

Record Date: 11/16/2017 9:22 AM

King County, WA

After Recording Return  
Original Signed Covenant to:  
Toxics Cleanup Program  
Department of Ecology  
NW Regional Office  
Attn: Richard Thomas  
3190 160<sup>th</sup> Ave SE  
Bellevue, WA 98008

## Environmental Covenant

**Grantor: Port of Seattle**

**Grantee: State of Washington, Department of Ecology (hereafter "Ecology")**

**Brief Legal Description: T-117 property located offshore at 8700 Dallas Avenue South, Seattle, WA**

**Tax Parcel Nos.: King County 332404 - /// /**

### RECITALS

- a. This document is an environmental (restrictive) covenant (hereafter "Covenant") executed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, the Model Toxics Control Act ("MTCA"), chapter 70.105D RCW, and Uniform Environmental Covenants Act ("UECA"), chapter 64.70 RCW.
- b. The covenants granted herein are required conditions of the Modification to Administrative Settlement Agreement and Order on Consent for Removal Action Implementation ("Settlement Agreement Modification") entered into by the Port of Seattle, City of Seattle, and United States Environmental Protection Agency ("EPA") in CERCLA Docket No. 10-2011-0089. EPA determined these conditions are necessary for the protection of public health and the environment in the Amendment to the Action Memorandum for the Non-Time-Critical Removal Action at the Terminal 117 Early Action Area of the Lower Duwamish Waterway Superfund Site, Seattle, King County, Washington ("Action Memorandum Amendment") issued on October 3, 2016.
- c. The property that is the subject of this Covenant ("Restricted Property") is part of the site commonly known as Terminal 117 Early Action Area and EPA Facility 10DT (the "Site"). The Restricted Property is legally described in Exhibit A, and illustrated in Exhibit B, both of which are attached. If there are differences between these two Exhibits, the legal description in Exhibit A shall prevail.
- d. There was a removal action conducted at the Site, under Section 104 of CERCLA, 42 U.S.C. § 9604. The removal action was an "environmental response project" within the meaning of UECA. As part of the removal action, sediments with contamination above the removal action levels established by EPA were dredged from the Site and disposed of at a chemical waste landfill. Following this work, backfill was installed over the exposed sediments remaining in the dredged areas. Despite these efforts, sampling has shown that sediments remaining beneath the backfill on the Restricted Property contain polychlorinated biphenyls ("PCBs") above the

established removal action level of 12 mg/kg organic carbon normalized or 0.13 mg/kg dry weight. This Covenant is necessary to protect against exposure to this residual contamination.

e. It is the purpose of this Covenant to restrict certain activities and uses for the Restricted Property to protect public health and the environment and the integrity of the removal action conducted at the Site. A copy of the administrative record supporting the removal action is on file with EPA Region 10 or its successor agency and is available for public review. In order to make arrangements for such review, a person may contact the EPA Superfund Records Center by calling telephone number (206) 553-4494. The EPA Region 10 office is located at 1200 Sixth Avenue, Seattle, Washington. The relevant documents include, but are not limited to, (i) the Action Memorandum for a Non-Time-Critical Removal Action at the Terminal 117 Early Action Area of Lower Duwamish Waterway Superfund Site, Seattle, Washington issued by EPA on September 30, 2010, (ii) Action Memorandum Amendment, and (iii) the Removal Action Construction Report ("RACR")<sup>1</sup>. Appendix 23 of the RACR provides details on the effectiveness and extent of the backfill which is functioning as a cap, and Appendix 2 of the RACR provides the memorandum *Capping Model Evaluation of Maximum Protect Total PCB Concentrations in DU-1 Confirmation Samples*<sup>2</sup>.

