



INSTITUTIONAL CONTROL PLAN WHATCOM WATERWAY CLEANUP IN PHASE 1 SITE AREAS

Prepared for

Port of Bellingham

Prepared by

Anchor QEA, LLC

June 2018

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LIST OF ACRONYMS AND ABBREVIATIONS

ASB	aerated stabilization basin
BMP	best management practice
BST	Bellingham Shipping Terminal
CAP	Cleanup Action Plan
City	City of Bellingham
cm	centimeter
D/F	dioxin/furan
DNR	Washington Department of Natural Resources
EC	environmental covenant
Ecology	Washington State Department of Ecology
GIS	geographic information system
GP West	Georgia-Pacific West mill site
HPA	Hydraulic Project Approval
ICP	Institutional Control Plan
Meridian Pacific	Meridian Pacific Highway, LLC
mg	milligram
MLLW	mean lower low water
MNR	monitored natural recovery
MTCA	Model Toxics Control Act
NPDES	National Pollutant Discharge Elimination System
PAH	polycyclic aromatic hydrocarbon
PDCR	Preliminary Design Concept Report
PLP	potentially liable party
Port	Port of Bellingham
propwash	propeller wash
RAU	Remedial Action Unit
RCW	Revised Code of Washington
RI/FS	Remedial Investigation and Feasibility Study
Site	Whatcom Waterway Site

SMS	Sediment Management Standards
SQS	sediment quality standard
SSSMGP	South State Street Manufactured Gas Plant
UECA	Uniform Environmental Covenants Act
USACE	U.S. Army Corps of Engineers
WAC	Washington Administrative Code
WDFW	Washington Department of Fish and Wildlife

GLOSSARY

Whatcom Waterway Site (Site)	The overall MTCA cleanup site addressed by the Whatcom Waterway Consent Decree. This area includes both Whatcom Waterway and adjacent aquatic lands impacted by historic mercury discharges from the former Georgia Pacific chlor-alkali plant wastewater discharges. The Site includes both Phase 1 and Phase 2 cleanup areas and additional areas being addressed by monitored natural recovery.
Whatcom Waterway	The physical waterway extending from Roeder Avenue to deep water. Whatcom Waterway includes both the Inner Waterway and Outer Waterway areas.
Inner Waterway	The inner portion of Whatcom Waterway, extending from Roeder Avenue to the beginning of the federal navigation channel at Waterway Station 29+00. The Inner Waterway includes Site Units 2 and 3 of the Whatcom Waterway Site.
Outer Waterway	The outer portion of Whatcom Waterway, extending from Station 29+00 into deep water. The Outer Waterway includes Site Units 1A, 1B, and 1C of the Whatcom Waterway Site. The federal navigation channel is located within the Outer Waterway.
Federal Navigation Channel	The federal navigation project as currently authorized in existing Water Resources Development Act (WRDA) legislation. The authorized project includes a 30-foot deep navigation channel extending from Station 29+00 of Whatcom Waterway into deep water. The Federal Navigation Channel is maintained by coordinated actions of the U.S. Army Corps of Engineers and the Port of Bellingham as the local sponsor.
Central Waterfront Site	The MTCA site located on certain properties between Whatcom Waterway and I&J Waterway. The Central Waterfront Site is undergoing an RI/FS investigation under a MTCA Agreed Order.

GP West Site	The MTCA site located on upland property on the south side of Whatcom Waterway. The GP West Site is divided into two remedial action units (RAUs): the Pulp and Tissue Mill RAU and the Chlor-Alkali RAU. The RAUs are in different stages of the cleanup process under MTCA.
Log Pond	Site Unit 4 of the Whatcom Waterway Site. The Log Pond is located between Whatcom Waterway and the GP-West Site. The Log Pond was capped in 2001 as an interim cleanup action. Additional capping was completed as part of the Whatcom Waterway Phase 1 cleanup work.
Chlor-Alkali Remedial Action Unit	The Chlor-Alkali Remedial Action Unit comprises the western portion of the GP West Site adjacent to the Log Pond and Cornwall Avenue.
Pulp and Tissue Mill Remedial Action Unit	The Pulp and Tissue Mill Remedial Action Unit comprises the eastern portion of the GP West Site adjacent to Whatcom Waterway and Roeder Avenue.
Whatcom Waterway Cleanup in Phase 1 Site Areas Project (Project)	The construction and monitoring activities completed to implement the final cleanup of Phase 1 Areas of the Whatcom Waterway Site
Phase 1 Site Areas	Whatcom Waterway Site Units 2A, 3B, 4, and portions of Units 1C and 2C. Cleanup of these units has been completed and units with remaining contamination are addressed in this ICP.
Phase 2 Site Areas	Whatcom Waterway Site Units 1A, 1B, 2B, and 8, and portions of Units 1C, 2C, 5B, 6B, and 6C. These areas will be cleaned up as part of a future phase of construction, consistent with the requirements of the First Amendment to the Whatcom Waterway Consent Decree.

Monitored Natural Recovery Areas (MNR Areas) Whatcom Waterway Site Units 3A, 5A, 5C, 6A, 7, and 9, and portions of Units 5B, 6B, and 6C. Clean sediment is naturally accumulating in these areas and they are subject to long-term compliance monitoring requirements. Institutional controls for these areas are addressed in this ICP.

1 INTRODUCTION

This Institutional Control Plan (ICP) was prepared for the Port of Bellingham (Port) in accordance with the requirements of the Consent Decree (No. 07-2-02257-7) and the First Amendment to the Consent Decree (Ecology 2011). It concisely describes the institutional controls to be undertaken in certain areas of the Whatcom Waterway Site (Site) in Bellingham, Washington.

The Site location and vicinity are shown in Figure 1, including Site units. The cleanup of the Site is being performed consistent with the cleanup requirements of the Model Toxics Control Act (MTCA), Chapter 70.105D in the Revised Code of Washington (RCW), as administered by the Washington State Department of Ecology (Ecology) under the MTCA Cleanup Regulation, Chapter 173-340 of the Washington Administrative Code (WAC). The cleanup also complies with Sediment Management Standards (SMS; WAC 173-204).

Site cleanup is being performed by the Port and other cooperating potentially liable parties (PLPs) under Ecology oversight. The cooperating parties include the City of Bellingham (City), the Washington Department of Natural Resources (DNR), and Meridian Pacific Highway, LLC (Meridian Pacific). This document was prepared in coordination with those parties, as overseen by Ecology.

1.1 Site Location and Vicinity

Figure 1 presents the Site vicinity and location features, including the overall Site boundary and the location of Site units within the Site. Figure 1 also shows the location of several other cleanup sites designated by Ecology and located in adjacent portions of Bellingham Bay. These adjacent sites include the Central Waterfront, I&J Waterway, Cornwall Avenue landfill, South State Street Manufactured Gas Plant (SSSMGP), and R.G. Haley. The cleanup action for the Site is being coordinated with these separate site cleanups.

The Site includes sediments that have been impacted by contaminants historically released from industrial waterfront activities, including mercury discharges from the former Georgia-Pacific (GP) chlor-alkali plant. The chlor-alkali plant was located on the south shoreline of the adjacent site and operated between 1965 and 1999, when it was permanently closed. The

chlor-alkali plant discharged mercury-containing wastewater into the Whatcom Waterway, primarily during the late 1960s and 1970s.

The Site boundary shown in Figure 1 was determined based on the extent of surface and subsurface mercury contamination in sediments exceeding regulatory cleanup levels as determined during the Remedial Investigation and Feasibility Study (RI/FS) process and during subsequent Pre-Remedial Design Investigations conducted during 2008 (Anchor QEA 2010).

Other site-associated contaminants include wood waste and degradation products from historical log rafting activities and phenolic compounds from pulp mill wastewater discharges. Some contaminants (hydrocarbons and boatyard metals) associated with the Central Waterfront Site were co-located with subsurface contamination in shoreline areas along the northern portion of the Site. These contaminants were remediated as part of the Site cleanup action described in the draft As-Built Report for Whatcom Waterway Cleanup in Phase 1 Site Areas (Anchor QEA, in production).

1.2 Document Purpose

This document provides a concise description of the institutional controls that will be undertaken for areas of the Site where contaminated sediments are being managed by engineered caps constructed during the cleanup in Phase 1 Site Areas, and for containment walls constructed as part of source control actions implemented in parallel with the cleanup. This plan also describes institutional controls that will be undertaken for the monitored natural recovery (MNR) areas of the Site.

This plan does not describe institutional controls to be undertaken in cap areas to be constructed as part of the future anticipated cleanup in Phase 2 Site Areas. Institutional controls for those areas will be undertaken following future implementation of Phase 2 construction activities as described in Section 2.2.

This plan has been developed in accordance with current MTCA regulations and policies, and also in accordance with the Uniform Environmental Covenants Act (UECA) as

promulgated in the Revised Code of Washington (RCW) 64.70. The intent of the UECA statute is to ensure that environmental covenants (ECs) filed in connection with cleanup projects are legally valid and enforceable (RCW 64.70.005).

The areas of the Site to be subject to institutional controls are described in Section 3. These areas include both non-state-owned and state-owned lands. Different administrative mechanisms will be used to record property restrictions for the non-state-owned and state-owned areas. These administrative mechanisms are described in Section 4.

1.3 Limitations

The institutional controls developed for the Site are intended to remain in place indefinitely. However, the institutional controls may be modified or amended in the future with the written approval of Ecology. Such modifications or amendments could include the revision of an institutional control (e.g., adjustment to EC areas if a cap area required modification), or elimination of an institutional control (e.g., removal of an EC if contaminated sediments are removed from a parcel). Nothing in this plan is intended to prevent such future modifications or amendments should they be required.

The institutional controls described in this document are intended to work in association with certain ongoing land uses, permits and environmental reviews, and cleanup activities occurring at other adjacent cleanup sites. Considerations in this regard include the following:

- **Current and Anticipated Land Uses:** Institutional controls are not intended to represent zoning or land use designations. However, Site cleanup activities (including institutional controls) were designed to be consistent with and support certain ongoing and anticipated land uses, as described in Section 4 of this document. This list of anticipated uses and activities is not necessarily exhaustive (i.e., other uses not described in this document are not precluded).
- **Other Environmental Review and Permitting Activities:** The Site institutional controls are not intended to eliminate or substitute for the environmental review and permitting processes associated with local, state, or federal regulations. For example, future in-water construction activities will continue to be subject to additional project

reviews under state and federal permitting authorities (e.g., U.S. Army Corps of Engineers [USACE] Section 10/404, Washington State Department of Fish and Wildlife [WDFW] Hydraulic Project Approval [HPA], Ecology water quality certification, and City permitting requirements).

- **Ongoing Cleanup Activities at Adjacent Sites:** The Whatcom Waterway Site is located adjacent to several upland and in-water cleanup sites as described in Section 2.3. It is not the intent of the institutional controls described herein to preclude or predetermine the cleanup measures to be taken or institutional controls to be implemented at those sites to address other contaminants and media. It is understood that where necessary to implement those cleanup actions, the institutional controls described herein for the Whatcom Waterway Site may be modified with the written approval of Ecology.

2 BACKGROUND

This section provides background information regarding the Whatcom Waterway Site and the associated cleanup activities.

2.1 Sediment Cleanup Levels

Sediment cleanup levels and points of compliance were defined in the Cleanup Action Plan (CAP) and Consent Decree (Ecology 2007) for the Site. These criteria remained unchanged in the First Amendment to the Consent Decree (Ecology 2011). Site cleanup levels and points of compliance include the following:

- **Sediment quality standard (SQS) for Site-associated contaminants:** The CAP defined sediment cleanup levels for Site-associated contaminants, including mercury and phenolic compounds. For these compounds, the cleanup levels for benthic protection were established at the SQS. Compliance with the benthic SQS is to be determined using a combination of chemical testing and contingent bioassay testing. Samples that exceed the chemical SQS but pass bioassay testing are considered to comply with the benthic SQS, consistent with Washington's SMS regulations.
- **Bioaccumulation screening level for mercury:** An additional requirement was established in the CAP and Consent Decree for mercury, to ensure that the cleanup protects against potential bioaccumulation of mercury and methylmercury compounds. This screening level is 1.2 milligrams (mg) total mercury per kg dry weight. This value was developed using area-weighted averaging but is to be applied throughout surface sediments at the Site.
- **Sediment points of compliance:** Compliance with the sediment cleanup levels is measured based on the thickness of the sediment biologically active zone. In Bellingham Bay, this thickness is the upper 12 centimeters (cm) of the sediment bed. In addition, while cleanup levels do not directly apply to sediment below 12 cm, the SMS require that the potential risks of the current or future exposure of deeper sediments be considered and minimized through the implementation of the cleanup action.

Dioxin/furan compounds (D/F) are known to be present in surface and subsurface sediments throughout most of Bellingham Bay and other urban bays within Puget Sound. The full range

of sources for these compounds in Bellingham Bay has not yet been determined but may include contributions from many sources throughout the bay, including former combustion sources, former GP pulp and paper mill operations, former wood-treating facilities, historical and ongoing stormwater and wastewater discharges, and atmospheric deposition.

During 2015, Ecology completed sampling activities to determine if regional background concentrations of bioaccumulative chemicals existed in Bellingham Bay (Ecology 2015). That work identified a regional background concentration of 15 nanograms per kilogram for D/F in an area of Bellingham Bay, which includes most of the Site.

2.2 Overview of Site Cleanup

Consistent with the requirements of the First Amendment to the Consent Decree, the cleanup is being implemented in two phases, with separate and independent construction projects, each addressing distinct areas of the Site. The Preliminary Design Concept Report (PDCR; Anchor QEA 2012) describes the cleanup work to be conducted in each area of the Site, including the work to be conducted within the Phase 1 Site Areas (constructed during 2015 and 2016), as well as the work to be conducted in the Phase 2 Site Areas (separate future project). The PDCR also describes the management of the areas of the Site for which the selected cleanup action was MNR. No cleanup construction activities are planned for these MNR Areas. Additional cleanup action details are presented below.

2.2.1 Cleanup in Phase 1 Site Areas

A detailed description of the completed cleanup in the Phase 1 Site Areas is contained in the As-Built Report (Anchor QEA, in production). Those completed cleanup activities are summarized in Figure 2. These cleanup activities included three primary remedial action technologies:

- **Remedial dredging:** Dredging was used to remove contaminated sediments from portions of the Inner Waterway and the Outer Waterway. Sediments were removed using mechanical dredging and were transported to a permitted upland disposal facility. Within the Inner Waterway, dredging removed a portion of the contaminated sediments, and dredging was followed by engineered capping. In the Outer Waterway, contaminated sediments were completely removed, such that the

only capping required was at the transition between the dredge area and areas to be capped during the cleanup of Phase 2 Site Areas.

- **Engineered capping:** Engineered capping was used within portions of the Inner Waterway, the Log Pond, and at the transition between the Inner Waterway and Outer Waterway to isolate contaminated sediments from the aquatic environment. The cap composition and thickness varies in different portions of the Site, as defined in the As-Built Report (Anchor QEA, in production). The caps are generally constructed of sand overlain by larger size materials such as gravel or rock to protect against erosion due to hydrodynamic forces. Engineered caps constructed in the Phase 1 Site Areas included three types:
 - Type I: Three-layer engineered cap (sand, gravel filter, and rock armor) used to isolate contamination and provide erosion protection from wind waves and propeller wash (propwash) forces. This engineered cap design is primarily employed along shorelines and in nearshore areas.
 - Type II: Two-layer cap (sand and gravel armor) used to isolate contamination and provide erosion protection from primarily propwash forces. This engineered cap design is primarily used in open-water areas where water depths result in lower propwash velocities and wind wave forces than areas where Type I caps are used.
 - Type III: Two-layer cap (gravel filter and rock armor) used for erosion protection along the Log Pond shoreline areas that are experiencing ongoing erosion but where no chemical recontamination has occurred.
- **Installation of containment wall structures:** Containment wall structures were installed along the shoreline between the Central Waterfront Site and the Inner Waterway. The containment walls were constructed of steel sheet-piling. Tie-backs were installed where necessary to support project geotechnical requirements. The containment wall structures were used to prevent uncontrolled slope movement during nearshore dredging and engineered capping operations, to contain contaminated soils and to minimize the potential for groundwater contaminant migration from the adjacent upland cleanup areas to re-contaminate the newly placed caps.

To enable remediation to be conducted, certain structures and debris located within the Inner Waterway and Log Pond were removed. Marine structures required to support

ongoing navigation uses (dolphins and pilings) were replaced, but these structures are not integral elements of the cleanup action.

In addition, monitoring and contingency response actions are an integral part of the dredging and capping activities. A Compliance Monitoring and Contingency Response Plan was defined as part of the Final Engineering Design Report (Anchor QEA 2015a). The details of the monitoring program were further elaborated in the Sampling and Quality Assurance Project Plan (Anchor QEA 2016). Monitoring activities described in those documents have been initiated.

2.2.2 MNR Areas

The areas of the Site to be managed by MNR include Units 3A, 5A, 5C, 6A, 7, and 9, and portions of Units 5B, 6B, and 6C (Figure 3).

The Compliance Monitoring and Contingency Response Plan defined as part of the Final Engineering Design Report (Anchor QEA 2015a) also addresses the MNR Areas. The details of the monitoring program were further elaborated in the Sampling and Quality Assurance Project Plan (Anchor QEA 2016). Monitoring activities described in those documents have been initiated.

2.2.3 Cleanup in Phase 2 Site Areas

The future cleanup of the Phase 2 Site Areas will address Units 1A, 1B, 2B, 5B, 6B, 6C, and 8, and portions of Units 1C and 2C as shown in Figure 4. Detailed cleanup actions for the Phase 2 Site Areas will be defined in an Engineering Design Report. Where applicable, institutional controls will be defined in an ICP for Phase 2 Site Areas.

2.3 Coordination with Adjacent Cleanup Sites

The cleanup of the Site is being coordinated with work at other cleanup sites located in the Site vicinity (see Figure 1). A brief description of these adjacent cleanup sites is provided below:

- **Central Waterfront Site:** The Central Waterfront Site is approximately 55 acres and shares more than 1,200 linear feet of shoreline with the Whatcom Waterway Site. Cleanup activities in this shoreline area were implemented jointly during 2015 and 2016, including measures to address contaminated sediment and measures to address source control requirements for upland soil and groundwater contamination. Final cleanup of the upland areas of the Central Waterfront Site, including any associated monitoring activities, will be implemented separately as part of a future Ecology-selected cleanup action for the Central Waterfront Site. The cleanup action will be described in a future CAP that will also describe the work completed in overlapping site areas as part of the Whatcom Waterway Cleanup in Phase 1 Site Areas project.
- **GP West Site cleanup:** The GP West Site is approximately 74 acres located in the area south of the Whatcom Waterway. A site-wide Remedial Investigation was completed for that site during 2013 (Aspect 2013). Cleanup work is related to soil and groundwater contamination and is being implemented in two distinct phases. The first phase of cleanup was completed at the Pulp and Tissue Mill Remedial Action Unit (RAU), consistent with a CAP issued under a Consent Decree between the Port and Ecology for that RAU (Ecology 2014a). Construction of cleanup work in that RAU included the removal of contaminated soil from two areas, and construction of an environmental cap. This work was completed during 2016. The second phase of cleanup will address the Chlor-Alkali RAU. A Feasibility Study is currently in development for that area under an Agreed Order with Ecology. The Ecology-selected cleanup action for the Chlor-Alkali RAU will be described in a future CAP.
- **I&J Waterway Site cleanup:** The I&J Waterway Site is approximately 5 acres. An RI/FS was finalized in 2015 for this site under a MTCA agreed order with Ecology (Anchor QEA 2015b). Surface sediment contamination from historical industrial activities along the southern shoreline of I&J Waterway includes but is not limited to bis(2-ethylhexyl)phthalate, PAH compounds, bioassay exceedances, and nickel. Contaminated surface sediments from the I&J Waterway Site overlay buried contaminated sediment that comprise part of the Whatcom Waterway Site. Co-located contaminated sediment within these areas will be remediated as part of the future Ecology-selected cleanup action for the I&J Waterway Site.
- **Cornwall Avenue Landfill cleanup:** The Cornwall Avenue Landfill is approximately 26 acres (approximately 13 acres upland and 13 acres aquatic lands) and is undergoing

design and permitting consistent with a CAP issued under a Consent Decree (Ecology 2014b) between the Port, the City, WDNR, and Ecology. Surface sediment contamination from historical municipal landfill activities along the shoreline at the south end of Cornwall Avenue includes but is not limited to solid waste and associated hazardous substances including phthalates, PCBs, and cPAHs.

Contaminated sediments from the Cornwall Avenue Landfill and Whatcom Waterway sites overlap as shown in Figure 1. Co-located contaminated sediments in these areas will be addressed by the selected cleanup actions for the Cornwall Avenue Landfill and Whatcom Waterway sites. This includes a large area in which MNR will be performed as components of both site cleanups.

- **R.G. Haley Site cleanup:** The R.G. Haley Site is approximately 8 acres. In 2016 an RI/FS (GeoEngineers 2016) was completed under a MTCA agreed order between the City and Ecology. In April 2018 a cleanup action was selected in the approved CAP. Surface sediment contamination from historical wood treatment activities is present along the shoreline at the south end of Cornwall Avenue. Contaminants include petroleum hydrocarbons, pentachlorophenol, cPAHs, and dioxins. Contaminated sediments from the R.G. Haley and Whatcom Waterway sites overlap as shown in Figure 1. Co-located contaminated sediments in these areas will be addressed by the selected cleanup actions for the R.G. Haley and Whatcom Waterway sites. This includes a large area in which MNR will be performed as components of both site cleanups.
- **SSSMGP Site cleanup:** This cleanup site includes areas impacted by historic manufactured gas plant operations. The South State Street Manufactured Gas Plant (SSSMGP) Site includes portions of Boulevard Park and adjacent aquatic lands. Contaminants include petroleum hydrocarbons, PAHs and other compounds associated with manufactured gas plant operations. The SSSMGP Site is undergoing an RI/FS under a MTCA agreed order between the City, Puget Sound Energy and Ecology. Contaminated sediments from the SSSMGP and Whatcom Waterway sites overlap as shown in Figure 1. Co-located contaminated sediments in these areas will be addressed by the selected cleanup actions for the SSSMGP and Whatcom Waterway sites. This includes a large area in which MNR will be performed as components of both site cleanups.

