

PROJECT INFORMATION DOCUMENT

Chapter 2. Project Permitting

Gateway Pacific Terminal

Whatcom County, Washington

Pacific International Terminals, Inc.

1131 SW Klickitat Way

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CHAPTER 2 PROJECT PERMITTING

Pacific International Terminals began initial permitting and environmental assessment for the Gateway Pacific Terminal in the late 1980s, and in 1997 received permits for what was then considered the first phase of the project. Since then, Pacific International Terminals has completed numerous additional studies and undertaken extensive collaboration with regulatory agencies, affected Native American Tribes, and other stakeholders. The studies and consultation have led to many project modifications and other changes intended to, among other considerations, mitigate impacts and address stakeholder concerns on earlier designs. This chapter summarizes the permits and authorizations that have been issued to date and outlines the remaining permits and approvals needed prior to construction of the project.

2.1 PERMITS AND AUTHORIZATIONS

Numerous permits and authorizations will be required from various federal, state, and local agencies to construct and operate the Gateway Pacific Terminal and for improvements to the Custer Spur. This section provides an overview of the permits that have already been retained and those that will be required for the project, organized by the responsible agency or jurisdiction.

2.1.1 Whatcom County

Several permits will be required from Whatcom County, as shown on Table 2-1. This section describes Whatcom County permitting activities conducted to date and summarizes additional anticipated permitting activities.

2.1.1.1 Whatcom County Permitting Activities from 1992 to Present

In 1992, after the completion of environmental studies and reviews, Pacific International Terminals submitted a SEPA Environmental Checklist and applications for a Shoreline Substantial Development Permit and a Major Development Permit to Whatcom County. Whatcom County determined that the application was complete and vested the project under the then existing Whatcom County Code and Shoreline Management Plan. In late 1992, Whatcom County issued a *Notice of Determination of Significance* and a request for comments on the scope of a SEPA EIS. Whatcom County subsequently retained a team of consultants to develop the EIS in accordance with applicable requirements. The Draft and Final SEPA EIS documents were published in 1996 and 1997, respectively (Whatcom County 1996 and 1997).

Table 2–1 Anticipated Permits and Authorizations for the Gateway Pacific Terminal

Permit/Authorization Name	Lead Agency	Regulated Activity	Regulated Terminal Project Component
Clean Water Act, Section 404 and Rivers and Harbors Act Section 10 Permit	USACE	Discharge of dredge or fill material into navigable waters and construction in or over navigable waters	All components
National Historic Preservation Act, Section 106 Review	USACE	Review of any action with a federal nexus	All components
National Environmental Policy Act	USACE	Review of any action with a federal nexus	All components
Private Aids to Navigation	US Coast Guard	Installation of fixed structure or floating object within waters of the United States	Wharf, Trestle, & ship movements
Endangered Species Act, Section 7 Consultation	USFWS and NOAA Fisheries	Potential impacts to federally listed species and/or their designated critical habitats	All components
Marine Mammal Protection Act, Marine Mammals	NOAA Fisheries	Potential impacts to marine mammals, including whales.	Wharf, Trestle, & ship movements
Magnuson-Stevenson Act	NOAA Fisheries	Potential impacts to designated Essential Fish Habitat	Wharf & Trestle
Hydraulic Project Approval(s)	WDFW	Project uses, diverts, or changes flow or bed of waters of the state	All components
Aquatic Lease Agreement	WDNR	Long-term lease of state-owned aquatic lands	Wharf & Trestle on State Lands
Clean Water Act, Section 401 Water Quality Certification	Ecology	Discharges to waters of the US, including wetlands	All components
Coastal Zone Management Consistency Determination	Ecology	Qualifying activity within a coastal county	Wharf & Trestle
NPDES General Industrial Stormwater Permit	Ecology	Discharge of stormwater to surface waters	All components
NPDES General Stormwater Permit for Construction	Ecology	Construction activities that disturb 1 acre or more	Upland components
Clean Air Act – Order of Approval to Construct	Northwest Clean Air Agency	New or modified source of air pollution	All components
Building Permits	Whatcom County	Constructing any permanent structure	All components
Certificate of Occupancy	Whatcom County	Begin use of constructed building	All components
Major Project Permit	Whatcom County	Construction of the Terminal	All components
State Environmental Policy Act Threshold Determination	Whatcom County	Any non-exempt development activities	All components
Street Vacation	Whatcom County	Vacation of public rights-of-way	Whatcom County rights-of-way

