



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

Regulatory Branch

MAY - 9 2016

Mr. Skip Sahlin
Pacific International Holdings, LLC
1131 Southwest Klickitat Way
Seattle, Washington 98134

Reference: NWS-2008-260
Pacific International
Holdings LLC

Dear Mr. Sahlin:

You applied for a permit under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 the Clean Water Act to install structures in navigable waters and place fill in tributaries and wetlands to construct a dry bulk goods rail-to-ship transfer terminal (Gateway Pacific Terminal) near Ferndale, Whatcom County, Washington. Your application for a Department of the Army (DA) permit is denied without prejudice. I reached this decision because the proposed project would violate the Lummi Indian Nation's Tribal Treaty Rights to access and utilize usual and accustomed fishing areas. While this decision is not appealable, a denial without prejudice means that you can reinstate processing of the DA permit application should Tribal objections be resolved.

I appreciate the effort and cooperation that you and your representatives have put forth on this application. Because a DA permit is necessary for this work, do not commence construction before obtaining a valid permit. If you have any questions, please contact Mr. Randel Perry at randel.j.perry@usace.army.mil or by phone at (360) 734-3156.

Sincerely,

A handwritten signature in black ink, appearing to read "John G. Buck".

John G. Buck
Colonel, Corps of Engineers
District Engineer

CENWS-OD-RG

MEMORANDUM FOR RECORD

SUBJECT: Application NWS-2008-260, Pacific International Holdings, LLC (previously Pacific International Terminals, LLC) - Denial Without Prejudice of Application for a Department of the Army Permit

1. Project Description: Pacific International Holdings, LLC (previously Pacific International Terminals, LLC) (PIH) has requested Department of the Army authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act to install structures in navigable waters and place fill in tributaries and wetlands to construct a dry bulk goods rail-to-ship transfer terminal (the Gateway Pacific Terminal or GPT). The project is being processed through the standard individual permit process. The project would entail:

- Installation of a 3,000-foot long by 107-foot wide, deep-water wharf and a 1,285-foot long by 50-foot wide access trestle; 730 48-inch steel piles would be installed to support the wharf; 64 steel piles, 24 to 30 inches in diameter, would be installed to support the trestle.
- Filling 72.5 acres of wetlands and approximately 5,443 linear feet of drainages and 5,696 linear feet of streams (11,139 linear feet total) to construct a rail loop connected to BNSF Railway's Custer Spur rail line, open and closed commodity storage areas, material unloading and storage area handling equipment, a conveyor system connecting storage areas to the wharf, and operational support facilities (parking, offices, stormwater treatment, etc.). In addition, approximately 8.0 acres of wetlands would be temporarily affected and permanent direct impacts to approximately 70.7 acres of wetland buffers would occur.

Additional details of the proposed project are found in the Joint Aquatic Resources Permit Application (JARPA) dated 18 March 2016, and in the document titled, "*Gateway Pacific Terminal Project Alternatives Report, Appendix B: Project Description for Alternative C2*," dated 18 April 2014.

Wetland mitigation proposed for the project is described in the documents titled, "*Draft Conceptual Compensatory Wetland Mitigation Plan*," dated May 2014. Proposed wetland mitigation includes creation of 122.7 acres of wetlands and enhancement of 117.5 acres of wetlands. Approximately 534 acres of existing wetlands would be preserved. Wetland buffers would be provided in association with the wetland creation and enhancement areas.

2. Project Purpose: The overall project purpose is to develop and operate a multimodal (rail-to-ship) deepwater bulk terminal for export of dry bulk commodities.

3. Location: In the Strait of Georgia and in tributaries and wetlands draining to the Strait of Georgia near Ferndale, Whatcom County, Washington.

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4. Coordination with Tribes: The Corps received project information from PIH for the GPT and Burlington Northern Sante Fe (BNSF) for the Custer Spur in February 2011. Based on this information, the U.S. Army Corps of Engineers, Seattle District (Corps) determined the proposed projects, PIH's GPT and BNSF's Custer Spur, were interrelated and may have a significant individual and/or cumulative impact on the following elements of the human environment: Special aquatic sites, endangered species, cultural resources and historic properties, navigation, air quality, transportation, and Tribal Treaty rights. The decision to prepare a joint GPT/Custer Spur Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) was made by the Corps on 25 June 2011. In June 2012, both PIH and BNSF withdrew their applications with the understanding the Corps would proceed with EIS development as a pre-application action per 33 CFR 325.1(b).

