

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

In the Matter of Remedial Action by: )

The Port of Bellingham )

) AGREED ORDER  
) FOR RI/FS  
) No. DE 03TCPBE-5670  
)

TO: Port of Bellingham  
P.O. Box 1677  
Bellingham, Washington 98225

I.  
Jurisdiction

This Agreed Order ("Order") is issued pursuant to the authority of RCW 70.105D.050(1).

II.  
Findings of Fact

The Washington State Department of Ecology ("Ecology") makes the following Findings of Fact, without admission or agreement of the accuracy or completeness of such facts by the Port of Bellingham (the "Port").

1. The Site, known as the Harris Avenue Shipyard, is located at 201 Harris Avenue in Bellingham, Washington, as shown in Exhibit A. The Site has been used by various parties for shipbuilding and ship maintenance since approximately 1915.
2. Industrial activities at the Site have taken place both in the fee-owned upland areas, as well as on adjacent state-owned Harbor Area lands, including those of Port Management Agreement Parcel 6. These Harbor Area lands include submerged and inter-tidal aquatic lands, as well as former aquatic lands that were subsequently filled.
3. The Port of Bellingham has been an owner of the fee-owned upland areas of the Site since 1966 when the Port acquired those areas from Pacific American Corporation. In 1966 the Port was also assigned the leases formerly held by Pacific American Corporation for the harbor areas (including filled and aquatic lands). The Port leased the harbor areas from the Washington State Department of Natural Resources ("DNR") from 1966 to 1997. Since 1997 the Port has managed the harbor areas at the Site under a Port Management Agreement signed with DNR.

4. The Port has not been an operator of the Shipyard. Entities that conducted shipyard operations at the Site prior to the discovery of the site sediment contamination in 1993 included Pacific American Fisheries (a.k.a. Pacific American Corporation), Northwestern Shipbuilding Company, Post Point Marine Inc. (a.k.a. Post Point Industries), Associated Venture Capital Inc.; Fairhaven Shipyard Inc and its parent company Weldit Corporation (a.k.a., Fairhaven Industries), and Maritime Contractors Inc.
5. In 1993 the Department of Ecology conducted sediment sampling at the Site. Based on that sampling, Ecology added the Site to its list of Confirmed and Suspected Contaminated Sites. Ecology issued Early Notice Letters to the Port and to Maritime Contractors, Inc.
6. In 1995 Ecology conducted a Site Hazard Assessment and placed the Site on the Hazardous Sites List. In 1996, Ecology listed the Site on its Sediment Management Standards Contaminated Sediment Site List.
7. During 1998 the Port and DNR implemented sediment sampling at the Site. That work was conducted pursuant to an Ecology-approved Work Plan, developed with Ecology under the Voluntary Cleanup Program. The results of that sampling confirmed that the hazardous substances in Site sediments were associated with historical shipyard operations.
8. Between 1998 and 2002, the Port and DNR conducted additional studies at the Site, including preparation of (i) an investigation and feasibility study, (ii) scoping memorandum, (iii) an investigation and feasibility study Work Plan and (iv) a draft investigation and feasibility study Report dated February 15, 2002. These documents were developed with Ecology under the Voluntary Cleanup Program.
9. The above-listed investigations by Ecology, the Port and DNR have confirmed the presence of hazardous substances in site sediments including arsenic, copper, lead, mercury, zinc, tributyl tin, polychlorinated biphenyls, phenol, bis(2-ethylhexyl)phthalate benzyl alcohol, butylbenzylphthalate, PAH compounds, dibenzofuran and 2,4-dimethylphenol.
10. The investigations conducted by the Port to date constitute remedial actions as defined in RCW 70.105D.020(11).
11. In order to protect human health and the environment and to prevent the release or threatened release of hazardous substances from the Site, Ecology has determined that a Remedial Investigation and Feasibility Study (RI/FS) should be developed for Site sediments pursuant to WAC 173-340-350 and WAC 173-204-560.

III.  
Ecology Determinations

Ecology makes the following Determinations, without admission or agreement of the accuracy or completeness of the determinations by the Port.

