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**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. 90-2-13283-8 SEA

AMENDMENT NO. 2 TO
CONSENT DECREE
(MIDWAY LANDFILL SITE)

This amendment to Consent Decree No. 90-2-13283-8 is issued pursuant to the authority of RCW 70.105D, the Model Toxics Control Act (MTCA).

STATEMENT OF CURRENT CONDITIONS

A. Consent Decree No. 90-2-13283-8 was signed by the Court and filed on June 29, 1990. The Decree was a negotiated settlement between the Washington State Department of Ecology (Ecology) and the City of Seattle (Seattle). The Consent Decree included provisions for the implementation of remedial actions to address the release of hazardous substances at the site. Based upon Ecology's determination that the remedial actions in the Consent Decree would provide immediate protection to the public health, welfare and environment, the Consent Decree was negotiated and filed before Ecology had completed a Cleanup Action Plan (CAP) under MTCA to select a final cleanup action.

1 B. On February 3, 2006, the Court signed, and on February 7, 2006, filed,
2 Amendment No. 1 to the Consent Decree. The Amendment was for the purpose of integrating
3 into the Decree the selected final remedy (cleanup action) for the Site, as well as to make certain
4 changes to clarify the intent of the Decree. The final remedy (cleanup action) for the Site was
5 set forth in a September 6, 2000 Record of Decision (ROD) issued by the United States
6 Environmental Protection Agency (EPA) under the federal Comprehensive Environmental
7 Response, Compensation, and Liability Act (CERCLA). The ROD provided that Ecology would
8 continue as the lead agency overseeing the performance of the selected remedy at the Site.
9 Pursuant to WAC 173-340-380(4), Ecology adopted EPA's ROD to serve as a CAP for the Site
10 under MTCA.

11 C. Among other matters, EPA's ROD/Ecology's CAP, as implemented through
12 Amendment No. 1 to the Consent Decree, specifies landfill cover, landfill gas extraction system,
13 surface water management, monitoring, other operations and management, and institutional
14 control requirements for the Site, including a requirement for Seattle to record an environmental
15 covenant on property it owns within the Site.

16 D. The Central Puget Sound Regional Transit Authority (Sound Transit) proposes to
17 construct the Federal Way Link Extension through the eastern portion of the Midway Landfill
18 Site, on property currently owned by the Washington State Department of Transportation
19 (WSDOT) and Seattle that will be acquired by Sound Transit (the Sound Transit Property).
20 Sound Transit's construction would also facilitate WSDOT's State Route 509 Corridor Project,
21 which involves eventually adding two additional lanes to Interstate 5 adjoining the Midway
22 Landfill. Both projects will impact areas that currently contain Landfill Material and that contain
23 landfill cover and other components of the remedial action. The purpose of the Federal Way
24 Link Extension is to expand mass transit capacity in the Central Puget Sound region. The purpose
25 of the State Route 509 Corridor Project is to ease Interstate 5 congestion and improve access to
26 Sea-Tac Airport.

1 E. The site work required for the Sound Transit and WSDOT projects through the
2 Midway Landfill area will be combined in one construction effort to be undertaken by
3 contractors employed by Sound Transit. This effort will require Landfill Material removal,
4 relocation of the eastern edge of the landfill cap system, and drainage improvements within the
5 area subject to the EPA ROD/Ecology CAP for the Site, as implemented through Amendment
6 No. 1 to the Consent Decree. After this work is completed, the Sound Transit Property and parts
7 of the remaining WSDOT property will have an underlying infiltration barrier and newly placed
8 backfill. No Municipal Solid Waste will remain on the Sound Transit Property. No Landfill
9 Material will remain on the remaining WSDOT property. These changes affect Seattle's existing
10 requirements and plans for the Site under Amendment No. 1 to the Consent Decree, including
11 its Compliance Monitoring Plan and Operations and Maintenance Manual for the Site.

12 F. In conjunction with the above work, Sound Transit will be acquiring property
13 currently owned by WSDOT and Seattle within the Site. Seattle will also be acquiring an area
14 west of the property to be acquired by Sound Transit within the Site. Seattle will consolidate this
15 acquisition with property it currently owns within the Site. These transactions will require that
16 an environmental covenant be recorded by Seattle on the property Seattle acquires to which a
17 covenant should apply.

18 G. Ecology has issued an amendment to the Ecology CAP for the Site (CAP
19 Amendment) that specifies modifications to remedial action requirements necessitated by Sound
20 Transit's construction activities. The CAP Amendment is attached to this Amendment as Exhibit
21 E. These modifications are to ensure that the construction activities, as well as Sound Transit's
22 and WSDOT's future operations, are consistent with and maintain the integrity of the remedy
23 selected in the EPA ROD/Ecology CAP. Specifically, the CAP Amendment updates the landfill
24 cover, landfill gas extraction system, surface water management system, compliance monitoring
25 plan, operations and management manual, and institutional control requirements in response to
26 the construction activities and use changes planned within the Site. Prior to issuance of the CAP

1 Amendment, Ecology, as the lead agency for the Site under the cooperative agreement between
2 EPA and Ecology for management of National Priorities List sites in Washington, briefed EPA
3 as to the requirements of the proposed CAP Amendment, and their consistency with the ROD,
4 i.e., how they will protect the integrity of the remedy selected under the ROD. EPA did not object
5 to Ecology's issuance of the CAP Amendment.

