
Transportation Element, Page 23

B. Policies Requiring Support for an Efficient Transportation System

Policy 6L-4:

Support passenger rail service.

Policy 6N-1:

Support public transit system design that encourages frequent and convenient access points, and that integrates various transportation modes into the transit services, such as bus systems, park-and-ride lots for cars and bicycles, and bus, railroad and airline terminal facilities.

Policy 6R-2:

Support efficient movement of goods and people with regard to land use regulation and environmental and community impacts.

Appendix C

Asian Mercury Atmospheric Transport

1. UW Scientists in 2008 found that Asian sources of mercury, the largest share of which are emitted from coal combustion and smelting, account for an average of 16% of the atmospheric mercury deposited in North America.

Jaffe, D., Strode, S., *Sources, Fate and Transport of Atmospheric Mercury from Asia*, Environmental Chemistry Vol. 5(2): 121-126 (doi:10.1071/EN08010) (April 17, 2008).

2. Accord: Another scholarly, peer-reviewed study concludes that Asian emissions of mercury may account for 20-30% of remote mercury accumulations.

<http://atmos-chem-phys.net/10/1853/2010/acp-10-1853-2010.pdf>

3. Some good graphics on atmospheric transport of Asian mercury are found at:

Wilkening, K, Barrie, L., Engle, M., *Atmospheric Science: Trans-Pacific Air Pollution*, Science Magazine at [http://capita.wustl.edu/asia-fareast/Reports/Science%20-20Wilkening%20et%20al%20290%20\(5489\)%2065.htm](http://capita.wustl.edu/asia-fareast/Reports/Science%20-20Wilkening%20et%20al%20290%20(5489)%2065.htm)

4. The serious health effects of mercury in the environment are well understood, particularly the increases in serious health defects in infants:

Trasande, L., P. Landrigan & C. Schechter. 2005. *Public health and economic consequences of methyl mercury toxicity to the developing brain*. Environ. Health Perspect. 113: 590–596.

Trasande, L., C. Schechter, K. Haynes & P. Landrigan. 2006. *Mental retardation and prenatal methylmercury toxicity* Am. J. Ind. Med. 49: 153–158.

Appendix D

Sea Level Rise Estimates

From EPA website:

<http://www.epa.gov/climatechange/effects/coastal/index.html>

Sea level is rising along most of the U.S. coast, and around the world. In the last century, sea level rose 5 to 6 inches more than the global average along the Mid-Atlantic and Gulf Coasts, because coastal lands there are subsiding.

EPA, in coordination with the U.S. Geological Survey and the National Oceanic and Atmospheric Administration, has published a report, "Coastal Sensitivity to Sea Level Rise: A Focus on the Mid-Atlantic Region." The study is one of 21 climate change studies commissioned being conducted by the U.S. Global Change Research Program (USGCRP). "Coastal Sensitivity to Sea-Level Rise: A Focus on the Mid-Atlantic Region" discusses the possible impacts of sea-level rise and how governments and communities can respond to rising waters.

Higher temperatures are expected to further raise sea level by expanding ocean water, melting mountain glaciers and small ice caps, and causing portions of Greenland and the Antarctic ice sheets to melt. The International Panel on Climate Change (IPCC) estimates that the global average sea level will rise between 0.6 and 2 feet (0.18 to 0.59 meters) in the next century (IPCC, 2007).

The range reflects uncertainty about global temperature projections and how rapidly ice sheets will melt or slide into the ocean in response to the warmer temperatures. Furthermore, some processes affecting sea level sea level have long (centuries and longer) time-scales, so that current sea level change is also related to past climate change, and some relevant processes are not determined solely by climate. Climate models, satellite data and hydrographic observations demonstrate that sea level is not rising uniformly around the world. Depending on the region, sea level has risen several times the global mean rise, or has actually fallen (IPCC, 2007). While current model projections indicate substantial variability in future sea level rise at regional and local scales, the IPCC has concluded that the impacts are "virtually certain to be overwhelmingly negative" (IPCC, 2007).

Appendix E

Recommendations for Transparency

Part of our mission at Salish Land Policy Solutions is to assist government and private sector clients by developing credible information that elevates the discussion of important policy issues. In larger projects, like the Gateway Pacific Terminal Expansion, it is our experience that agency reviews gain the greatest public acceptance and credibility when they are transparent to interested members of the public and media, *from the outset*.

In our experience, early transparency has a direct effect on the quality and credibility of these larger projects. A project such as this one tends to span years in the permit review process rather than months. A perception of an atmosphere of secrecy at the beginning of this long permitting timeframe may give rise to controversy. By contrast, public involvement at the very inception builds public trust in the process that serves as a strong foundation for extended review. Public confidence early in the process results in fewer conflicts, less media dramatization, a more informed discussion of relevant policy issues, and thus a narrowing of issues and parties on appeal.

In the spirit of assisting the ORA review of the Gateway proposal, we offer the following observations:

Example One:

- In a recent conversation, the U.S. Army Corps of Engineers informed us that they are not evaluating any information from Whatcom County as part of their determination as to whether to prepare an EIS for the Gateway proposal.
- The ORA website information verifies that the Corps and the County have had extensive communications regarding joint NEPA/SEPA process, exchanged documents on the parameters for an RFP for an EIS consultant, and recently exchanged draft comment letters through the ORA process.

Conclusion: The Corps appears to have had substantial input and interaction with Whatcom County concerning co-lead of environmental review, despite its statements downplaying that interaction.

