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STATE OF WASHINGTON
 WHATCOM COUNTY SUPERIOR COURT

NO. **14 2 02593 5**
 CONSENT DECREE

STATE OF WASHINGTON,
 DEPARTMENT OF ECOLOGY,

 Plaintiff,

v.

CITY OF BELLINGHAM, a Washington
 municipal corporation; PORT OF
 BELLINGHAM, a Washington municipal
 corporation; WASHINGTON STATE
 DEPARTMENT OF NATURAL
 RESOURCES,

 Defendant.

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I. INTRODUCTION

A. The mutual objective of the State of Washington, Department of Ecology (Ecology) and the City of Bellingham (the City), the Port of Bellingham (the Port), and Washington State Department of Natural Resources (DNR) (Defendants) under this Decree is to provide for remedial action at a portion of the Cornwall Avenue Landfill Site (the Site), a facility where there has been a release or threatened release of hazardous substances. The Site consists of three separate Management Units (MUs): MU-1, MU-2, and MU-3. MU-1 is defined as the upland area of the Site as presented on the Site Diagram (Exhibit A). MU-2 is the approximate extent of refuse and wood debris in the aquatic area of the Site subject to active remediation and is shown on the Site Diagram (Exhibit A). MU-3 is the remainder of the aquatic portion of the Site and is described as the potential area of monitored natural recovery that will be further defined at a later date. This Decree requires Defendants to conduct a final cleanup action of the portion of Site that is the subject of this Decree (MU-1 and MU-2), by implementing the Cleanup Action Plan (CAP), attached hereto as Exhibit B. To the extent that further remedial actions are required at MU-3, such actions will be performed under an amendment to this Decree and CAP to address releases or threatened releases of hazardous substances in MU-3.

B. Ecology has determined that these actions are necessary to protect human health and the environment.

C. The Complaint in this action is being filed simultaneously with this Decree. An Answer has not been filed, and there has not been a trial on any issue of fact or law in this case. However, the Parties wish to resolve the issues raised by Ecology's Complaint. In addition, the Parties agree that settlement of these matters without litigation is reasonable and in the public interest, and that entry of this Decree is the most appropriate means of resolving these matters.

1 D. By signing this Decree, the Parties agree to its entry and agree to be bound by
2 its terms.

3 E. By entering into this Decree, the Parties do not intend to discharge non-settling
4 parties from any liability they may have with respect to matters alleged in the Complaint. The
5 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
6 sums expended under this Decree.

7 F. This Decree shall not be construed as proof of liability or responsibility for any
8 releases of hazardous substances or cost for remedial action nor an admission of any facts;
9 provided, however, that Defendants shall not challenge the authority of the Attorney General
10 and Ecology to enforce this Decree.

11 G. The Court is fully advised of the reasons for entry of this Decree, and good
12 cause having been shown:

13 Now, therefore, it is HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

14 **II. JURISDICTION**

15 A. This Court has jurisdiction over the subject matter and over the Parties pursuant
16 to the Model Toxics Control Act (MTCA), Chapter 70.105D RCW.

17 B. Authority is conferred upon the Washington State Attorney General by
18 RCW 70.105D.040(4)(a) to agree to a settlement with any potentially liable person (PLP) if,
19 after public notice and any required hearing, Ecology finds the proposed settlement would lead
20 to a more expeditious cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that
21 such a settlement be entered as a consent decree issued by a court of competent jurisdiction.

22 C. Ecology has determined that a release or threatened release of hazardous
23 substances has occurred at the Site that is the subject of this Decree.

24 D. Ecology has given notice to Defendants of Ecology's determination that
25 Defendants are PLPs for the Site, as required by RCW 70.105D.020(26) and
26 WAC 173-340-500.

1 E. The actions to be taken pursuant to this Decree are necessary to protect public
2 health and the environment.

3 F. This Decree has been subject to public notice and comment.

4 G. Ecology finds that this Decree will lead to a more expeditious cleanup of
5 hazardous substances at a portion of the Site described as MU-1 and MU-2 in compliance
6 with the cleanup standards established under RCW 70.105D.030(2)(e) and
7 Chapter 173-340 WAC.

8 H. Defendants have agreed to undertake the actions specified in this Decree and
9 consents to the entry of this Decree under MTCA.

10 III. PARTIES BOUND

11 This Decree shall apply to and be binding upon the Parties to this Decree, their
12 successors and assigns. The undersigned representative of each party hereby certifies that he
13 or she is fully authorized to enter into this Decree and to execute and legally bind such party to
14 comply with this Decree. Defendants agree to undertake all actions required by the terms and
15 conditions of this Decree. No change in ownership or corporate status shall alter Defendants'
16 responsibility under this Decree. Defendants shall provide a copy of this Decree to all agents,
17 contractors, and subcontractors retained to perform work required by this Decree, and shall
18 ensure that all work undertaken by such agents, contractors, and subcontractors complies with
19 this Decree.

20 IV. DEFINITIONS

21 Unless otherwise specified herein, all definitions in RCW 70.105D.020 and
22 WAC 173-340-200 shall control the meanings of the terms in this Decree.

23 A. Site: The Site is referred to as the Cornwall Avenue Landfill and is generally
24 located at the south end of Cornwall Avenue in Bellingham, Washington. The Site is more
25 particularly described in the Site Diagram (Exhibit A). The Site is defined by the extent of
26 contamination caused by the release of hazardous substances at the Site. The final in-water

1 boundary has not been established for the Site pending the development of final
2 bioaccumulative sediment cleanup levels. The final in-water Site boundary is expected to be
3 located further out from shore than the MU-2 boundary shown on the Site Diagram, The Site
4 constitutes a Facility under RCW 70.105D.020(8).

5 B. Parties: Refers to the Ecology and the City, the Port, and DNR.

6 C. Defendants: Refers to the Port, the City, and DNR.

7 D. Consent Decree or Decree: Refers to this Consent Decree and each of the
8 exhibits to this Decree. All exhibits are integral and enforceable parts of this Consent Decree.
9 The terms "Consent Decree" or "Decree" shall include all exhibits to this Consent Decree.