2.1.1.2 Shoreline Substantial Development Suit and Settlement Agreement

In 1997, Whatcom County issued a Shoreline Substantial Development Permit (SSD permit – SHS92-0020) and a Major Development Permit (MD permit – MDP92-0003) to Pacific International Terminals

allowing construction and operation of the Terminal. The SSD permit was subsequently appealed¹ by the Washington State Department of Ecology (Ecology), the Washington Department of Fish and Wildlife (WDFW), and a coalition of five environmental groups represented by the Washington Environmental Council. The parties settled the appeal in 1999 with a formal Settlement Agreement. The execution of the Settlement Agreement² among all parties added a number of conditions to the 1997 SSD permit. These conditions are shown in Appendix A.

In 2009, Whatcom County administratively affirmed the effectiveness of the 1997 SSD permit and Settlement Agreement and determined that no additional review under the County's Shoreline Management Plan would be required for the project to be developed as it was permitted.

The 1997 SSD permit provides for construction and operation of the proposed wharf and its connecting trestle as shown in the 1996 Draft EIS (Whatcom County 1996; note: the upland portion of the project was outside the Shoreline Management Act jurisdiction). The current development plan proposes to use the permitted wharf and trestle configuration. The configuration is the same as the design included in the approved 1997 SSD permit, except where design features have been altered either to comply with, or as allowed by, the conditions of the Settlement Agreement.

The County's 2009 administrative decision also reaffirmed the 1997 MD permit, which permitted construction and operation of the western portion of the project. The current development plan proposes to retain the purpose, operational characteristics, and infrastructure included in the original design, but changes the layout. However, the proposed Terminal now includes a second materials handling and storage area and its infrastructure, which requires environmental review and permitting.

Pacific International Terminals has been working to implement the Settlement Agreement conditions since 1999. The parties are currently negotiating the resolution of final issues associated with remaining tasks to be performed under the Settlement Agreement by Pacific International Terminals prior to and during construction, and its future obligations during operation of the Terminal.

2.1.1.3 Additional Whatcom County Permitting Activity

Because the upland portion of the Terminal design has changed from the previously permitted project, it is anticipated that a Major Project Permit (MPP) will be required. This process will require staff review, a public hearing before the Hearing Examiner, and, probably, a closed record hearing before the County Council. No changes to the Shoreline Substantial Development Permit for the wharf and

¹ Neither the SEPA Final EIS nor the 1997 Major Development Permit were appealed.

² Shoreline Hearings Board Appeals numbers 97-22 and 97-23, 1999; called 'the Settlement Agreement' in this document.

trestle are required. Once the MPP is granted, several additional County permits will be acquired, including building permits.

To issue the MPP and associated permits, the County will also be required to complete additional environmental review under SEPA. The County has been identified as the lead agency for compliance with SEPA and will coordinate preparation of an EIS as a co-lead agency with the US Army Corps of Engineers (USACE).

2.1.2 Federal Permitting

Construction of project facilities that affect waters of the US, including wetlands, require an individual permit under Section 404 of the Clean Water Act, and a permit for construction in navigable waters under Section 10 of the Rivers and Harbors Act. The USACE was identified in 1992 as the lead federal agency for the Terminal project and has continued responsibility for NEPA compliance.

Pacific International Terminals filed an initial USACE permit application (USACE Application 91-2-00203-R) for these permits after execution of the 1999 Settlement Agreement. In 2006, at the request of USACE, and given the changing nature of the project and the passage of time, Pacific International Terminals officially withdrew its original application with the express understanding that a new application would be filed in its place, without prejudice, to appropriately address environmental documentation and compliance requirements. A Joint Aquatic Resources Permit Application (JARPA) was filed for the Terminal by Pacific International Terminals on February 28, 2011, with the USACE, other appropriate agencies, and the MAP Team.

BNSF's Custer Spur improvements are expected to impact jurisdictional wetlands and streams and will also require an individual Section 404 permit. The permit will also be required for expansion and upgrades to crossings of California Creek and Terrell Creek, including:

- Construction of bridge structures spanning the creeks' channels to support additional rail infrastructure; and
- Restoration of a portion of California Creek to realign it to a more natural right-angle crossing under the BNSF infrastructure.

The USACE has been identified as the lead federal agency and will be responsible for NEPA compliance for BNSF Railway's Custer Spur improvements as part of the Terminal project. This Project Information Document evaluates the effects of both Terminal development and the Custer Spur improvements to support future NEPA and SEPA processes concerning these actions.

