

## **MEMORANDUM OF UNDERSTANDING BETWEEN THE PORT OF SEATTLE AND THE CITY OF SEATTLE TO ESTABLISH A RAILROAD QUIET ZONE**

THIS MEMORANDUM OF UNDERSTANDING TO ESTABLISH A RAILROAD QUIET ZONE (“MOU”) is made and entered into by and between the City of Seattle, a Washington first class city and municipal corporation, through its Department of Transportation (“City” or “SDOT”) and the Port of Seattle (“Port”), either of which may be referred to hereinafter individually as “Party” or collectively as the “Parties.”

WHEREAS, The Port proposes to rehabilitate the existing marine cargo facilities at Terminal 5 at the west margin of the West Waterway in Elliott Bay; and

WHEREAS, the proposed changes include modification of intermodal rail facilities; and

WHEREAS, a Final Environmental Impact Statement prepared by the Port of Seattle identifies train horn noise required for public and private crossings and presence of human activity as an annoyance noise; and

WHEREAS, the Port, as part of its permit application for a Shoreline Substantial Development Permit, permit application Number 3019071, received from the City of Seattle (“City”) “Analysis and Decision of the Director of the Seattle Department of Construction and Inspections,” dated April 3, 2017 (“City Decision”);

NOW, THEREFORE, in consideration of mutual promises, covenants and MOU terms set forth herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged by both Parties, the Parties agree as follows:

## **1. PURPOSE**

- 1.1. The purpose of this MOU is to describe how the Port and City will work together to secure approval of a U.S. Federal Railroad Administration (“FRA”) designated quiet zone between the west end of the train bridge across the West Waterway of the Duwamish and the Terminal 5 gate (“Quiet Zone”).

## **2. PORT RESPONSIBILITIES**

- 2.1. The Port shall provide the funding to complete a scope of work and final design for appropriate measures to at-grade crossings and the rail corridor to reduce the need for locomotive horns that create noise impacts exceeding applicable standards and work together with the City to qualify the rail use area as a FRA-designated quiet zone.
- 2.2. The Port shall perform outreach and/or agreement with stakeholders as required through the FRA quiet zone approval process.
- 2.3. The Port shall convene regular meetings of Port and SDOT representatives to review proposed scope of work, infrastructure design and installation, technical analysis, and regulatory requirements.
- 2.4. After FRA approves final design for the Quiet Zone, the Port shall fund construction and implementation of infrastructure and other measures in the Scope of Work and final design as approved by SDOT and performed by BNSF or its designee.
- 2.5. If work performed by BNSF or its designee requires correction as identified by SDOT at the completion of construction and implementation, the Port shall fund the cost of these corrections.
- 2.6. The Port shall provide funding for the annual maintenance of the Quiet Zone as determined by BNSF Railway as necessary to retain FRA quiet zone designation.

### **3. CITY RESPONSIBILITIES**

- 3.1. SDOT shall provide general oversight to ensure that Port responsibilities under this MOU are completed consistent with the terms of the City Decision.
- 3.2. SDOT shall review and provide direction to the Port or designated agent to ensure that after completion of Port responsibilities the rail use area will qualify for FRA quiet zone designation.
- 3.3. SDOT may prepare one or more analyses to assess consistency with City Decision and FRA quiet zone designation.
- 3.4. SDOT shall inform the Director of the Seattle Department of Construction and Inspections or his designee as to SDOT's assessment of completed Port responsibilities.
- 3.5. SDOT shall prepare and submit an analysis to BNSF Railway for engineering and construction.
- 3.6. SDOT, as required by FRA quiet zone regulations, shall come to agreement with BNSF Railway regarding final Quiet Zone design and implementation.
- 3.7. SDOT will issue the Notice to Proceed to BNSF Railway or its designated contractor to initiate construction.
- 3.8. At the completion of each improvement, the City will identify any work that does not meet the requirements as necessary to obtain FRA quiet zone designation, prepare a specific list of revisions, and submit them to BNSF or its designee for correction. The Port will fund these corrections as identified in Section 2.5.
- 3.9. SDOT will act as official petitioner to FRA for the purposes of establishing an FRA-designated quiet zone.