10 E. Site Management Unit (MU): Refers to separate portions of the Cornwall
11 Avenue Landfill Site that are the subject of this Consent Decree. MU-1 and MU-2 are the
12 only portions of the Site addressed by this Consent Decree.

13 F. MU-1: Refers to the upland area of the Site as presented on the Site Diagram
14 (Exhibit A). MU-1 is subject to this Consent Decree.

15 G. MU-2: Refers to the approximate extent of refuse and wood debris in the
16 aquatic area of the Site subject to active remediation and is shown on the Site Diagram
17 (Exhibit A). MU-2 is subject to this Consent Decree.

18 H. MU-3: Refers to the remainder of the aquatic portion of the Site and is
19 described as the potential area of monitored natural recovery that will be further defined at a
20 later date.

21 V. FINDINGS OF FACTS

22 Ecology makes the following findings of fact without any express or implied
23 admissions of such facts by Defendants.

24 A. The Site is located in Bellingham, Washington, and consists of approximately
25 25.8 acres. The Site is bounded by the Burlington Northern Santa Fe right-of-way to the east
26 and in part by the RG Haley Site to the north. The Site also extends across state lands

1 managed by DNR and into Bellingham Bay on the south and west, as specifically described in
2 the CAP (Exhibit B). A diagram of the Site is attached as Exhibit A.

3 B. Historical Operations and Ownership. Between approximately 1900 and 1945, a
4 portion of the Site was used by the Bellingham Bay Improvement Company and Bloedel
5 Donovan Lumber Company for lumber milling and wood products manufacturing. Between
6 approximately 1954 and 1965, a portion of the Site was used by the City for a city dump. The
7 history of lease and subleases state-owned lands at the Site involve many different parties,
8 leaseholds, and time periods. Relevant historical information includes, but is not limited to, the
9 following:

10 1. The Port purchased the fee-owned portion of the Site from Bloedel
11 Donovan Lumber Mill in 1947 and leased it to the City from 1953 to 1956 for use as a
12 municipal landfill.

13 2. The Port leased state lands at the Site from DNR from 1946 to 1965.
14 The City subleased that land from the Port from 1953 to 1962 for use as a municipal
15 landfill.

16 3. In 1961 the Port sold a portion of the Site to American Fabricators, Inc.
17 Ownership of this portion of the Site passed to Frank Brooks Manufacturing Co. in 1965.

18 4. In 1962 the City entered into a sublease with American Fabricators
19 (another Port tenant) and continued operations of the municipal landfill at the Site until
20 1965.

21 5. In April 1965, the Port assigned its lease of state harbor area to Frank
22 Brooks Manufacturing Co.

23 6. Frank Brooks Manufacturing Company, Inc. leased state lands at the
24 Site from 1965 to 1976.

25 7. From 1971 to 1985, the Port leased the Site to Georgia Pacific West
26 (GP), including sublease of the DNR-owned land.

1 8. In July 1976 DNR executed harbor area lease no. 22-002353 to Brook-
2 Richards, Inc. The lease area included 10.28 acres of harbor area fronting tideland
3 blocks 240 ½ through 250 for a twenty year term.

4 9. In 1982, Georgia Pacific entered a sublease with Brooks-Richards, Inc.
5 for use of the filled area for dry storage.

6 10. In January 1985, Brooks-Richards assigned harbor areas lease
7 no. 22002353 to the Brooks Manufacturing Company, which, in turn, assigned the lease
8 to Georgia Pacific Co.

9 11. In 1985, the Georgia Pacific Corporation (or its wholly owned
10 subsidiary, Georgia Pacific West, Inc.) acquired the fee-owned portion of the Site.

11 12. DNR entered into a holdover agreement with Georgia Pacific Co. in July
12 2001 for an indefinite term.

13 13. DNR terminated the holdover of lease no. 22-002343 on
14 January 5, 2005.

15 14. On January 8, 2005, the Port purchased Georgia Pacific's fee-owned
16 portion of the Site.

17 15. On December 14, 2005, the City purchased an ownership interest in the
18 fee-owned portion of the Site from the Port.

19 16. In October of 2011, the Port placed fine-grained sediment on the
20 Cornwall site as part of an interim action.

21 17. On October 24, 2012, the City acquired the remainder of the Port's fee-
22 owned interest of the Site.

23 C. Contamination at MU-1 and MU-2 are related to the lumbering and landfilling
24 operations. Wood waste fill, soil, and landfill refuse were placed into Bellingham Bay,
25 resulting in the release of hazardous substances to soil, groundwater, marine sediment, and
26 possibly air. Some of the hazardous substances were detected in landfill leachate and adjacent

1 sediments (see contaminants of concern below). The hazardous substances are described in
2 detail in the CAP. Methane and other volatile organic compounds may be detected at
3 concentrations of concern in soil vapor during the design phase characterization.

4 D. A series of environmental investigations, beginning in 1993 and extending to
5 2013, confirmed contamination at the Site.

6 E. In 1993, Ecology sampled sediment and shoreline seeps at the Site.

7 F. In 1995, Ecology conducted a Site Hazard Assessment, assigned the Site an
8 overall priority ranking of two on a scale of one to five, with one being considered the highest
9 ranking pursuant to MTCA. The Site was added to the Hazardous Sites List that same year.

10 G. In 1996, the Port, in cooperation with the City and DNR, conducted an
11 expanded site investigation including soil, sediment, and groundwater sampling.

12 H. Between 1996 and 2004 the Port, in cooperation with the City and DNR,
13 performed three investigations of the Site under Ecology's Voluntary Cleanup Program. The
14 results of these investigations are contained in the following documents:

15 (i) Landau Associates, 1996, Report, Expanded Site Investigation, Cornwall Avenue
16 Landfill Investigation, Bellingham, Washington.

17 (ii) Landau Associates, 2000, Report, Focused Remedial Investigation/Feasibility
18 Study, Cornwall Avenue Landfill, Bellingham, Washington, October 3, 2000.

19 I. The Port's investigation (listed above) confirmed the presence of hazardous
20 substances in the Site groundwater, surface water, soil and/or sediments in quantities of
21 hazardous substances above state standards that include arsenic, copper, lead, mercury, silver,
22 zinc, cyanide, polychlorinated biphenyls, ("PCBs"), bis(2-ethylhexyl)phthalate, polycyclic
23 aromatic hydrocarbon ("PAH") compounds and fecal coliform.