3 SITE AREAS SUBJECT TO INSTITUTIONAL CONTROLS

Institutional controls will be undertaken in Site areas that have engineered caps, or containment wall structures, as well as those areas that are to be addressed using MNR. These areas are shown in Figure 5, and associated parcels are identified in Figures 6, 7, 8, 9, and 10 and in Table 1. This section includes a brief description of each of these areas, along with a discussion of current and future land uses anticipated for these areas.

3.1 MNR Area at the Head of the Inner Waterway

Sediments currently comply with Site cleanup levels in the emergent tidelflat area at the head of the Inner Waterway. This portion of the Inner Waterway is located within the locally managed, multi-purpose channel. It includes portions of the area originally defined as Site Unit 3A, and portions of Site Unit 3B. The Port, WDNR, and USACE completed the deauthorization process in 2007 for the federal navigation channel that formerly extended into this area.

The MNR area includes emergent nearshore intertidal and subtidal habitat. Navigation uses within the MNR area are limited due to shallow water depths.

Future land uses along the Inner Waterway are expected to consist of marine trades and mixed-use redevelopment consistent with updated property zoning and Waterfront District planning. Routine navigation dredging is not anticipated within the MNR area.

Future uses within the MNR area may include the implementation of habitat enhancement or public access improvements. Some docks and piles associated with existing overwater structures are also located in this area and may require repair, replacement, or removal from time to time. Such construction activities will require Ecology review, and implementation of best management practices (BMPs) during any in-water construction activities as appropriate to minimize potential sediment disturbance.

3.2 Inner Waterway Capping Areas

Engineered capping performed in portions of the Inner Waterway in Phase 1 included areas originally designated as Units 2A, 3B, and portions of 3A and 2C. These caps include a sandy

contaminant isolation layer overlain by armoring to resist cap erosion. The elevation and composition of the caps vary by location. Phase 1 cap areas did not include material placement over the pipe crossing (capping of that area is anticipated to occur during the cleanup in Phase 2 construction areas).

Containment walls were also installed along the shoreline of the Central Waterfront Site as shown in Figures 5 and 6. These walls are constructed of steel sheet-piling with a concrete pile cap. Tie-backs are included in the Maple Street area as required to meet project geotechnical requirements.

Navigation uses within the Inner Waterway will include operation of the waterway as a locally managed, multi-purpose channel with an operational bed elevation of -18 feet mean lower low water (MLLW). The federal navigation channel in this area was deauthorized by the Port, WDNR, and USACE in 2007 (WRDA 2007). Operation of the multi-purpose channel and associated berth areas will include periodic maintenance dredging by the Port (in conjunction with other property owners along the Inner Waterway) to maintain water depths, but future deepening or widening of the channel is not anticipated at this time.

Berth areas along the north side of the Inner Waterway are currently used to support barge loading/unloading operations, boat haul-out activities, and other marine trades uses. Future land uses in this area are expected to consist of marine trades activities. These uses may require periodic updates to navigation infrastructure, including pilings, dolphins, and other in-water structures.

Existing Port operational restrictions for vessels using the C Street berthing areas are communicated by the Port to tenants and terminal users and are incorporated into lease documentation. They include the following:

1. Vessel operations are limited to tide and wave conditions where grounding of the vessel hull or contact of the vessel propeller with the seabed will not occur.
2. Vessel operations are limited to tugs that are equivalent (or of lesser power) than a Puget Sound Tug Class; maximum draft 11 feet, propeller diameter 5.8 feet, 850 horsepower, and should not exceed 85% of applied horsepower.

3. Vessel operations are restricted to avoid periods when tides are below MLLW (based on National Oceanic and Atmospheric Administration Station No. 9449211).

Berth areas along the south side of the Inner Waterway are used to support existing navigation uses, including moorage of barges and other marine vessels. These uses may require periodic updates to navigation infrastructure, including replacement of dock/wharf/bridge pilings, or replacement of dolphins and other in-water structures.

Upland land uses along the southern portion of the Inner Waterway are expected to consist of mixed-use redevelopment consistent with updated property zoning. Public shoreline access is to be enhanced in capped areas near Central Avenue along the south side of the Inner Waterway. Additional habitat enhancement activities (e.g., placement of beach nourishment materials) could be performed in this area as well, provided that these activities do not disturb the engineered caps constructed there.

3.3 Log Pond Cap Areas

Sediment in the Log Pond (Unit 4) was previously capped; however, erosion had caused breakthrough in a portion of this area, and additional capping material was placed during Phase 1 cleanup activities.

The Log Pond areas are located within non-state-owned land (owned by the Port).

The Log Pond is a Bellingham Bay priority habitat restoration area. Navigation use in the nearshore portions of the Log Pond is not anticipated, with the exception of small boat access (i.e., kayaks or hand-carry boats). Navigation within the outer portion of the Log Pond is expected to be limited to small boat access to support BST vessel-mooring activities (e.g., use of small boat to attach bow and stern lines to the mooring dolphins within the Log Pond). No maintenance dredging or deepening activities are anticipated for the Log Pond area.

Public shoreline access may be provided in the future to a portion of the Log Pond shoreline as part of planned redevelopment within adjacent areas of the GP West Site. Additional habitat enhancement activities (e.g., placement of beach nourishment materials) could be

performed in the Log Pond, provided that those activities do not disturb the engineered caps constructed there.

3.4 MNR Areas Adjacent to the ASB

Other than those areas that are anticipated to be managed by dredging and confined aquatic disposal during Phase 2 remediation, the sediments located adjacent to the ASB are to be managed by MNR. These MNR areas include portions of Unit 2B and 5B, and Units 5A, 5C, and Unit 9. Most of these areas have relatively shallow water depths. The MNR areas include both non-state-owned (owned by the Port) and state-owned aquatic lands.

Areas of emergent shallow intertidal and subtidal aquatic habitat including eelgrass have come to be located adjacent to the ASB. With the exception of the buried National Pollutant Discharge Elimination System (NPDES)-permitted ASB outfall pipe and the buried pipe crossing from GP West to the ASB, no structures are currently located in Unit 5.

Naturally shallow water depths limit navigation uses to transiting of the area by shallow-draft vessels. Future navigation dredging within the MNR areas adjacent to the ASB is not currently anticipated.

3.5 MNR Areas Adjacent to BST

Most of the aquatic lands located to the west and adjacent to BST are to be managed by MNR. The exception to this is a portion of Unit 6 (portions of Unit 6B and 6C) located near the barge dock. That area is planned for armoring during Phase 2 remediation to resist potential propwash erosion.

The MNR areas adjacent to BST consist of state-owned harbor areas. These areas are expected to continue in Port-related navigation uses for the foreseeable future. Such uses include vessel berthing and operations, and operation of associated water-dependent activities.

Navigation uses could require periodic maintenance dredging. No deepening projects are currently planned for this area. If uses change and navigation dredging is required, that dredging will be subject to Ecology review and approval, and measures would be required to

ensure appropriate management of dredged materials and continued compliance with Site cleanup levels.

Docks and structures associated with the Port terminal are located in the MNR areas. Future construction activities will likely be required around these or other new structures for maintenance, repair, or construction and demolition. Such construction activities will be subject to Ecology review and approval, and BMPs will be implemented during any in-water construction activities as appropriate to minimize potential sediment disturbance.

3.6 I&J Waterway MNR Areas

Site MNR areas include the I&J Waterway. That MNR area includes state-owned aquatic lands within the state waterway boundary, and adjacent non-state-owned lands (owned by the Port). A federal channel exists within the I&J Waterway, as shown in Figure 5. The Port has historically been the local sponsor for navigation dredging activities conducted by the USACE within the I&J Waterway federal channel.

The I&J Waterway services a variety of navigation uses, which currently include access to marine vessels entering the Squalicum Inner Boat Basin; operation of a U.S. Coast Guard base located within the waterway; and operations of Port tenants including a seafood processor, a boat manufacturer, and an upland boatyard and boatlift. Structures located within and adjacent to the I&J Waterway MNR areas include docks, floats, pilings, and dolphins, as well as aids to navigation.

Navigation uses could require periodic maintenance dredging within the waterway or berth areas. No deepening projects are currently planned for this area. Any dredging within this area will be subject to Ecology review and approval, and measures will be required to ensure appropriate management of dredged materials and continued compliance with Site cleanup levels.

Existing or new structures located in the MNR area may require future construction activities for maintenance, repair, or construction and demolition. Such construction activities will be subject to Ecology review and approval, and BMPs will be implemented

during any in-water construction activities as appropriate to minimize potential sediment disturbance.

3.7 Remaining MNR Areas

The remaining areas of the Site are to be managed by MNR. These areas include Unit 7 and Unit 9.

Unit 7 includes the offshore sediments within and around the former Starr Rock sediment disposal site. There are no structures currently located in this area. Navigation uses are primarily limited to small-boat navigation due to the shallow water depths. This area is owned by the state.

Unit 9 consists of the remaining area of the Site (beyond the boundaries of Units 1 through 8) that contain low-level, buried subsurface mercury contamination. This area is primarily owned by the state, though an area adjacent to the Inner Squalicum Boat Basin is owned by the Port.

Most of Unit 9 consists of deep-water, offshore areas. However, Unit 9 also abuts the shoreline along the northern and eastern sides of the Site. Several separate cleanup sites are located within Unit 9, and future construction and/or monitoring activities overseen by Ecology are expected at the following sites:

- I&J Waterway
- R.G. Haley
- Cornwall Avenue Landfill
- South State Street Manufactured Gas Plant

Land uses within and adjacent to Unit 9 vary by location. Navigation uses occur within subtidal areas. Several current and planned parks are located within and adjacent to Unit 9, including existing Boulevard Park (at the SSSMGP Site), the planned Cornwall Beach Park (at the Cornwall Avenue Landfill and R.G. Haley sites) and the Zuanich Point Park (adjacent to the Squalicum Inner Boat Basin). Park uses are expected to continue and may include improvements to shorelines and public access areas, and/or new or replacement structures.

Some navigation dredging may be required in the future in portions of the Unit 9 areas. Such dredging will be subject to Ecology review and approval, and measures would be required to ensure appropriate management of dredged materials and continued compliance with Site cleanup levels.

Future construction activities (maintenance, repair, or construction and demolition associated with marine structures or shorelines) could be required. Such construction activities will be subject to Ecology review and approval, and BMPs will be implemented during any in-water construction activities as appropriate to minimize potential sediment disturbances.

4 INSTITUTIONAL CONTROL MECHANISMS

This section describes the institutional control mechanisms to be used for capped areas, containment wall areas, and MNR areas.

4.1 Controls for Capped Areas

Sediment caps were constructed in a portion of the Inner Waterway and within the Log Pond. Descriptions of all constructed caps are presented in the As-Built Report; however, in each case, the cap construction includes an underlying isolation layer (composed of sandy materials) designed to contain the contaminated sediments, and one or more layers of armor materials (composed of gravel and/or stone) to minimize potential for cap erosion under natural (e.g., tidal currents, wind and wave forces) or anthropogenic (e.g., propwash) conditions.

To ensure the long-term integrity of the engineered caps, use restrictions will be placed on non-state-owned and state-owned property on which caps were constructed. The mechanisms for these use restrictions are described below.

4.1.1 *Non-State-owned Property*

MTCA ECs will be filed with Whatcom County for each parcel of the non-state-owned property on which an engineered cap has been constructed (see Table 1). The EC will be written in accordance with RCW 64.70 based on the template contained in Attachment A.

There are several functions of the EC:

- Informs individuals that the property is the subject of remedial action conducted under MTCA, describes the type and location of the remedial action, and the principal contaminants present.
- Limit uses of the capped areas to those that do not interfere with the remedial action and prohibit the modification of cap areas without the consent of Ecology.
- Require owners of the property to notify all lessees or property purchasers of the restrictions on the use of the properties.

- Require the owners of the properties to make provisions for continued monitoring and operation and maintenance of the remedial action prior to conveying title, easement, lease, or other interest in the property.

The EC for each non-state-owned parcel will include a legal description as well as a map of the locations of engineered caps within that parcel. Sufficient information will be provided to document the cap elevations and construction. The ECs will also include inspection and maintenance requirements for shoreline caps.

Ecology will draft the ECs, and the Port will provide legal descriptions, property maps, and any other necessary exhibits to the ECs. After the ECs are finalized, the Port will record them with the auditor of Whatcom County and return the original ECs to Ecology. These controls will remain in place indefinitely unless removal or modification is approved by Ecology in writing.

4.1.2 State-owned Property

For state-owned aquatic lands containing engineered caps, the institutional controls may be undertaken using the mechanisms below, as well as other mechanisms identified by Ecology and DNR:

- Remediation Easement: DNR has granted the Port a remediation easement to allow caps in two areas located on state-owned aquatic land: 1) capped areas within the Inner Waterway; and 2) capped areas at the transition slope between the Inner Waterway and the Outer Waterway. The remediation easement is included as Attachment B.
- DNR GIS Mapping System and “Index Plates”: DNR maintains a mapping system for state-owned aquatic lands. The mapping system will be updated to show the remediation easement encumbrance for the sediment caps based on the as-built survey. This information also already has been entered onto “index plates” that serve as the official record of conveyance of property rights through the easement.

4.2 Controls for Containment Walls

Shoreline containment walls were installed on four non-state-owned properties along the shoreline of the Central Waterfront Site. These containment walls are intended to remain in place for a design life of at least 50 years.

To ensure the long-term integrity of the containment walls, use restrictions will be included in the MTCA ECs for the four non-state-owned parcels on which the walls were constructed. The ECs will also include requirements for inspection and maintenance of the walls. These four parcels also include engineered caps (see Table 1). Therefore, the ECs will include provisions for both engineered caps and containment wall areas. The EC for each of these parcels will be written in accordance with RCW 64.70 consistent with the template contained in Attachment A.

The EC for each of these parcels will include a legal description of the location of containment walls. Sufficient information will be provided to document the wall elevations, construction, and design loads applicable to each parcel.

Ecology will draft the ECs, and the Port will provide legal descriptions, property maps and any other necessary exhibits to the ECs. After the ECs are finalized, the Port will record them with the auditor of Whatcom County and return the original ECs to Ecology. These controls will remain in place indefinitely unless removal or modification is approved by Ecology in writing.

4.3 Controls for MNR Areas

MNR areas are located in multiple areas of the Site. Within these areas, natural processes have achieved compliance with the sediment cleanup standards. Additional monitoring activities are being performed in order to ensure that this protectiveness is maintained over the long term.

The location, elevations, and land uses for the natural recovery areas within the Site are described in Section 3 of this document, and affected properties are listed in Table 1.

To ensure the long-term integrity of the natural caps that have formed in the MNR areas, use restrictions will be placed on non-state-owned and state-owned property with defined MNR areas. The mechanisms for these use restrictions are described below.

4.3.1 Non-State-owned Property

MTCA ECs will be recorded with Whatcom County for each parcel of the non-state-owned property with defined MNR areas (see Table 1). The EC will be written in accordance with RCW 64.70 consistent with the template contained in Attachment A.

Ecology will draft the ECs and the Port will provide legal descriptions, property maps and any other necessary exhibits to the ECs. After the ECs are finalized, the Port will record them with the auditor of Whatcom County and return the original ECs to Ecology. These controls will remain in place indefinitely unless removal or modification is approved by Ecology in writing.

4.3.2 State-owned Property

For state-owned aquatic lands containing MNR areas, institutional controls may be undertaken using the DNR GIS Mapping System and “index plates” as discussed in Section 4.1.2, as well as other mechanisms identified by Ecology and DNR.

5 REFERENCES

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- Ecology, 2014b. *Consent Decree No. 14-2-02593-5 for the Cornwall Avenue Landfill Site* (with Exhibits). Available online at:
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- Ecology, 2015. *Bellingham Bay Regional Background Sediment Characterization Final Data Evaluation and Summary Report*. Publication No. 15-09-044. February 2015.

GeoEngineers, 2016. *Final Remedial Investigation/Feasibility Study. R.G. Haley Site. Bellingham, Washington*. Prepared by GeoEngineers for the City of Bellingham. February 1, 2016.

WRDA (Water Resources Development Act), 2007. *Water Resources Development Act of 2007*. Section 3181.

WSL (Washington State Legislature), 2007. *Chapter 64.70 of the Revised Code of Washington (RCW), Uniform Environmental Covenants Act*.

TABLE

Table 1
Summary of Property Subject to Institutional Controls

Site Area	Parcel Type	Parcel ID	Cap Areas	MNR Areas	Containment Walls
Inner Waterway Cap, Containment Wall, and MNR Areas	State-owned	State Waterway Property (Whatcom Waterway)	Yes (portion)	Yes (portion)	No
	Non-State-owned	W. Laurel Street Right-of-Way	Yes (portion)	Yes (portion)	No
		Central Avenue Right-of-Way	Yes (portion)	Yes (portion)	No
		W. Maple Street Right-of-Way	No	No	Yes (portion)
		380225522022*	Yes (portion)	No	No
		380330004215	No	Yes (portion)	No
		380225552227	No	Yes (portion)	No
		380225535202	Yes (portion)	No	Yes (Portion)
		380225545212	Yes (portion)	Yes (portion)	No
		380225525191	No	No	Yes (Portion)
		380225509177	Yes (portion)	No	Yes (Portion)
		380225493165	Yes (portion)	No	Yes (Portion)
		380225472140 *	Yes (portion)	No	No
Log Pond Cap Areas	Non-State-owned	380225432004	Yes (portion)	No	No
		380225522023	Yes (portion)	No	No
		380236496526	Yes (portion)	No	No
MNR Areas Near the ASB	State-owned	State Harbor Area Offshore of the ASB	No	Yes (portion)	No
	Non-State-owned	W. Ivy Street Right-of-Way	No	Yes (portion)	No
		380225397064	No	Yes	No
		380225522022*	No	Yes (portion)	No
		380225402173	No	Yes (portion)	No
		380225458125	No	Yes (portion)	No
		380225472140*	No	Yes (portion)	No
		380225341167	No	Yes (portion)	No
		380225358198	No	Yes (portion)	No
380225410334	No	Yes (portion)	No		
MNR Areas Near BST	State-owned	State Harbor Areas Offshore of BST	No	Yes (portion)	No
MNR Areas Near the I&J Waterway	State-owned	State Waterway Property (I&J Waterway)	No	Yes	No
		State Harbor Areas Offshore of the Inner Boat Basin	No	Yes (portion)	No
	Non-State-owned	380225130445	No	Yes (portion)	No
MNR Areas Near Cornwall Avenue Landfill and Boulevard Park	State-owned	State Harbor Areas Offshore of Cornwall Avenue	No	Yes (portion)	No
		State Harbor Areas Offshore of Boulevard Park	No	Yes (portion)	No
		State-owned Bedlands Beyond the Outer Harbor Line	No	Yes (portion)	No
	Non-State-owned	380236496526			
		380236386308	No	Yes (portion)	No
		380236261137	No	Yes (portion)	No
		370201090495	No	Yes (portion)	No

Notes:

Refer to Figures 5 through 10 for property locations.

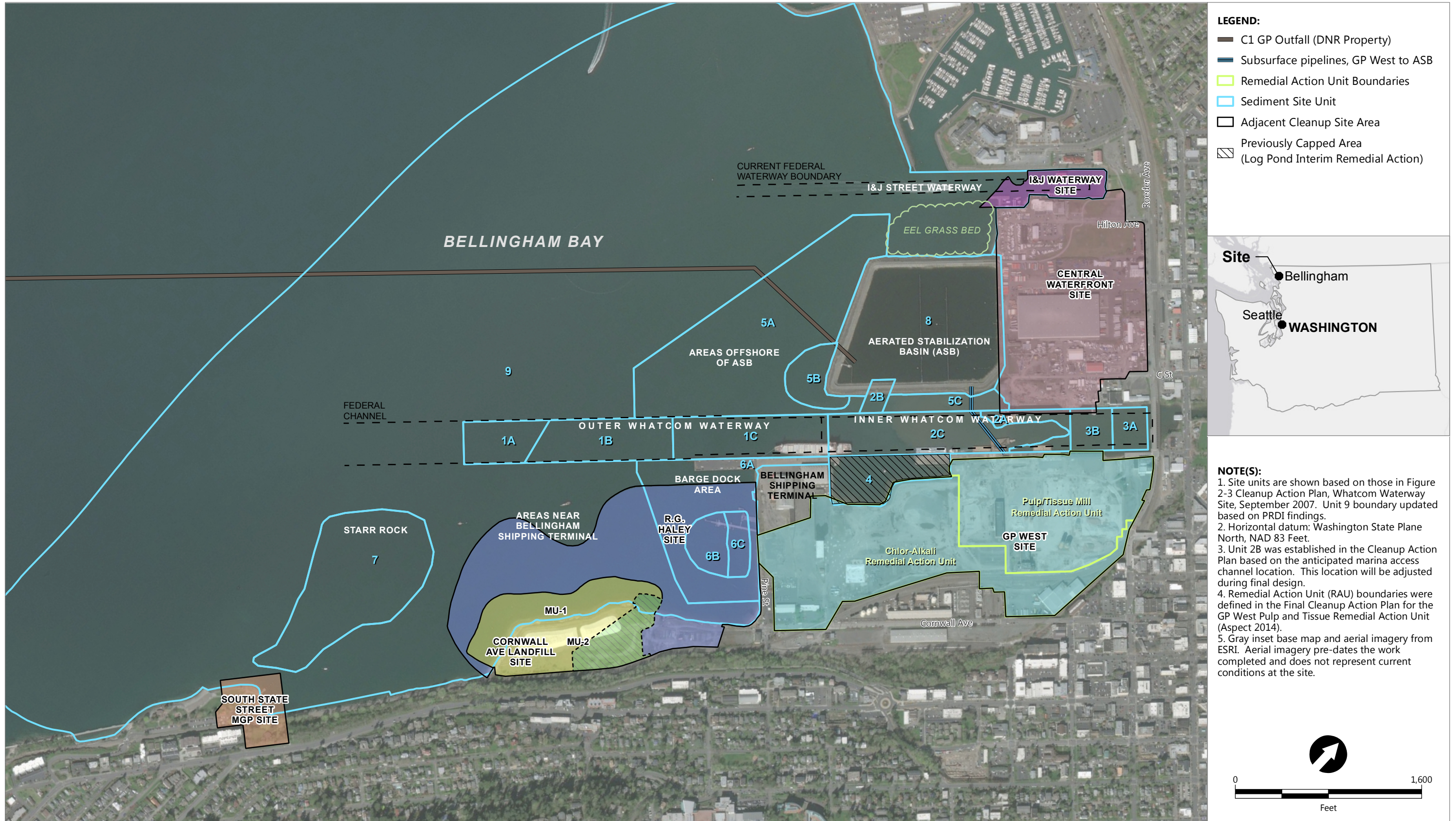
* Parcel is listed under multiple areas.