1. The Port of Bellingham is an "owner or operator" as defined at RCW 70.105D.020(11) of a "facility" as defined in RCW 70.105D.020(4).
2. The facility is known as the Harris Avenue Shipyard and is located at 201 Harris Avenue in Bellingham, Washington 98225. The facility includes contaminated sediments within Parcel 6.
3. The substances found at the facility as described above are "hazardous substances" as defined at RCW 70.105D.020(7).
4. Based on the presence of these hazardous substances at the facility and all factors known to the Ecology, there is a release or threatened release of hazardous substances from the facility, as defined at RCW 70.105D.020(19).
5. By letter dated June 19, 2002, Ecology notified the Port of its status as a "potentially liable person" under RCW 70.105D.040 after notice and opportunity for comment.
6. Pursuant to RCW 70.105D.030(1) and 70.105D.050, the Department may require potentially liable persons to investigate or conduct other remedial actions with respect to the release or threatened release of hazardous substances, whenever it believes such action to be in the public interest.
7. Based on the foregoing facts, Ecology believes the remedial action required by this Order is in the public interest.

IV.  
Work to be Performed

Based on the foregoing Facts and Determinations, it is hereby ordered the Port take the following remedial actions and that these actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein.

1. Purpose & Scope of the RI/FS (the "Work").  
The purpose of the Work will be to complete a Final RI/FS (Remedial Investigation and Feasibility Study) for site sediments pursuant to WAC 173-340-350 and WAC 173-204-560.

2. Description of the Work

A. Sediments SAP. The Port has prepared a draft SAP (Sampling Analysis Plan) for review and comment (Exhibit C). The draft SAP identifies sampling needed to supplement existing site sediment data and describes how samples will be collected and analyzed. This supplemental data will be used to delineate sediment contamination at the site during preparation of the RI/FS. A final SAP will be submitted to Ecology within 30 days of the effective date of this order. The work specified in the SAP will meet MTCA (WAC 173-340-350) and SMS (WAC 173-204-560) requirements for sediment sampling. Actions specified in the SAP will take place during summer 2003. All chemical and biological data collected as part of the SAP will be submitted to Ecology in SEDQUAL electronic data format.

B. Sediments RI/FS. The Port will produce a draft RI/FS (Ecology Review Draft RI/FS) for Ecology review and comment. The Ecology Review Draft of the RI/FS will be submitted to Ecology within 90 days of the Port's receipt of all chemical and biological data resulting from the sediment sampling specified in the SAP. The Ecology Review Draft will identify a Preferred Remedial Alternative for sediment cleanup at the site and will meet MTCA (WAC 173-340-350) and SMS (WAC 173-204-560) requirements for a sediments RI/FS. All chemical and biological data collected as part of the RI/FS will be submitted to Ecology in SEDQUAL electronic data format.

- 1) The Port will submit a revised RI/FS to Ecology addressing Ecology review comments on the Ecology Review Draft RI/FS. The Revised Draft will be submitted to Ecology within 45 days of receiving Ecology's comments.
- 2) After Ecology has determined that the Revised Draft RI/FS has adequately addressed Ecology's comments, Ecology will make the draft available to the public. This "Public Review Draft" of the RI/FS will be made available for public review consistent with WAC 173-340-600(13)(c). Following completion of the review period, Ecology will prepare a responsiveness summary.
- 3) Within 45 days of Ecology's responsiveness summary, the Port will submit to Ecology a revised RI/FS addressing issues raised during public comment. After determining that public comments have been adequately addressed, Ecology will declare the RI/FS final (the "Final RI/FS").

3. Progress Reports

During performance of this Order, the Port will submit written quarterly progress reports to Ecology. The progress reports will summarize work performed during the reporting period, and the work anticipated during the following quarter.

V.

Terms and Conditions of Order

1. Definitions

Unless otherwise specified, the definitions set forth in ch. 70.105D RCW and ch. 173-340 WAC shall control the meanings of the terms used in this Order.

2. Public Notices.

WAC 173-340-600(10)(c) requires a 30 day public comment period before this agreed order on a state RI/FS becomes effective. Ecology shall be responsible for providing such public notice and reserves the right to modify or withdraw any provisions of this Order should public comment disclose facts or considerations which indicate to Ecology that the Order is inadequate or improper in any respect.