24 J. In October 2000, Ecology published the Bellingham Bay Comprehensive
25 Strategy Final Environmental Impact Statement which included the Cornwall Site.

26

1 K. In 2000, the Port (in cooperation with the City and DNR) conducted a focused
2 RI/FS to evaluate the nature and extent of contamination and cleanup alternatives.

3 L. Ecology named the City and Port as Potentially Liable Persons (PLPs) for the
4 Cornwall Avenue Landfill Site on December 12, 2002, and named DNR as an additional PLP
5 on April 29, 2004.

6 M. On February 10, 2005, the City and the Port entered into an Agreed Order with
7 Ecology (No. 1778) to complete a Remedial Investigation/Feasibility Study (RI/FS) for Site
8 groundwater, surface water, soil, and sediments.

9 N. In 2009, Ecology conducted sediment sampling at the Site and vicinity.

10 O. In 2011, the Port and the City entered into a First Amendment to Agreed Order
11 No. 1778 with Ecology to perform an interim action to reduce stormwater infiltration through
12 the Site by placing and contouring imported dredged sediments, and covering this material
13 with a low-permeability liner. The interim action also reduced potential migration of landfill
14 gas to off-Site structures or utility lines through installation of a landfill gas and passive
15 venting system.

16 P. In 2012, the Port and City developed a work plan for additional groundwater
17 investigation, and conducted the investigation.

18 Q. In 2013, the Port, in cooperation with the City and DNR prepared a final RI/FS
19 report summarizing all investigations completed at the Site. The RI identified the presence of
20 hazardous substances in soil, sediment, and groundwater at concentrations potentially harmful
21 to human health and the environment, and the FS developed a preferred alternative to clean up
22 the Site.

23 R. The contaminants of concern at the Site that currently exceed MTCA cleanup
24 levels are: 1) sediment: cadmium, copper, lead, silver, zinc, bis(2-ethylhexyl)phthalate, total
25 PCBs, total cPAHs, wood waste; 2) groundwater: ammonia, manganese; and 3) soil: municipal
26 refuse and interim action sediment are presumed to contain contaminants at concentrations

1 exceeding MTCA cleanup levels. Methane and other volatile organic compounds may be
2 detected at concentrations of concern in soil vapor during the design phase characterization.

3 S. As documented in the CAP (Exhibit B), the cleanup action to be implemented at
4 the Site generally includes hazardous substance containment, monitoring, and institutional
5 controls.

6 VI. WORK TO BE PERFORMED

7 This Decree contains a program designed to protect human health and the environment
8 from the known release, or threatened release, of hazardous substances or contaminants at, on,
9 or from MU-1 and/or MU-2.

10 A. The Defendants shall perform all tasks set forth in the CAP (Exhibit B) and
11 implement the CAP in accordance with the Schedule of Work and Deliverables (Exhibit C).
12 The CAP requires:

13 1. Preparation of a draft Engineering Design Studies Work Plan (EDS
14 Work Plan) for Ecology review and approval, followed by preparation of a final EDS
15 Work Plan incorporating Ecology's review comments.

16 2. Completion of the work outlined in the EDS Work Plan

17 3. Preparation of a draft Engineering Design Report (EDR) for Ecology
18 review and approval incorporating the results of the engineering design studies, followed
19 by preparation of a final EDR incorporating Ecology's review comments.

20 4. Preparation of 90% design documents for the cleanup action
21 (construction plans and specifications) for Ecology review and approval, followed by the
22 preparation of 100% design documents incorporating Ecology's review comments and
23 the requirements imposed by permitting agencies.

24 5. Construction of the cleanup action in accordance with the approved
25 design documents. The cleanup action will consist generally of the following
26 construction elements:

- 1 • An upland low-permeability soil cover, including fine-grained sediment
- 2 stored at MU-1 as part of the interim action described below.
- 3 • An upland surface cap including various combinations of topsoil,
- 4 drainage layers, flexible membranes, asphalt and concrete pavement,
- 5 and buildings.
- 6 • An upland stormwater collection and discharge system.
- 7 • Improvements to the drainage ditch on the Burlington Northern Santa Fe
- 8 (BNSF) right-of-way, contingent on approval from BNSF.
- 9 • An upland soil gas collection and discharge system. The collected gas
- 10 will be treated, as needed, for MU-1 to meet air quality standards.
- 11 • A shoreline stabilization system.
- 12 • A shoreline sand filter beneath the shoreline stabilization system.
- 13 • An in-water sediment cap beyond the shoreline stabilization system.
- 14 • Groundwater and soil gas monitoring wells
- 15 6. Preparation of a draft Construction Completion Report for Ecology
- 16 review and approval, followed by preparation of a final Construction Completion report
- 17 incorporating Ecology's review comments.
- 18 7. Preparation of a draft Confirmation Monitoring Plan (CMP) for Ecology
- 19 review and approval, followed by preparation of a final CMP incorporating Ecology's
- 20 review comments.
- 21 8. Implementation of the long-term Confirmation Monitoring Plan for
- 22 monitoring of groundwater, sediment, gas discharge, and habitat replacement.
- 23 9. Preparation of a draft Operations and Maintenance Plan (O&M Plan – or
- 24 Institutional Controls Plan) for Ecology review and approval, followed by preparation of
- 25 a final O&M Plan incorporating Ecology's review comments.
- 26 10. Implementation of the long-term O&M Plan.

1 11. As described in more detail in Section XX, an environmental covenant
2 will be recorded after completing the remedial construction that will, among other
3 requirements: prohibit groundwater use and restrict any uses or practices that would
4 damage or reduce the effectiveness of the cleanup action.

5 B. Defendants agree not to perform any remedial actions outside the scope of this
6 Decree unless the Parties agree to modify the CAP or Schedule of Work and Deliverables
7 (Exhibits B & C) to cover these actions. All work conducted by Defendants under this Decree
8 shall be done in accordance with Chapter 173-340 WAC unless otherwise provided herein.