### **4. INVOICING AND PAYMENT**

- 4.1. SDOT may obtain reimbursement for actual costs from the Port for the purposes of providing oversight and direction to the Port toward completing Port responsibilities and for completing

the Quiet Zone. Both Parties, in good faith, will work together to determine a reasonable methodology for establishing the total cost of work performed.

- 4.2. SDOT shall keep records as appropriate to describe work performed and actual costs incurred and submit an invoice on a regular basis, not more than once a month, for reimbursement for the actual costs incurred by SDOT, subject to any appropriations and/or other authorizations that may be necessary.

## 5. OWNERSHIP OF DOCUMENTATION

- 5.1. The Port shall own all documentation prepared by the Port to complete each Port responsibility. The Port shall reasonably make available all interim and final documentation to the City upon request for the purposes of timely oversight and direction by the City.
- 5.2. The City shall own all documentation prepared by the City for review and concurrence and for purposes of applying to establish the Quiet Zone. The City shall reasonably make available all interim and final documentation upon request for the purposes of review and comment by the Port.
- 5.3. The Port and City shall notify the other Party of any requests for access to materials or information prepared by either the Port or City by persons or entities outside this MOU. Both Parties recognize that they are public entities and are subject to the public disclosure laws of the State of Washington, and are not liable for breach if they disclose documents as required.

## 6. INDEMNIFICATION

- 6.1. **Indemnification and Hold Harmless.** Each Party shall protect, defend, indemnify, and save harmless the other Party, its officers, officials, employees, and agents while acting within the scope of their employment as such, from any and all suits, costs, claims, actions, losses,

penalties, judgments, and /or awards of damages, of whatsoever kind arising out of, in connection with, or incident to activities undertaken pursuant to this MOU caused by or resulting from each Party's (or their respective agents and contractors) own negligent acts or omissions. Each Party agrees that it is fully responsible for the acts and omissions of its own contractors and subcontractors, their employees, and agents, acting within the scope of their employment as such, as it is for the acts and omissions of its own employees and agents. Each Party agrees that its obligations under this provision extend to any claim, demand, and/or cause of action brought by or on behalf of any of its employees or agents. The foregoing indemnity is specifically and expressly intended to constitute a waiver of each Party's immunity under Washington's Industrial Insurance Act, RCW Title 51, as respects the other Party only, and only to the extent necessary to provide the indemnified Party with a full and complete indemnity of claims made by the indemnitor's employees. The Parties acknowledge that these provisions were specifically negotiated and agreed upon by them. Each Party shall require similar indemnification language in all agreements with contractors and subcontractors entered into in conjunction with this MOU.

#### **7. EFFECTIVE DATE AND TERM OF MOU**

This MOU and its obligations shall take effect when fully executed by all Parties. The MOU will end when the Port has completed construction as per the approved and agreed design; provided, however, the Port will retain responsibility for funding for annual maintenance of the Quiet Zone as determined by BNSF Railway.

#### **8. TERMINATION**

**8.1. Termination for Cause.** Either Party may terminate this MOU with cause by giving the other Party written notice of such termination at least (30) calendar days prior to the effective date of termination.

## 9. ENTIRE MOU AND AMENDMENTS

9.1. **Entire MOU.** This document contains all term, conditions and provisions agreed upon by the Parties hereto, and shall not be modified except by written amendment.

9.2 **Amendments.** Except as otherwise provided for in this MOU, amendments may be made to this MOU within applicable authority for and on behalf of the City by its Transportation Director or authorized representative, and for and on behalf of the Port by its Director of Seaport Environmental and Planning or authorized representative and shall be in writing and executed by such duly authorized representative of each Party. No variation or alteration of the terms of this MOU shall be valid unless made in writing and signed by authorized representatives of the Parties hereto.