The EIS scoping was initiated on 24 September 2012 and ended on 21 January 2013. Based on PIH's alternatives analysis, the PIH provided a revised project design reducing impacts to wetlands and tributaries. PIH re-submitted its JARPA in December 2015 and submitted additional information – including a change of applicant name to Pacific International Holdings – in March 2016 to complete its application.

Since the beginning of the Corps' action on the current GPT proposal, the Lummi Nation has on a number of occasions expressed its concerns and objections based on potential impacts to Treaty rights. In addition to coordinating with the Lummi Nation, the Corps has also consulted and coordinated with other Puget Sound tribes, which is documented in the Memorandum for the Record dated 26 January 2016 titled "Tribal Coordination (to date) for PIT's Gateway Pacific Terminals Project and BNSF's Custer Spur Rail Improvements Project." The Lummi Nation's concerns and objections were provided in correspondence dated 22 November 2010 (e-mail), 17 October 2011, 15 January 2013 (scoping comments), and 30 July 2013. The District Engineer met with the Tribal Chairman and Council members in November 2012, June 2013, June 2014, and November 2014. On 15 January 2015, the Lummi Nation submitted an official request to the Corps to deny the Department of the Army permit for the GPT project based on impacts to their specific treaty rights including access to usual and accustomed (U & A) fishing grounds, interference with fishing practices, and impacts to fisheries stocks and habitat. As documented in the Memorandum for the Record dated May 9, 2016 (enclosed), the Corps requested and received affidavits documenting use of the area by Lummi Tribal fishermen. In order to obtain sufficient information to determine whether interference with a treaty right would reach a level of legal significance, that is whether the impacts would have a greater than "*de minimis*" effect, the Corps engaged in a process of providing Tribal information to PIH for response, and PIH's responses to the Lummi Tribe for comment.

5. Tribal Impact Evaluation: It has been held that access to usual and accustomed grounds and stations cannot be substantially impaired, limited, or eliminated. The test is whether the impact of

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the proposed activity will be greater than *de minimis*. As documented in the Memorandum for the Record dated May 9, 2016, the work proposed in PIH's application has been analyzed with respect to its effects on the Lummi Nation's treaty rights described above. Corps technical staff reviewed the Lummi Nation and PIH's submittals regarding the project's effects on the Lummi Nation's treaty rights. The Corps' conclusion is the proposed project would have greater than a *de minimis* impact on the Tribe's access to its usual and accustomed fishing grounds for harvesting fish and shellfish within the footprint and immediate vicinity of the proposed wharf and causeway. If the wharf and trestle are constructed as proposed, it would impede the Lummi Tribe's access to its usual and accustomed treaty fishing area and interfere with the Lummi Tribe's fishing activities within their U&A area.

The Suquamish, Swinomish and Tulalip have expressed objections to this proposal since 2013 and submitted declarations and maps in April 2016 claiming that the GPT project would have a greater than *de minimis* impact on their tribal treaty rights. These tribes' submittals have not yet undergone a full analysis by the Corps and have not been shared with PIH. These tribes requested their objections not delay the Corps' decision on the Lummi Nation's objection to GPT.

6. Findings: While the NEPA EIS provides a platform for the comprehensive review of all potential environmental effects of the permit activity subject to the Corps control and responsibility, the Corps responsibility to protect tribal treaty rights is independent of the NEPA process. The Corps is making a timely decision on whether adverse effects on treaty-reserved U&A fishing rights are *de minimis* or greater than *de minimis* in response to information it has received from the Lummi Nation and from the permit applicant PIH. This determination can be made separate from the NEPA process after receipt, review and analysis of the information.

Based on the submittals provided by the parties and the Corps technical analysis, the Corps has determined the proposed project would have greater than a *de minimis* impact on Lummi Tribe's treaty rights at Cherry Point because the proposed wharf and trestle impair, limit, or eliminate access to the Lummi Nation's adjudicated usual and accustomed fishing grounds. The determination is supported by the physical impacts caused by GPT's wharf and trestle; therefore, this decision does not consider vessel traffic impacts associated with GPT on the Lummi's tribal treaty rights. The Lummi Nation have provided their objection to these effects to their treaty reserved rights.

The Corps has determined the work requiring Department of the Army authorization associated with the proposed GPT project will eliminate access to usual and accustomed grounds and stations and impede Tribal fishing practices in violation of the Lummi Indian Nation's treaty rights. Therefore, I am denying, without prejudice, PIH's request for Department of the Army authorization under Application NWS-2008-260. Should the Lummi choose to withdraw their tribal treaty right objections, there is no prejudice to the applicant's right to reinstate processing of the

