Robert Bakemeier

Please see uploaded file--Joint Comments submitted on behalf of Occidental Chemical Corporation, General Metals of Tacoma, Inc., and Burlington Environmental LLC.

COMMENTS BY OCCIDENTAL CHEMICAL CORPORATION, GENERAL METALS OF TACOMA, INC., AND BURLINGTON ENVIRONMENTAL LLC

"TAYLOR WAY & ALEXANDER AVENUE FILL AREA"
1500 Block Taylor Way E, Tacoma, Washington

Agreed Order No. DE 14260
Enforcement Order No. DE 19410

Occidental Chemical Corporation ("Occidental"), General Metals of Tacoma, Inc. ("General Metals"), and Burlington Environmental LLC ("BE") (all collectively the "AO Parties") jointly submit these comments regarding the two orders (both effective as of December 4, 2020) recently issued by Washington's Department of Ecology ("Ecology") for the site located in Tacoma and denominated by Ecology as the "Taylor Way & Alexander Avenue Fill Area" (aka "TWAAFA") (the "Site").[1] Ecology invited such comments by the public regarding Agreed Order No. DE 14260 (the "AO") (among Ecology, Occidental, General Metals, and BE) and regarding Enforcement Order No. DE 19410 (the "EO") (issued by Ecology to the Port of Tacoma) (the "Port"). The pertinent public comment period runs from December 7, 2020 to January 5, 2021.[2] The AO Parties respectfully submit these comments about the AO/EO and request Ecology to act as indicated below.[3]

Occidental, General Metals, and BE Cooperation Regarding Past and Future Site Activities.

Occidental, General Metals, and BE have signed the AO, and intend to fully satisfy their AO obligations. Indeed, AO activities already have begun. The AO Parties' cooperation with Ecology regarding the Site began many years ago, individually as well as collectively. Much could be said about the parties' individual cooperation in the past (over several decades) but will be reserved for now.

Collectively, it should be observed that the AO Parties cooperated extensively with Ecology long before finalizing and signing the AO. The AO Parties responded immediately in 2016, when Ecology first proposed to begin agreed order negotiations for the Site.[4] The AO Parties' subsequent cooperation included: (a) compilation of Site information and data from previous extensive investigations and monitoring of the Site (identified in the AO/EO, Section V, Paragraphs DD and EE); and (b) preparation of the Data Gap Work Plan (the AO/EO's Exhibit B) which delineated the relatively limited amount of additional investigation necessary to

[1] As discussed below, the AO Parties request that Ecology rename the Site as the "Taylor Way & Alexander Avenue Area."
[2] *See* Ecology's Fact Sheet on Ecology's "TWAAFA" Website Page accessible at: https://apps.ecology.wa.gov/gsp/Sitepage.aspx?csid=4692.
[3] All correspondence and materials cited in these comments are already included in Ecology's Site File.
[4] The progress of negotiations was interrupted for a long time in 2018-2019 due to circumstances involving Ecology staffing for the Site.

prepare a Remedial Investigation/Feasibility Study ("RI/FS") Report for the Site under the AO/EO.[5]

The AO Parties' efforts and funding positioned the Site for the now ongoing AO activities. Among many, many other parties liable for the Site under applicable environmental laws, only Occidental, General Metals, and BE voluntarily stepped up to sign the AO and to perform AO activities. The circumstances justify these AO Parties' comments and the requests of Ecology set forth below.

Ecology Should Expand Its Selective, Limited, Arbitrary, and Capricious Site Enforcement Strategy to Target Many Other Liable Parties.