9 **VII. DESIGNATED PROJECT COORDINATORS**

10 The Project Coordinator for Ecology is:

11 Mark Adams
12 3190 160th Avenue SE
13 Bellevue, Washington 98005
14 425-649-7107

15 The Project Coordinator for Defendants is:

16 Brian Gouran
17 Port of Bellingham
18 1801 Roeder Avenue
19 Bellingham, Washington 98227
20 360-676-2500

21 Each project coordinator shall be responsible for overseeing the implementation of this
22 Decree. Ecology's project coordinator will be Ecology's designated representative for MU-1
23 and MU-2. To the maximum extent possible, communications between Ecology and
24 Defendants and all documents, including reports, approvals, and other correspondence
25 concerning the activities performed pursuant to the terms and conditions of this Decree shall be
26 directed through the project coordinators. It is the responsibility of the Port's project
coordinator to distribute materials to DNR and the City. The project coordinators may
designate, in writing, working level staff contacts for all or portions of the implementation of
the work to be performed required by this Decree.

1 Any party may change its respective project coordinator. Written notification shall be
2 given to the other party at least ten (10) calendar days prior to the change.

3 VIII. PERFORMANCE

4 All geologic and hydrogeologic work performed pursuant to this Decree shall be under
5 the supervision and direction of a geologist or hydrogeologist licensed by the State of
6 Washington or under the direct supervision of an engineer registered by the State of
7 Washington, except as otherwise provided for by Chapters 18.220 and 18.43 RCW.

8 All engineering work performed pursuant to this Decree shall be under the direct
9 supervision of a professional engineer registered by the State of Washington, except as
10 otherwise provided for by RCW 18.43.130.

11 All construction work performed pursuant to this Decree shall be under the direct
12 supervision of a professional engineer or a qualified technician under the direct supervision of
13 a professional engineer. The professional engineer must be registered by the State of
14 Washington, except as otherwise provided for by RCW 18.43.130.

15 Any documents submitted containing geologic, hydrologic, or engineering work shall
16 be under the seal of an appropriately licensed professional as required by Chapters 18.220 and
17 18.43 RCW.

18 Defendants shall notify Ecology in writing of the identity of any engineer(s) and
19 geologist(s), contractor(s) and subcontractor(s), and others to be used in carrying out the terms
20 of this Decree, in advance of their involvement at the Site.

21 IX. ACCESS

22 Ecology or any Ecology authorized representative shall have access to enter and freely
23 move about all property MU-1 and MU-2 that Defendants either own, control, or have access
24 rights to at all reasonable times for the purposes of, *inter alia*: inspecting records, operation
25 logs, and contracts related to the work being performed pursuant to this Decree; reviewing
26 Defendants' progress in carrying out the terms of this Decree; conducting such tests or

1 collecting such samples as Ecology may deem necessary; using a camera, sound recording, or
2 other documentary type equipment to record work done pursuant to this Decree; and verifying
3 the data submitted to Ecology by Defendants. Defendants shall make all reasonable efforts to
4 secure access rights for those properties within the Site not owned or controlled by Defendants
5 where remedial activities or investigations will be performed pursuant to this Decree. Ecology
6 or any Ecology authorized representative shall give reasonable notice before entering any
7 MU-1 or MU-2 property owned or controlled by Defendants unless an emergency prevents
8 such notice. All Parties who access MU-1 or MU-2 pursuant to this section shall comply with
9 any applicable health and safety plan(s). Ecology employees and their representatives shall not
10 be required to sign any liability release or waiver as a condition of Site property access. The
11 scope and terms of Ecology's right of access specified in this section extend to cleanup actions
12 at the adjacent RG Haley and Whatcom Waterway Sites, should the Cleanup Action Plans for
13 those Sites require access to MU-1 or MU-2.

14 **X. SAMPLING, DATA SUBMITTAL, AND AVAILABILITY**

15 With respect to the implementation of this Decree, Defendants shall make the results of
16 all sampling, laboratory reports, and/or test results generated by them or on their behalf
17 available to Ecology. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted
18 to Ecology in both printed and electronic formats in accordance with Section XI (Progress
19 Reports), Ecology's Toxics Cleanup Program Policy 840 (Data Submittal Requirements),
20 and/or any subsequent procedures specified by Ecology for data submittal.

21 If requested by Ecology, Defendants shall allow Ecology and/or its authorized
22 representative to take split or duplicate samples of any samples collected by Defendants
23 pursuant to the implementation of this Decree. Defendants shall notify Ecology seven (7) days
24 in advance of any sample collection or work activity at the Site. Ecology shall, upon request,
25 allow Defendants and/or their authorized representative to take split or duplicate samples of
26 any samples collected by Ecology pursuant to the implementation of this Decree, provided that

1 | doing so does not interfere with Ecology's sampling. Without limitation on Ecology's rights
2 | under Section IX (Access), Ecology shall notify Defendants prior to any sample collection
3 | activity unless an emergency prevents such notice.

4 | In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be
5 | conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to
6 | be conducted, unless otherwise approved by Ecology.

7 | **XI. PROGRESS REPORTS**

8 | Defendants shall submit to Ecology written quarterly Progress Reports that describe the
9 | actions taken during the previous quarter to implement the requirements of this Decree. The
10 | Progress Reports shall include the following:

11 | A. A list of on-site activities that have taken place during the quarter;

12 | B. Detailed description of any deviations from required tasks not otherwise
13 | documented in project plans or amendment requests;

14 | C. Description of significant deviations from scopes of work or schedules
15 | established for the various phases of work necessary to implement the cleanup action during
16 | the current quarter and any planned deviations in the upcoming quarter;

17 | D. For any deviations in schedule, a plan for recovering lost time and maintaining
18 | compliance with the schedule;

19 | E. All raw data (including laboratory analyses) received by Defendants during the
20 | past quarter and an identification of the source of the sample; and

21 | F. A list of deliverables for the upcoming quarter if different from the schedule.

22 | All Progress Reports shall be submitted by the tenth (10th) day of the month following
23 | the end of the quarter in which they are due starting after the first full quarter following the
24 | effective date of this Decree. Unless otherwise specified, Progress Reports and any other
25 | documents submitted pursuant to this Decree shall be sent by certified mail, return receipt
26 | requested, to Ecology's project coordinator.