Other permits and approvals applicable to BNSF Railway's actions are described in Table 2-2.

Table 2–2 Anticipated Permits and Authorizations for the Custer Spur Improvements

Permit/Authorization Name	Issuing/Performing Agency	Regulated Activity	Regulated Rail Project Components
Clean Water Act, Section 404	USACE	Discharge of dredge or fill material into navigable waters	All components
Clean Water Act, Section 401 Water Quality Certification	Ecology	Discharge to water, excavation in water, discharges to special aquatic sites	All components
NPDES General Stormwater Permit for Construction	Ecology	Construction activities that disrupt 1 acre or more	All components
National Historic Preservation Act, Section 106 Review	USACE	Review of any action with a federal nexus	All components
Coastal Zone Management Act Consistency	Ecology	Review of any action with a coastal resource nexus	All components
Endangered Species Act, Section 7 Consultation	USFWS and NOAA Fisheries	Potential impacts to federally listed species and/or their designated critical habitats	All components

2.1.3 State Approvals and Leases

At the time the Shoreline Substantial Development and Major Development Permit applications were submitted in 1992, Pacific International Terminals also submitted an application and initiated discussions with the Washington Department of Natural Resources (WDNR) to secure a commercial tidelands lease. The negotiation process was placed on hold in 2002 pending the release and approval of the *Cherry Point Environmental Aquatic Reserve Management Plan* (WDNR 2010). The final plan was released in November 2010.

Other state approvals, such as Hydraulic Project Approval and Section 401 Water Quality Certification, will be pursued for the Terminal once applications are filed and in coordination with the MAP Team.

For the Custer Spur improvements, BNSF Railway will pursue a Section 401 Water Quality Certification with Ecology.

2.1.4 Environmental Review Under NEPA and SEPA

The Major Project Permit (MPP) and other state and county permits and approvals will require environmental review under SEPA. Pacific International Terminals anticipates that an EIS will be prepared to provide this review. Through discussions with USACE, Pacific International Terminals understands that the USACE will prepare an EIS to evaluate the environmental impacts associated with the proposed Terminal and Custer Spur improvements and will retain an independent NEPA contractor to develop the EIS.

Because an EIS is anticipated under both SEPA and NEPA, it is expected that Whatcom County and the USACE will be co-leads and that a Joint NEPA/SEPA EIS will be prepared that complies with requirements under both sets of regulations. Both SEPA and NEPA require public notice, public participation, and an opportunity to review and comment on a Draft EIS. It is expected that these activities will be combined and conducted jointly between the USACE and Whatcom County.

2.1.5 Process to Coordinate Permitting among Agencies

As shown in Tables 2-1 and 2-2, a number of agencies retain jurisdiction over various elements of the proposed project. After significant discussion with relevant federal, state, and local regulatory agencies and the Governor's Office of Regulatory Assistance (ORA), it was agreed that the permitting process for the Terminal would benefit from the coordination and collaboration offered by the legislatively authorized Multi-agency Permitting (MAP) Team process overseen and administered by ORA. With the agreement of all the parties involved, a MAP Team has been designated and organized to complete the permitting process for the Terminal project.

The purposes of the MAP Team are to:

- Address environmental regulatory and permit issues specific to the project.
- Provide early project review, including pre-application meetings.
- Provide interagency coordinated reviews.
- Provide regulatory and technical project comments according to a predictable schedule.
- Be a consistent review body for the project at all jurisdictional levels.

The MAP Team includes staff from Whatcom County, WDFW, WDNR, Ecology, USACE, the National Oceanic and Atmospheric Administration (NOAA), Northwest Clean Air Agency, local Tribes, and staff from the ORA. The MAP Team also includes technology staff providing internet-based document control and team-communication management tools.

Pacific International Terminals and BNSF anticipate securing the required permits through individual JARPA submittals respectively for the Terminal and Custer Spur improvements. BNSF Railway will directly coordinate its permitting efforts for the Custer Spur improvements with the appropriate agencies and in a manner consistent with current federal and state requirements and agreements.

2.2 TRIBAL CONSULTATION AND COORDINATION

The USACE has been leading government-to-government consultation for the project, as directed by Section 106 of the National Historic Preservation Act (NHPA), since 2009. Project description letters

and vicinity maps have been sent to affected Native American Tribes, including the Lummi Nation and Nooksack Tribe. Tribal consultations on usual and accustomed fishing areas around Cherry Point, and cultural resources in the uplands, are ongoing and will continue as part of consultation under the NEPA and SEPA process.