3. Remedial Action Costs.

The Port shall pay to Ecology costs incurred by Ecology pursuant to this Order and consistent with WAC 173-340-550. These costs shall include work performed by Ecology or its contractors for investigations, remedial actions, and Order preparation, oversight and administration. Ecology costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). The Port shall pay the required amount within ninety (90) days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general description of work performed will be provided upon request. Itemized statements shall be prepared quarterly. The Port may invoke the Dispute Resolution process under §IV, paragraph (9) of this Order if it disagrees with Ecology's oversight cost charges. Failure to pay Ecology's uncontested costs and costs for which a final decision has been issued under the Dispute Resolution process within 90 days of receipt of the itemized statement of costs or the date of the Dispute Resolution final decision will result in interest charges.

4. Designated Project Coordinators.

The project coordinator for Ecology is:

Name: Mary K. O'Herron, Environmental Specialist  
Address: Department of Ecology, Bellingham Field Office  
1204 Railroad Avenue, #200  
Bellingham, Washington 98225

The project coordinator for the Port of Bellingham is:

Name: Mike Stoner, Director of Environment  
Address: Port of Bellingham  
P.O. Box 1677  
Bellingham, WA 98227

The project coordinator(s) shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology and the Port, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the project coordinator(s). Should Ecology or the Port change project coordinator(s), written notification shall be provided to Ecology or the Port at least ten (10) calendar days prior to the change.

5. Performance.

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a professional engineer, hydrogeologist, or similar expert, with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. The Port shall notify Ecology as to the identity of such engineer(s) or hydrogeologist(s), and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site. The Port shall provide a copy of this Order to all agents, contractors and subcontractors retained to perform work required by this Order and shall ensure that all work undertaken by such agents, contractors and subcontractors will be in compliance with this Order.

A. Except where necessary to abate an emergency situation, the Port shall not perform any remedial actions at the Site outside that required by this Order unless Ecology concurs, in writing, with such additional remedial actions.

6. Access.

Ecology or any Ecology authorized representative shall have the authority to enter and freely move about the Site at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the progress in carrying out the terms of this Order; conducting such tests or collecting samples as Ecology or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by the Port. By signing this Agreed Order, the Port agrees that this Order constitutes reasonable notice of access, and agrees to allow access to the Site at all reasonable times for purposes of overseeing work performed under this Order. Ecology shall allow split or replicate samples to be taken by the Port during an inspection unless doing so interferes with Ecology's sampling. The Port shall allow split or replicate samples to be taken by Ecology and shall provide seven (7) days notice before any sampling activity.

7. Public Participation

Ecology shall maintain the responsibility for public participation at the site. The Port shall help coordinate and implement public participation (Exhibit B).

8. Retention of Records.

The Port shall preserve in a readily retrievable fashion, during the pendency of this Order and for ten (10) years from the date of completion of the work performed pursuant to this Order, all records, reports, documents, and underlying data in its possession relevant to this Order. Should any portion of the work performed hereunder be undertaken through contractors or agents of the Port, then the Port agrees to include in their contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9. Dispute Resolution.

In the event a dispute arises as to an approval, disapproval, proposed modification or other decision or action by Ecology's project coordinator, the parties shall utilize the dispute resolution procedure set forth below.

- A. Upon receipt of the Ecology project coordinator's decision, the Defendant has fourteen (14) days within which to notify Ecology's project coordinator of its objection to the decision.
- B. The parties' project coordinators shall then confer in an effort to resolve the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days, Ecology's project coordinator shall issue a written decision.
- C. Defendant may then request Ecology management review of the decision. This request shall be submitted in writing to the Toxics Cleanup Program Manager within seven (7) days of receipt of Ecology's project coordinator's decision.
- D. Ecology's Program Manager shall conduct a review of the dispute and shall issue a written decision regarding the dispute within thirty (30) days of the Defendant's request for review. The Program Manager's decision shall be Ecology's final decision on the disputed matter.

10. Reservation of Rights/No Settlement.

This Agreed Order is not a settlement under ch. 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against the Port to recover remedial action costs paid to and received by Ecology under this Agreed Order. In addition, Ecology will not take additional enforcement actions against the Port to require those remedial actions required by this Agreed Order, provided the Port complies with this Agreed Order.

- A. Ecology reserves the right, however, to require additional remedial actions at the Site, in addition to those required under this Order, should it deem such actions necessary. The Port expressly reserves its rights with regard to any future agency action.