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XII. RETENTION OF RECORDS

During the pendency of this Decree, and for ten (10) years from the date this Decree is no longer in effect as provided in Section XXVII (Duration of Decree), Defendants shall preserve all records, reports, documents, and underlying data in its possession relevant to the implementation of this Decree and shall insert a similar record retention requirement into all contracts with project contractors and subcontractors. Upon request of Ecology, Defendants shall make all records available to Ecology and allow access for review within a reasonable time.

Nothing in this Decree is intended by Defendants to waive any right they may have under applicable law to limit disclosure of documents protected by the attorney work-product privilege and/or the attorney-client privilege. If a Defendant withholds any requested records based on an assertion of privilege, that Defendant shall provide Ecology with a privilege log specifying the records withheld and the applicable privilege. No MU-1 or MU-2 related data collected pursuant to this Decree shall be considered privileged.

XIII. TRANSFER OF INTEREST IN PROPERTY

No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by Defendants without provision for continued operation and maintenance of any containment system, treatment system, and/or monitoring system installed or implemented pursuant to this Decree.

Prior to a Defendant's transfer of any interest in all or any portion of MU-1 or MU-2, and during the effective period of this Decree, that Defendant shall provide a copy of this Decree to any prospective purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least thirty (30) days prior to any transfer, that Defendant shall notify Ecology of said transfer. Upon transfer of any interest, the transferring Defendant shall notify all transferees of the restrictions on the activities and uses of the property under this Decree and incorporate any such use restrictions into the transfer documents.

1 **XIV. RESOLUTION OF DISPUTES**

2 A. In the event a dispute arises as to an approval, disapproval, proposed change, or
3 other decision or action by Ecology's project coordinator, or an itemized billing statement
4 under Section XXIII (Remedial Action Costs), the Parties shall utilize the dispute resolution
5 procedure set forth below.

6 1. Upon receipt of Ecology's project coordinator's written decision, or the
7 itemized billing statement, Defendants' project coordinator has fourteen (14) days within
8 which to notify Ecology's project coordinator in writing of Defendants' objection to the
9 decision or itemized statement.

10 2. The Parties' project coordinators shall then confer in an effort to resolve
11 the dispute. If the project coordinators cannot resolve the dispute within fourteen (14)
12 days, Ecology's project coordinator shall issue a written decision.

13 3. A Defendant may then request regional management review of the
14 decision. This request shall be submitted in writing to the Northwest Regional Toxics
15 Cleanup Program Section Manager within seven (7) days of receipt of Ecology's project
16 coordinator's written decision.

17 4. Ecology's Regional Section Manager shall conduct a review of the
18 dispute and shall endeavor to issue a written decision regarding the dispute within
19 thirty (30) days of Defendant's request for review.

20 5. If a Defendant finds Ecology's Regional Section Manager's decision
21 unacceptable, that Defendant may then request final management review of the decision.
22 This request shall be submitted in writing to the Toxics Cleanup Program Manager
23 within seven (7) days of receipt of the Regional Section Manager's decision.

24 6. Ecology's Toxics Cleanup Program Manager shall conduct a review of
25 the dispute and shall endeavor to issue a written decision regarding the dispute within
26 thirty (30) days of a Defendant's request for review of the Regional Section Manager's

1 decision. The Toxics Cleanup Program Manager's decision shall be Ecology's final
2 decision on the disputed matter.

3 B. If Ecology's final written decision is unacceptable to a Defendant, that
4 Defendant has the right to submit the dispute to the Court for resolution. The Parties agree that
5 one judge should retain jurisdiction over this case and shall, as necessary, resolve any dispute
6 arising under this Decree. In the event a Defendant presents an issue to the Court for review,
7 the Court shall review the action or decision of Ecology on the basis of whether such action or
8 decision was arbitrary and capricious and render a decision based on such standard of review.

9 C. The Parties agree to only utilize the dispute resolution process in good faith and
10 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.
11 Where either party utilizes the dispute resolution process in bad faith or for purposes of delay,
12 the other party may seek sanctions.

13 D. Implementation of these dispute resolution procedures shall not provide a basis
14 for delay of any activities required in this Decree, unless Ecology agrees in writing to a
15 schedule extension or the Court so orders.

16 **XV. AMENDMENT OF DECREE**

17 The project coordinators may agree to minor changes to the work to be performed
18 without formally amending this Decree. Minor changes will be documented in writing by
19 Ecology.

20 Substantial changes to the work to be performed shall require formal amendment of this
21 Decree. This Decree may only be formally amended by a written stipulation among the Parties
22 that is entered by the Court, or by order of the Court. Such amendment shall become effective
23 upon entry by the Court. Agreement to amend the Decree shall not be unreasonably withheld
24 by any party.

25 Defendants shall submit a written request for amendment to Ecology for approval.
26 Ecology shall indicate its approval or disapproval in writing and in a timely manner after the

1 written request for amendment is received. If the amendment to the Decree is a substantial
2 change, Ecology will provide public notice and opportunity for comment. Reasons for the
3 disapproval of a proposed amendment to the Decree shall be stated in writing. If Ecology does
4 not agree to a proposed amendment, the disagreement may be addressed through the dispute
5 resolution procedures described in Section XIV (Resolution of Disputes).

6 **XVI. EXTENSION OF SCHEDULE**

7 A. An extension of schedule shall be granted only when a request for an extension
8 is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the
9 deadline for which the extension is requested, and good cause exists for granting the extension.
10 All extensions shall be requested in writing. The request shall specify:

- 11 1. The deadline that is sought to be extended;
- 12 2. The length of the extension sought;
- 13 3. The reason(s) for the extension; and
- 14 4. Any related deadline or schedule that would be affected if the extension
15 were granted.

16 B. The burden shall be on Defendants to demonstrate to the satisfaction of Ecology
17 that the request for such extension has been submitted in a timely fashion and that good cause
18 exists for granting the extension. Good cause may include, but may not be limited to:

- 19 1. Circumstances beyond the reasonable control and despite the due
20 diligence of Defendants including delays caused by unrelated third parties or Ecology,
21 such as (but not limited to) delays by Ecology in reviewing, approving, or modifying
22 documents submitted by Defendants;
 - 23 2. Acts of God, including fire, flood, blizzard, extreme temperatures,
24 storm, or other unavoidable casualty; or
 - 25 3. Endangerment as described in Section XVII (Endangerment).
- 26

1 However, neither increased costs of performance of the terms of this Decree nor
2 changed economic circumstances shall be considered circumstances beyond the reasonable
3 control of Defendants.