6 H. This Amendment is to implement the CAP Amendment requirements as they
7 pertain to Seattle's obligations under this Decree. Ecology is concurrently entering into a
8 Prospective Purchaser Consent Decree with Sound Transit requiring Sound Transit to undertake
9 work at the Site in conformance with, and implement portions of the remedial actions specified
10 in, the CAP Amendment.

11 **AMENDMENT TO CONSENT DECREE**

12 Based on the foregoing, the parties stipulate and agree that the Decree should be
13 amended, pursuant to the provisions of Section XXI. AMENDMENT OF CONSENT DECREE,
14 as follows:

15 A. All of the terms of the Consent Decree, as amended through Amendment No. 1,
16 remain in effect unless expressly amended herein.

17 B. Section IX. DEFINITIONS shall be amended as follows:

18 R. Municipal Solid Waste: Refers to material disposed of in the Midway
19 Landfill, excluding Landfill Soils. Municipal Solid Waste may include, but not be limited
20 to, "solid waste" as defined by RCW 70.95.030(22); "commercial solid waste,"
21 "household waste," "industrial solid wastes," and "solid waste" as defined by WAC 173-
22 351-100; and "dangerous wastes" as defined by WAC 173-303-040.

23 S. Landfill Soils: Refers to soils used as daily cover material during
24 operations of the Midway Landfill, or otherwise comingled with the Municipal Solid
25 Waste.

1 T. Landfill Material: Refers inclusively to Municipal Solid Waste, Landfill
2 Soils, and comingled Municipal Solid Waste and Landfill Soils.

3 C. Section XI. SCOPE OF WORK, Heading B, shall be amended, and new
4 Paragraphs 7, 8, and 9 shall be added, as follows:

5 7. Seattle shall undertake work at the Site in conformance with, and
6 implement the remedial actions specified in, Exhibit E (CAP Amendment), in accordance
7 with Exhibit F (Scope of Work and Schedule). The CAP Amendment specifies
8 requirements related to, among other things, overburden removal and reuse; landfill
9 cover system removal and replacement; Landfill Material removal, relocation, and
10 disposal; segregation and reuse of Landfill Soils; landfill gas extraction system
11 disturbance and replacement; surface water management; the protection, and if
12 necessary, decommissioning and replacement, of groundwater monitoring wells; access
13 controls during and after construction; other controls during construction (including
14 stormwater controls and dust and odor control); institutional controls; and revising
15 Seattle's existing Operation and Maintenance Manual and Compliance Monitoring Plan
16 for the Site to reflect and address changes to the Midway Landfill's landfill cover, landfill
17 gas extraction system, and surface water management system. All plans or other
18 deliverables submitted by Seattle for Ecology's review and approval under the Scope of
19 Work and Schedule (Exhibit F) shall, upon Ecology's approval, become integral and
20 enforceable parts of this Decree.

21 8. To effectuate work to be performed under this Decree and the Sound
22 Transit Prospective Purchaser Consent Decree (Work) in the most efficient manner,
23 Sound Transit and Seattle have designated lead roles in performing various aspects of
24 the Work. These roles are designated in the Scope of Work and Schedule (Exhibit F).
25 Seattle and Sound Transit may, by mutual agreement and with notice to Ecology, revise
26 the lead agency designations, provided that all Work is completed as required. In the

1 event the party identified as a lead should fail to timely and properly complete
2 performance of all or any portion of its Work as designated in Exhibit F, Sound Transit
3 and Seattle remain strictly, jointly, and severally liable for the performance of any
4 remaining Work, regardless of designations in Exhibit F; provided, that: (1) in the event
5 Sound Transit fails to timely and properly complete performance of tasks solely
6 necessary to the Sound Transit and WSDOT projects, Seattle's sole obligation under this
7 Decree will be to, under Ecology's supervision, maintain and, if necessary, restore the
8 Site to conform with the remedy selected in the ROD/CAP; (2) in the event Sound Transit
9 fails to timely and properly complete performance of tasks related to ongoing operation
10 and maintenance of the Site within the Subject Property as defined in the Sound Transit
11 Prospective Purchaser Consent Decree, Seattle's sole obligation under this Decree will
12 be to comply to the extent the task is necessary to maintain compliance with the approved
13 Amended Operations and Maintenance Plan; (3) in the event Seattle fails to timely and
14 properly complete performance of tasks related to ongoing compliance monitoring or
15 operations and monitoring of the Site outside of the Subject Property as defined in the
16 Sound Transit Prospective Purchaser Consent Decree, Sound Transit's sole obligation
17 under the Sound Transit Prospective Purchaser Consent Decree will be to comply to the
18 extent the task is applicable to the Subject Property as defined in that Decree; and (4)
19 with respect to tasks related to recording Environmental Covenants, those tasks will
20 remain the sole obligations of Sound Transit and Seattle with respect to their respective
21 properties.