Ecology has pursued a very selective and limited Site enforcement strategy, despite the AO Parties' several long-standing requests that Ecology pursue more parties among the many, many targets known to Ecology.[6] To date, Ecology only has designated nine (9) "potentially liable persons" ("PLPs") for the Site under Washington's Model Toxics Control Act ("MTCA") (and two of those designations were essentially "duplicative" of other designations). In addition to the three AO Parties, the only other PLPs designated have been: (4) David Bromley (involved with the Bromley-Marr ECOS Inc. and related entities that owned and operated the facility known as "CleanCare" at the Site); (5) the Port of Tacoma (the "Port"); (6) Potter Property, LLC (a former property owner that sold out to the Port); and (7/8) Don Oline (now-deceased, a former property owner/operator who placed fill materials at the Site as a generator/transporter—the Estate of Don Oline also was named separately as a PLP). The ninth PLP was Stericycle Environmental Solutions, Inc. (a former parent entity of BE).

While Ecology appropriately issued the EO for the Site, Ecology inappropriately limited that EO to the Port. The Port should be a Site PLP, and the Port properly was named in the EO when the Port declined to sign the AO (as discussed in more detail below). However, Ecology inexplicably did not add any other parties to the EO—not even any other previously Ecology-designated PLPs—particularly David Bromley and the CleanCare entities already named as PLPs via Ecology's determination letters dated November 19, 2007. Evidently Ecology also has abandoned any enforcement action against the Estate of Don Oline.

In addition to the previously designated PLPs, Ecology is aware of many, many other parties who should be compelled by Ecology to fulfill their legal obligations for the Site's environmental conditions. For decades since the 1970s, Ecology has been responsible for regulation of the hazardous waste management facilities at the Site, and thus Ecology has extensive information ("credible evidence") about the pertinent owners/operators, and numerous hazardous waste generators/transporters liable for the Site. Indeed, Ecology's long history of Site investigations and enforcement activities (particularly involving the CleanCare and BE Parcels described in the AO/EO at Section V) yielded vast evidence of Site activities and

[5] The Port of Tacoma also participated in these pre-AO/EO activities.

[6] Examples in the Ecology Site File of the AO Parties' requests to Ecology regarding this topic included the following: (a) November 17, 2005, letter from M. Wassmann to Ecology; (b) July 20, 2020, email from R. Bakemeier to Ecology; (c) July 20, 2020, email from M. Myers to Ecology; (d) August 3, 2020, email from R. Bakemeier to Ecology; and (e) August 3, 2020, email from M. Myers to Ecology.

hazardous substance releases creating Site liabilities for specific owners, operators, generators, and transporters known to Ecology.

See, e.g., "Recommendation for Enforcement" dated July 22, 1999, pertaining to the "CleanCare TSDR Facility" from D. Saunders and K. Graber (of Ecology) to G. Sorlie, Ecology Program Manager:

> "As a result of a series of inspections at the Tacoma CleanCare Facility, review of prior inspections, and written and verbal correspondence with the owners and operators of this site, we recommend that a combination of an Order and Penalty be assessed against CleanCare Corporation....The CleanCare site is an interim status storage and recycling facility. Dangerous waste is received at the site and either placed in storage for transport to another TSD for treatment or disposal, or blended into hazardous waste fuel. Fuel wastes primarily consist of paint wastes and other ignitable solvents and wastes with fuel value. Solvent is received and recycled as part of a parts-washer program marketed to generators. CleanCare picks up the spent solvent and replaces it with recycled stock. CleanCare also takes paint 'gun-wash,' solvent that is generally of low quality, routinely used to clean paint spray guns....[The Recommendation for Enforcement listed] "eight consistent, overarching problems that emerge from Ecology's compliance efforts at this facility....[including] spill reporting and spill response....The compliance history at this site demonstrates that the company is reluctant to report to Ecology spills and leaks to both secondary containment and to soils. The lack of mitigation of spills is also unsatisfactory, and unless addressed by this [enforcement] order, will continue to contribute to the contamination of the site."