4 C. Ecology shall act upon any written request for extension in a timely fashion.
5 Ecology shall give Defendants written notification of any extensions granted pursuant to this
6 Decree. A requested extension shall not be effective until approved by Ecology or, if required,
7 by the Court. Unless the extension is a substantial change, it shall not be necessary to amend
8 this Decree pursuant to Section XV (Amendment of Decree) when a schedule extension is
9 granted.

10 D. An extension shall only be granted for such period of time as Ecology
11 determines is reasonable under the circumstances. Ecology may grant schedule extensions
12 exceeding ninety (90) days only as a result of:

- 13 1. Delays in the issuance of a necessary permit which was applied for in a
14 timely manner;
- 15 2. Other circumstances deemed exceptional or extraordinary by
16 Ecology; or
- 17 3. Endangerment as described in Section XVII (Endangerment).

18 **XVII. ENDANGERMENT**

19 In the event Ecology determines that any activity being performed at MU-1 or MU-2
20 under this Decree is creating or has the potential to create a danger to human health or the
21 environment, Ecology may direct Defendants to cease such activities for such period of time as
22 it deems necessary to abate the danger. Defendants shall immediately comply with such
23 direction.

24 In the event Defendants determine that any activity being performed at MU-1 or
25 MU-2 under this Decree is creating or has the potential to create a danger to human health or
26 the environment, Defendants may cease such activities. Defendants shall notify Ecology's

1 project coordinator as soon as possible, but no later than twenty-four (24) hours after making
2 such determination or ceasing such activities. Upon Ecology's direction, Defendants shall
3 provide Ecology with documentation of the basis for the determination or cessation of such
4 activities. If Ecology disagrees with Defendants' cessation of activities, it may direct
5 Defendants to resume such activities.

6 If Ecology concurs with or orders a work stoppage pursuant to this section, Defendants'
7 obligations with respect to the ceased activities shall be suspended until Ecology determines
8 the danger is abated, and the time for performance of such activities, as well as the time for any
9 other work dependent upon such activities, shall be extended, in accordance with Section XVI
10 (Extension of Schedule), for such period of time as Ecology determines is reasonable under the
11 circumstances.

12 Nothing in this Decree shall limit the authority of Ecology, its employees, agents, or
13 contractors to take or require appropriate action in the event of an emergency.

14 **XVIII. COVENANT NOT TO SUE**

15 A. Covenant Not to Sue: In consideration of Defendants' compliance with the
16 terms and conditions of this Decree, Ecology covenants not to institute legal or administrative
17 actions against Defendants regarding the release or threatened release of hazardous substances
18 covered by this Decree.

19 This Decree covers only MU-1 or MU-2 specifically identified in the Site Diagram
20 (Exhibit A) and those hazardous substances that Ecology knows are located at MU-1 or MU-2
21 as of the date of entry of this Decree, in addition to methane and other volatile organic
22 compounds that may be detected at concentrations of concern in soil vapor during the design
23 phase characterization. In the event of an amendment to this Decree or a reopener under
24 Section XVIII(B), those areas of MU-2 subject to a sediment cap, sand filter, or cap pursuant
25 to the CAP will not be required to be excavated, disturbed or otherwise modified to further
26 address contamination unless that contamination originates from MU-1 and/or

1 MU-2. This Decree does not cover any other hazardous substance or area. Ecology retains all
2 of its authority relative to any substance or area, including but not limited to MU-3, not
3 covered by this Decree.

4 This Covenant Not to Sue shall have no applicability whatsoever to:

- 5 1. Criminal liability;
- 6 2. Liability for damages to natural resources; and
- 7 3. Any Ecology action, including cost recovery, against PLPs not a party to
8 this Decree.

9 If factors not known at the time of entry of this Decree are discovered and present a
10 previously unknown threat to human health or the environment, the Court shall amend this
11 Covenant Not to Sue.

12 B. Reopeners: Ecology specifically reserves the right to institute legal or
13 administrative action against Defendants to require them to perform additional remedial
14 actions at MU-1 or MU-2 and to pursue appropriate cost recovery, pursuant to
15 RCW 70.105D.050 under the following circumstances:

- 16 1. Upon Defendants' failure to meet the requirements of this Decree,
17 including, but not limited to, failure of the remedial action to meet the cleanup standards
18 identified in the Cleanup Action Plan (CAP) (Exhibit B);
- 19 2. Upon Ecology's determination that remedial action beyond the terms of
20 this Decree is necessary to abate an imminent and substantial endangerment to human
21 health or the environment;
- 22 3. Upon the availability of new information regarding factors previously
23 unknown to Ecology, including the nature or quantity of hazardous substances at the
24 Site, and Ecology's determination, in light of this information, that further remedial
25 action is necessary at the Site to protect human health or the environment; or
26

1 4. Upon Ecology's determination that additional remedial actions are
2 necessary to achieve cleanup standards within the reasonable restoration time frame set
3 forth in the CAP.

4 C. Except in the case of an emergency, prior to instituting legal or administrative
5 action against Defendants pursuant to this section, Ecology shall provide Defendants with
6 fifteen (15) calendar days' notice of such action.

7 **XIX. CONTRIBUTION PROTECTION**

8 With regard to claims for contribution against Defendants, the Parties agree that
9 Defendants are entitled to protection against claims for contribution for matters addressed in
10 this Decree as provided by RCW 70.105D.040(4)(d).

11 **XX. LAND USE RESTRICTIONS**

12 In consultation with Defendants, Ecology will prepare an Environmental (Restrictive)
13 Covenant consistent with WAC 173-340-440 and Chapter 64.70 RCW. After approval by
14 Ecology, each Defendant shall record an Environmental (Restrictive) Covenant with the office
15 of the Whatcom County Auditor within ninety (90) days of completing the cleanup action.
16 Each Environmental (Restrictive) Covenant shall restrict future activities and uses of the Site
17 as agreed to by Ecology and each Defendant. Defendants shall provide Ecology with each
18 original recorded Environmental (Restrictive) Covenant within thirty (30) days of the
19 recording date.