ASB = aerated stabilization basin

BST = Bellingham Shipping Terminal

MNR = monitored natural recovery

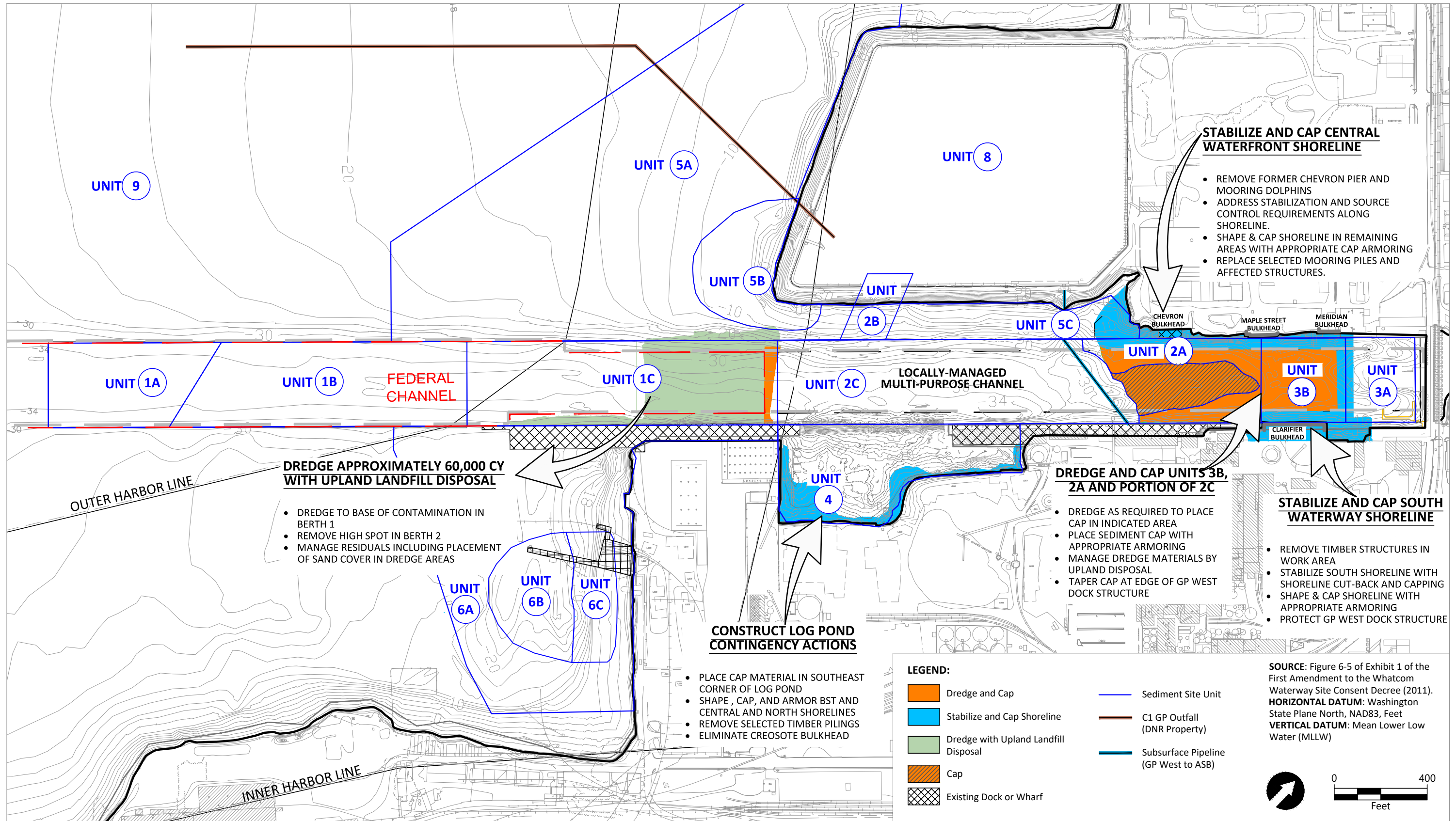
FIGURES



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Figure 1
Site Vicinity Map
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1

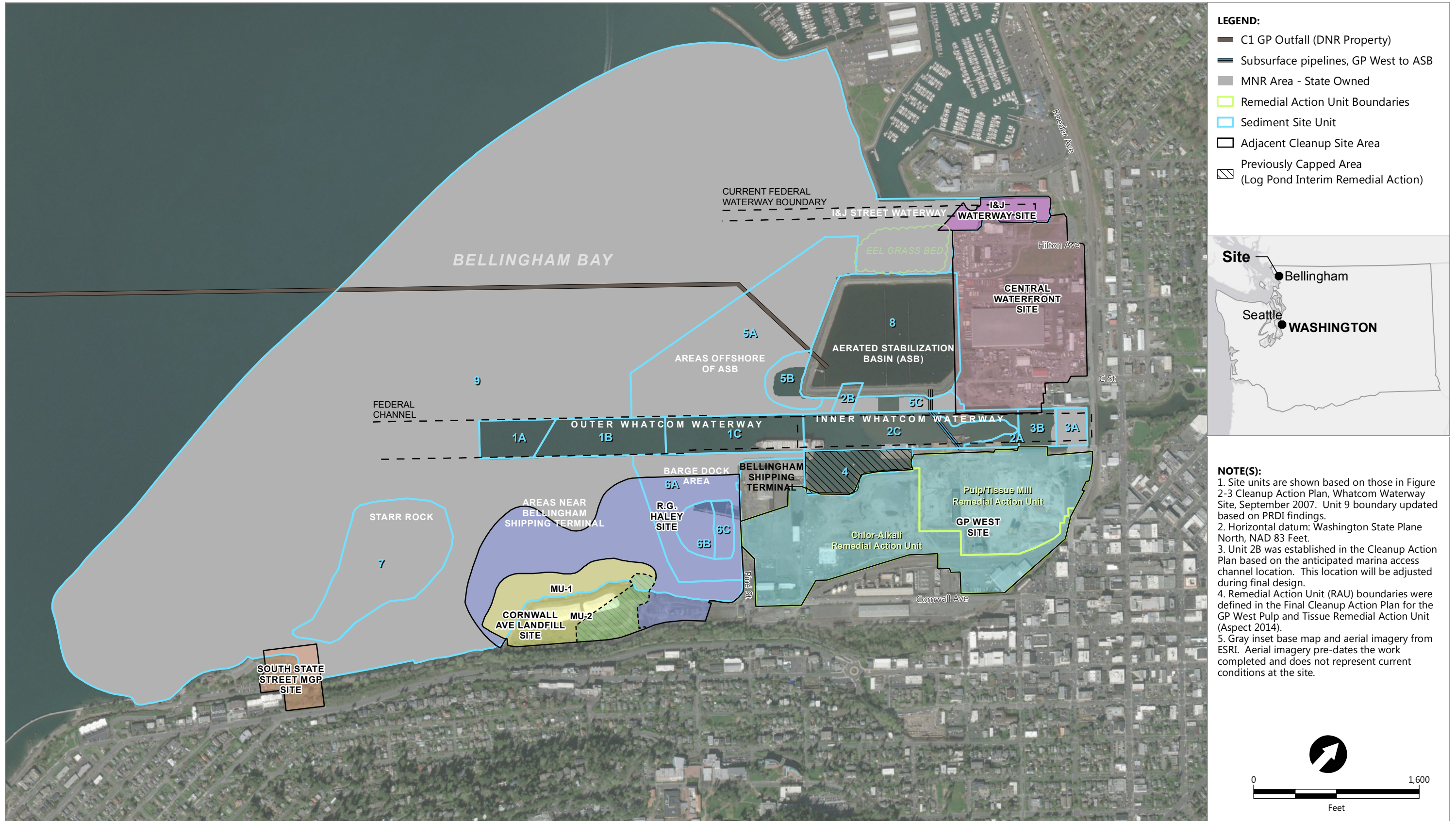


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 Filepath: K:\Projects\0007-Port of Bellingham\Whatcom Waterway Cleanup Inner Wtr\zTacoma\EDR\007-RP-008-EDR.dwg Cleanup Elements



Figure 2
Cleanup Elements in Phase 1 Site Areas

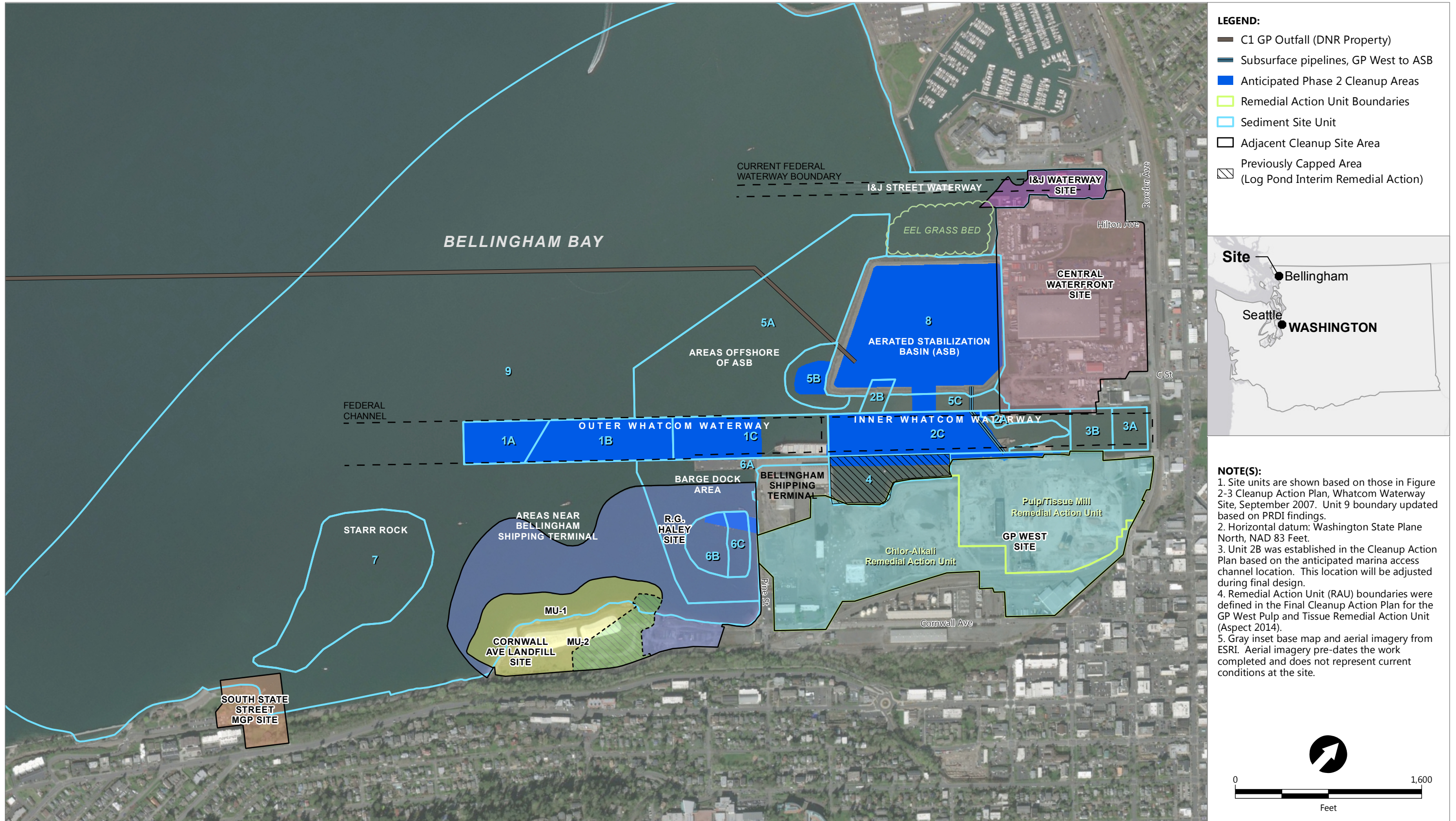
Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1



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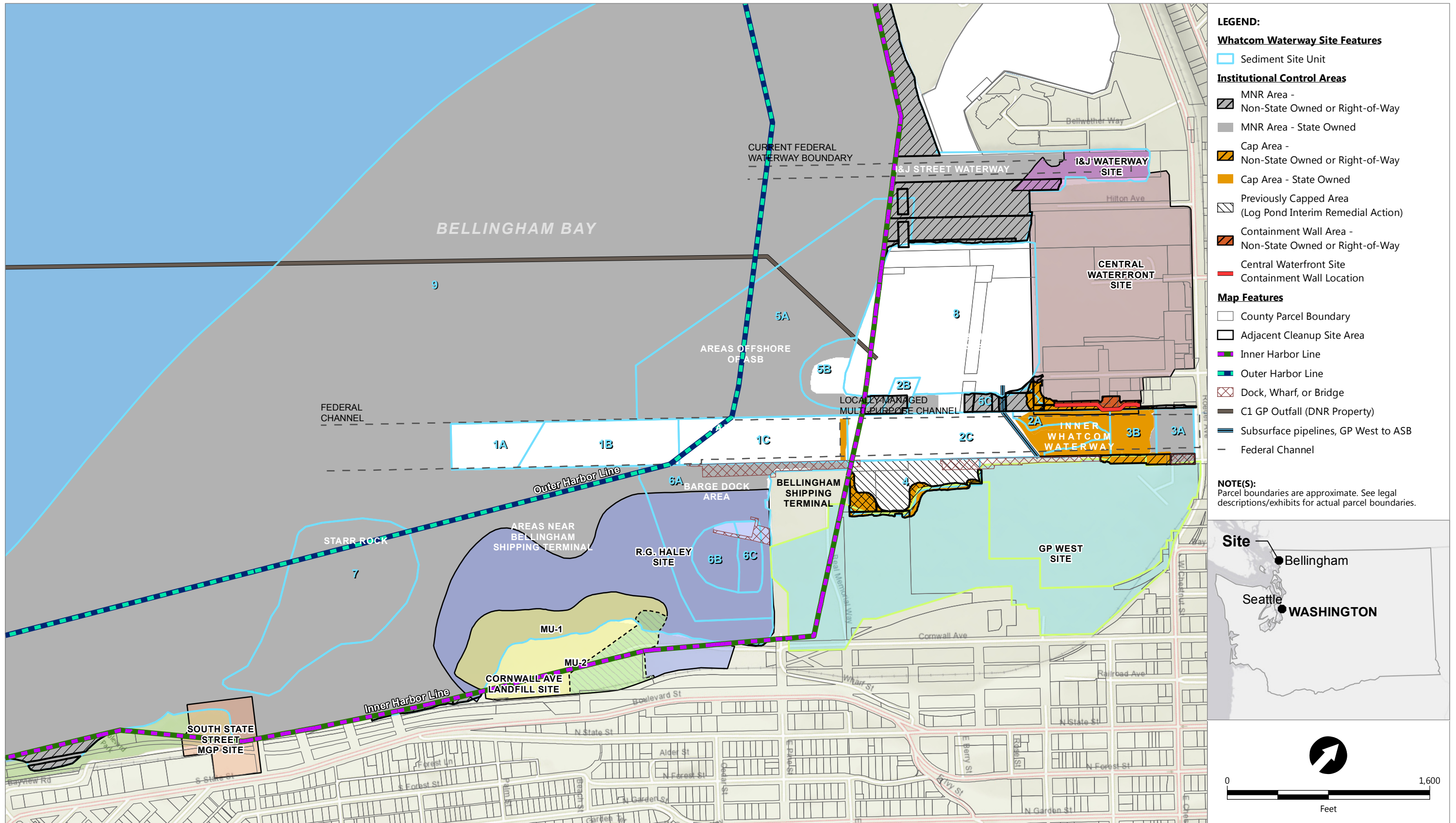
Figure 3
Monitored Natural Recovery Areas
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1



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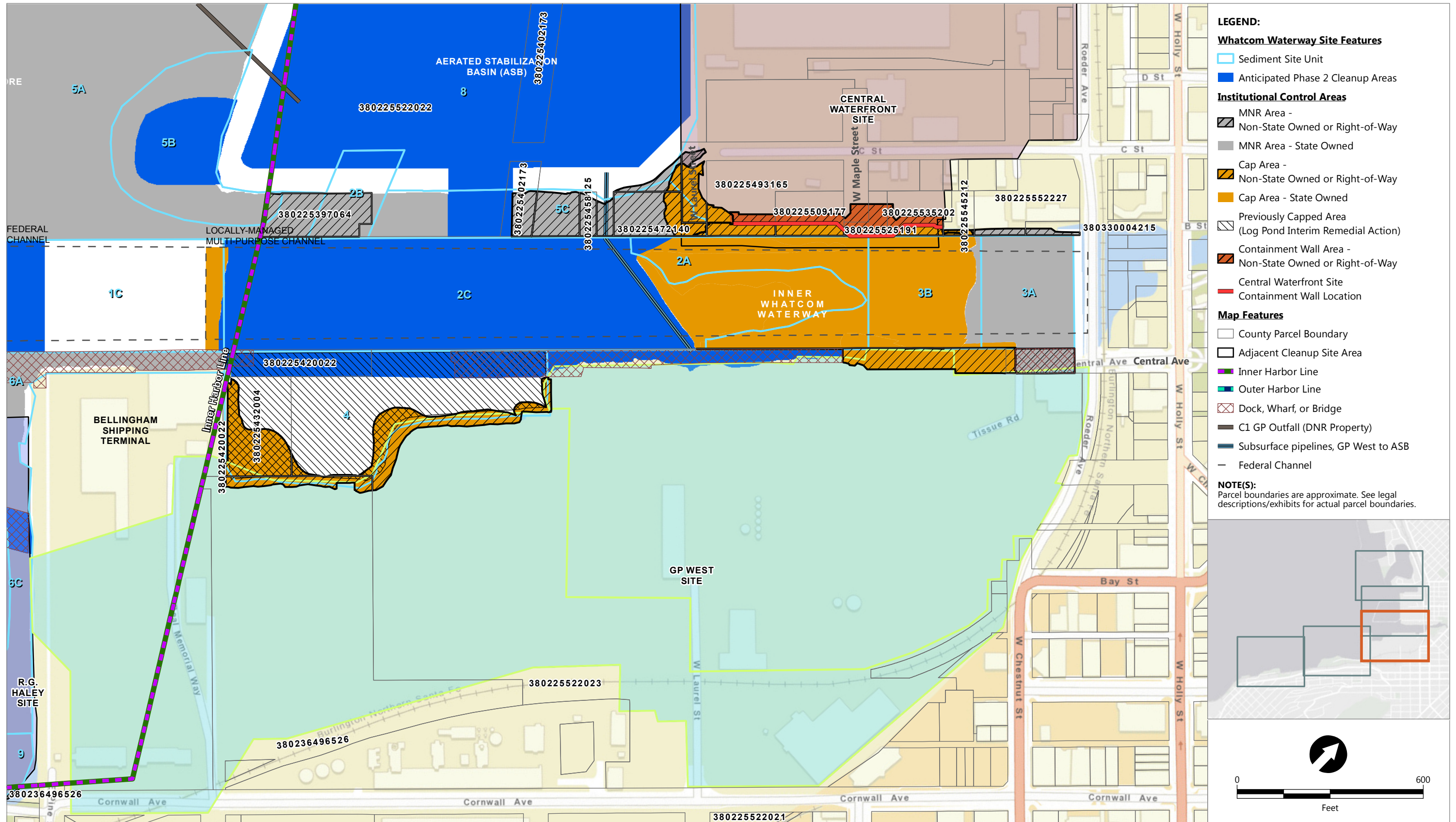
Figure 4
Cleanup Areas in Phase 2 Site Areas
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1



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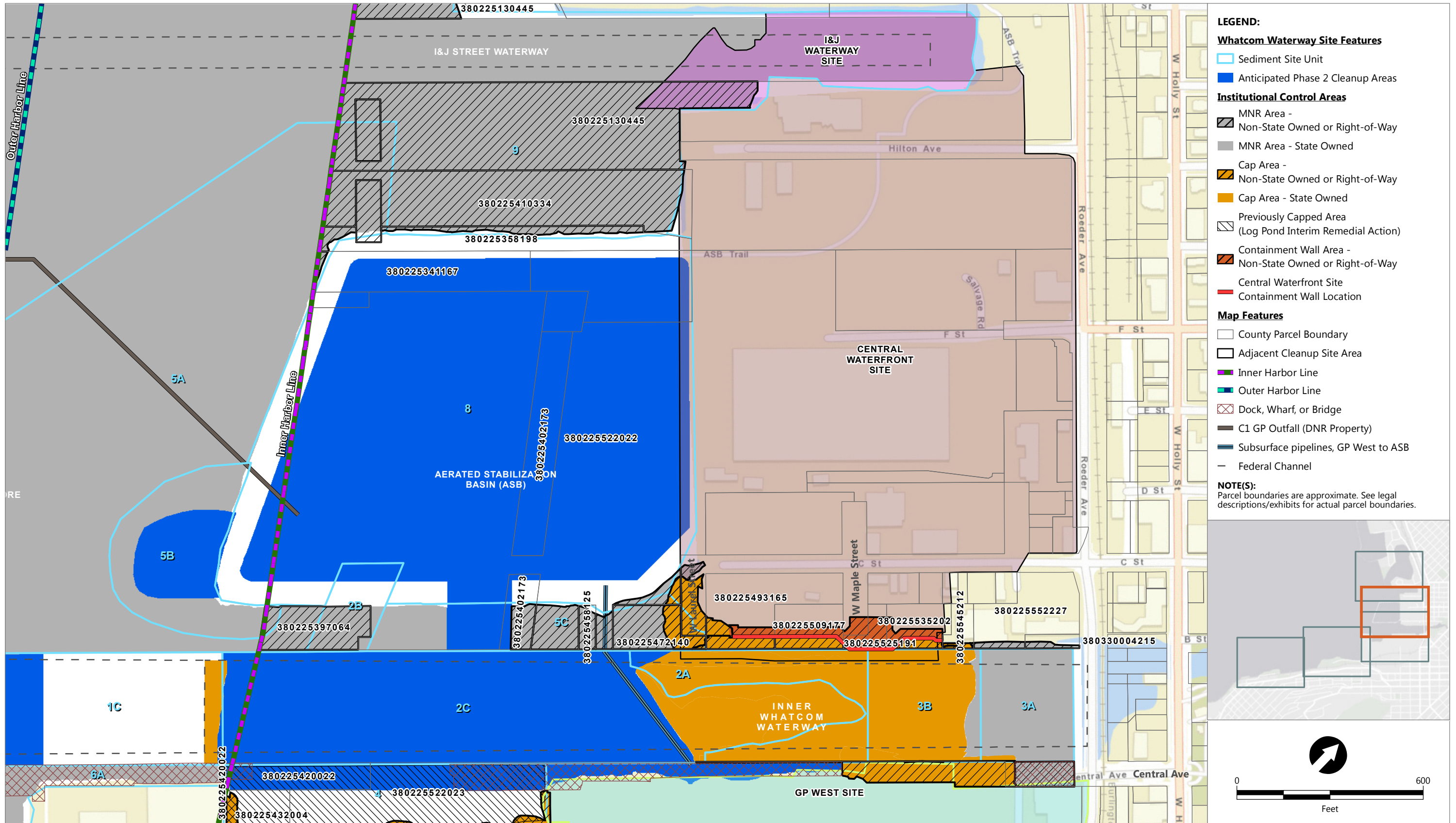
Figure 5
Phase 1 Institutional Control Areas
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1