f. **The Port of Seattle** ("Port" or "Grantor") is the successor to the interests of the Commercial Waterway District No. 1 of King County ("CWD") in the shoreline and submerged lands on the Lower Duwamish Waterway, including the Restricted Property and other portions of the Site. The Port interprets the Washington Supreme Court ruling, in *Commercial Waterway District No. 1 of King County v. Permanente Cement Company*, 61 Wn.2d 509 (1963) ("*Permanente*"), to mean that the CWD's property rights allowed the CWD to control only those uses in the Duwamish Waterway that would obstruct public navigation or interfere with any right of the general public. The Port is also of the view that it succeeds to only those rights the CWD had in the Restricted Property, and can therefore only grant these rights in this Covenant. In addition, the Port believes that it holds the Restricted Property subject to all valid rights of the public and treaty rights of Indian Tribes.

g. This Covenant grants Ecology, as Holder of this Covenant, certain rights under UECA and as specified in this Covenant. As a Holder of this Covenant under UECA, Ecology has an interest in real property, however, this is not an ownership interest under MTCA or CERCLA. The rights of Ecology and EPA as an "agency" under UECA, other than Ecology's right as a holder, are not an interest in real property.

## COVENANT

**The Port**, as Grantor, hereby grants to Ecology the following covenants. It is the intent of Grantor that such covenants shall supersede any prior interests Grantor has in the Restricted Property, and shall run with the land and be binding on all current and future owners of any portion of, or interest in, the Restricted Property.

<sup>1</sup> *Removal Action Construction Report, Phase 1 Sediment and Upland Cleanup*, Prepared for the Port of Seattle and the City of Seattle by AECOM. March 31, 2016.

<sup>2</sup> *Capping Model Evaluation of Maximum Protect Total PCB Concentrations in DU-1 Confirmation Samples*, Prepared for the Port of Seattle by Crete Consulting, Inc. July 2, 2014.



Ecology and EPA have the full rights to enforce the restrictions, conditions, or other rights set forth in this Covenant, as provided by law, including but not limited to CERCLA, MTCA and UECA.

**Section 1. General Restrictions and Requirements.**

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

- a. Interference with Removal Action.** Grantor shall not engage in any activity on the Restricted Property that may impact or interfere with the removal action and any operation, maintenance, inspection or monitoring of that removal action without prior written approval from Ecology and EPA.
- b. Protection of Human Health and the Environment.** Grantor shall not engage in any activity on the Restricted Property that may threaten continued protection of human health or the environment without prior written approval from Ecology and EPA. This includes, but is not limited to, any activity that results in the release of residual contamination that was contained as a part of the removal action or that exacerbates or creates a new exposure to residual contamination remaining on the Restricted Property.
- c. Continued Compliance Required.** Grantor shall not convey any interest in any portion of the Restricted Property without providing for the continued adequate and complete operation, maintenance and monitoring of the removal action and continued compliance with this Covenant.
- d. Other Uses.** Grantor shall, to the fullest extent possible within the limits of its rights and powers, restrict activities and uses by other parties at the Restricted Property in a manner that protects the backfill from damage which could lead to exposure to PCBs remaining in the covered sediments.
- e. Boundary Identification.** The Global Positioning System (GPS) coordinates for the four corners of the Restricted Property are:

NE	47.526132	-122.310286
NW	47.526110	-122.310346
SE	47.526007	-122.310194
SW	47.525987	-122.310250

Exhibits A and B and the GPS coordinates provide information which may be used to identify the area of Restricted Property, but if additional information or documents is needed for this purpose, notify Grantor using the contact information provided in Section 4.d.

