



October 19, 2020

Marian L. Abbett, P.E., Acting Section Manager
Toxics Cleanup Program, Southwest Regional Office
Washington State Department of Ecology
PO Box 47775
Olympia, WA 98504-7775

Re: Response to October 6, 2020, Notice of Planned Issuance of Enforcement Order

- **Site Name:** Taylor Way and Alexander Avenue Fill Area (TWAFA)
- **Site Address:** 1500 Block Taylor Way E, Tacoma, Pierce County, WA
- **Facility/Site No.** 1403183
- **Cleanup Site ID No.** 4692

Dear Ms. Abbett:

The Port of Tacoma (Port) received and reviewed The Department of Ecology's October 6, 2020 letter responding to the Port's rejection¹ of Ecology's proposed Agreed Order (AO) for the above-reference site. I'd like to begin by reiterating the Port and Ecology's long history of working together to remediate properties in and around Commencement Bay. In fact, with Ecology as a close partner, the Port has leveraged over \$300 million dollars 'cleaning' up upland and sediment properties throughout Pierce County. As a result, when we received your letter, the tone and assertion that the Port was attempting to be untruthful or misleading was extremely discouraging and completely unwarranted. Nevertheless, we hope through this letter, along with subsequent meetings, we will find a way to move this effort forward.

The Port rejected the AO because no cogent legal basis exists to compel the Port to investigate and remediate the polluting properties² to which the Port has no connection. The Port must reject Ecology's attempt to coerce the Port to incur remedial action costs on an equal basis with the polluting PLPs—the PLPs liable for the lion share of pollution on those properties. The purpose of this letter is to respond to some of the issues you have raised, and to propose an alternative path forward that we believe can move the TWAFA site through the cleanup process more efficiently than naming the Port in an Enforcement Order (EO).

The Port openly acknowledges its responsibility to remediate contaminated properties it has acquired and has a long track record of success in this regard. Cleaning up legacy contamination to put land back to productive use is an important part of what all public ports do well – and candidly, a source of pride here at the Port. The residents of Pierce County seem to

¹ *Taylor Way & Alexander Avenue Fill Area (TWAFA) Site, Ecology Agreed Order.* Letter from Kimberly Seely, Coastline Law Group to Gabrielle Gurian, Assistant Attorney General, dated July 31, 2020.

² For clarity, the Port's analysis should have also referred to the Don Oline Landfill parcels in addition to Clean Care. However, inclusion of the Don Oline parcels in no way affects the Port's argument. Agreed Order Exhibit C, *Taylor Way and Alexander Avenue Fill Area Parcel Ownership, Activity and Releases* confirms through Ecology's own research of former parcel ownership that the Port's parcels have neither a Don Oline nor Clean Care nexus whatsoever.

agree, based on online public input we've received to the Port's Strategic Plan. In that survey, the only priority higher than "clean up environmentally contaminated property" was "create jobs." But, that doesn't mean the Port is obligated or willing to expend public tax payer resources to address an abandoned hazardous waste facility and former landfill, which was privately owned and operated and located on property the Port does not own and did not operate.

Frankly, we do not understand the reasoning behind, or purpose served by naming the Port in an EO now that the AO has been signed by Occidental Chemical Corporation, Burlington Environmental, LLC and General Metals (the "AO PLPs"). Your letter states that the EO is intended to require the Port to work with the AO PLPs so that co-mingled soil and groundwater contamination from the TWAAFA site can be addressed in concert. However, by issuing a parallel EO to the Port, Ecology is providing ill-advised leverage to the AO PLPs' demand that the Port pay 25% of costs associated with the Don Oline Landfill and Clean Care, where the Port has 0% responsibility. The Port does not believe this to be an appropriate use of Pierce County taxpayer dollars.

On page 4 of your letter you stated that Ecology does not make a liability determination, but is required to identify potentially liable parties under RCW 70.105D.040. The Office of Attorney General (OAG) – to whom the Port's letter was addressed -- did not respond to Port's liability analysis. We presume that OAG acceded to a response from Ecology -- where staff simply aren't in the business of liability determination or allocation. It is disappointing that legal analysis from Port Counsel was given little consideration.

On page 2 of your letter you stated that the Port is jointly and severally liable for addressing all TWAAFA contamination, including releases originating from Clean Care and the Don Oline Landfill, based on the "Facility" definition in RCW 70A.305.020(8):

"Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, *or otherwise come to be located* [emphasis added].