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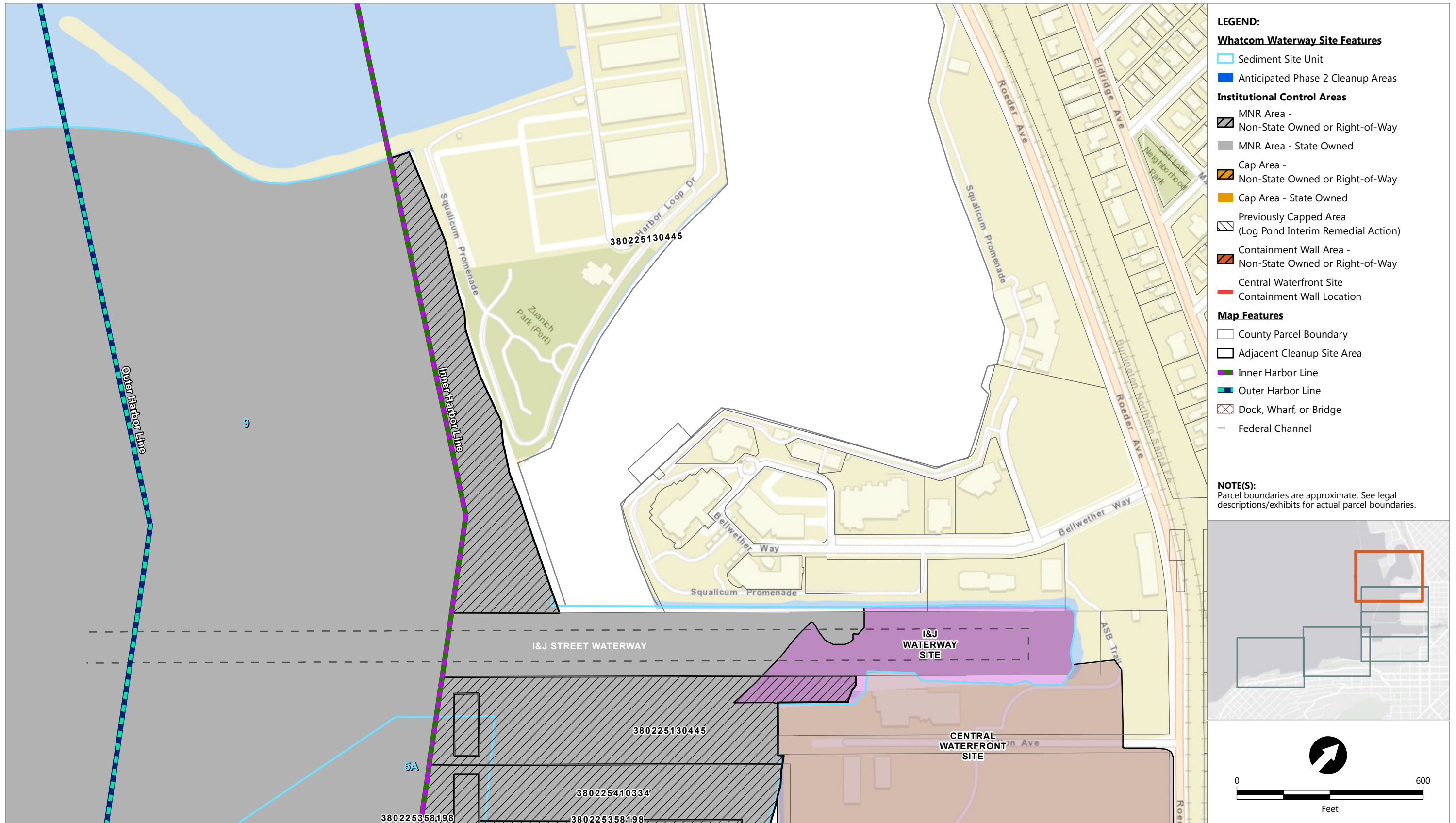
Figure 6
Detailed Parcel Map
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1



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Figure 7
Detailed Parcel Map
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1



LEGEND:

Whatcom Waterway Site Features

- Sediment Site Unit
- Anticipated Phase 2 Cleanup Areas

Institutional Control Areas

- MNR Area - Non-State Owned or Right-of-Way
- MNR Area - State Owned
- Cap Area - Non-State Owned or Right-of-Way
- Cap Area - State Owned
- Previously Capped Area (Log Pond Interim Remedial Action)
- Containment Wall Area - Non-State Owned or Right-of-Way
- Central Waterfront Site
- Containment Wall Location

Map Features

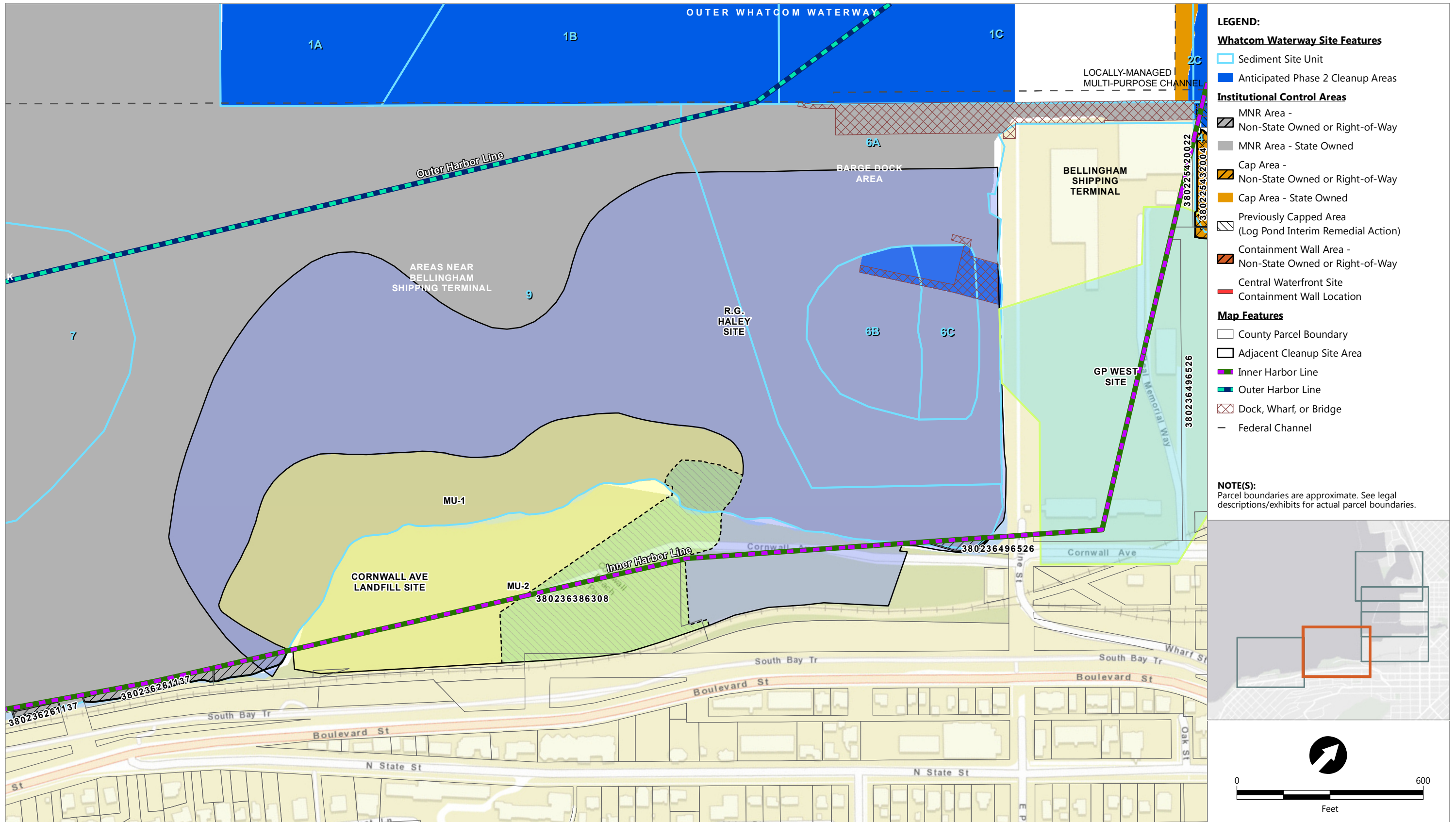
- County Parcel Boundary
- Adjacent Cleanup Site Area
- Inner Harbor Line
- Outer Harbor Line
- Dock, Wharf, or Bridge
- Federal Channel

NOTE(S):
Parcel boundaries are approximate. See legal descriptions/exhibits for actual parcel boundaries.

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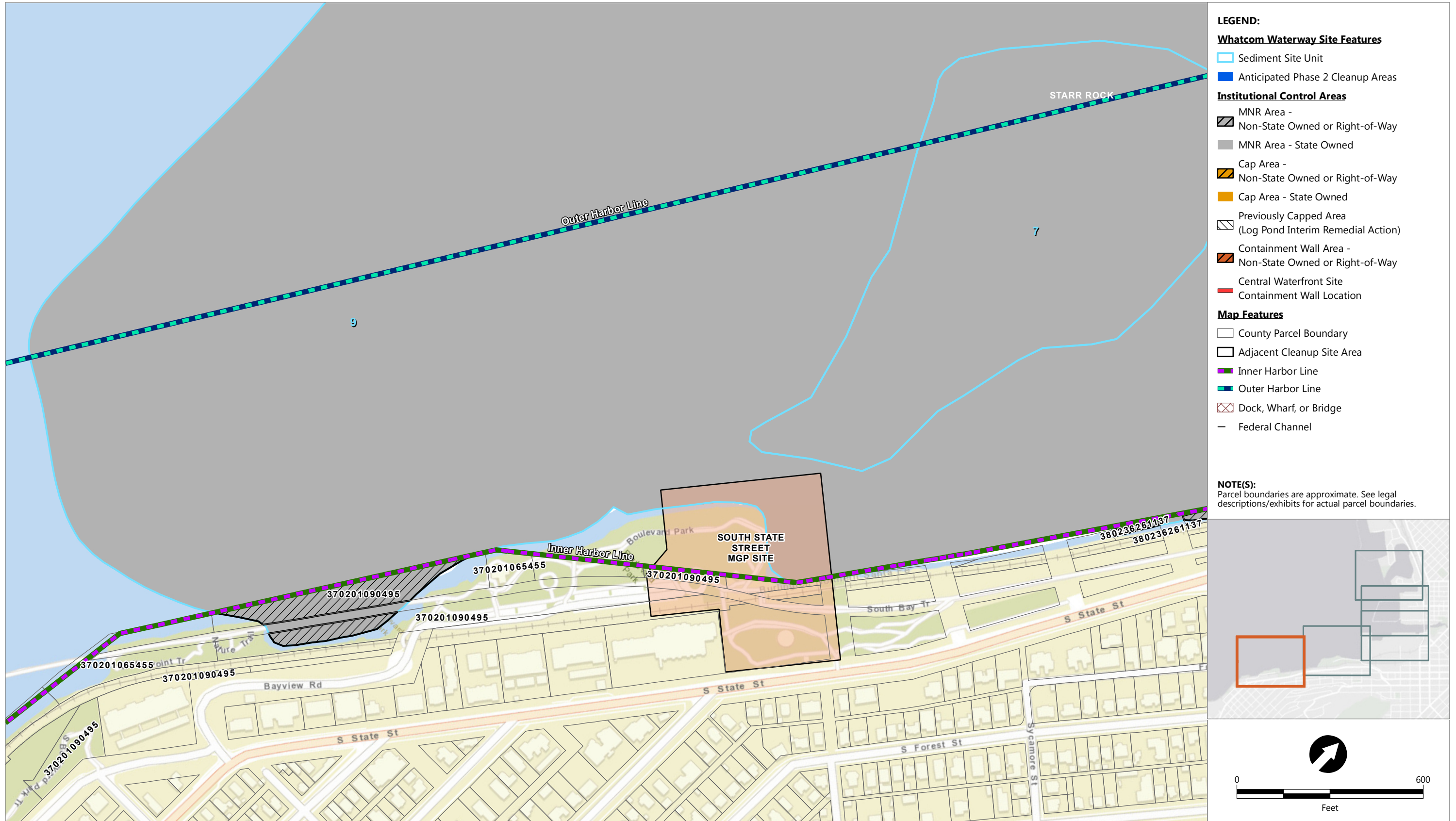
Figure 8
Detailed Parcel Map
Institutional Control Plan
Whatcom Waterway Cleanup Phase 1



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Figure 9
Detailed Parcel Map
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1



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Figure 10
Detailed Parcel Map
 Institutional Control Plan
 Whatcom Waterway Cleanup Phase 1

ATTACHMENT A
ENVIRONMENTAL COVENANT FOR
MTCA SITES: INSTRUCTIONS FOR USE
AND COVENANT TEMPLATE



Environmental Covenant for MTCA Sites: Instructions for Use and Covenant Template

Established: August 20, 2015

Revised: December 22, 2016

To: Interested Persons

From: James. J. Pendowski, Program Manager
Toxics Cleanup Program

Contact: Policy & Technical Support Unit, Headquarters

Note: This is Attachment C in Procedure 440A. For additional instructions on using this Covenant, please see Toxics Cleanup Program's **Procedure 440A: Establishing Environmental Covenants under the Model Toxics Control Act**, publication no. 15-09-054.

Instructions for Use

The following steps provide guidance on how to develop an environmental covenant using the enclosed template. While the exact sequence of steps, as well as who conducts the work (Ecology, potentially liable person (PLP) or Voluntary Cleanup Program (VCP) customer), may vary from site to site, all of the elements identified here must be addressed. When requesting a Covenant, Ecology should identify which steps are the responsibilities of the PLP or VCP customer at the site. Questions about specific provisions in the Covenant template should be directed to the Ecology Cleanup Project Manager assigned to the site. If no Cleanup Project Manager has been assigned, contact Ecology's Toxics Cleanup Program at (360) 407-7170 and ask for advice from the Toxics Cleanup Program (TCP) Policy Unit.

Step 1: Identify the Parcels Subject to the Covenant

Using the County Assessors Tax records, identify the parcels subject to the Covenant. Even though the site (or part of the site subject to the Covenant) may be owned by one entity, it may actually encompass more than one parcel of real property as shown on the County's property (and tax) records.

Step 2: Identify the Specific Activity and Use Restrictions for the Property

Create a conceptual list of specific prohibited activities (e.g., don't drill wells on the property) and prohibited uses (e.g., property can't be used for residential uses).

Work with the PLP/VCP customer, the property owner, and owners of other property interests (if different) to refine the language implementing these restrictions.

Step 3: Consult with the Local Government Land Use Planning Authority

The Uniform Environmental Covenants Act (UECA) and Model Toxics Control Act (MTCA) require Ecology to "consult" with the local government land use planning authority on the terms of the Covenant. While technically the Mayor/Executive is this authority, this guidance recommends contacting the staff that who work with land use issues. However, if the jurisdiction prefers the contact be through the local elected executive, work through the Mayor/Executive instead.

Ideally, before drafting the Covenant, Ecology staff should discuss the proposed restrictions with the local government staff by phone or email. **Once the Covenant has been drafted, the full covenant should be sent to the local government for review.** This consultation should be done by Ecology, but may be delegated to the PLP or VCP customer, upon agreement by Ecology.

The purpose of this consultation is to identify provisions in the Covenant that might conflict with current or future land use plans and development regulations for the property. For example, a provision requiring the land to remain in industrial use won't hold up in the long term if the comprehensive plans for the area call for future mixed residential and commercial use development. Similarly, a provision prohibiting infiltration of stormwater anywhere on the property may conflict with local development regulations requiring all stormwater to be retained and infiltrated on the property. If there is a conflict, see if it's possible to apply the restriction to only part of the property where the exposure pathway is of concern.

Use the following table as a guide for whom to contact:

Jurisdiction	Department
City or Town	City or Town Planning Department
Unincorporated Areas	County Planning Department
Urban Growth Areas not Annexed to City or Town ¹	Both City or Town Planning Department and County Planning Department

Note: In larger communities, planning staff who work on zoning and comprehensive plan issues are typically different than those who review development proposals. *Make sure you are talking to the right staff.*

¹ City limits and urban growth area should be identified in the City's and County's comprehensive plans. They can typically be found on the local jurisdiction's website. If not, call the jurisdiction's staff to obtain a copy.

Step 4: Confirm the Recorded Interests in the Property

To determine who owns the property and any relevant property interests that may need to be superseded by the Covenant, a title search must be conducted to identify all recorded interests in the Property. The title search should be the responsibility of the PLP (or VCP customer) and conducted by a title company. **The results of this search, typically called a title report or plat certificate, must be included with any request asking Ecology to sign a Covenant.** An uninsured title report is sufficient for this purpose.

In general, the title search should be no more than six months old to ensure it reflects the current status of the property. However, under some circumstances, Ecology may accept an older title search, such as that completed during the PLP identification process. Accepting older title searches should be done only if Ecology has been closely involved with the site during the intervening time period since the last title search, and there is no reason to suspect the owner has changed or an easement or other interest in the property has been granted. Examples of changes that would trigger the need for a new title search are:

- Establishment of a new business on the property;
- Change in the name of the business currently on the property;
- Subdivision of the property;
- Construction of new utilities or roads across the property;
- Foreclosure on the property;
- Change in the status of the persons owning the property (death, divorce or marriage); and
- Bankruptcy of the site owner or operator.

Step 5: Determine Who Needs to Sign the Covenant

Real property interests are prioritized according to the date on which they were recorded with the land record authority. Such interests include not only ownership of the property, but may also include mortgages; tax or mechanics' liens; utility easements; surface land rights; and judgments. If a senior mortgage holder forecloses on the property, for instance, it may be able to dispose of all other interests, including Ecology's Covenant. For this reason, to ensure the restrictions in a Covenant are enforceable, the Covenant must supersede these pre-existing property interests.

Grantors or signatories to a Covenant not only are granting access to Ecology and agreeing to adhere to the restrictions on future activities or uses of the property, they are also agreeing to be responsible for any "affirmative obligations" described in the Covenant, such as maintaining the remedy and monitoring.

Signing a subordination agreement means the person holding a senior property interest is agreeing that the Covenant takes precedent over their interest, including providing Ecology with access, and consenting to the restrictions on future uses and activities on the property. However, they are not necessarily agreeing to the affirmative obligations in the Covenant.

Use the following as a guide to determine who must sign the Covenant as a grantor or subordinate their interests:

a) Persons holding fee simple title to the property (i.e., landowners).

The landowner must always sign the Covenant as a Grantor.

b) Persons holding other property interests (such as easements, right-of-ways, water & mineral rights).

In general, if a person holds a title to:

- a) An easement or right-of-way,

b) Water rights (if groundwater use is restricted); or

c) Mineral rights,

...that is located within the area of activity or use restrictions, and compliance with those restrictions could be overridden by the person exercising their rights, then the person holding the title should either:

a) Sign the covenant as a Grantor, or

b) Subordinate their interests by signing a subordination agreement.

However, if a current contact cannot be located, or if the holder's interest is not critical to the success of the Covenant, it is probably not necessary to expend a lot of effort to track them down and obtain a signature. For example, many properties, especially in eastern Washington State, have underlying mineral rights that are controlled by someone different than the owner. In most urban areas it is unlikely those rights would be exercised to the detriment of the remedy, and so there would be no reason to pursue a signature.

Similarly, the holder of an easement or right-of-way for overhead power lines that is unlikely to affect the performance of the remedy does not need to be pursued.

However, if a cap is part of the remedy, and the easement or right-of-way grants the holder the right to conduct activities that could compromise the integrity of the cap (such as installation and maintenance of road or an underground utility), these holders should be required to sign the Covenant as a Grantor or subordinate their interests.

c) Persons holding encumbrances on the property (such as lien and mortgage holders).

In general, persons holding a lien have merely a monetary interest (lien imposed because of lack of payment of a bill) and do not need to sign the Covenant or subordinate their interests. However, if the lien holder is claiming a right that could affect the performance of the remedy, such as control over future sale and development of the property, then they should be required to subordinate their interest.

Mortgage holders such as banks usually hold the title to the property until the property owner pays off the loan for purchase of the property. Should they foreclose on a property, they may be able to extinguish all subsequent interests, including Ecology's Covenant. As such, they should be required to sign a subordination agreement.

A Covenant or subordination agreement must be voluntarily granted. There may be circumstances where the holder of an interest or encumbrance on the property (other than the property owner) refuses to grant a Covenant or subordinate their interests, can't be located, or are not responsive. In these cases, the Ecology Cleanup Project Manager should, in consultation with the Assistant Attorney General assigned to the site, consider the success of the remedy without their signature. If it is deemed necessary to secure their signature and they refuse to sign, then a more complete cleanup will be required.

In cases where there is minimal risk to the success of the remedy and it is decided to proceed without their signature, a letter should be sent to the holder of this interest or encumbrance notifying them that, should they do anything on the property that affects the integrity of the remedial action or results in a release of a hazardous substance, they could trigger liability under MTCA. If the holder of this interest is unresponsive or cannot be located, work with the Assistant Attorney General assigned to the site on an appropriate notification procedure.

Step 6: Prepare the Covenant

Use the attached Ecology template to prepare the Covenant.

A precise legal description of the Property and any interests in the Property (such as an easement) is essential to know where the Covenant applies. A map must also be developed to provide a visual representation of where the restrictions apply on the Property.