20 **XXI. INDEMNIFICATION**

21 Defendants agree, to the extent permitted by law, to indemnify and save and hold the
22 State of Washington, its employees, and agents harmless from any and all claims or causes of
23 action (1) for death or injuries to persons, or (2) for loss or damage to property to the extent
24 arising from or on account of acts or omissions of Defendants, their officers, employees,
25 agents, or contractors in entering into and implementing this Decree. However, Defendants
26 shall not indemnify the State of Washington nor save nor hold its employees and agents

1 harmless from any claims or causes of action to the extent arising out of the negligent acts or
2 omissions of the State of Washington, or the employees or agents of the State, in entering into
3 or implementing this Decree.

4 **XXII. COMPLIANCE WITH APPLICABLE LAWS**

5 A. All actions carried out by Defendants pursuant to this Decree shall be done in
6 accordance with all applicable federal, state, and local requirements, including requirements to
7 obtain necessary permits, except as provided in RCW 70.105D.090. The permits or other
8 federal, state, or local requirements that the agency has determined are applicable and that are
9 known at the time of entry of this Decree have been identified in Exhibit D.

10 B. Pursuant to RCW 70.105D.090(1), Defendants are exempt from the procedural
11 requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws
12 requiring or authorizing local government permits or approvals. However, Defendants shall
13 comply with the substantive requirements of such permits or approvals. The exempt permits or
14 approvals and the applicable substantive requirements of those permits or approvals, as they
15 are known at the time of entry of this Decree, have been identified in Exhibit E.

16 Defendants have a continuing obligation to determine whether additional permits or
17 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
18 action under this Decree. In the event either Ecology or Defendants determine that additional
19 permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the
20 remedial action under this Decree, it shall promptly notify the other party of this determination.
21 Ecology shall determine whether Ecology or Defendants shall be responsible to contact the
22 appropriate state and/or local agencies. If Ecology so requires, Defendants shall promptly
23 consult with the appropriate state and/or local agencies and provide Ecology with written
24 documentation from those agencies of the substantive requirements those agencies believe are
25 applicable to the remedial action. Ecology shall make the final determination on the additional
26 substantive requirements that must be met by Defendants and on how Defendants must meet

1 those requirements. Ecology shall inform Defendants in writing of these requirements. Once
2 established by Ecology, the additional requirements shall be enforceable requirements of this
3 Decree. Defendants shall not begin or continue the remedial action potentially subject to the
4 additional requirements until Ecology makes its final determination.

5 C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the
6 exemption from complying with the procedural requirements of the laws referenced in
7 RCW 70.105D.090(1) would result in the loss of approval from a federal agency that is
8 necessary for the state to administer any federal law, the exemption shall not apply and
9 Defendants shall comply with both the procedural and substantive requirements of the laws
10 referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

11 **XXIII. REMEDIAL ACTION COSTS**

12 Defendants shall pay to Ecology costs incurred by Ecology pursuant to this Decree and
13 consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology
14 or its contractors for, or on, the Site under Chapter 70.105D RCW, including remedial actions
15 and Decree preparation, negotiation, oversight, and administration. These costs shall include
16 work performed both prior to and subsequent to the entry of this Decree. Ecology's costs shall
17 include costs of direct activities and support costs of direct activities as defined in
18 WAC 173-340-550(2). Ecology has accumulated \$13,849.14 in remedial action costs related
19 to this facility as of March 31, 2014. Payment for this amount shall be submitted within thirty
20 (30) days of the effective date of this Decree. For all costs incurred subsequent to March 31,
21 2014 Defendants shall pay the required amount within thirty (30) days of receiving from
22 Ecology an itemized statement of costs that includes a summary of costs incurred, an
23 identification of involved staff, and the amount of time spent by involved staff members on the
24 project. A general statement of work performed will be provided upon request. Itemized
25 statements shall be prepared quarterly. Failure to pay Ecology's costs within ninety (90) days
26 of receipt of the itemized statement of costs will result in interest charges at the rate of twelve

1 percent (12%) per annum, compounded monthly, to the extent authorized by WAC 173-340-
2 550(4).

3 In addition to other available relief, pursuant to RCW 70.105D.055, Ecology has
4 authority to recover unreimbursed remedial action costs by filing a lien against real property
5 subject to the remedial actions.

6 **XXIV. IMPLEMENTATION OF REMEDIAL ACTION**

7 If Ecology determines that Defendants have failed without good cause to implement the
8 remedial action, in whole or in part, Ecology may, after notice to Defendants, perform any or
9 all portions of the remedial action that remain incomplete. If Ecology performs all or portions
10 of the remedial action because of Defendant's failure to comply with their obligations under
11 this Decree, Defendants shall reimburse Ecology for the costs of doing such work in
12 accordance with Section XXIII (Remedial Action Costs), provided that Defendants are not
13 obligated under this section to reimburse Ecology for costs incurred for work inconsistent with
14 or beyond the scope of this Decree.

15 Except where necessary to abate an emergency situation, Defendants shall not perform
16 any remedial actions at MU-1 or MU-2 outside those remedial actions required by this
17 Decree, unless Ecology concurs, in writing, with such additional remedial actions pursuant to
18 Section XV (Amendment of Decree).

19 **XXV. PERIODIC REVIEW**

20 As remedial action, including groundwater monitoring, continues at MU-1 or MU-2,
21 the Parties agree to review the progress of remedial action at MU-1 or MU-2, and to review
22 the data accumulated as a result of monitoring MU-1 or MU-2 as often as is necessary and
23 appropriate under the circumstances. At least every five (5) years after the initiation of cleanup
24 action at MU-1 or MU-2 the Parties shall meet to discuss the status of MU-1 or MU-2 and
25 the need, if any, for further remedial action at MU-1 or MU-2. At least ninety (90) days prior
26 to each periodic review, Defendants shall submit a report to Ecology that documents whether

1 human health and the environment are being protected based on the factors set forth in
2 WAC 173-340-420(4). Ecology reserves the right to require further remedial action at MU-1
3 or MU-2 under appropriate circumstances. This provision shall remain in effect for the
4 duration of this Decree.