**Section 2. Specific Prohibitions and Requirements.**

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

- a. Containment of sediments/waste materials.**

The removal action for the Restricted Property consists, in part, of containing contaminated sediment under backfill that is functioning as a protective cap. The backfill comprises a minimum of 3.6 feet of clean granular material (i.e., sand and gravel). The primary purpose of the backfill is to provide a physical and chemical barrier between PCB contamination remaining in sediments and the top surface of the backfill. As such, the following restrictions shall apply within the Restricted Property. Grantor shall not engage in any activity or use on the Restricted Property that will compromise the integrity of the backfill, including: drilling; digging; piercing



with a sampling device, post, stake or similar device; grading; excavation; installation of underground utilities; removal of the backfill; and application of loads in excess of the backfill load bearing capacity without prior written approval by Ecology and EPA. Grantor shall report to Ecology and EPA within forty-eight (48) hours of the discovery of any damage to the backfill, and shall immediately notify Ecology and EPA if Grantor becomes aware that a third party is engaged in any activities or uses that may compromise the integrity of the backfill. Unless an alternative plan has been approved by Ecology and EPA in writing, Grantor shall promptly repair any damage to the backfill and shall submit a report documenting this work to Ecology and EPA within thirty (30) days of completing the repairs.

The Port will install signs notifying the public of the presence of PCBs in the Restricted Property and providing the associated GPS coordinates which mark the four corners of this area. The language on the signs will be subject to approval by EPA and Ecology. The signs will be installed following the Port's habitat restoration project at the Restricted Property.

**b. Monitoring.** Grantor will perform inspections of the Restricted Property consistent with its obligations under the Settlement Agreement Modification or other enforcement order that may be issued by EPA or Ecology.

### **Section 3. Access.**

**a.** To the maximum extent of its legal authority, Grantor shall maintain clear access to all removal action components necessary to construct, operate, inspect, monitor and maintain the removal action on the Restricted Property.

**b.** Grantor freely and voluntarily consents to Ecology, EPA, and their authorized representatives entering the Restricted Property to evaluate the effectiveness of this Covenant and the removal action, and to enforce compliance with this Covenant and that action, including the right to take samples and inspect the Restricted Property.

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

### **Section 4. Notice Requirements.**

**a. Conveyance of Any Interest.** Grantor, when conveying any interest in the Restricted Property, must:

- i.** Unless otherwise agreed to in writing by Ecology and EPA, provide written notice to Ecology and EPA of the intended conveyance at least thirty (30) days in advance of the conveyance.
- ii.** Include in the conveying document a notice in substantially the following form, as well as a complete copy of this Covenant:

**NOTICE: PURSUANT TO A REMOVAL ACTION OVERSEEN BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY, THIS PROPERTY IS SUBJECT TO AN ENVIRONMENTAL COVENANT GRANTED TO THE WASHINGTON STATE DEPARTMENT OF ECOLOGY ON [DATE] AND RECORDED WITH THE KING COUNTY AUDITOR UNDER RECORDING NUMBER [RECORDING NUMBER]. USES AND ACTIVITIES ON THIS**



**PROPERTY MUST COMPLY WITH THAT COVENANT, A COMPLETE COPY OF WHICH IS ATTACHED TO THIS DOCUMENT.**

- iii. Unless otherwise agreed to in writing by Ecology and EPA, provide Ecology and EPA with a complete copy of the executed document within thirty (30) days of the date of execution of such document.
- b. **Reporting Problems.** Should Grantor become aware of any activity or anticipated activity by any party which could compromise the integrity of the backfill on the Restricted Property, or of any violation or anticipated violation of the restrictions contained in this Covenant, Grantor shall promptly report such activity or violation, as the case may be, in writing to Ecology and EPA.
- c. **Emergencies.** For any emergency or significant change in the Restricted Property conditions due to Acts of Nature (for example, flood, fire) resulting in a violation of the restrictions contained in this Covenant, Grantor is authorized to respond to such an event in accordance with state and federal law. Grantor must notify Ecology and EPA in writing of the event and response actions planned or taken as soon as practical but no later than within 24 hours of the discovery of the event.
- d. **Notification procedure.** Any required written notice, approval, reporting, or other communication shall be either personally delivered or sent by first class parcel post to the following persons. Any change in this contact information shall be submitted in writing and in advance of such change to all parties to this Covenant. Upon mutual agreement of the parties to this Covenant, an alternative to personal delivery or first class parcel post, such as e-mail or other electronic means, may be used for these communications.