Likewise, Ecology's Site File contains extensive "credible evidence" about specific generator/transporter parties liable for the Site's environmental conditions. *See, e.g.*, Ecology List of "state and local agencies that used CleanCare in the past [for the disposal of hazardous wastes]" attached to March 17, 2000, email from K. Graber to K. Seiler, D. Nightingale, and J. Sachet (all Ecology personnel).[7]

Ecology also has extensive "credible evidence" gathered in 1999-2001 during the time frame when Ecology requested the United States Environmental Protection Agency ("EPA") to oversee Site cleanup activities. As part of EPA's effort, EPA identified and designated by notice letters numerous "potentially responsible parties" ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). EPA provided such notice letters to at least 64 generators of hazardous wastes sent to CleanCare for disposal (including Ecology). *See, e.g.*, July 2000 and December 2000 EPA Superfund Fact Sheets for the CleanCare Site. Certainly, any parties designated as PRPs by EPA should be designated as Site PLPs by Ecology. Ecology also compiled its own lists of numerous parties that used CleanCare for waste disposal, as described above. And, Ecology and EPA jointly produced two volumes of "PLP Search Documentation" dated October 12, 2001, for the Ecology Site File. *See*, AO/EO, Section V, Paragraph DD.1.

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[7] This "credible evidence" from the Ecology Site File was once again brought to Ecology's attention during AO negotiations via an August 3, 2020, email from M. Myers to Ecology.

Ecology has ample evidence in its Site File (most gathered over 20 years ago) to expand its Site enforcement activities and should do so. Ecology's long delay in taking appropriate enforcement action (particularly against the CleanCare owners, operators, generators, and transporters) has likely compromised opportunities to hold those parties liable for the Site's environmental cleanup.

If Ecology does not expand its enforcement strategy in the context of the AO/EO, Ecology should begin to do so immediately to prepare for the next phase of Site activities (implementation of a Cleanup Action Plan). And, it is particularly appropriate for Ecology to pursue other parties as soon as possible for recovery of Ecology's $352,302.05 in past remedial costs (described as "deferred" by Ecology in Section VIII of the AO/EO "until the negotiation of the next formal agreement for the Site"). As the AO Parties have previously demonstrated to Ecology,[8] nearly all of Ecology's past costs relate to hazardous waste and material abandoned by CleanCare, stormwater management at the facility, and management of above-ground structures that were solely related to the former CleanCare operations.[9] These remedial action costs arose from historical operations completely unrelated to alleged liabilities attributed to the AO Parties.

The Ecology past costs were incurred to address CleanCare operations and conditions known to Ecology for many years due to Ecology's role in regulation and oversight of the CleanCare facility prior to its closure (demonstrated above in the discussion about Ecology's "Recommendation for Enforcement" dated July 22, 1999). As the regulator of the facility, Ecology should have required CleanCare to address the conditions giving rise to Ecology's past costs while CleanCare was operating its facility.

Ecology cannot seek to impose a form of "successor liability" upon parties that had no connection whatsoever to CleanCare or to the wastes/conditions giving rise to the past costs. The AO Parties are not "successors" to CleanCare and its liabilities. MTCA does not provide authority for Ecology to attempt to impose such liabilities upon the AO Parties. MTCA does provide Ecology the authority to impose such liabilities upon the CleanCare owners, operators, generators, and transporters. Ecology should not wait any longer to pursue those enforcement activities—to address Ecology's past costs and to address any future remedial activities resulting from the CleanCare "legacy."

Ecology Appropriately Designated the Port as a Site PLP and Appropriately Issued the EO to the Port.

Ecology sent the Port a PLP notice letter for the Site dated August 8, 2007. Ecology subsequently designated the Port as a Site PLP in a determination letter dated November 19, 2007, after the Port did not respond within the pertinent comment period. The Port's PLP designation is appropriate because the Port owns three real estate parcels comprising very large portions of the Site (as described in AO/EO Section V, Paragraphs AA, BB, and CC). According to Ecology's historical Site investigations, the Port also was one of many generators that sent

[8] *See* June 6, 2018, letter from R. Bakemeier, M. Myers, K. Seely, and M. Palumbo to Ecology (R. Lawson) seeking Ecology's waiver of past Ecology costs related to the abandoned CleanCare facility.