Recommendation: Post all communications between the Corps and Whatcom County on the IMAP website for immediate public review.

Example Two:

- The County and the applicant represent to the inquiring public, including ourselves, that they have not yet begun a County review process, i.e., no permit application has been submitted and thus no County review is taking place.
- Based on our investigation, there is a tremendous amount of work being conducted by County staff in this process concerning the specific details of the proposal, as reflected for example in the County's draft April 7 comment letter submitted to the ORA.
- County staff maintain that they will not be posting any information on the project on the County website describing this proposal until the applicant formally submits a major project application.
- The applicant and County are already in process on review of an existing shoreline permit, as an *ongoing* application for the terminal.
- For other larger proposals in process and of substantial public interest, the County website maintains a page where it posts information on applications, process, notices, agency comments and public comments.

Conclusion: It appears to some that the County and applicant are using the non-filing of a new major project application as a thin rationale for not airing the details of the Gateway proposal on the County website. Since extensive review of the Gateway JARPA proposal by the County staff has begun through the iMAP process but none of that work is posted on the County website, it appears to the public that the County is not making its extensive work readily accessible to the local public.

Recommendation: The County should not wait until of the major project application is submitted to trigger full communication on the County website regarding the scope of the new proposal and the County's review to date. The County should post all information on the County website and provide an interactive link for the interested public to register as parties of record for the proposal. Because the County's work is being conducted in connection with the terminal described in the existing shoreline permit, the County can reasonably charge the applicant for the time and resources spent on this additional but early public outreach.

Example 3:

- We understand the ORA has taken a legal position that the iMAP team meetings by video feed and the April 7 draft comment letters prepared by various federal, state and local agencies regarding the Gateway proposal are somehow protected from public disclosure under an exemption that protects only *intra* agency communications.

- The iMAP updates for the Gateway proposal specify that agency comments will be posted to the web, but only to an “internal” website that is not made available to the members of the public who are not part of the iMAP team.
- The video feeds occur electronically in order to assemble iMAP members for joint meetings from geographically separate locations.
- Apparently, some members of the public who are not the applicant are allowed to participate with the iMAP team. For example, Burlington Northern Santa Fe has been allowed to participate, although it is a private corporation, it is not a public agency, and it is not the applicant for the Gateway proposal. The applicant and the agencies appear to be treating the operations of BNSF as an outside service, not part of the application itself. If that is the case, the ORA appears to be allowing a private corporation (non-applicant) into the iMAP proceedings at the same time it is barring the public.

Conclusion: The iMAP team may be violating state law. Typically, electronic records may not be destroyed and may not be kept from the public, absent an exemption under the Public Records Act, RCW ch. 42.56. The comments submitted by each of the agencies on the proposal and their comments at meetings with the iMAP team (recorded electronically) are public documents involving the participation of separate agencies, not just discussions within a single agency.

The PRA contains an exception for “intra-agency” communications and records that express new formulations of policies, but does not exempt “inter-agency” communications, and those with outside parties. The rule developed by the Attorney General’s Office is as follows, codified in the “deliberative process exemption” at WAC 44-14-06002(4):

(4) **Deliberative process exemption.** RCW [42.17.310](#) (1)(i)/[42.56.210](#) (1)(i) exempts "Preliminary drafts, notes, recommendations, and **intra-agency** memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.¹² Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.¹³ It applies only to those portions of a record containing recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.¹⁴ The exemption does not apply to records or portions of records concerning the implementation of policy or the factual basis for the policy.¹⁵ The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations that are actually implemented lose their protection from disclosure after they have been adopted by the agency.¹⁶

¹²*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("PAWS II").

¹³*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.

¹⁴*PAWS II*, 125 Wn.2d at 256.

¹⁵*Cowles Pub. Co. v. City of Spokane*, 69 Wn. App. 678, 685, 849 P.2d 1271 (1993).

¹⁶*Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

(Emphasis added). Since the iMAP team is composed of multiple levels of government with multiple agencies represented, and those agencies are sharing opinions at these meetings, we see no justification for how this very narrow exemption could be stretched to address this situation. In addition, we do not believe the iMAP team is charged with *policymaking*, which is the basis for this exemption. Rather, these agency representatives are *implementing* policy choices already made by the state legislature and other policymaking bodies, through the permit process.

In addition, in terms of both the agency written materials and the video-meeting electronic transmissions, allowing a non-applicant, such as Burlington Northern, and even a non-agency, such as the applicant, to view the materials and attend the proceedings destroys any privilege or exemption that might otherwise apply intra-agency. While an applicant is entitled to a preapplication process, this applicant has already submitted a JARPA application. Information developed between agencies and the applicant – and now a third party, BNSF – is not intra-agency; it is therefore public and discoverable. The better course would be to produce this information to the public, even without public records requests.

Recommendation: (a) Produce all communications, documents, and video feeds on the iMAP website for public access; (b) preserve video feeds of meetings and recordings of conversations for public review after they occur in accordance with the records retention statutes; (c) request and obtain an Attorney General's opinion as to whether the iMAP inter-agency communications and opinions can be kept from public disclosure, even if the applicant were not provided that exclusive access; and (d) request the same opinion in circumstances where the applicant, a non-agency, is allowed access to the information and meetings.

We believe these three sets of recommendations would cure the public perception that the ORA and participating agencies are reviewing and assisting the applicant to refine the Gateway proposal outside of public view.