5 **XXVI. PUBLIC PARTICIPATION**

6 A Public Participation Plan is required for this Site. Ecology shall review any existing
7 Public Participation Plan to determine its continued appropriateness and whether it requires
8 amendment, or if no plan exists, Ecology shall develop a Public Participation Plan alone or in
9 conjunction with Defendants. Ecology shall maintain the responsibility for public participation
10 at the Site. However, Defendants shall cooperate with Ecology, and shall:

11 A. If agreed to by Ecology, develop appropriate mailing lists, prepare drafts of
12 public notices and fact sheets at important stages of the remedial action, such as the submission
13 of work plans, remedial investigation/feasibility study reports, cleanup action plans, and
14 engineering design reports. As appropriate, Ecology will edit, finalize, and distribute such fact
15 sheets and prepare and distribute public notices of Ecology's presentations and meetings.

16 B. Notify Ecology's project coordinator prior to the preparation of all press
17 releases and fact sheets, and before major meetings with the interested public and local
18 governments. Likewise, Ecology shall notify Defendants prior to the issuance of all press
19 releases and fact sheets, and before major meetings with the interested public and local
20 governments. For all press releases, fact sheets, meetings, and other outreach efforts by
21 Defendants that do not receive prior Ecology approval, Defendants shall clearly indicate to its
22 audience that the press release, fact sheet, meeting, or other outreach effort was not sponsored
23 or endorsed by Ecology.

24 C. When requested by Ecology, participate in public presentations on the progress
25 of the remedial action at the Site. Participation may be through attendance at public meetings
26 to assist in answering questions, or as a presenter.

1 D. When requested by Ecology, arrange and/or continue information repositories at
2 the following locations:

- 3 1. Ecology's Bellingham Field Office
4 1440 10th Street, Suite 102
5 Bellingham, WA 98225-7028
- 6 2. Ecology's Northwest Regional Office
7 3190 160th Ave. SE
8 Bellevue, WA 98008-5452
- 9 3. Bellingham Public Library
10 210 Central Avenue
11 Bellingham, WA 98225

12 At a minimum, copies of all public notices, fact sheets, and documents relating to public
13 comment periods shall be promptly placed in these repositories. A copy of all documents
14 related to this Site shall be maintained in the repository at Ecology's Northwest Regional
15 Office in Bellevue, Washington.

16 **XXVII. DURATION OF DECREE**

17 The remedial program required pursuant to this Decree shall be maintained and
18 continued until Defendants have received written notification from Ecology that the
19 requirements of this Decree have been satisfactorily completed. This Decree shall remain in
20 effect until dismissed by the Court. When dismissed, Section XVIII (Covenant Not to Sue)
21 and Section XIX (Contribution Protection) shall survive.

22 **XXVIII. CLAIMS AGAINST THE STATE**

23 Defendants hereby agree that they will not seek to recover any costs accrued in
24 implementing the remedial action required by this Decree from the State of Washington or any
25 of its agencies. Defendants will make no claim against the State Toxics Control Account or
26 any local Toxics Control Account for any costs incurred in implementing this Decree. Except
as provided above, however, Defendants expressly reserve their right to seek to recover any
costs incurred in implementing this Decree from any other PLP. This section does not limit or

1 address funding that may be provided under Chapter 173-322 WAC. This section is not
2 intended to limit the Legislature's authority to appropriate funds.

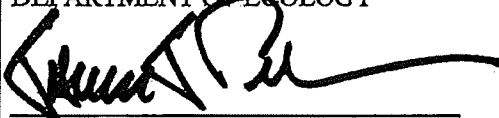
3 **XXIX. EFFECTIVE DATE**

4 This Decree is effective upon the date it is entered by the Court.

5 **XXX. WITHDRAWAL OF CONSENT**

6 If the Court withholds or withdraws its consent to this Decree, it shall be null and void
7 at the option of any party and the accompanying Complaint shall be dismissed without costs
8 and without prejudice. In such an event, no party shall be bound by the requirements of this
9 Decree.

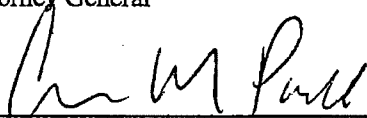
11 STATE OF WASHINGTON
12 DEPARTMENT OF ECOLOGY

13 

14 JAMES PENDOWSKI
15 Program Manager
16 Toxics Cleanup Program
17 (360) 407-7177

18 Date Signed: 11/19/14

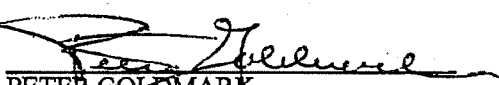
ROBERT W. FERGUSON
Attorney General

13 

14 ANNE M. POWELL, WSBA #42934
15 Assistant Attorney General
16 (360) 586-4607

17 Date Signed: 11/19/14

19 STATE OF WASHINGTON
20 DEP'T OF NATURAL RESOURCES

21 

22 PETER GOLDMARK
23 Commissioner of Public Lands
24 (360) 902-1004

25 Date Signed: 10/23/2014

ROBERT W. FERGUSON
Attorney General

21 

22 CHRISTA L. THOMPSON, WSBA #15431
23 Sr. Counsel for DNR
24 (360) 586-3511

25 Date Signed: 10-21-2014

1 CITY OF BELLINGHAM

PORT OF BELLINGHAM

2
3 Kelli Linville
KELLI LINVILLE
Mayor, City of Bellingham
4 (360) 778-8100

Robert Fix
ROBERT FIX
Executive Director
5 (360) 676-2500

6
7 Date Signed: 10/24/14

Date Signed: 10/27/14

8 APPROVED AS TO FORM:

9 [Signature]
Office of the City Attorney

10 ATTEST: [Signature]
11 Finance Director

12 Date Signed: 10/24/2014

13
14 ENTERED this _____ day of DEC - 2 2014 2014.

15
16 **DAVID M. THORN**

17 ~~JUDGE~~ Commissioner
Whatcom County Superior Court

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