Director, Maritime Environmental Programs Port of Seattle 2711 Alaskan Way Seattle, WA 98121 (206) 787 - 3000	Director, Office of Environmental Cleanup EPA MS-122 1200 6 <sup>th</sup> Avenue Seattle, WA 98101	Environmental Covenants Coordinator Washington State Department of Ecology Toxics Cleanup Program P.O. Box 47600 Olympia, WA 98504 - 7600 (360) 407-6000 <a href="mailto:ToxicsCleanupProgramHQ@ecy.wa.gov">ToxicsCleanupProgramHQ@ecy.wa.gov</a>
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**Section 5. Modification or Termination.**

- a. Grantor must provide written notice and obtain approval from Ecology and EPA at least sixty (60) days in advance of engaging in any proposed activity or use of the Restricted Property in a manner that is inconsistent with this Covenant. For any Grantor proposal that is inconsistent with this Covenant and permanently modifies an activity or use restriction at the Restricted Property:
- i. Ecology or EPA must issue a public notice and provide an opportunity for the public to comment on the proposal; and
- ii. If Ecology and EPA approve of the proposal, this Covenant must be amended to reflect the change before the activity or use can proceed.
- b. If the conditions at the Restricted Property requiring this Covenant have changed or no longer exist, then Grantor may submit a request to Ecology and EPA that this Covenant be amended or terminated. Any amendment or termination of this Covenant must follow the procedures in MTCA and UECA and any rules promulgated under these chapters.

**Section 6. Enforcement and Construction.**

- a. This Covenant is being freely and voluntarily granted by Grantor.
- b. Within ten (10) days of execution of this Covenant, Grantor shall provide Ecology with an original signed Covenant and proof of recording and a copy of the Covenant and proof of recording to EPA and others required by RCW 64.70.070.
- c. Ecology or EPA shall be entitled to enforce the terms of this Covenant by resort to specific performance or legal process. All remedies available in this Covenant shall be in addition to any and all remedies at law or in equity, including CERCLA, MTCA and UECA. Enforcement of the terms of this Covenant shall be at the discretion of Ecology or EPA, and any forbearance, delay or omission to exercise rights under this Covenant in the event of a breach of any term of this Covenant is not a waiver by Ecology or EPA of that term or of any subsequent breach of that term, or any other term in this Covenant, or of any rights of Ecology or EPA under this Covenant.
- d. Grantor shall be responsible for all costs associated with implementation of this Covenant. Furthermore, Grantor, upon request from Ecology or EPA, shall be obligated to pay for Ecology's and EPA's costs to process a request for any modification or termination of this Covenant and any approval required by this Covenant.
- e. This Covenant shall be liberally construed to meet the intent of CERCLA, MTCA and UECA.
- f. The provisions of this Covenant shall be severable. If any provision in this Covenant or its application to any person or circumstance is held invalid, the remainder of this Covenant or its application to any person or circumstance is not affected and shall continue in full force and effect as though such void provision had not been contained herein.
- g. A heading used at the beginning of any section or paragraph or exhibit of this Covenant may be used to aid in the interpretation of that section or paragraph or exhibit but does not override the specific requirements in that section or paragraph.



The undersigned Grantor warrants he/she holds the title to the Terminal 117 Site and has authority to execute this Covenant.

EXECUTED this 9th day of November, 2017.

Lindsay Pulsifer  
by: LINDSAY PULSIFER

Title: MANAGING DIRECTOR, MARITIME

**GRANTOR ACKNOWLEDGMENT**

STATE OF Washington  
COUNTY OF King

On this 9th day of November, 2017 I certify that Lindsay Pulsifer personally appeared before me, acknowledged that he/she is the Managing Director of the corporation that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute said instrument for said corporation.