Ecology is asserting that the phrase "otherwise come to be located" means that the Port is liable for investigation and remediation costs for the Don Oline Landfill and Clean Care, because contamination originating from the Don Oline Landfill and Clean Care "came to be located" on Port-owned property. This interpretation is diametrically opposed to comments Ecology provided during rulemaking. The phrase "otherwise come to be located" was inserted in the rule to prevent polluters from using a property line as a shield to evade liability for contamination that migrates off the property from which it originated. It was not intended to provide Ecology with a sword to compel a PLP to investigate a polluting property to which it has no connection, other than suffering the effects of a release originating from a neighboring property. Ecology's analysis of the Port's liability with respect to the Don Oline Landfill and Clean Care is fundamentally flawed by this error.

Ecology addressed the meaning of the phrase “comes to be located” within the “Facility” definition in 1991 Responsiveness Summary for the Amendments to the Model Toxics Control Act (MTCA) Cleanup Regulation Chapter 173-340 WAC (pages 114 - 115) as follows:

"Facility"

Mr. Butler expressed the opinion that the definition of "facility" does not give enough guidance as to the actual scope of the regulation. He suggested that the broad definition of facility as now written could include public water supply distribution systems. He also expressed the opinion that Ecology needs to provide more guidance concerning the phrase "comes to be located".

Ecology's Response: Ecology believes it would be inappropriate to change this definition since it is a statutory definition. It is important to note that the MTCA definition of "facility" is virtually identical to the EPA definition published in the National Contingency Plan (EPA, 1990a³).

The NCP discussion in the Federal Register (FR) uses the terms “vessel” and “facility” interchangeably when referring to the origin of a release. This is consistent with the MTCA definition of a facility. The FR also explains that on-site is not limited to the property from which a release originated, but rather as a means to address the extent of contamination in order to facilitate the intent of congress to expedite cleanup (e.g. by streamlining permitting requirements or locating necessary treatment facilities beyond the boundaries of permitted facilities. It does not serve to impose CERCLA liability on a property owner impacted by a release originating on neighboring property. The case law cited in the Port’s rejection of the Agreed Order is consistent with this explanation. Ecology has not offered any case law or other supporting evidence to substantiate its flawed legal basis for imposing liability on the Port associated with the investigation and remediation of the Clean Care and Don Oline Landfill properties.⁴

The Port is deeply concerned that the EO as presently drafted effectively penalizes the Port for implementing Agreed Order DE 13921 at 1514 Taylor Way and elements of the AO workplan germane to the Hylebos Marsh. The Port respectfully submits that issuing this EO to a party that has been responsibly engaged in corrective action is not sound public policy, sets incredibly ill-advised precedent, and undermines the goals stated in your letter.

³ U.S. EPA. 1990a. "National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan) Final Rule," 40 CFR Part 300, Federal Register 55. U.S. Environmental Protection Agency, Washington, DC. pp. 8666-8865.

⁴ Ecology rationalizes the obvious inequities in this case by directing the Port to use MTCA’s Private Right of Action provision at RCW 70.105D.080, to sue the polluting PLPs to recover costs for which the Port is not liable. Such a directive is ill-informed and leads to abhorrent precedent. First, any future litigation involving this Site will most assuredly involve dozens of PLPs—former generators of hazardous wastes sent to Clean Care for disposal and many orphan PLPs—and will be extremely complex and costly. Second, it is the AO PLPs that should be forced to recover costs through litigation if they pay more than their fair share of the costs—not the Port. Ecology is setting a horrendous precedent - polluting PLPs can now look to Ecology to erroneously force a non-liable public entity to use public funds for cleanup in lieu of compelling the polluting PLPs to pay to clean up their own pollution. Ecology’s position in this case is plainly arbitrary and capricious.

The Port would like to meet discuss alternatives to the EO to achieve Ecology's stated goal of addressing co-mingled TWAFA contamination in concert, and yet in a way that does not create leverage for the AO PLPs to allocate Don Oline Landfill and Clean Care costs to the Port. Port staff will forward a survey to you, Rebecca Lawson, and Heather Bartlett to schedule a videoconference prior to the October 26, 2020 EO issue date.

Please call me at (253) 428-8633 if you have questions or comments in the interim.

Sincerely,



Eric D. Johnson, Executive Director
Port of Tacoma

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