- If the restrictions apply to the entire Property, the legal description in the Property deed and a map of the Property should be sufficient.
- If the restrictions apply to only part of the Property, a new legal description and map will need to be developed, and boundary markers or reference monuments will need to be established on the Property by a licensed surveyor.

If the Property includes more than one parcel of real property, the legal description and map should cover all of the parcels. This will enable recording of the same covenant on each parcel instead of creating and recording a different covenant for each parcel.

There are specific formatting requirements that apply to recorded Covenants. For example, there must be a three inch margin on the top of the first page and a one inch margin on the bottom and sides. See Chapter 65.04.045 RCW for additional format requirements.

Step 7: Public Involvement

In general, there is no requirement for a public notice and comment period on a Covenant, other than the requirement for local government consultation discussed above. However, because a Covenant can affect future uses of a property and potentially impact future development in the area, any public notice issued for the cleanup action plan or order or decree governing the cleanup should highlight the fact that there will be restrictions on future activities or uses of the property.

For sites with a high level of public interest or controversy, it may be appropriate to provide a separate opportunity for public comment. The Ecology Cleanup Project Manager should consult with the public involvement specialist assigned to the site regarding the appropriate level of public involvement.

Step 8: Sign the Covenant

The Ecology Cleanup Project Manager must ensure all appropriate persons sign the Covenant and that each of those signatures is notarized. This responsibility can be delegated to the PLP (or VCP applicant) but Ecology staff must verify this step has been completed.

Ecology's representative should sign the Covenant only after all other parties to the Covenant have signed.

Step 9: Record the Covenant

The Covenant must be recorded on the title of each parcel of real property subject to the Covenant. Recording is done by the County Auditor. If the area covered by the Covenant extends across a County boundary, the Covenant will have to be recorded in both Counties.

Step 10: Send the Recorded Covenant to Ecology and Others per RCW 64.70.070

- a. Send the original recorded Covenant to Ecology's contact for the site.²
- b. Send a legible copy of the recorded Covenant, with the recording number evident, to the following persons (per RCW 64.70.070):
 - Each person who signed the Covenant.
 - Each person holding a recorded interest in the real property subject to the Covenant (including each person who subordinated their interests to Ecology's Covenant).
 - Each person in possession of the real property subject to the Covenant at the time the Covenant is executed (such as renters).
 - The local government planning authority in which the real property subject to the Covenant is located.
 - Any other person to whom the Covenant expressly grants the power to enforce the Covenant.
 - Any other persons required by Ecology.

Note: These instructions and attached template are intended solely for the guidance of Ecology staff. They are not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party in litigation with the state of Washington. Ecology may act at variance with these instructions and the attached template depending on site-specific circumstances, or modify or withdraw these documents at any time.

² Some Counties retain the original. If that is the case, make sure Ecology receives a legible copy of the recorded Covenant with all the signatures and with recorded notation.

Environmental Covenant for MTCA Sites: Covenant Template

*See Toxics Cleanup Program's **Procedure 440A** for
additional instructions on the use of this Covenant.*

**Text highlighted by yellow are instructions/comments and options.
Those instructions and related footnotes should be removed from the Covenant.**

After Recording Return
Original Signed Covenant to: ¹

[**ECOLOGY SITE MANAGER**]

Toxics Cleanup Program
Department of Ecology

[**ECOLOGY OFFICE ADDRESS**]

NOTE: This Covenant is not valid without Ecology's approval and signature.

Environmental Covenant

(For MTCA Sites – August 20, 2015 Version)

Grantor: [**NAME OF THE LANDOWNER OR OTHER GRANTOR**] ²

Grantee: State of Washington, Department of Ecology (hereafter “Ecology”)

Brief Legal Description: [**BRIEF LEGAL DESCRIPTION**]

Tax Parcel Nos.: [**INSERT TAX PARCEL NUMBERS**]

Cross Reference: [**SEE BOX**]

- **If superseding or amending an existing Covenant, insert one of the following:**
“Original Covenant # ____ (superseding)” OR “Original Covenant # ____ (amending)”
- **Insert a reference to any subordination agreements, if separately recorded**
- **Insert a list of other related documents such as consent decree, order, or NFA opinion**
- **Otherwise, delete**

RECITALS ³

a. This document is an environmental (restrictive) covenant (hereafter “Covenant”) executed pursuant to the Model Toxics Control Act (“MTCA”), chapter 70.105D RCW, and Uniform Environmental Covenants Act (“UECA”), chapter 64.70 RCW.

b. The Property that is the subject of this Covenant is part or all of a site commonly known as [**ECOLOGY SITE NAME AND FACILITY ID**]. The Property is legally described in Exhibit A, and illustrated in Exhibit B, both of which are attached (hereafter “Property”). If there are differences between these two Exhibits, the legal description in Exhibit A shall prevail.

c. The Property is the subject of remedial action conducted under MTCA. This Covenant is required because residual contamination remains on the Property after completion of remedial actions. Specifically, the following principal contaminants remain on the Property: ⁴

¹ Some counties keep the original Covenant, others don't. If the signed original is available, it must be sent to Ecology. If the signed original is not available, send a legible copy to Ecology.

² The Grantor of a Covenant typically is the fee simple land owner of the property. The Grantor may also include holders of other property interests such as a holder of an easement, right-of-way, mineral right, lien, or mortgage.

³ This section is primarily used to describe this document and its purpose. It should not be used for substantive binding provisions.

⁴ List the contaminants for the associated media. If more than a few are present, list the top three to five for each medium.

Medium	Principal Contaminants Present
Soil	
Groundwater	
Surface Water/Sediment	

d. It is the purpose of this Covenant to restrict certain activities and uses of the Property to protect human health and the environment and the integrity of remedial actions conducted at the site. Records describing the extent of residual contamination and remedial actions conducted are available through Ecology. **[Optional--This includes the following documents: (list key documents such as RI/FS, Cleanup Action Plan, Voluntary Cleanup Report(s), As-built report)].**

e. This Covenant grants Ecology certain rights under UECA and as specified in this Covenant. As a Holder of this Covenant under UECA, Ecology has an interest in real property, however, this is not an ownership interest which equates to liability under MTCA or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* The rights of Ecology as an “agency” under UECA, other than its’ right as a holder, are not an interest in real property.

f. **[Include the following statement if this Covenant is superseding another environmental covenant.]** This Covenant supersedes and replaces the existing Environmental (Restrictive) Covenant, which is recorded with [] County as [# OF ORIGINAL COVENANT].

COVENANT

[NAME OF LANDOWNER OR OTHER GRANTOR], as Grantor ⁵ and **[FEE SIMPLE, EASEMENT OR OTHER]** owner of the Property hereby grants to the Washington State Department of Ecology, and its successors and assignees, the following covenants. Furthermore, it is the intent of the Grantor that such covenants shall supersede any prior interests the GRANTOR has in the property and run with the land and be binding on all current and future owners of any portion of, or interest in, the Property.

Section 1. General Restrictions and Requirements.

The following general restrictions and requirements shall apply to the Property:

a. **Interference with Remedial Action.** The Grantor shall not engage in any activity on the Property that may impact or interfere with the remedial action and any operation, maintenance, inspection or monitoring of that remedial action without prior written approval from Ecology.

b. **Protection of Human Health and the Environment.** The Grantor shall not engage in any activity on the Property that may threaten continued protection of human health or the environment without prior written approval from Ecology. This includes, but is not limited to, any activity that results in the release of residual contamination that was contained as a part of the remedial action or that exacerbates or creates a new exposure to residual contamination remaining on the Property.

⁵ If there is more than one Grantor, use the term “Grantors” here and throughout this document.

c. Continued Compliance Required. Grantor shall not convey any interest in any portion of the Property without providing for the continued adequate and complete operation, maintenance and monitoring of remedial actions and continued compliance with this Covenant.

d. Leases. Grantor shall restrict any lease for any portion of the Property to uses and activities consistent with this Covenant and notify all lessees of the restrictions on the use of the Property.

e. Preservation of Reference Monuments. Grantor shall make a good faith effort to preserve any reference monuments and boundary markers used to define the areal extent of coverage of this Covenant. Should a monument or marker be damaged or destroyed, Grantor shall have it replaced by a licensed professional surveyor within 30 days of discovery of the damage or destruction.

Section 2. Specific Prohibitions and Requirements.

In addition to the general restrictions in Section 1 of this Covenant, the following additional specific restrictions and requirements shall apply to the Property.

[See Appendix 1 for example restrictions.]

Select from the restrictions in Appendix 1 as appropriate, based on site-specific circumstances. Most sites will have only some of these restrictions. Options are provided to illustrate the range of potential restrictions. In some cases, the options are mutually exclusive (pick one or the other, but not both). In other cases, several options may need to be combined to cover the range of conditions at the site. This is not intended to be an all-inclusive list. In circumstances where none of the categories or suggested options fit the site conditions, adjust the language as appropriate to fit the situation.

- a. Land use.**
- b. Containment of soil/waste materials.**
- c. Stormwater facilities.**
- d. Vapor/gas controls.**
- e. Groundwater use.**
- f. Sediments.**
- g. Monitoring.**
- h. Other.**

Section 3. Access.

a. The Grantor shall maintain clear access to all remedial action components necessary to construct, operate, inspect, monitor and maintain the remedial action.

b. The Grantor freely and voluntarily grants Ecology and its authorized representatives, upon reasonable notice, the right to enter the Property at reasonable times to evaluate the effectiveness of this Covenant and associated remedial actions, and enforce compliance with this Covenant and those actions, including the right to take samples, inspect any remedial actions conducted on the Property, and to inspect related records.

c. No right of access or use by a third party to any portion of the Property is conveyed by this instrument.

Section 4. Notice Requirements.

a. Conveyance of Any Interest. The Grantor, when conveying any interest [IN ANY PART OF THE PROPERTY] **OR** [WITHIN THE AREA OF THE PROPERTY DESCRIBED AND ILLUSTRATED IN EXHIBITS B AND C], including but not limited to title, easement, leases, and security or other interests, must:

- i. Provide written notice to Ecology of the intended conveyance at least thirty (30) days in advance of the conveyance.⁶
- ii. Include in the conveying document a notice in substantially the following form, as well as a complete copy of this Covenant:

NOTICE: THIS PROPERTY IS SUBJECT TO AN ENVIRONMENTAL COVENANT GRANTED TO THE WASHINGTON STATE DEPARTMENT OF ECOLOGY ON [DATE] AND RECORDED WITH THE [COUNTY] COUNTY AUDITOR UNDER RECORDING NUMBER [RECORDING NUMBER]. USES AND ACTIVITIES ON THIS PROPERTY MUST COMPLY WITH THAT COVENANT, A COMPLETE COPY OF WHICH IS ATTACHED TO THIS DOCUMENT.

- iii. Unless otherwise agreed to in writing by Ecology, provide Ecology with a complete copy of the executed document within thirty (30) days of the date of execution of such document.

b. Reporting Violations. Should the Grantor become aware of any violation of this Covenant, Grantor shall promptly report such violation in writing to Ecology.

c. Emergencies. For any emergency or significant change in site conditions due to Acts of Nature (for example, flood or fire) resulting in a violation of this Covenant, the Grantor is authorized to respond to such an event in accordance with state and federal law. The Grantor must notify Ecology in writing of the event and response actions planned or taken as soon as practical but no later than within 24 hours of the discovery of the event.

d. Notification procedure. Any required written notice, approval, reporting or other communication shall be personally delivered or sent by first class mail to the following persons. Any change in this contact information shall be submitted in writing to all parties to this Covenant. Upon mutual agreement of the parties to this Covenant, an alternative to personal delivery or first class mail, such as e-mail or other electronic means, may be used for these communications.

⁶ Ecology may waive this notice provision for some units at a Property where the anticipated use is a multi-tenant/owner building where some owners or tenants are unlikely to be exposed to residual contamination. For example: upper story apartments or condominiums, or commercial tenants in a strip mall, with limited rights to use the grounds under and around the building (such as for parking).

If Ecology agrees to such a waiver, the circumstances of the waiver must be detailed in paragraph 4.a.i. In addition to the specific circumstances, this provision must include the following statement: "Waiver of this advance notice to Ecology for these transactions does not constitute waiver of this notice for the entire Property nor a waiver of the requirement in Section 4.a.ii. to include this notice in any document conveying interest in the Property."

<p>[insert contact name, address, phone number and e-mail for Grantor]</p>	<p>Environmental Covenants Coordinator Washington State Department of Ecology Toxics Cleanup Program P.O. Box 47600 Olympia, WA 98504 – 7600 (360) 407-6000 ToxicsCleanupProgramHQ@ecy.wa.gov</p>
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Section 5. Modification or Termination.

a. Grantor must provide written notice and obtain approval from Ecology at least sixty (60) days in advance of any proposed activity or use of the Property in a manner that is inconsistent with this Covenant. ⁷ For any proposal that is inconsistent with this Covenant and permanently modifies an activity or use restriction at the site: ⁸

i. Ecology must issue a public notice and provide an opportunity for the public to comment on the proposal; and

ii. If Ecology approves of the proposal, the Covenant must be amended to reflect the change before the activity or use can proceed.

b. If the conditions at the site requiring a Covenant have changed or no longer exist, then the Grantor may submit a request to Ecology that this Covenant be amended or terminated. Any amendment or termination of this Covenant must follow the procedures in MTCA and UECA and any rules promulgated under these chapters.

c. **[Optional]** By signing this agreement, per RCW 64.70.100, the original signatories to this agreement, other than Ecology, agree to waive all rights to sign amendments to and termination of this Covenant. ⁹

Section 6. Enforcement and Construction.

a. This Covenant is being freely and voluntarily granted by the Grantor.

b. Within ten (10) days of execution of this Covenant, Grantor shall provide Ecology with an original signed Covenant and proof of recording and a copy of the Covenant and proof of recording to others required by RCW 64.70.070.

c. Ecology shall be entitled to enforce the terms of this Covenant by resort to specific performance or legal process. All remedies available in this Covenant shall be in addition to any

⁷ Example of inconsistent uses are using the Property for a use not allowed under the covenant (i.e. mixed residential and commercial use on a property restricted to industrial uses), OR drilling a water supply well when use of the groundwater for water supply is prohibited by the covenant.

⁸ An example of an activity that is unlikely to be considered a permanent modification is a proposal to disturb a cap to repair an existing underground utility that passes through the site. However, installing a new underground utility within a capped area would be a permanent change.

⁹ As time passes, the original grantor and other signers of the Covenant may no longer exist as viable entities. This provision is intended to allow future amendments or termination of the Covenant without Ecology having to seek court authorization, as provided by RCW 64.70.100.

and all remedies at law or in equity, including MTCA and UECA. Enforcement of the terms of this Covenant shall be at the discretion of Ecology, and any forbearance, delay or omission to exercise its rights under this Covenant in the event of a breach of any term of this Covenant is not a waiver by Ecology of that term or of any subsequent breach of that term, or any other term in this Covenant, or of any rights of Ecology under this Covenant.

d. The Grantor shall be responsible for all costs associated with implementation of this Covenant. Furthermore, the Grantor, upon request by Ecology, shall be obligated to pay for Ecology’s costs to process a request for any modification or termination of this Covenant and any approval required by this Covenant.

e. This Covenant shall be liberally construed to meet the intent of MTCA and UECA.

f. The provisions of this Covenant shall be severable. If any provision in this Covenant or its application to any person or circumstance is held invalid, the remainder of this Covenant or its application to any person or circumstance is not affected and shall continue in full force and effect as though such void provision had not been contained herein.

g. A heading used at the beginning of any section or paragraph or exhibit of this Covenant may be used to aid in the interpretation of that section or paragraph or exhibit but does not override the specific requirements in that section or paragraph.

[GRANTOR’S SIGNATURE BLOCK FOR ORIGINAL COVENANTS]

Each person who signs must have a separate signature block and applicable notary acknowledgment. Repeat as many times as necessary.

Holders of other property interests must either sign the amended Covenant as a GRANTOR or sign the subordination agreement in Exhibit D.

The undersigned Grantor warrants he/she holds the title **[to the Property] OR [to an (Easement/Right of Way/etc.) on the Property]** and has authority to execute this Covenant.

EXECUTED this _____ day of _____, 20__.

_____ **[SIGNATURE]** _____

by: _____ **[PRINTED NAME]** _____

Title: _____

Insert one of the following, as applicable after each signature. See example format on page after next:

INDIVIDUAL ACKNOWLEDGMENT

CORPORATE ACKNOWLEDGMENT

REPRESENTATIVE ACKNOWLEDGEMENT

[GRANTOR'S SIGNATURE BLOCK FOR AMENDED COVENANTS]

Each person who signs must have a separate signature block and applicable notary acknowledgment. Repeat as many times as necessary.

When amending a Covenant, each GRANTOR of the existing Covenant must sign the amended Covenant unless the GRANTOR waived its rights under Section 5(b) of the Covenant.

Holders of other property interests must either sign the amended Covenant as a GRANTOR or sign the subordination agreement in Exhibit D.

The undersigned Grantor warrants he/she holds the title **[to the Property] OR [to an (Easement/Right of Way/etc.) on the Property]** and has authority to execute this Covenant.

EXECUTED this _____ day of _____, 20____.

The undersigned further acknowledges **[Environmental or Restrictive]** Covenant **[# OF THE ORIGINAL COVENANT]** filed in **[]** County, is hereby terminated and replaced with the above Environmental Covenant.

_____ **[SIGNATURE]** _____

by: _____ **[PRINTED NAME]** _____

Title: _____

Insert one of the following, as applicable. See example format on next page:

INDIVIDUAL ACKNOWLEDGMENT

CORPORATE ACKNOWLEDGMENT

REPRESENTATIVE ACKNOWLEDGEMENT

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the individual described herein and who executed the within and foregoing instrument and signed the same at **his/her** free and voluntary act and deed for the uses and purposes therein mentioned.

Notary Public in and for the State of Washington ¹⁰
Residing at _____
My appointment expires _____

CORPORATE ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the _____ of the corporation that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that **he/she** was authorized to execute said instrument for said corporation.

Notary Public in and for the State of Washington ¹⁵
Residing at _____
My appointment expires _____

REPRESENTATIVE ACKNOWLEDGEMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** signed this instrument, on oath stated that **he/she** was authorized to execute this instrument, and acknowledged it as the _____ [**TYPE OF AUTHORITY**] of _____ [**NAME OF PARTY BEING REPRESENTED**] to be the free and voluntary act and deed of such party for the uses and purposes mentioned in the instrument.

Notary Public in and for the State of Washington ¹⁵
Residing at _____
My appointment expires _____

¹⁰ Where landowner is located out of state, replace with appropriate out-of-state title and location.

[ECOLOGYS SIGNATURE BLOCK]

The Department of Ecology, hereby accepts the status as GRANTEE and HOLDER of the above Environmental Covenant.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

_____ [SIGNATURE] _____

by: _____ [PRINTED NAME] _____

Title: _____

Dated: _____

STATE ACKNOWLEDGMENT

STATE OF _____

COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the _____ of the state agency that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed, for the uses and purposes therein mentioned, and on oath stated that **he/she** was authorized to execute said instrument for said state agency.

Notary Public in and for the State of Washington

Residing at _____

My appointment expires _____

Exhibit A

LEGAL DESCRIPTION

(Required)

Exhibit B

PROPERTY MAP

(Required)

Exhibit C

MAP ILLUSTRATING LOCATION OF RESTRICTIONS

While a map illustrating the location of the restrictions is required, the grantor has the option of creating a separate map or including this information in Exhibit B.

More than one map may be necessary to illustrate the area subject to restrictions. For example, the area encompassing a soil cap may be different than the area where vapor or groundwater contamination is a concern.

The area subject to the restrictions, if less than the entire property, should be a contiguous area with even boundaries that follow physical features on the site so the boundary can be easily discerned in the field.

Exhibit D

SUBORDINATION AGREEMENT

KNOW ALL PERSONS, That __ [HOLDER'S NAME] __, the owner and holder of that certain
 __ [INSTRUMENT – E.G. EASEMENT/ROW/MORTGAGE/ETC.] __ bearing the date the _____ day
 of __ [MONTH] __, __ [YEAR] __, executed by __ [NAME OF PERSON THAT GRANTED THE INTEREST
 BEING SUBORDINATED] __, __ [LEGAL STATUS OF ORIGINAL GRANTOR – E.G. LANDOWNER,
 CORPORATE OFFICER, ETC.] __, and recorded in the office of the County Auditor of
 __ [COUNTY] __ County, State of Washington, on __ [DATE] __, under Auditor's File Number
 _____, does hereby agree that said Instrument shall be subordinate to the interest of the
 State of Washington, Department of Ecology, under the environmental (restrictive) covenant
 dated __ [DATE] __, executed by __ [NAME OF PERSON SIGNING THIS SUBORDINATION
 AGREEMENT] __, and recorded in __ [COUNTY] __ County, Washington under Auditor's File
 Number _____.

_____ [SIGNATURE] _____

by: _____ [PRINTED NAME] _____

Title: _____

Dated: _____

Insert one of the following, as applicable. See example format on next page:

INDIVIDUAL ACKNOWLEDGMENT

CORPORATE ACKNOWLEDGMENT

REPRESENTATIVE ACKNOWLEDGEMENT

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the individual described herein and who executed the within and foregoing instrument and signed the same at **his/her** free and voluntary act and deed for the uses and purposes therein mentioned.

Notary Public in and for the State of Washington ¹¹
Residing at _____
My appointment expires _____

CORPORATE ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the _____ of the corporation that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that **he/she** was authorized to execute said instrument for said corporation.

Notary Public in and for the State of Washington ¹⁶
Residing at _____
My appointment expires _____

REPRESENTATIVE ACKNOWLEDGEMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** signed this instrument, on oath stated that **he/she** was authorized to execute this instrument, and acknowledged it as the _____ [**TYPE OF AUTHORITY**] of _____ [**NAME OF PARTY BEING REPRESENTED**] to be the free and voluntary act and deed of such party for the uses and purposes mentioned in the instrument.

Notary Public in and for the State of Washington ¹⁶
Residing at _____
My appointment expires _____

¹¹ Where landowner is located out of state, replace with appropriate out-of-state title and location.

APPENDIX 1

EXAMPLE SITE-SPECIFIC COVENANT PROVISIONS**a. Land Use.** ¹²

Option 1 Industrial Land Use: The remedial action for the Property is based on a cleanup designed for industrial property. As such, the Property shall be used in perpetuity only for industrial uses, as that term is defined in the rules promulgated under Chapter 70.105D RCW. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, parks, grazing of animals, growing of food crops, and non-industrial commercial uses.