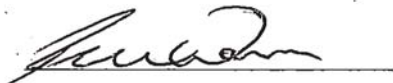


Teresa K. Bach  
Notary Public in and for the State of Washington  
Residing at Seattle, WA  
My appointment expires 2-06-18



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

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY



by: ROBERT W. WARREN

Title: NWRC SECTION MANAGER

Dated: 10/13/17

#### STATE ACKNOWLEDGMENT

STATE OF Washington

COUNTY OF King

On this 13 day of October, 2017, I certify that Robert W. Warren personally appeared before me, acknowledged that he/she is the Holder representative of the state agency that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed, for the uses and purposes therein mentioned; and on oath stated that he/she was authorized to execute said instrument for said state agency.

  
Notary Public in and for the State of Washington

Residing at King County

My appointment expires 12-20-20





The U.S. Environmental Protection Agency hereby approves of the above described Environmental Covenant.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, REGION 10

  
by: Sheila Fleming

Title: Associate Director, OFFICE OF ENVIRONMENTAL CLEANUP

Dated: 10/26/2017

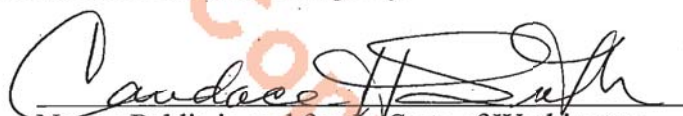
**FEDERAL ACKNOWLEDGMENT**

STATE OF Washington

COUNTY OF King

On this 26<sup>th</sup> day of October, 2017, I certify that Sheila Fleming personally appeared before me, acknowledged that he/she is the Associate Director of the federal agency that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute said instrument for said federal agency.



  
Notary Public in and for the State of Washington

Residing at Seattle, WA

My appointment expires 10-1-2020

**TERMINAL 117  
ENVIRONMENTAL CAP RESTRICTIVE COVENANT  
LEGAL DESCRIPTION  
EXHIBIT A**

A PORTION OF SECTION 33, TOWNSHIP 24 NORTH, RANGE 04 EAST,  
W.M., KING COUNTY, WASHINGTON MORE PARTICULARLY  
DESCRIBED AS FOLLOWS:

COMMENCING AT THE WEST QUARTER CORNER OF SECTION 33;  
THENCE SOUTH  $87^{\circ}22'41''$  EAST ALONG THE EAST-WEST CENTERLINE  
OF SAID SECTION 33, 1074.23 FEET TO STATION 188+32.82 AS  
RECORDED IN A RECORD OF SURVEY FOR COMMERCIAL  
WATERWAY NO.1 FILED UNDER RECORDING NUMBER  
20051219900013 AND 20070831900005, RECORDS OF SAID COUNTY;  
THENCE NORTH  $13^{\circ}51'35''$  WEST ALONG THE CENTERLINE OF  
COMMERCIAL WATERWAY NO.1, 211.70 FEET TO STATION 186+21.12  
AND THE BEGINNING OF A CURVE CONCAVE TO THE SOUTHWEST  
HAVING A RADIUS OF 1719.11 FEET;  
THENCE NORTHWESTERLY ALONG THE CENTERLINE OF  
COMMERCIAL WATERWAY NO.1 AND ARC OF SAID CURVE  
THROUGH A CENTRAL ANGLE OF  $12^{\circ}03'39''$ , 361.87 FEET;  
THENCE SOUTH  $60^{\circ}22'50''$  WEST, 156.90 FEET TO THE POINT OF  
BEGINNING;

THENCE SOUTH  $25^{\circ}33'36''$  EAST, 50.99 FEET;  
THENCE SOUTH  $63^{\circ}26'06''$  WEST, 15.65 FEET;  
THENCE NORTH  $27^{\circ}04'19''$  WEST, 50.54 FEET;  
THENCE NORTH  $61^{\circ}55'39''$  EAST, 17.00 FEET TO THE POINT OF  
BEGINNING;

CONTAINING 829 SQUARE FEET OR 0.02 ACRES MORE OR LESS.