- B. Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the releases or threatened releases of hazardous substances from the Site.
  - C. In the event Ecology determines that conditions at the Site are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order the Port to stop further implementation of this Order, for such period of time as needed to abate the danger. Any verbal order by Ecology to stop work shall be followed within forty eight (48) hours of such verbal order by written confirmation from Ecology to the Port of such verbal order.
  - D. Nothing herein shall be a waiver of the Port's right to pursue any other responsible party for its costs associated herewith.
11. Extension of Schedule.
- A. An extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least 30 days prior to expiration of the deadline for which the extension is requested, and good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed.  
  
An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. A requested extension shall not be effective until approved by Ecology. Ecology shall act upon any written request for extension in a timely fashion. It shall not be necessary to formally amend this Order when a schedule extension is granted.
  - B. The burden shall be on the Port to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause includes, but is not limited to, the following.
    - 1) Circumstances beyond the reasonable control and despite the due diligence of Port including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by Port; or
    - 2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or
    - 3) Endangerment of the health or welfare of the people on the site or in the surrounding area or to the environment.



However, neither increased costs of performance of the terms of the Decree nor changed economic circumstances shall be considered circumstances beyond the reasonable control of Port.

- C. Ecology may extend the schedule for a period not to exceed ninety (90) days, except where an extension is needed as a result of:
- 1) Delays in the issuance of a necessary permit which was applied for in a timely manner; or
  - 2) Other circumstances deemed exceptional or extraordinary by Ecology; or
  - 3) Endangerment of the health or welfare of the people on the Site or in the surrounding area or to the environment.

Ecology shall give the Port written notification in a timely fashion of any extensions granted pursuant to this Order.

12. Transference of Property

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by the Port without provision for continued implementation of all requirements of this Order.

Prior to the transfer of any legal or equitable interest the Port may have in the Site or any portions thereof, the Port shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest. At least thirty (30) days prior to finalization of any transfer, The Port shall notify Ecology of the contemplated transfer.

13. Compliance with Other Applicable Laws.

- A. All actions carried out by the Port pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in paragraph B of this section.
- B. Pursuant to RCW 70.105D.090(1), the substantive requirements of chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals are to be included in the work documents approved by Ecology for this remedial action. Ecology has determined that the work under this Order does not implicate laws or regulations covered under RCW 70.105D.090(1).

- C. The Port has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order. In the event the Port determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, it shall promptly notify Ecology of this determination. Ecology shall determine whether Ecology or the Port shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, the Port shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the remedial action. Ecology shall make the final determination on the additional substantive requirements that must be met by the Port and on how the Port must meet those requirements. Ecology shall inform the Port in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. The Port shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination.
  - D. Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.
  - E. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the State to administer any federal law, the exemption shall not apply and the Port shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.
14. Indemnification.  
The Port agrees to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property arising from or on account of acts or omissions of the Port, its officers, employees, agents, or contractors in entering into and implementing this Order. However, the Port shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in implementing the activities pursuant to this Order.

VI.  
Satisfaction of this Order

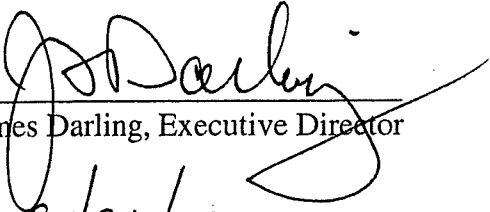
The provisions of this Order shall be deemed satisfied upon receipt by the Port of written notification from Ecology that the Port has completed the remedial activity required by this Order, as amended by any modifications, and that all other provisions of this Agreed Order have been complied with.

VII.  
Enforcement

1. Pursuant to RCW 70.105D.050, this Order may be enforced as follows:
  - A. The Attorney General may bring an action to enforce this Order in a state or federal court.
  - B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for investigative and remedial actions and orders related to the Site.
  - C. In the event the Port refuse, without sufficient cause, to comply with any term of this Order, the Port will be liable for:
    - 1) Up to three times the amount of any costs incurred by the state of Washington as a result of its refusal to comply; and
    - 2) Civil penalties of up to \$25,000 per day for each day it refuses to comply.
  - D. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70.105D.060.


Effective date of this Order: August 25, 2003

PORT OF BELLINGHAM

  
Mr. James Darling, Executive Director

Date 8/21/03

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

  
Steven M. Alexander, Section Manager  
Toxics Cleanup Program

Date 8-25-03