Option 2 Commercial Land Use: The remedial action for the Property is based on a cleanup designed for commercial property. As such, the Property shall be used in perpetuity only for commercial land uses as that term is defined in the rules promulgated under Chapter 70.105D RCW. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, parks, grazing of animals, and growing of food crops.

Option 3 Park: The remedial action for the Property is based on a cleanup designed for a public park. As such, the Property shall be used in perpetuity only for a public park. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, grazing of animals, and growing of food crops.

Option 4 [Specify other land use limitations as appropriate.]

b. Containment of Soil/Waste Materials. ¹³

[Use where contaminated soil or solid or hazardous waste remains on the property.]

The remedial action for the Property is based on containing contaminated soil **[and waste materials]** under a cap consisting of **[Insert a description of the cap]** ¹⁴ and located as illustrated in **[Exhibit B/C]** ¹⁵. The primary purpose of this cap is to **[Insert purpose of cap]**. ¹⁶ As such, the following restrictions shall apply within the area illustrated in **[Exhibit B/C]** ¹⁷:

Option 1 [Use where a cap is required.] Any activity on the Property that will compromise the integrity of the cap including: drilling; digging; piercing the cap with sampling device, post, stake or similar device; grading; excavation; installation of underground utilities; removal of the cap; or, application of loads in excess of the cap load bearing capacity, is prohibited without prior written approval by Ecology. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to the cap. Unless an alternative plan has been approved by Ecology in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

¹² Use one of these restrictions only if the underlying zoning allows the use.

¹³ Waste materials means solid wastes as defined in Chapter 70.95 RCW or hazardous wastes as defined in Chapter 70.105 RCW and the rules promulgated under these statutes.

¹⁴ Such as: an X foot thick layer of clean soil; an engineered cap consisting of X inches of clean soil overlying a X mil thick geomembrane and/or clay layer; asphalt pavement; an X square foot building, etc.]

¹⁵ Be very clear in describing or diagramming where the contamination is located relative to a legally defined benchmark such as a property line or survey monument; or use a legal description.

¹⁶ Such as: minimize the potential for contact with contaminated soil; minimize leaching of contaminants to groundwater and surface water; prevent runoff from contacting contaminated soil; minimize airborne contaminants. A cap may have multiple purposes.

¹⁷ NOTE: More than one exhibit may be necessary to illustrate the area restricted by this and other limitations.

Option 2 [Use when contamination is left behind under a building.]

The Grantor shall not alter or remove the existing structures on the Property in any manner that would expose contaminated soil [and waste materials], result in a release to the environment of contaminants, or create a new exposure pathway, without prior written approval of Ecology. Should the Grantor propose to remove all or a portion of the existing structures illustrated in [Exhibit B/C] so that access to the underlying contamination is feasible, Ecology may require treatment or removal of the underlying contaminated soil [and waste materials].

Option 3: [Use when periodic inspections of a cap/building are included.]

The Grantor covenants and agrees that it shall annually, or at another time as approved in writing by Ecology, inspect the [cap/building] and report within thirty (30) days of the inspection the condition of the [cap/building] and any changes to the [cap/building] that would impair its performance.

c. Stormwater facilities. [Use when infiltration needs to be controlled to minimize leaching from soil or waste materials, or spreading of groundwater contamination.]

To minimize the potential for mobilization of contaminants remaining in the [soil/waste materials/groundwater] on the Property, no stormwater infiltration facilities or ponds shall be constructed [on the Property] OR [within the area of the Property illustrated in Exhibit B/C]. All stormwater catch basins, conveyance systems, and other appurtenances located within this area shall be of water-tight construction.¹⁸

d. Vapor/gas controls. [Use when vapors and/or methane gas are a concern. An example of when this provision would be appropriate is if a soil cap or a groundwater conditional point of compliance are being used to address volatile contaminants remaining on the property.]

The residual contamination on the Property includes [volatile chemicals that may generate harmful vapors] and/or [biodegradable wastes/chemicals that may generate methane, a combustible gas]. As such, the following restrictions shall apply [on the Property] or [within the area of the Property illustrated in Exhibit B/C] to minimize the potential for exposure to these vapors:

1. No building or other enclosed structure shall be constructed [on the Property/within this area] unless approved by Ecology.
2. If a building or other enclosed structure is approved, it shall be constructed with a sealed foundation and a [vapor/gas] control system that is operated and maintained to prevent the migration of [vapors/gas] into the building or structure, unless an alternative approach is approved by Ecology.

e. Groundwater Use. [Use when groundwater use restrictions are required.]

The groundwater beneath [the Property] OR [within the area of the Property illustrated in Exhibit B/C] remains contaminated and shall not be extracted for any purpose other than temporary construction dewatering, investigation, monitoring or remediation. Drilling of a well for any water supply purpose is strictly prohibited. Groundwater extracted [from the

¹⁸ NOTE: Most local ordinances require on-site infiltration of runoff. If redevelopment of the Property is anticipated, the cleanup plan should reserve an area for this infiltration to occur without exacerbating leaching of residual soil contamination or enhancing movement of contaminants within the groundwater.

Property/within this area for any purpose shall be considered potentially contaminated and any discharge of this water shall be done in accordance with state and federal law.

f. Sediments. [Use for sediment cleanup sites.]¹⁹

The residual contamination on the Property includes contaminated sediments. As such, the following restrictions shall apply to minimize potential disturbance of these sediments **[on the Property] OR [within the area of the Property illustrated in Exhibit B/C]**:

Option 1 [Use where a cap is required.] Any activity **[on the Property/within this area]** that will compromise the integrity of the cap including: drilling; digging; piercing the cap with sampling device, post, stake or similar device; excavation; installation of buried utilities; removal of the cap; or, application of loads in excess of the cap load bearing capacity, is prohibited without prior written approval by Ecology. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to the cap. Unless an alternative plan has been approved by Ecology in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

Option 2 No docks or other structures shall be constructed **[on the Property/within this area]** without prior written approval of Ecology.

Option 3 No dredging shall be allowed **[on the Property/within this area]** without prior written approval of Ecology.

Option 4 No ships or boats shall be allowed to anchor or use side thrusters **[on the Property/within this area]**. A no wake zone shall be enforced and ships and boats shall be limited to a draft depth of **[XX]** feet **[on the Property/within this area]**.

Option 5 No digging for clams, setting of crab pots or fishing nets, anchoring of mooring buoys or channel markers, or similar activities that could disturb the surface of the sediment shall be allowed **[on the Property/within this area]** without prior written approval of Ecology.

g. Monitoring. [Use for long-term protection of monitoring devices.]

Several **[groundwater monitoring wells, vapor probes, etc.]** are located on the Property to monitor the performance of the remedial action. The Grantor shall maintain clear access to these devices and protect them from damage. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to any monitoring device. Unless Ecology approves of an alternative plan in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

h. Other.

[Add other property-specific use or activity restrictions and affirmative obligations that are necessary but not identified above. Examples include special remedy-specific requirements such as restrictions on structures over leachate/groundwater collection systems, or protection requirements for cut-off walls or sheet piling.]

¹⁹ NOTE: Sediment restrictions are currently evolving. Additional guidance can be found in Ecology's Sediment Cleanup Users Manual II (SCUM II), Publication No. 12-09-057, located at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1209057.html>

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ATTACHMENT B
EXISTING DNR EASEMENT FOR
WATERWAY CAPPING AREAS

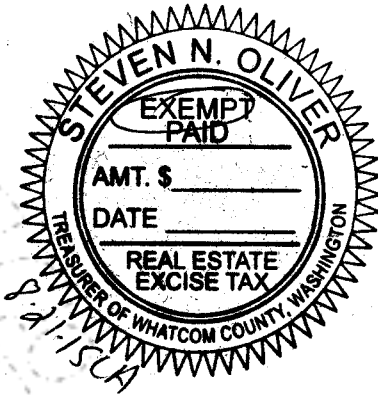


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EASE \$103.00
Whatcom County, WA

Request of: PORT OF BELLINGHAM

PORT OF BELLINGHAM
1801 Roeder Avenue
Bellingham, WA 98225
(360) 676-2500



DOCUMENT TITLE(S):

AQUATIC LANDS SEDIMENT REMEDIATION EASEMENT

REFERENCE NUMBER OF DOCUMENTS ASSIGNED OR RELEASED:

2070404380

GRANTORS:

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

GRANTEE:

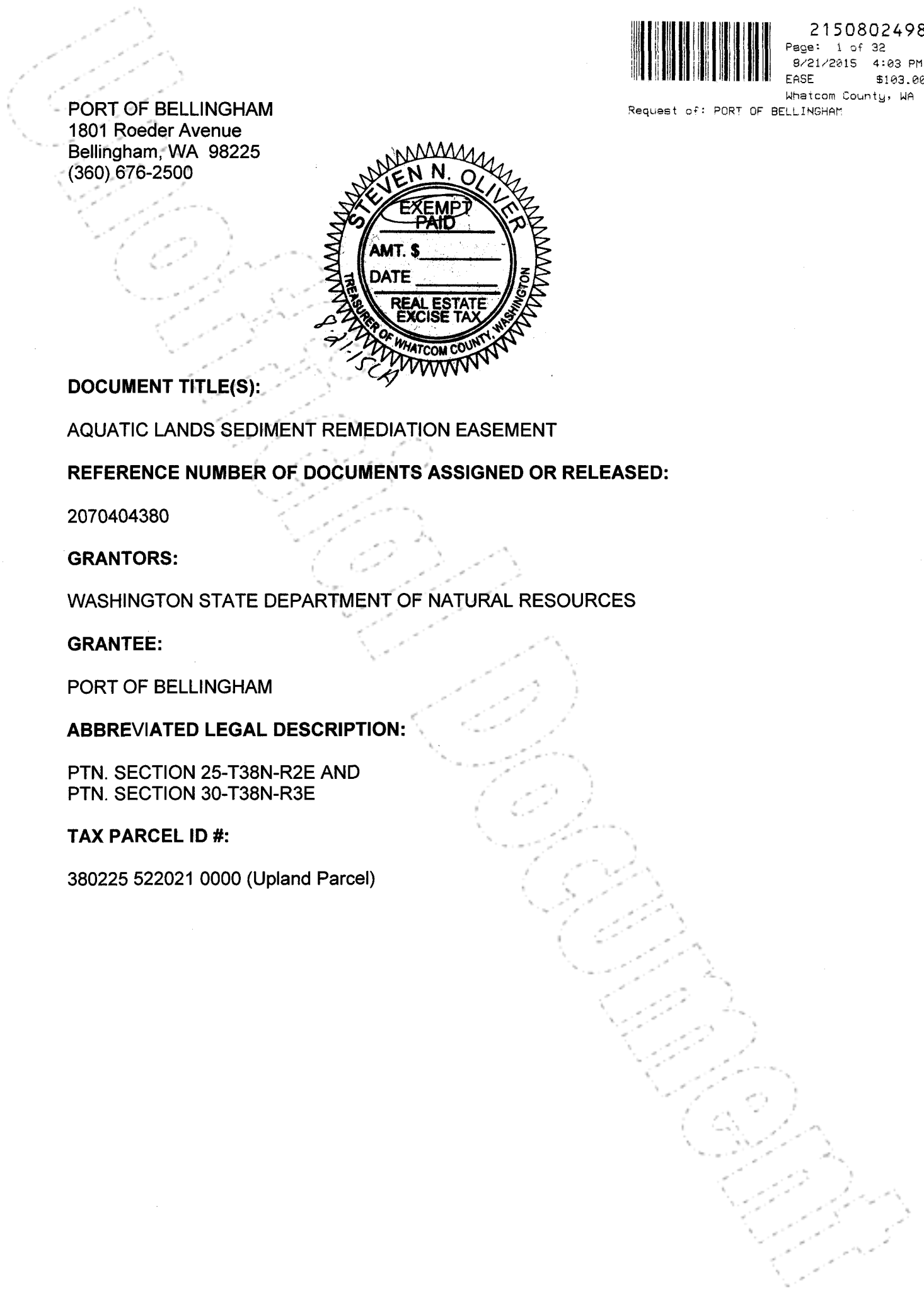
PORT OF BELLINGHAM

ABBREVIATED LEGAL DESCRIPTION:

PTN. SECTION 25-T38N-R2E AND
PTN. SECTION 30-T38N-R3E

TAX PARCEL ID #:

380225 522021 0000 (Upland Parcel)



When recorded return to:

Port of Bellingham
PO Box 1677
Bellingham, WA 98227



WASHINGTON STATE DEPARTMENT OF
Natural Resources
Peter Goldmark - Commissioner of Public Lands

AQUATIC LANDS SEDIMENT REMEDIATION EASEMENT

Easement No. 51-089568

Grantor:	Washington State Department of Natural Resources
Grantee(s):	Port of Bellingham
Legal Description:	Section 25 and 36, Township 38 North, Range 2 East, W.M. and Section 30, Township 38 North, Range 3 East, W.M.
Assessor's Property Tax Parcel or Account Number:	Not Applicable
Assessor's Property Tax Parcel or Account Number for Upland Parcel used in conjunction with this Easement:	Not Applicable

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and PORT OF BELLINGHAM, a Washington municipal government ("Grantee").

1. Grantee and State seek to fulfill mutual obligation to undertake remedial action for contaminated sediments located on the real property that is the subject of this Agreement. The Parties' obligation arise under the Consent Decree dated September 24, 2007 and First Amendment to Consent Decree dated August 19, 2011 (collectively the "Consent Decree")

issued by the Washington State Department of Ecology (“Regulatory Agency”), State of Washington Whatcom County Superior Court Case No. 07-2-02257-7.

2. This Agreement is entered into pursuant to a separate agreement between the Parties titled Interlocal Agreement for the Remediation of the Whatcom Waterway Site, the Cornwall Avenue Landfill Site, and the Harris Avenue Shipyard Site, dated April 6, 2007, and recorded with the Whatcom County Auditor’s Office under recording number 2070404380 (“the ILA”). The provisions of the ILA are not incorporated into this Agreement and this Agreement does not alter the terms or conditions of the ILA.

THE Parties agree as follows:

SECTION 1 GRANT OF EASEMENT

1.1 Easement Defined.

- (a) State grants and conveys to Grantee a nonexclusive easement, subject to the terms and conditions of this Agreement, over, upon, and under the real property at Whatcom Waterway and Bellingham Harbor Area described in Exhibit A. In this agreement, the term “Easement” means this Agreement and the rights granted herein. The term “Easement Property” means the real property subject to the easement.
- (b) This Easement is subject to all valid interests of third parties noted in the records of Whatcom County, or on file in the Office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or federal navigation servitude; and treaty rights of Indian Tribes.
- (c) Except as necessary for the Permitted Use, this Easement does not include any right to harvest, collect or damage any natural resource, including aquatic life or living plants, any water rights, or any mineral rights, including any right to excavate or withdraw sand, gravel, or other valuable materials.
- (d) State grants to Grantee a nonexclusive easement for construction purposes only over the property described in Exhibit B.

1.2 Survey and Easement Property Descriptions.

- (a) Grantee prepared the preliminary Exhibit A, which describes the Easement Property. Grantee warrants that, Exhibit A is a true and accurate description of the Easement boundaries and the improvements to be constructed or already existing in the Easement area.
- (b) Grantee shall not rely on any written legal descriptions, surveys, plats, or diagrams (“property description”) provided by State. Grantee shall not rely on State’s approval or acceptance of Exhibit A or any other Grantee-provided property description as affirmation or agreement that Exhibit A or other property description is true and accurate. Grantee’s obligation to provide a true and accurate description of the Easement Property boundaries is a material term of this Easement.

- (c) State accepts a preliminary Exhibit A upon the Commencement Date of this Easement. Grantee shall submit a final Exhibit A for State's approval within ninety (90) days of the Washington State Department of Ecology approving the Completion Report. Upon State's written approval, the final Exhibit A supersedes the preliminary Exhibit A. Until superseded, the preliminary Exhibit A has full legal effect.

1.3 Condition of Easement Property. State makes no representation regarding the condition of the Easement Property, improvements located on the Easement Property, the suitability of the Easement Property for Grantee's Permitted Use, compliance with governmental laws and regulations, availability of utility rights, or access to the Easement Property.

SECTION 2 USE

2.1 Permitted Use. Grantee shall use the Easement Property for installation of the remedy required in the Consent Decree, including but not limited to the removal of contaminated sediment, capping of contaminated sediment, and monitoring and maintenance the cap, all as set forth in the Consent Decree (the "Permitted Use"), and for no other purpose. The Permitted Use is described or shown in detail in Exhibit B.

2.2 Restrictions on Use.

- (a) Except as necessary for the Permitted Use, Grantee shall not cause or allow damage to natural resources on the Easement Property. Grantee shall not cause or allow damage to natural resources on adjacent state-owned aquatic lands.
- (b) Except as necessary for the Permitted Use, Grantee shall not cause or allow deposit of rock, sand, ballast or other similar materials the Easement Property. Grantee shall not cause or permit any filling activity of any kind on adjacent state-owned aquatic land. Grantee shall not cause or allow deposit of wood waste, refuse, garbage, waste matter (including chemical, biological, or toxic wastes), hydrocarbons, any other pollutants, or other matter on the Easement Property or adjacent state-owned aquatic land.
- (c) Grantee shall neither commit nor allow waste to be committed to or on the Easement Property or adjacent state-owned aquatic land.
- (d) Failure to Comply with Restrictions on Use.
- (1) Grantee's failure to comply with the restrictions on use under this Paragraph 2.2 is a default subject to Section 13. Grantee shall cure the default by taking all steps necessary to remedy the failure and restore the Easement Property and adjacent state-owned aquatic lands to the condition before the failure occurred within the time for cure provided in Section 13.
- (2) If Grantee fails to cure the default in the manner described in this Paragraph 2.2(d), State may (1) restore the state-owned aquatic lands and charge Grantee restoration costs and/or (2) charge Grantee natural

resource damages. On demand by State, Grantee shall pay all restoration costs and natural resources damages.

- (e) State's failure to notify Grantee of Grantee's failure to comply with all or any of the restrictions set out in this Paragraph 2.2 does not constitute a waiver of any remedies available to State.
- (f) Grantee's compliance with this Paragraph 2.2 does not limit Grantee's liability under Section 8, below.

2.3 Conformance with Laws. Grantee shall keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other applicable government rules and regulations regarding its use of the Easement Property.

2.4 Liens and Encumbrances. Grantee shall keep the Easement Property free and clear of any liens and encumbrances arising out of or relating to its use of the Easement Property, unless expressly authorized by State in writing.

2.5 Interference with Other Uses.

- (a) Grantee shall exercise Grantee's rights under this Easement in a manner that minimizes or avoids interference with the rights of State, the public or others with valid right to use or occupy the Easement Property or surrounding lands and water.
- (b) To the fullest extent reasonably possible, Grantee shall implement the Permitted Use in a manner that allows unobstructed movement in and on the waters above and around the Easement Property.
- (c) Except in an emergency, Grantee shall provide State with written notice of construction or other significant activity on Easement Property at least thirty (30) days in advance. "Significant Activity" means any activity that may affect use or enjoyment by the State, public, or others with valid rights to use or occupy the Easement Property or surrounding lands and water.
- (d) Grantee shall mark the location of any hazards associated with the Permitted Use and any Improvements in a manner that ensures reasonable notice to the public.
- (e) Grantee shall mark the location and limits of the Improvements. As required by applicable regulation or the Regulatory Agency, Grantee shall facilitate amendment of official navigational charts to indicate existence and location of submerged improvements.

SECTION 3 TERM

3.1 Term Defined. The term of this Easement is thirty (30) years (the "Term"), beginning on the 1st day of July, 2015 (the "Commencement Date"), and ending on the 30th day of June, 2045 (the "Termination Date"), unless terminated sooner under the terms of this Easement.

3.2 Renewal of the Easement. Upon the termination of this Easement, the need for a new easement or other use authorization shall be determined based on the provisions of the ILA.

SECTION 4 FEES

4.1 Fee. Grantee is not obligated to pay a fee pursuant to the provisions of the ILA relating to payment as between the Grantee and the State.

4.2 Payment Place. Grantee shall make payment, if required, to Financial Management Division, 1111 Washington St SE, PO Box 47041, Olympia, WA 98504-7041.

SECTION 5 OTHER EXPENSES

5.1 Utilities. Grantee shall pay all fees charged for utilities in connection with Grantee's use of the Easement Property, if any.

5.2 Taxes and Assessments. Grantee shall pay all taxes, assessments, and other governmental charges, of any kind whatsoever, applicable or attributable to the Easement and the Permitted Use.

5.3 Failure to Pay. If Grantee fails to pay any of the amounts due under this Easement, State may pay the amount due, and recover its cost in accordance with Section 6.

SECTION 6 LATE PAYMENTS AND OTHER CHARGES

6.1 Late Charge. If State does not receive any required payment within ten (10) days of the date due, Grantee shall pay to State a late charge equal to four percent (4%) of the amount of the payment or Fifty Dollars (\$50), whichever is greater, to defray the overhead expenses of State incident to the delay.

6.2 Interest Penalty for Past Due Fees and Other Sums Owed.

- (a) Grantee shall pay interest on the past due fee at the rate of one percent (1%) per month until paid, in addition to paying the late charges determined under Paragraph 6.1, above.
- (b) If State pays or advances any amounts for or on behalf of Grantee, Grantee shall reimburse State for the amount paid or advanced and shall pay interest on that amount at the rate of one percent (1%) per month from the date State notifies Grantee of the payment or advance. This includes, but is not limited to taxes, assessments, insurance premiums, costs of removal and disposal of unauthorized materials pursuant to Paragraph 2.2 above, costs of removal and disposal of improvements pursuant to Section 7 below, or other amounts not paid when due.

6.3 Referral to Collection Agency and Collection Agency Fees. If State does not receive payment within thirty (30) days of the due date, State may refer the unpaid amount to a collection agency as provided by RCW 19.16.500 or other applicable law. Upon referral, Grantee shall pay collection agency fees in addition to the unpaid amount.

6.4 No Accord and Satisfaction. If Grantee pays, or State otherwise receives, an amount less than the full amount then due, State may apply such payment as it elects. No endorsement or statement on any check, any payment, or any letter accompanying any check or payment constitutes accord and satisfaction.