## 10. NOTIFICATION AND IDENTIFICATION OF CONTACTS

10.1. **Notice.** Any notice or communication, other than termination for cause as provided for in Subsection 8.1, required or permitted to be given pursuant to this MOU shall be in writing, and shall be sent postage prepaid by U.S. Mail, return receipt request, to the contact persons and addresses identified in Subsection 10.2 of this MOU unless otherwise indicated by the Parties in writing.

10.2 **Contact Persons and Addresses.** The contact persons for the administration of this MOU are as follows:

### **City of Seattle**

Christopher Eaves, P.E.

700 5<sup>th</sup> Avenue, Suite 3800

Seattle, WA 98124-4996

(206) 684-4524

**Port of Seattle**

**Anne Porter**

2711 Alaskan Way

Seattle, WA 98121

(206) 787-3133

**11. DISPUTE RESOLUTION PROCESS**

The Parties, through their designated representatives identified in Subsection 10.2 of this MOU, shall use their best efforts to resolve any disputes pertaining to this MOU that may arise between the Parties. If these designated representatives are unable to resolve a dispute, the responsible project leads of both Parties shall review the matter and attempt to resolve it. If they are unable to resolve the dispute, the matter shall be reviewed by the department directors of the Parties or their designees. The Parties agree to exhaust each of these procedural steps before seeking to resolve disputes in a court of law or any other forum.

**12. RECORDS RETENTION AND AUDIT**

All MOU activities must be documented, including assessments, review comments, agendas and minutes of meetings, copies of invoices, or financial system expense reports documenting these items.

**13. LEGAL RELATIONS**

**13.1. No Partnership or Joint Venture.** No joint venture, agent-principal relationship or partnership is formed as result of this MOU. No employees or agents of one Party or any of its contractors or subcontractors shall be deemed, or represent themselves to be, employees or agents of the other Party.

**13.2. No Third Party Beneficiaries.** It is understood and agreed that this MOU is solely for the benefit of the Parties hereto and gives no right to any other person or entity.

- 13.3. **Assignment.** Neither this MOU, nor any interest herein, may be assigned by either Party without the prior written consent of the other Party.
- 13.4. **Binding on Successors and Assigns.** This MOU, and all of its terms, provisions, conditions, and covenants, together with any exhibits and attachments now or hereafter made a part hereof, shall be binding on the Parties and their respective successors and assigns.
- 13.5. **Mutual Negotiation and Construction.** This MOU and each of the terms and provisions hereof shall be deemed to have been explicitly negotiated between, and mutually drafted by both Parties.
- 13.6. **Waiver of Default.** Waiver of any default shall not be deemed to be a waiver of any subsequent default; as such, failure to require full and timely performance of any provision at any time shall not waive or reduce the right to insist upon complete and timely performance of any other provision thereafter. Waiver of breach of any provision of this MOU shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be modification of the terms of this MOU unless stated to be such in writing, signed by duly authorized representatives of the Parties, and attached to the original MOU.
- 13.7. **Applicable Law.** This MOU shall be governed by and construed in accordance with the laws of the State of Washington.
- 13.8. **Jurisdiction and Venue.** The King County Superior Court, situated in Seattle, Washington, shall have exclusive jurisdiction and venue over any legal action arising under this MOU.
- 13.9. **Rights and Remedies.** The Parties' rights and remedies in this MOU are in addition to any other rights and remedies provided by law.
- 13.10. **Severability.** If any provisions of this MOU are held invalid by a court of competent jurisdiction, the remainder of the MOU shall not be affected thereby if such remainder would then continue to serve the purposes and objectives originally contemplated by the Parties.
- 13.11. **Entire MOU.** This MOU embodies the Parties' entire understanding and MOU on the issues covered by it, except as may be supplemented by subsequent written amendment to this MOU,