22 9. Financial Assurance. Pursuant to WAC 173-340-440(11), Seattle shall
23 maintain sufficient and adequate financial assurance mechanisms to cover all costs
24 associated with the operation and maintenance of engineering and institutional controls
25 at the Site, including compliance monitoring and corrective measures.
26

1 1. Within sixty (60) days of the effective date of this Amendment,
2 Seattle shall submit to Ecology for review and approval an estimate of the costs
3 associated with the operation and maintenance of the engineering and
4 institutional controls at the Site that it will incur in carrying out the terms of this
5 Decree. Within sixty (60) days after Ecology approves the aforementioned cost
6 estimate, Seattle shall provide proof of financial assurance sufficient to cover
7 those costs in a form acceptable to Ecology. Seattle may utilize one of the
8 allowable mechanisms described in WAC 173-340-440(11)(a), including the
9 government financial test.

10 2. Seattle shall adjust the financial assurance coverage and provide
11 Ecology's project coordinator with documentation of the updated financial
12 assurance for:

13 i. Inflation, annually, within ninety (90) days after the close
14 of Seattle's fiscal year if the government financial test is used, or if not,
15 within thirty (30) days of the anniversary date of the entry of this Decree
16 or, if applicable, the modified anniversary date established in accordance
17 with this section.

18 ii. Changes in cost estimates, within thirty (30) days of
19 issuance of Ecology's approval of a modification or revision to the CAP
20 that result in increases to the cost or expected duration of engineering and
21 institutional controls at the Site. Any adjustments for inflation since the
22 most recent preceding anniversary date shall be made concurrent with
23 adjustments for changes in cost estimates. The issuance of Ecology's
24 approval of a revised or modified CAP will, subject to subparagraph i
25 above, revise the anniversary date established under this section to
26 become the date of issuance of such revised or modified CAP.

1 D. Section XIX. TRANSFER OF INTEREST IN PROPERTY shall be amended and
2 replaced in its entirety as follows:

3 No voluntary conveyance or relinquishment of title, easement, leasehold, or other
4 interest in any portion of the landfill shall be consummated without provision for
5 continued operation and maintenance of any containment system, treatment system, or
6 monitoring system installed or implemented pursuant to this Decree, unless Ecology has
7 approved of the retirement or abandonment of any such systems or part thereof. Prior to
8 transfer of any legal or equitable interest in all or any portion of the landfill real property,
9 Seattle shall serve a copy of this Decree upon any prospective purchaser, lessee,
10 transferee, assignee, or other successor in interest of the property; and, at least thirty (30)
11 days prior to the transfer, Seattle shall notify Ecology of said contemplated transfer.

12 Seattle and Ecology will, pursuant to RCW 64.70.100, cooperate in recording a
13 restrictive covenant on property that is acquired by the Seattle pursuant to this project,
14 and such restrictive covenant shall be substantially the same as the covenant that was
15 previously recorded and applies to the Midway Landfill. Ecology will, in consultation
16 with Seattle, prepare an Environmental (Restrictive) Covenant consistent with
17 WAC 173-340-440, RCW 64.70, and any policies or procedures specified by Ecology,
18 for the property to be acquired and owned by Seattle at the Midway Landfill Site after
19 the acquisitions by Sound Transit and Seattle described above (“Subject Property”). The
20 Environmental (Restrictive) Covenant shall restrict future activities and uses of the
21 Subject Property as required by the CAP Amendment and as agreed to by Ecology and
22 Seattle.

23 After approval by Ecology, Seattle shall record the Environmental (Restrictive)
24 Covenant for the Subject Property with the office of the King County Auditor as detailed
25 in the Schedule (Exhibit F). Seattle shall provide Ecology with the original recorded
26 Environmental (Restrictive) Covenant within thirty (30) days of the recording date.

1 STATE OF WASHINGTON
2 DEPARTMENT OF ECOLOGY

ROBERT W. FERGUSON
Attorney General

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4 _____
JAMES J. PENDOWSKI
Program Manager
5 Toxics Cleanup Program

_____ ANDREW A. FITZ, WSBA #22169
Senior Counsel
Attorney for Plaintiff

6 Date: _____

Date: _____

7 CITY OF SEATTLE

PETER HOLMES
City Attorney

8
9
10 _____
MAMI HARA, General Manager
Seattle Public Utilities

_____ TAD H. SHIMAZU, WSBA #16571
Assistant City Attorney
Attorney for Defendant

11
12 Date: _____

Date: _____

13
14 DATED this _____ day of _____, 2020.

15
16 _____
17 JUDGE
King County Superior Court

18
19 ATTACHED EXHIBITS:

20 EXHIBIT E – Midway Landfill CAP Amendment
21 EXHIBIT F – Scope of Work & Schedule
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