SECTION 7 IMPROVEMENTS

7.1 Improvements Defined.

- (a) "Improvements" is defined in RCW 79.105.060(6). This includes, but is not limited to, structures and fixtures.
- (b) "State-Owned Improvements" are Improvements made or owned by State.
- (c) "Grantee-Owned Improvements" are Improvements made by Grantee with State's consent. Grantee-Owned Improvements includes any materials deposited as part of the Permitted Use.
- (d) "Unauthorized Improvements" are Improvements made on the Easement Property without State's prior consent or Improvements made by Grantee that do not conform with plans submitted to and approved by the State.
- (e) "Improvements Owned by Others" are Improvements made by Others with a right to occupy or use the Easement Property or adjacent state-owned lands.

7.2 Existing Improvements. On the Commencement Date, the following Improvements are located on the Easement Property: pilings, dolphins, floats, and ramps. The Improvements are variously Grantee-owned and Owned by Others.

7.3 Construction, Major Repair, Modification, and Demolition.

- (a) This Paragraph 7.3 governs construction, alteration, replacement, major repair, modification alteration, demolition and deconstruction of Improvements ("Work"). Section 11 governs routine maintenance and minor repair of Improvements and Easement Property.
- (b) Except in an emergency, Grantee shall not conduct any Work, without State's prior written consent, as follows:
 - (1) State may deny consent if State determines that denial is in the best interests of the State. State may impose additional conditions reasonably intended to protect and preserve the Easement Property.
 - (2) Except in an emergency, Grantee shall submit to State plans and specifications describing the proposed Work at least sixty (60) days before submitting permit applications to regulatory authorities unless Grantee and

State otherwise agree to coordinate permit applications. At a minimum, or if no permits are necessary, Grantee shall submit plans and specifications at least ninety (90) days before commencement of Work. This submittal requirement does not apply to activity described in Exhibit B.

- (3) State waives the requirement for consent if State does not notify Grantee of its grant or denial of consent within sixty (60) days of submittal.
- (c) Grantee shall notify State of emergency Work within five (5) business days of the start of such Work. Upon State's request, Grantee shall provide State with plans and specifications or as-builts of emergency Work.
- (d) Grantee shall not commence or authorize Work until Grantee has:
 - (1) Obtained all required permits.
 - (2) Provided notice of Significant Activity, including the Work described in Exhibit B in accordance with Paragraph 2.5(c).
 - (3) Grantee is conducting the Work as a public work pursuant to chapter 39.04 RCW and therefore will receive a 100% performance and payment bond from the contractor pursuant to chapter 39.08. Grantee hereby represents and warrants that it will not begin the Work unless and until it has sufficient funds committed to pay the Grantee's contractor according to the terms of the public works contract. Grantee's contractor shall maintain the performance and payment bond until Grantee or Grantee's contractor pays in full the costs of the Work, including all laborers and material suppliers.
- (e) Grantee shall preserve and protect State-Owned Improvements and Improvements Owned by Others, if any.
- (f) Grantee shall preserve all legal land subdivision survey markers and witness objects ("Markers.") If disturbance of a Marker will be a necessary consequence of Grantee's construction, Grantee shall reference and/or replace the Marker in accordance with all applicable laws and regulations current at the time, including, but not limited to Chapter 58.24 RCW. At Grantee's expense, Grantee shall retain a registered professional engineer or licensed land surveyor to reestablish destroyed or disturbed Markers in accordance with U.S. General Land Office standards.
- (g) Before completing Work, Grantee shall remove all debris and restore the Easement Property, as nearly as possible, to a substantially natural state, except for alterations necessary under the Permitted Use or otherwise authorized by State.
- (h) Upon completing Work, Grantee shall promptly provide State with as-built plans and specifications.

7.4 Grantee-Owned Improvements at End of Easement. Grantee-Owned Improvements merge with the Easement Property upon termination of the Easement, unless the Parties agree otherwise.

7.5 Disposition of Unauthorized Improvements.

- (a) Unauthorized Improvements belong to State, unless State elects otherwise.
- (b) State may either:
 - (1) Consent to Grantee ownership of the Unauthorized Improvements, or
 - (2) Charge use and occupancy fee in accordance with RCW 79.105.200 of the Unauthorized Improvements from the time of installation or construction and
 - (i) Require Grantee to remove the Unauthorized Improvements in accordance with Paragraph 7.3, in which case Grantee shall pay use and occupancy fee for the Unauthorized Improvements until removal,
 - (ii) Consent to Unauthorized Improvements remaining and Grantee shall pay use and occupancy fee for the use of the Unauthorized Improvements, or
 - (iii) Remove Unauthorized Improvements and Grantee shall pay for the cost of removal and disposal, in which case Grantee shall pay use and occupancy fee for use of the Unauthorized Improvements until removal and disposal.

SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION

8.1 Definitions.

- (a) "Hazardous Substance" means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup.
- (b) "Release or threatened release of Hazardous Substance" means a release or threatened release as defined under any law described in Paragraph 8.1(a) or any similar event defined under any such law.
- (c) "Utmost care" means the standard of care applicable under MTCA, RCW 70.105D.040.

8.2 General Conditions.

- (a) Grantee's obligations under this Section 8 extend to the area in, on, under, or above:
 - (1) The Easement Property and
 - (2) Adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances may arise from Grantee's use of the Easement Property pursuant to this Easement.
- (b) Standard of Care.
 - (1) Grantee shall exercise the utmost care with respect to Hazardous Substances.

- (2) In relation to the Permitted Use, Grantee shall exercise utmost care for the foreseeable acts or omissions of third parties with respect to Hazardous Substances, and the foreseeable consequences of those acts or omissions.

8.3 Current Conditions and Duty to Investigate.

Grantee is responsible for conducting all appropriate inquiry and gathering sufficient information concerning the Easement Property and the existence, scope, and location of any Hazardous Substances on the Easement Property or on adjacent lands that allows Grantee to meet Grantee's obligations for sediment remediation pursuant to the Consent Decree.

8.4 Use of Hazardous Substances.

- (a) Except as necessary for the Permitted Use, Grantee, its, contractors, agents, employees, guests, invitees, or affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances, except in accordance with all applicable laws or as authorized by the Regulatory Agency.
- (b) Except as necessary for the Permitted Use, Grantee shall not undertake, or allow others to undertake by Grantee's permission, acquiescence, or failure to act, activities that:
 - (1) Result in a release or threatened release of Hazardous Substances, or
 - (2) Cause, contribute to, or exacerbate existing contamination.
- (c) If use of Hazardous Substance related to the Permitted Use results in a violation of an applicable law:
 - (1) Grantee shall submit to State any plans for remedying the violation, and
 - (2) Grantee shall implement any measures State may reasonably require to restore the Easement Property in addition to measures required by the Regulatory Agency or other regulatory authorities to remedy the violation.

8.5 Management of Contamination.

- (a) Grantee is responsible for management of Permitted Use consistent with the Consent Decree.
- (b) Subject to the provisions of the ILA relating to payment as between the Grantee and the State, Grantee is responsible for all monitoring and maintenance of the Permitted Use required by the Consent Decree.

8.6 Notification and Reporting.

- (a) Grantee shall immediately notify State if Grantee becomes aware of any of the following:
 - (1) Except as necessary for the Permitted Use, a release or threatened release of Hazardous Substances;
 - (2) Any new discovery of or new information about a problem or liability related to, or derived from, the presence of any Hazardous Substance;
 - (3) Any lien or action arising from the foregoing;

- (4) Any actual or alleged violation of any federal, state, or local statute, ordinance, rule, regulation, or other law pertaining to Hazardous Substances;
 - (5) Any notification from the US Environmental Protection Agency (EPA) or the Washington State Department of Ecology (DOE) that additional remediation or removal of Hazardous Substances is or may be required at the Easement Property.
- (b) Grantee's duty to report under Paragraph 8.6(a) extends to the Easement Property, adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances could arise from the Easement Property.
 - (c) Grantee shall provide State with copies of all documents concerning environmental issues associated with the Easement Property, and submitted by Grantee to any federal, state or local authorities.

8.7 Indemnification.

- (a) "Liabilities" as used in this Paragraph 8.7 means any claims, demands, proceedings, lawsuits, damages, costs, expenses, fees (including attorneys' fees and disbursements), penalties, or judgments.
- (b) To the extent permitted by law and subject to the provisions of the ILA relating to payment as between the Grantee and the State, Grantee shall fully indemnify, defend, and hold State harmless from and against any Liabilities that arise out of, or relate to:
 - (1) Except as necessary for the Permitted Use, the use, storage, generation, processing, transportation, handling, or disposal of any Hazardous Substance by Grantee, its contractors, agents, invitees, guests, employees, affiliates, licensees, or permittees occurring anytime Grantee uses the Easement Property for the Permitted Use;
 - (2) Except as necessary for the Permitted Use, the release or threatened release of any Hazardous Substance, or the exacerbation of any Hazardous Substance contamination resulting from any act or omission of Grantee, its contractors, agents, employees, guests, invitees, or affiliates occurring anytime Grantee uses the Easement Property for the Permitted Use.
- (c) Grantee's indemnification obligations survive termination of the Easement.

8.8 Reservation of Rights.

- (a) For any environmental liabilities not covered by the indemnification provisions of Paragraph 8.7, the Parties expressly reserve and do not waive or relinquish any rights, claims, immunities, causes of action, or defenses relating to the presence, release, or threatened release of Hazardous Substances that either Party may have against the other under law.
- (b) This Easement affects no right, claim, immunity, or defense either Party may have against third parties, and the Parties expressly reserve all such rights, claims, immunities, and defenses.

- (c) The provisions under this Section 8 do not benefit, or create rights for, third parties.
- (d) The allocations of risks, liabilities, and responsibilities set forth above do not release either Party from, or affect the liability of either Party for, claims or actions by federal, state, or local regulatory agencies concerning Hazardous Substances or the Permitted Use.

8.9 Additional Cleanup.

- (a) Except as necessary for the Permitted Use, if Grantee's act, omission, or breach of obligation under Paragraph 8.4 results in a release of Hazardous Substances, Grantee shall, at Grantee's sole expense, promptly take all actions necessary or advisable to clean up the Hazardous Substances in accordance with applicable law or required by the Regulatory Agency. Cleanup actions include, without limitation, removal, containment, and remedial actions.
- (b) Grantee's obligation to undertake a cleanup under Section 8 is limited to those instances where the Hazardous Substances exist in amounts that exceed the threshold limits of any applicable regulatory cleanup standards.

SECTION 9 ASSIGNMENT

Grantee shall not assign any part of Grantee's interest in this Easement or the Easement Property or grant any rights or franchises to third parties without State's prior written consent. State reserves the right to reasonably change the terms and conditions of this Easement upon State's consent to assignment.

SECTION 10 INDEMNITY, FINANCIAL SECURITY, INSURANCE

10.1 Indemnity.

- (a) To the extent permitted by law and subject to the provisions of the ILA relating to payment as between the Grantee and the State, Grantee shall indemnify, defend, and hold State, its employees, officers, and agents harmless from any Claims arising out of the Permitted Use or activities related to the Permitted Use by Grantee, its contractors, agents, invitees, guests, employees, affiliates, licensees, or permittees.
- (b) "Claim" as used in this Paragraph 10.1 means any financial loss, claim, suit, action, damages, expenses, fees (including attorneys' fees), penalties, or judgments attributable to bodily injury, sickness, disease, death, and damages to tangible property, including, but not limited to, land, aquatic life, and other natural resources. "Damages to tangible property" includes, but is not limited to, physical injury to the Easement Property and damages resulting from loss of use of the Easement Property.

- (c) State shall not require Grantee to indemnify, defend, and hold State harmless for claims that arise solely out of the willful or negligent act of State or State's elected officials, employees, or agents.
- (d) Grantee waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold State and its agencies, officials, agents, or employees harmless.
- (e) Subject to the provisions of the ILA relating to payment as between the Grantee and the State, Section 8, Environmental Liability/Risk Allocation, exclusively governs Grantee's liability to State for Hazardous Substances and its obligation to indemnify, defend, and hold State harmless for Hazardous Substances.

10.2 Insurance Terms.

- (a) Insurance Required.
 - (1) At its own expense, Grantee or Grantee's contractor shall procure and maintain during the Term of this Easement, the insurance coverages and limits described in this Paragraph 10.2 and in Paragraph 10.3, Insurance Types and Limits.
 - (2) Unless State agrees to an exception, Grantee or Grantee's contractor shall provide insurance issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. Grantee may submit a request to the risk manager for the Department of Natural Resources for an exception to this requirement. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies must comply with Chapter 48.15 RCW and 284-15 WAC.
 - (3) The State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees must be named as an additional insured on all general liability, excess, umbrella, property, builder's risk, and pollution legal liability insurance policies.
 - (4) All insurance provided in compliance with this Easement must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.
- (b) Waiver.
 - (1) Grantee waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this Easement covers these damages.
 - (2) Except as prohibited by law, Grantee waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this Easement.
- (c) Proof of Insurance.
 - (1) Grantee shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with insurance requirements specified in this Easement and, if requested, copies of policies to State.

- (2) The certificate(s) of insurance must reference additional insureds and the Easement number.
 - (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.
- (d) State must receive written notice before cancellation or non-renewal of any insurance required by this Easement, in accordance with the following:
- (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State forty-five (45) days' advance notice of cancellation or non-renewal.
 - (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State thirty (30) days' advance notice of cancellation or non-renewal.
- (e) Adjustments in Insurance Coverage.
- (1) State may reasonably impose changes in the limits of liability for all types of insurance as State deems necessary.
 - (2) Grantee shall secure new or modified insurance coverage within thirty (30) days after State requires changes in the limits of liability.
- (f) If Grantee fails to procure and maintain the insurance described above within fifteen (15) days after Grantee receives a notice to comply from State, State may either:
- (1) Deem the failure an Event of Default under Section 14, or
 - (2) Procure and maintain comparable substitute insurance and pay the premiums. Upon demand, Grantee shall pay to State the full amount paid by State, together with interest at the rate provided in Paragraph 6.2 from the date of State's notice of the expenditure until Grantee's repayment.
- (g) General Terms.
- (1) State does not represent that coverage and limits required under this Easement will be adequate to protect Grantee.
 - (2) Coverage and limits do not limit Grantee's liability for indemnification and reimbursements granted to State under this Easement.
 - (3) The Parties shall use any insurance proceeds payable by reason of damage or destruction to Easement Property first to restore the Easement Property, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Grantee.

10.3 Insurance Types and Limits.

- (a) General Liability Insurance.
 - (1) Prior to and during the conduct of any Work on the Easement Property, Grantee shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Easement Property and/or arising out of the Permitted Use and, if necessary, commercial umbrella insurance with a limit of not less than Two Million Dollars (\$2,000,000) per each occurrence. If such CGL or MGL insurance contains aggregate limits, the general aggregate limit must be at least twice the “each occurrence” limit. CGL or MGL insurance must have products-completed operations aggregate limit of at least two times the “each occurrence” limit.
 - (2) CGL insurance must be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent coverage). All insurance must cover liability arising out of premises, operations, independent contractors, products completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a business contract) and contain separation of insured (cross-liability) condition.
 - (3) MGL insurance must have no exclusions for non-owned watercraft.
- (b) Prior to and during the conduct of any Work on the Easement Property, Workers’ Compensation.
 - (1) State of Washington Workers’ Compensation.
 - (i) Grantee shall comply with all State of Washington workers’ compensation statutes and regulations. Grantee shall provide workers’ compensation coverage for all employees of Grantee. Coverage must include bodily injury (including death) by accident or disease, which arises out of or in connection with the Permitted Use or related activities.
 - (ii) If Grantee fails to comply with all State of Washington workers’ compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Grantee shall indemnify State. Indemnity includes all fines; payment of benefits to Grantee, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
 - (2) Prior to and during the conduct of any Work on the Easement Property, Longshore and Harbor Workers’ Act. The Longshore and Harbor Workers’ Compensation Act (33 U.S.C. Section 901 *et. seq.*) may require Grantee to provide insurance coverage for longshore and harbor workers other than seaman. Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Grantee is fully responsible

for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Grantee is responsible for all civil and criminal liability arising from failure to maintain such coverage.

- (3) Prior to and during the conduct of any Work on the Easement Property Jones Act insurance. The Jones Act (46 U.S.C. Section 688) may require may require Grantee to provide insurance coverage for seamen injured during employment resulting from negligence of the owner, master, or fellow crew members. Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Grantee is fully responsible for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Grantee is responsible for all civil and criminal liability arising from failure to maintain such coverage.
- (c) Prior to and during the conduct of any Work on the Easement Property, Employer's Liability Insurance. Grantee shall procure employer's liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than One Million Dollars (\$1,000,000) each accident for bodily injury by accident or One Million Dollars (\$1,000,000) each employee for bodily injury by disease.
- (d) Prior to and during the conduct of any Work on the Easement Property, Builder's Risk Insurance.
 - (1) Grantee shall procure and maintain in force, or require its contractor(s) to procure and maintain in force, builder's risk insurance on the entire work during the period construction is in progress and until completion of the project. Such insurance must be written on a completed form and in an amount equal to the value of the completed Improvements, subject to subsequent modifications to the sum. The insurance must be written on a replacement cost basis. The insurance must name Grantee, all contractors, and subcontractors in the work as insured. State must be named additional insured as required by Paragraph 10.2(a)(3).
 - (2) Insurance described above must cover or include the following:
 - (i) All risks of physical loss except those specifically excluded in the policy, including loss or damage caused by collapse;
 - (ii) The entire work on the Easement Property, including reasonable compensation for architect's services and expenses made necessary by an insured loss;
 - (iii) Portions of the work located away from the Easement Property but intended for use at the Easement Property, and portions of the work in transit;
 - (iv) Scaffolding, falsework, and temporary buildings located on the Easement Property; and
 - (v) The cost of removing debris, including all demolition as made legally necessary by the operation of any law, ordinance, or regulation.

- (3) Grantee or Grantee's contractor is responsible for paying any part of any loss not covered because of application of a deductible contained in the policy described above.
- (4) Grantee or Grantee's contractor shall buy and maintain boiler and machinery insurance required by contract documents or by law, covering insured objects during installation and until final acceptance by permitting authority. If testing is performed, such insurance must cover such operations. The insurance must name Grantee, all contractors, and subcontractors in the work as insured. State must be named additional insured as required by Paragraph 10.2(a)(3).
- (e) Prior to and during the conduct of any Work on the Easement Property, Protection and Indemnity Insurance (P&I). Grantee or Grantee's contractor shall procure and maintain P&I insurance including hull coverage. This insurance must cover all claims with respect to injuries or damages to persons or property, including nets and fishing lines, sustained in, on, or about the Property, including while in transit, with limits of liability not less than Two Million Dollars (\$2,000,000). If necessary, Grantee or Grantee's contractor shall procure and maintain commercial umbrella liability insurance covering claims for these risks.
- (f) Contractor's Pollution Legal Liability Insurance
- (1) Grantee's contractor shall procure and maintain pollution legal liability insurance, including investigation and defense costs, for bodily injury and property damage, including loss of use of damaged property or of property that has been physically damaged or destroyed, on the entire work during the period construction is in progress and until completion of the project. Such coverage must provide for both on-site and off-site cleanup costs and cover gradual and sudden pollution, and include in its scope of coverage natural resource damage claims. Grantee's contractor shall maintain coverage in an amount of at least:
- (i) Two Million Dollars (\$2,000,000) each occurrence for Grantee's contractor's operations, and
- (ii) Five Million Dollars (\$5,000,000) general aggregate or policy limit, if any.
- (2) Such insurance may be provided on an occurrence or claims-made basis. If such coverage is obtained as an endorsement to the CGL and is provided on a claims-made basis, the following additional conditions must be met:
- (i) The Insurance Certificate must state that the insurer is covering Hazardous Substance removal.
- (ii) The policy must contain no retroactive date, or the retroactive date must precede abatement services.
- (iii) Coverage must be continuously maintained with the same insurance carrier through the official completion of any work on the Easement Property.

- (iv) The extended reporting period (tail) must be purchased to cover a minimum of thirty-six (36) months beyond completion of work.

10.4 Financial Security.

- (a) At its own expense, Grantee shall procure and maintain during the Term of this Easement, a corporate security bond or provide other financial security that State may approve (“Security”). Grantee shall provide Security in an amount equal to Zero Dollars (\$0.00), which secures Grantee’s performance of its obligations under this Easement. Grantee’s failure to maintain the Security in the required amount during the Term is a breach of this Easement.
- (b) All Security must be in a form acceptable to the State.
 - (1) Bonds must be issued by companies admitted to do business within the State of Washington and have a rating of A-, Class VII or better, in the most recently published edition of Best’s Reports, unless State approves an exception.. Grantee may submit a request to the risk manager for the Department of Natural Resources for an exception to this requirement.
 - (2) Letters of credit, if approved by State, must be irrevocable, allow State to draw funds at will, provide for automatic renewal, and comply with RCW 62A.5-101, et. seq.
 - (3) Savings account assignments, if approved by State, must allow State to draw funds at will.
- (c) Adjustment in Amount of Security.
 - (1) State may require an adjustment in the Security amount:
 - (i) At the same time as revaluation, if any,
 - (ii) As a condition of approval of assignment of this Easement,
 - (iii) Upon a material change in the condition or disposition of any Improvements, or
 - (iv) Upon a change in the Permitted Use.
 - (2) Grantee shall deliver a new or modified form of Security to State within thirty (30) days after State has required adjustment of the amount of the Security.
- (d) Upon any default by Grantee in its obligations under this Easement, State may collect on the Security to offset the liability of Grantee to State. Collection on the Security does not (1) relieve Grantee of liability, (2) limit any of State’s other remedies, (3) reinstate or cure the default or (4) prevent termination of the Easement because of the default.

SECTION 11 ROUTINE MAINTENANCE AND REPAIR

11.1 State’s Repairs. This Easement does not obligate State to make any alterations, maintenance, replacements, or repairs in, on, or about the Easement Property, during the Term.

11.2 Grantee's Repairs and Maintenance.

- (a) Routine maintenance and repair are acts intended to prevent a decline, lapse or, cessation of the Permitted Use.
- (b) At Grantee's sole expense, subject to the provisions of the ILA relating to payment as between the Grantee and the State, Grantee shall keep and maintain all Grantee-Owned Improvements and the Easement Property as it relates to the Permitted Use in good order and repair in a safe condition in accordance with any directives from the Regulatory Agency or any order, agreement, or decree from the Regulatory Agency. State's consent is not required for routine maintenance or repair.
- (c) At Grantee's own expense, subject to the provisions of the ILA relating to payment as between the Grantee and the State, Grantee shall make any additions, repairs, alterations, maintenance, replacements, or changes to the Easement Property or to any Improvements on the Easement Property that the Regulatory Agency requires because of the Permitted Use.
- (d) Upon completion of maintenance activities, Grantee shall subject to the provisions of the ILA relating to payment as between the Grantee and the State remove all debris and restore the Easement Property, as nearly as possible, to the condition prior to the commencement of maintenance activities.

