

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

In the Matter of Remedial Action by:
The Port of Bellingham

SECOND AMENDMENT
TO AGREED ORDER
No. DE 1090

TO: The Port of Bellingham
P.O. Box 1677
Bellingham, Washington 98227

I. INTRODUCTION

Agreed Order No. DE 1090 (2004 Order or Order), entered into by the State of Washington, Department of Ecology (Ecology) and the Port of Bellingham (Port) in 2004, requires the Port to conduct a remedial investigation and feasibility study (RI/FS) for the I&J Waterway Site (Site) in Bellingham, Washington. The First Amendment to the Order occurred in 2006 to incorporate the work plan and schedule for remedial actions to be performed under the Order. This Second Amendment incorporates minor changes to the work plan, and authorizes the project managers to approve any subsequent minor changes without formal amendment. This Second Amendment also contemplates the potential for interim actions at this Site, and sets out a process for approval of any interim actions proposed by the Port.

II. JURISDICTION

This Second Amendment to Agreed Order No. DE 1090 is issued pursuant to the authority of RCW 70.105D.050(1).

III. AMENDMENT

This Second Amendment does not attempt to recite all of the provisions of the 2004 Order or the First Amendment. Provisions of the Order and First Amendment not specifically addressed in this Second Amendment shall remain in full force and effect. This Second Amendment does not effect substantial changes in the work being performed and will not be the subject of public notice and comment under WAC 173-340-600.

Agreed Order No. 1090 is hereby amended to incorporate the following provisions, which are integral and enforceable parts of the Order:

A. Section V is hereby amended to include subsections 15 and 16 as follows:

15. 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 thirty (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:

- (1) The deadline that is sought to be extended;
- (2) The length of the extension sought;
- (3) The reason(s) for the extension; and
- (4) Any related deadline or schedule that would be affected if the extension were 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 may include, but may not be limited to:

- (1) Circumstances beyond the reasonable control and despite the due diligence of the 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 the Port;
- (2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or
- (3) Endangerment as described in Section V.14 (Endangerment).

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

c. Ecology shall act upon any written request for extension in a timely fashion. Ecology shall give the Port written notification of any extensions granted pursuant to this Order. A requested extension shall not be effective until approved by Ecology. Unless the extension is a substantial change, it shall not be necessary to amend this Order pursuant to Section V.17 (Amendment of Order) when a schedule extension is granted.

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

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

16. Amendment of Order

The project coordinators may verbally agree to minor changes to the work to be performed without formally amending this Order. Minor changes will be documented in writing by Ecology within seven (7) days of verbal agreement.

Except as provided in Section V.10 (Reservation of Rights), substantial changes to the work to be performed shall require formal amendment of this Order. This Order may only be formally amended by the written consent of both Ecology and the Port. The Port shall submit a written request for amendment to Ecology for approval. Ecology shall indicate its approval or disapproval in writing and in a timely manner after the written request for amendment is received. If the amendment to this Order represents a substantial change, Ecology will provide public notice and opportunity to comment.

Reasons for the disapproval of a proposed amendment to this Order shall be stated in writing. If Ecology does not agree to a proposed amendment, the disagreement may be addressed through the dispute resolution procedures described in Section V.9 (Resolution of Disputes).

B. Section IV (Work to Be Performed) of the 2004 Order is replaced in its entirety as follows:

Based on the Findings of Fact and Ecology Determinations, it is hereby ordered that the Port take the following actions at the Site and that these actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein.

1. Purpose of the Remedial Investigation/Feasibility Study (RI/FS)

The purpose of the work will be to conduct sediment investigations, upland source controls, and complete an RI/FS for the Site pursuant to WAC 173-340-350 and WAC 173-204-560.

2. Scope and Description of the Work

A. The Port shall conduct a remedial investigation and feasibility study (RI/FS) as specified in the RI/FS Work Plan (Work Plan), attached as Exhibit A, and the Work Plan Addendum, attached as Exhibit B. Exhibits A and B are hereby incorporated by reference and made an integral and enforceable part of the Order.

B. All sampling and analysis for the RI/FS shall be conducted in accordance with the Work Plan and Work Plan Addendum, including Appendix A (Sediment Sampling and Analysis Plan and Quality Assurance/Quality Control Plan) and Appendix B (PSDDA Sediment Characterization Sampling & Analysis Plan).

C. Within thirty (30) days of the effective date of the Second Amendment to the Order, and pursuant to WAC 173-340-350(7)(c)(iv), the Port shall submit a Health and Safety Plan that meets the requirements of WAC 173-340-810 to Ecology for review and comment. The Port shall perform the RI/FS in accordance with the Health and Safety Plan.

D. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted to Ecology in both printed and electronic formats in accordance with Ecology Toxics Cleanup Program Policy 840—Data Submittal Requirements.

E. The Port will submit a draft Supplemental Investigation Memorandum to Ecology for review and comment within ninety (90) calendar days of completion of field work and receipt of final analytical results. Within one-hundred and fifty (150) calendar days of receipt of Ecology's final comments on the draft Supplemental Investigation Memorandum, the Port will submit a draft RI/FS report to Ecology for review and comment. The draft RI/FS report will identify a preferred Remedial Alternative for site cleanup and will meet MTCA (WAC 173-340-350) and SMS (WAC 173-204-560) requirements for an RI/FS.

F. Within forty-five (45) days of receipt of Ecology's comments on the draft RI/FS, the Port will incorporate Ecology's comments and submit a revised RI/FS to Ecology for review. The revised RI/FS will be considered final after any necessary public comment and Ecology approval.

G. 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.

3. The Port may propose that interim actions be taken. Under WAC 173-340-430, an interim action is a remedial action that is technically necessary to reduce a threat to human health or the environment by eliminating or substantially reducing one or more pathways for exposure to a hazardous substance, that corrects a problem that may become substantially worse or cost substantially more to address if the remedial action is delayed, or that is needed to provide for completion of a site hazard assessment, remedial investigation/feasibility study or design of a cleanup action. Should Ecology determine a particular interim action proposed by the Port may be warranted, the Port will prepare and submit a work plan that includes a proposed scope of work and schedule (Work Plan). Interim action work plans are subject to public review and comment. Upon approval by Ecology following public review, the Work Plan becomes an

integral and enforceable part of this Order, and the Port is required to perform the interim action according to the work plan and schedule contained therein.

C. Section V.10 (Reservation of Rights/No Settlement) is replaced in its entirety by as follows:

10. Reservation of Rights

This Order is not a settlement under Chapter 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any of Ecology's 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 Order. In addition, Ecology will not take additional enforcement actions against the Port regarding remedial actions required by this Order, provided the Port complies with this Order.

Ecology nevertheless reserves its rights under Chapter 70.105D RCW, including the right to require additional or different remedial actions at the Site should it deem such actions necessary to protect human health and the environment, and to issue orders requiring such remedial actions. Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the release or threatened release of hazardous substances at the Site. The Port expressly reserves its rights with regard to any future agency action not covered by the scope of this Order.

D. Section V.12 (Compliance with Other Applicable Laws) is hereby replaced in its entirety as follows:

12. Compliance with 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 RCW 70.105D.090. At this time, no federal, state, or local requirements have been identified as being applicable to the actions related to the RI/FS work required by this Order. The permits or specific federal, state or local requirements applicable to any interim action that Ecology may approve in the future will be identified in the work plan for that interim action, which will

be subject to public comment. Ecology's approval of any such work plan following public comment reflects Ecology's determination as to the permits or specific federal, state, or local requirements that apply.

b. Pursuant to RCW 70.105D.090(1), the Port is exempt from the procedural requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals. However, the Port shall comply with the substantive requirements of such permits or approvals. At this time, no state or local permits or approvals have been identified as being applicable but procedurally exempt under this Section to the RI/FS work required by this Order. As to any interim action that Ecology may approve in the future, any exempt permits or approvals and the applicable substantive requirements of those permits or approvals will be identified in the work plan for that interim action, which will be subject to public comment. Ecology's approval of any such work plan following public comment reflects Ecology's determination on the substantive requirements that apply.

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 either Ecology or the Port determine 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 the other party of its 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 they 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.

c. 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 that 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.

E. The first sentence of Section V.13 (Indemnification) is amended to include the following underlined language:

The Port, to the extent permitted by law, agrees to indemnify and . . .

IV. SIGNATURE AUTHORITY

The undersigned representative of each party hereby certifies that he or she is fully authorized to enter into this Second Amendment and to execute and legally bind such party to the same.

V. EFFECTIVE DATE

This Second Amendment shall be effective upon execution by the Port and Ecology.

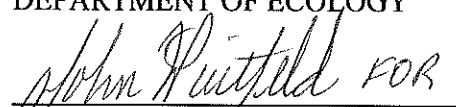
Effective date of this Second Amendment: _____

PORT OF BELLINGHAM

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Interim


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Date: 4/4/12

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