SECTION 12 DAMAGE OR DESTRUCTION

12.1 Notice and Repair.

- (a) In the event of any known damage to or destruction of the Easement Property or any Improvements, Grantee shall promptly give written notice to State. State does not have actual knowledge of the damage or destruction of the Easement Property or any Improvements without Grantee's written notice.
- (b) Grantee shall promptly reconstruct, repair, or replace any Improvements in accordance with any directive from the Regulatory Agency and Paragraph 7.3, Construction, Major Repair, Modification, and Demolition, as nearly as possible to its condition immediately prior to the damage or destruction.

12.2 State's Waiver of Claim. State does not waive any claims for damage or destruction of the Easement Property unless State provides written notice to Grantee of each specific claim waived.

12.3 Insurance Proceeds. Grantee's duty to reconstruct, repair, or replace any damage or destruction of the Easement Property or any Improvements on the Easement Property is not conditioned upon the availability of any insurance proceeds to Grantee from which the cost of repairs may be paid. The Parties shall use insurance proceeds, if any, in accordance with Paragraph 10.2(g)(3).

SECTION 13 DEFAULT AND REMEDIES

13.1 Default Defined. Grantee is in default of this Easement on the occurrence of any of the following:

- (a) Failure to comply with any order, decree, or agreement issued by the Regulatory Agency to the Grantee in connection with the Permitted Use.
- (b) Failure to comply with any law, regulation, policy, or order of any lawful governmental authority with jurisdiction over the Permitted Use in connection with the Permitted Use;
- (c) Failure to comply with any provision of this Easement.

13.2 Cure Period. State shall provide Grantee written notice of breach. Grantee shall have sixty (60) days after receiving notice to cure. State may extend the cure period if breach is not reasonably capable of cure within sixty (60) days.

13.3 State's Damages. Grantee is responsible for any damages that State incurs as a result of Grantee's default.

13.4 Specific Performance. State's remedies at law for Grantee's failure to comply with any order, decree, or agreement issued by the Regulatory Agency to the Grantee in connection with the Permitted Use are inadequate and State is entitled to injunctive relief, both prohibitive and mandatory, in addition to such other relief to which State may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies.

SECTION 14 TERMINATION

This Easement terminates in accordance with Section 3 or by mutual agreement of the Parties.

SECTION 15 NOTICE AND SUBMITTALS

15.1 Notice. Following are the locations for delivery of notice and submittals required or permitted under this Easement. Any Party may change the place of delivery upon ten (10) days written notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES
Orca-Straits District
919 North Township Street
Sedro-Woolley, WA 98284

Grantee: PORT OF BELLINGHAM
PO Box 1677
Bellingham, WA 98227

The Parties may deliver any notice in person, by facsimile machine, or by certified mail. Depending on the method of delivery, notice is effective upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three (3) days after mailing. All notices must identify the Easement number. On notices transmitted by facsimile machine, the Parties shall state the number of pages contained in the notice, including the transmittal page, if any.

15.2 Contact Persons. On the Commencement Date, the following persons are designated day-to-day contact persons. Any Party may change the Contact Person upon reasonable notice to the other.

State: Bellingham Bay Land Manager
Telephone: 360-856-3500
Fax: 360-856-2150
E-mail: aquaticleasing.orca@dnr.wa.gov

Grantee: *John Hergesheimer, Professional Engineer*
Telephone: 360-676-2500
Fax: 360-671-6411
E-mail: johnh@portofbellingham.com

SECTION 16 MISCELLANEOUS

16.1 Authority. Grantee and the person or persons executing this Easement on behalf of Grantee represent that Grantee is a Washington municipal government, that Grantee has full right and authority to enter into this Easement, and that each and every person signing on behalf of Grantee is authorized to do so. Upon State's request, Grantee shall provide evidence satisfactory to State confirming these representations. This Easement is entered into by State pursuant to the authority granted it in Chapter 43.12 RCW, Chapter 43.30 RCW, and Title 79 RCW and the Constitution of the State of Washington.

16.2 Successors and Assigns. This Easement binds and inures to the benefit of the Parties, their successors, and assigns.

16.3 Headings. The headings used in this Easement are for convenience only and in no way define, limit, or extend the scope of this Easement or the intent of any provision.

16.4 Entire Agreement. This Easement, including the exhibits and addenda, if any, contains the entire agreement of the Parties. With the exception of the ILA, this Easement merges all

prior and contemporaneous agreements, promises, representations, and statements relating to this transaction or to the Easement Property.

16.5 Waiver. The waiver of any breach or default of any term, covenant, or condition of this Easement is not a waiver of such term, covenant, or condition; of any subsequent breach or default of the same; or of any other term, covenant, or condition of this Easement. State's acceptance of payment is not a waiver of any preceding or existing breach other than the failure to pay the particular payment that was accepted.

16.6 Cumulative Remedies. The rights and remedies of State under this Easement are cumulative and in addition to all other rights and remedies afforded by law or equity or otherwise.

16.7 Time is of the Essence. TIME IS OF THE ESSENCE as to each and every provision of this Easement.

16.8 Language. The word "Grantee" as used in this Easement applies to one or more persons, as the case may be. The singular includes the plural, and the neuter includes the masculine and feminine. If there is more than one Grantee, their obligations are joint and several. The word "persons," whenever used, includes individuals, firms, associations, and corporations. The word "Parties" means State and Grantee in the collective. The word "Party" means either or both State and Grantee, depending on context.

16.9 Invalidity. The invalidity, voidness, or illegality of any provision of this Easement does not affect, impair, or invalidate any other provision of this Easement.

16.10 Applicable Law and Venue. This Easement is to be interpreted and construed in accordance with the laws of the State of Washington. Any reference to a statute means that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this Easement is in the Superior Court for Whatcom County, Washington.

16.11 Recordation. At Grantee's expense and no later than thirty (30) days after receiving the fully-executed Easement, Grantee shall record this Lease in the county in which the Easement Property is located. Grantee shall include the parcel number of the upland property used in conjunction with the Easement Property, if any. Grantee shall provide State with recording information, including the date of recordation and file number. If Grantee fails to record this Easement, State may record it and Grantee shall pay the costs of recording upon State's demand.

16.12 Modification. No modification of this Easement is effective unless in writing and signed by the Parties. Oral representations or statements do not bind either Party.

16.13 Survival. Any obligations of Grantee not fully performed upon termination of this Easement do not cease, but continue as obligations of the Grantee until fully performed.

16.14 Exhibits. All referenced exhibits are incorporated in this Easement unless expressly identified as unincorporated.

THIS AGREEMENT requires the signature of all Parties and is effective on the date of the last signature below.

PORT OF BELLINGHAM

Dated: 7/6/15, 2015


ROBERT FIX

Title: Executive Director
Address: PO Box 1677
Bellingham, WA 98227
Phone: 360-676-2500

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

Dated: July 21, 2015


PETER GOLDMARK

Title: Commissioner of Public Lands
Address: 1111 Washington Street SE
Olympia, WA 98504

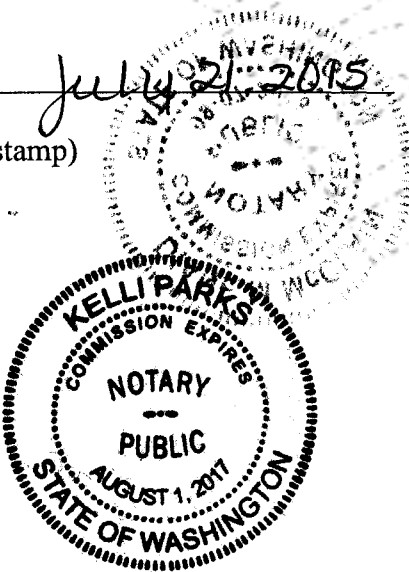
Approved as to Form this
6 day of April, 2015
Christa Thompson, Assistant Attorney General

STATE ACKNOWLEDGMENT

STATE OF WASHINGTON)
) ss
County of Thurston)

I certify that I know or have satisfactory evidence that PETER GOLDMARK is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Commissioner of Public Lands, and ex-officio administrator of the Department of Natural Resources of the State of Washington, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: July 21, 2015
(Seal or stamp)



Kelli Parks
(Signature)
Kelli Parks
(Print Name)
Notary Public in and for the State of Washington,
residing at Olympia
My appointment expires 8-1-17

EXHIBIT A
SEDIMENT REMEDIATION EASEMENT

INNER WHATCOM CREEK WATERWAY CAPPING EASEMENT
DNR AUTHORIZATION No. 51-089568

A PARCEL OF LAND LYING WITHIN SECTION 25, TOWNSHIP 38 NORTH, RANGE 2 EAST, W.M., AND SECTION 30, TOWNSHIP 38 NORTH, RANGE 3 EAST, W.M., BEING WITHIN THE EXTENDED MARGINS OF THE WHATCOM CREEK WATERWAY, PER THE "1971 SUPPLEMENTAL MAP OF BELLINGHAM HARBOR" RECORDED AS DEPARTMENT OF NATURAL RESOURCES MAP INDEX No. HA37-002, AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE BRASS DISC MONUMENT MARKING THE INTERSECTION OF "C" STREET AND ROEDER AVENUE, BEING CITY OF BELLINGHAM CADASTRAL SURVEY NAD83(1998) CONTROL POINT No.1860, PER THE CITY OF BELLINGHAM'S 2005 HORIZONTAL CONTROL NETWORK RECORD OF SURVEY, RECORDED UNDER WHATCOM COUNTY AUDITOR'S FILE No.2071002449

THENCE SOUTH 32°00'15" EAST, 282.26 FEET TO THE POINT OF INTERSECTION OF THE NORTHWEST MARGIN OF SAID PLATTED WATERWAY, WITH THE SOUTHWEST MARGIN OF ROEDER AVENUE;

THENCE SOUTH 44°12'12" EAST, ALONG SAID SOUTHWEST MARGIN, 363.19 FEET, TO THE INTERSECTION OF SAID SOUTHWEST MARGIN WITH THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY;

THENCE SOUTH 45°52'21" WEST, ALONG SAID SOUTHEAST MARGIN, 200.31 FEET, TO A POINT AT THE INTERSECTION OF SAID SOUTHEAST MARGIN WITH THE CENTER LINE OF WEST CHESTNUT STREET, SAID POINT BEARS NORTH 44°13'17" WEST, 41.27 FEET FROM THE LEAD PLUG AND TACK MONUMENT MARKING THE INTERSECTION OF WEST CHESTNUT STREET WITH CENTRAL AVENUE, SAID POINT BEING THE **TRUE POINT OF BEGINNING**;

THENCE CONTINUING ALONG THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY, SOUTH 45°52'21" WEST, 1041.35 FEET TO THE INTERSECTION OF SAID SOUTHEAST MARGIN WITH THE CENTER LINE OF WEST LAUREL STREET, SAID POINT BEARS NORTH 44°17'41" WEST, 1454.42 FEET FROM THE BRASS SURFACE MONUMENT MARKING THE INTERSECTION OF WEST LAUREL STREET WITH CORNWALL AVENUE;

THENCE NORTH 77°22'13" WEST, 348.00 FEET;

THENCE NORTH 31°52'45" WEST, 10.37 FEET;

THENCE NORTH 02°25'01" EAST, 7.82 FEET;

THENCE NORTH 19°21'39" EAST, 126.90 FEET, TO A POINT ON THE NORTHWEST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY;

THENCE NORTH 45°52'21" EAST, ALONG SAID NORTHWEST MARGIN, 68.27 FEET TO THE INTERSECTION OF SAID MARGIN WITH THE AFOREMENTIONED CENTER LINE OF WEST LAUREL STREET;

THENCE CONTINUING ALONG SAID NORTHWEST MARGIN NORTH 45°52'21" EAST, 903.42 FEET;

THENCE SOUTH 56°12'28" EAST, 29.66 FEET;

THENCE SOUTH 09°05'25" WEST, 38.01 FEET;

THENCE SOUTH 52°16'55" EAST, 32.44 FEET;

THENCE SOUTH 88°27'08" EAST, 33.01 FEET;

THENCE SOUTH 45°39'20" EAST, 27.08 FEET;

THENCE SOUTH 12°18'20" EAST, 52.65 FEET;

THENCE SOUTH 37°43'50" EAST, 84.94 FEET;

THENCE SOUTH 54°51'41" EAST, 75.80 FEET, TO A POINT ON AN OFFSET LINE PARALLEL WITH AND 25 FEET DISTANT FROM THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY;

THENCE ALONG SAID OFFSET LINE, PARALLEL WITH THE SAID SOUTHEAST MARGIN, NORTH 45°52'21" EAST, 157.84 FEET, TO THE INTERSECTION OF SAID OFFSET LINE WITH THE CENTER LINE OF WEST CHESTNUT STREET;

THENCE ALONG SAID CENTER LINE SOUTH 44°13'17" EAST, 25.00 FEET TO A POINT AT THE INTERSECTION OF SAID CENTERLINE WITH THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY, BEING THE **TRUE POINT OF BEGINNING**.

CONTAINS 363,358 SQUARE FEET, MORE OR LESS.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

WHATCOM CREEK WATERWAY BST CAPPING EASEMENT
DNR AUTHORIZATION No. 51-089568

A PARCEL OF LAND LYING WITHIN SECTION 25, TOWNSHIP 38 NORTH, RANGE 2 EAST, W.M., AND SECTION 30, TOWNSHIP 38 NORTH, RANGE 3 EAST, W.M., BEING WITHIN THE EXTENDED MARGINS OF THE WHATCOM CREEK WATERWAY, PER THE "1971 SUPPLEMENTAL MAP OF BELLINGHAM HARBOR" RECORDED AS DEPARTMENT OF NATURAL RESOURCES MAP INDEX No. HA37-002, AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE BRASS DISC MONUMENT MARKING THE INTERSECTION OF "C" STREET AND ROEDER AVENUE, BEING CITY OF BELLINGHAM CADASTRAL SURVEY NAD83(1998) CONTROL POINT No.1860, PER THE CITY OF BELLINGHAM'S 2005 HORIZONTAL CONTROL NETWORK RECORD OF SURVEY, RECORDED UNDER WHATCOM COUNTY AUDITOR'S FILE No.2071002449.

THENCE SOUTH 32°00'15" EAST, 282.26 FEET TO THE POINT OF INTERSECTION OF THE NORTHWEST MARGIN OF SAID PLATTED WATERWAY, WITH THE SOUTHWEST MARGIN OF ROEDER AVENUE;

THENCE SOUTH 44°12'12" EAST, ALONG SAID SOUTHWEST MARGIN, 363.19 FEET, TO THE INTERSECTION OF SAID SOUTHWEST MARGIN WITH THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY;

THENCE SOUTH 45°52'21" WEST, ALONG SAID SOUTHEAST MARGIN, 2281.01 FEET, TO A POINT AT THE INTERSECTION OF SAID SOUTHEAST MARGIN WITH THE PROJECTED CENTER LINE OF IVY STREET, SAID POINT BEARS NORTH 44°16'10" WEST, 1456.78 FEET FROM THE BRASS DISK MONUMENT MARKING THE INTERSECTION OF IVY STREET WITH CORNWALL AVENUE ;

THENCE CONTINUING ALONG THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY, SOUTH 45°52'21" WEST, 449.90 FEET TO THE INTERSECTION OF SAID SOUTHEAST MARGIN WITH THE PLATTED INNER HARBOR LINE, PER THE AFOREMENTIONED SUPPLEMENTAL MAP OF BELLINGHAM HARBOR;

THENCE CONTINUING ALONG SAID SOUTHEAST MARGIN SOUTH 45°52'21" WEST, 17.03 FEET, TO THE **TRUE POINT OF BEGINNING**;

THENCE CONTINUING ALONG SAID SOUTHEAST MARGIN SOUTH 45°52'21" WEST, 71.69 FEET;

THENCE NORTH 43°42'49" WEST, 331.65 FEET, TO POINT ON AN OFFSET LINE PARALLEL WITH AND 31.57 FEET DISTANT FROM THE NORTHWEST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY;

THENCE NORTH 45°52'21" EAST, ALONG SAID PARALLEL OFFSET LINE, 71.69 FEET;

THENCE SOUTH 43°42'49" EAST, 331.65 FEET TO A POINT ON THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY, SAID POINT BEING THE **TRUE POINT OF BEGINNING**.

CONTAINS 23,800 SQUARE FEET, MORE OR LESS.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

EXHIBIT B
SEDIMENT REMEDIATION EASEMENT
51-089568

1. DESCRIPTION OF PERMITTED USE

- A. Existing Facilities.
Pilings, dolphins, floats, and ramps.

The Whatcom Waterway and Bellingham Harbor Area are adjacent to land owned and managed by Grantee. Historic industrial uses of this land as a pulp and paper mill resulted in contamination of the waterway with mercury, phenolic compounds, and polycyclic aromatic hydrocarbons.

- B. Proposed Facilities.
Grantee has submitted to State plans and specifications for Work shown in Final Engineering Design Report Whatcom Waterway Cleanup in Phase 1 Site Areas, February 2015 (the “final EDR”), which is incorporated in this Easement. The State grants its consent to conduct the Work consistent with the final EDR occurring on state-owned aquatic lands as provided under Paragraph 7.3(b) of this Easement.

2. LEGAL DESCRIPTION OF TEMPORARY CONSTRUCTION EASEMENT FOR DNR AUTHORIZATION No. 51-089568

A PARCEL OF LAND LYING WITHIN SECTION 25, TOWNSHIP 38 NORTH, RANGE 2 EAST, W.M., AND SECTION 30, TOWNSHIP 38 NORTH, RANGE 3 EAST, W.M., BEING WITHIN THE EXTENDED MARGINS OF THE WHATCOM CREEK WATERWAY, PER THE “1971 SUPPLEMENTAL MAP OF BELLINGHAM HARBOR” RECORDED AS DEPARTMENT OF NATURAL RESOURCES MAP INDEX No. HA37-002, AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE BRASS DISC MONUMENT MARKING THE INTERSECTION OF “C” STREET AND ROEDER AVENUE, BEING CITY OF BELLINGHAM CADASTRAL SURVEY NAD83(1998) CONTROL POINT No.1860, PER THE CITY OF BELLINGHAM’S 2005 HORIZONTAL CONTROL NETWORK RECORD OF SURVEY, RECORDED UNDER WHATCOM COUNTY AUDITOR’S FILE No.2071002449.

THENCE SOUTH 32°00’15” EAST, 282.26 FEET TO THE POINT OF INTERSECTION OF THE NORTHWEST MARGIN OF SAID PLATTED

WATERWAY, WITH THE SOUTHWEST MARGIN OF ROEDER AVENUE, SAID POINT BEING THE **TRUE POINT OF BEGINNING**;

THENCE SOUTH 44°12'12" EAST, ALONG SAID SOUTHWEST MARGIN, 363.19 FEET, TO THE INTERSECTION OF SAID SOUTHWEST MARGIN WITH THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY;

THENCE SOUTH 45°52'21" WEST, ALONG SAID SOUTHEAST MARGIN, 2281.01 FEET, TO A POINT AT THE INTERSECTION OF SAID SOUTHEAST MARGIN WITH THE PROJECTED CENTER LINE OF IVY STREET, SAID POINT BEARS NORTH 44°16'10" WEST, 1456.78 FEET FROM THE BRASS DISK MONUMENT MARKING THE INTERSECTION OF IVY STREET WITH CORNWALL AVENUE ;

THENCE CONTINUING ALONG THE SOUTHEAST MARGIN OF THE AFOREMENTIONED WHATCOM CREEK WATERWAY, SOUTH 45°52'21" WEST, 449.90 FEET TO THE INTERSECTION OF SAID SOUTHEAST MARGIN WITH THE PLATTED INNER HARBOR LINE, PER THE AFOREMENTIONED SUPPLEMENTAL MAP OF BELLINGHAM HARBOR;

THENCE CONTINUING ALONG SAID SOUTHEAST MARGIN SOUTH 45°52'21" WEST, 1439.11 FEET, TO THE INTERSECTION OF SAID SOUTHEAST MARGIN WITH THE PLATTED OUTER HARBOR LINE, PER THE AFOREMENTIONED SUPPLEMENTAL MAP OF BELLINGHAM HARBOR;

THENCE SOUTH 45°52'21" WEST ALONG THE SOUTHWEST PROJECTION OF THE SOUTHEAST MARGIN OF SAID WHATCOM CREEK WATERWAY, 66.88 FEET;

THENCE NORTH 44°07'39" WEST, 363.21 FEET TO THE SOUTHWEST PROJECTION OF THE NORTHWEST MARGIN OF SAID WHATCOM CREEK WATERWAY;

THENCE NORTH 45°52'21" EAST, ALONG SAID PROJECTED NORTHWEST MARGIN, 564.52 FEET TO THE INTERSECTION OF SAID MARGIN WITH THE AFOREMENTIONED OUTER HARBOR LINE;

THENCE NORTH 45°52'21" EAST, ALONG SAID NORTHWEST MARGIN, 1027.95 FEET TO THE INTERSECTION OF SAID MARGIN WITH THE AFOREMENTIONED INNER HARBOR LINE;

THENCE CONTINUING ALONG SAID NORTHWEST MARGIN NORTH 45°52'21" EAST, 2644.02 FEET,

TO THE INTERSECTION OF SAID NORTHWEST MARGIN WITH THE
SOUTHWEST MARGIN OF ROEDER AVENUE, BEING THE **TRUE POINT OF
BEGINNING.**

CONTAINS 1,538,833 SQUARE FEET, MORE OR LESS.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

3. **ADDITIONAL OBLIGATIONS**

- A. Grantee shall submit to State for review and approval the proposed Institutional Control Plan at least sixty (60) days before submitting it to the Regulatory Agency.
- B. Grantee shall submit to State for review and approval any changes to the Appendix G: Compliance Monitoring and Contingency Response Plan of the final EDR that require approval by the Regulatory Agency at least sixty (60) days before submitting those changes to the Regulatory Agency.
- C. A copy of all Performance and Confirmation Monitoring reports required by the Washington Department of Ecology and described in Appendix G: Compliance Monitoring and Contingency Response Plan of the final EDR shall be provided to State in a timely manner.
- D. A detailed notification of any exceedance of protection monitoring limits set by State or federal permit shall be provided to State.