[9] These facts are demonstrated by the past costs records produced by Ecology from its Site File to the AO Parties in January 2018.

hazardous wastes to the CleanCare facility for disposal. *See, e.g.*, Ecology List of "state and local agencies that used CleanCare in the past [for the disposal of hazardous wastes]" attached to March 17, 2000, email from K. Graber to K. Seiler, D. Nightingale, and J. Sachet (all Ecology personnel).

For several years, the Port cooperated with Ecology and the AO Parties regarding Site activities. Although the Port participated in the AO negotiations, when the AO was finalized the Port declined to sign it. Evidently the Port now contends it should not have been designated as a Site PLP. The AO Parties disagree with many of the Port's contentions expressed to date. The AO Parties reserve their rights to expand upon their views about the Port's role in Site activities, as may be appropriate in the future.[10]

However, the AO Parties also are committed to work cooperatively with the Port as a Site landowner and as the recipient of Ecology's EO. The AO Parties believe AO/EO activities would be accomplished most effectively if the Port were to comply with its EO obligations and cooperate with the AO Parties in doing so. Indeed, the EO's Section VII, Introduction established the Port's obligation "to work jointly with AO [Parties] in completing the work required." The AO Parties remain committed to keeping lines of communication open with the Port in hopes the Port will participate cooperatively in funding and performing Site AO/EO activities.

Ecology Should More Accurately and Completely Describe the Site and the Factual History About the Site, Particularly About the CleanCare Facts and Circumstances—Ecology Should Rename the Site and Expand the Facts Recited in the AO/EO.

The AO Parties all were designated in 2007 by Ecology as PLPs for a site then-established by Ecology as "CleanCare" (Ecology's Facility/Site No. 37982391). *See,* November 19, 2007, Ecology PLP Determination Letters to Occidental, General Metals, and Philip Services Corporation (now BE). At some subsequent point in time, Ecology began using the name "Taylor Way and Alexander Avenue Fill Area" ("TWAAFA") (Ecology's Facility/Site No. 1403183) to refer to a larger geographic area encompassing the property formerly the location of the CleanCare facility and several nearby properties. Ecology continues to post a website page dedicated to "CleanCare" (Facility/Site No. 379823391).[11] Ecology has posted a separate website page dedicated to "TWAAFA" (Facility/Site No. 1403183).[12]

In 2016, when Ecology first initiated discussions proposing an agreed order with the AO Parties and the Port, Ecology insisted upon using the "new" name and expanded geography for the Site. The AO Parties believed the "new" name put undue emphasis upon early filling of vacant portions of the Site (1960s-1970s) and ignored the later (1970s-forward), significant history of hazardous waste treatment, storage, disposal, and releases at the former CleanCare

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[10] The AO Parties have previously communicated to Ecology their disagreement with several of the Port's assertions about the Site and the Port's role. The AO Parties reserved rights to respond to those assertions for appropriate time(s) in the future. *See, e.g.*, August 3, 2020, email from R. Bakemeier to Ecology; August 3, 2020, email from M. Myers to Ecology.

[11] *See* Ecology "CleanCare" website page accessible at: https://apps.ecology.wa.gov/gsp/Sitepage.aspx?csid=604.

[12] *See* Ecology"TWAAFA" website page accessible at: https://apps.ecology.wa.gov/gsp/Sitepage.aspx?csid=4692.

facility (and other facilities) within the Site. To address this issue, in part, the AO Parties sought to add indisputable facts about the Site history (particularly the CleanCare history) to the drafts of the proposed agreed order exchanged with Ecology. Ecology rejected the addition into the AO of some proffered facts about the CleanCare history, even though the rejected text originated verbatim in various agency source documents (and even though those documents were provided to Ecology). As a result, the facts recited in the final AO/EO incompletely describe the Site's history.

One consequence of the "new" Site name and the incomplete factual history in the AO/EO is to convey the erroneous impression that the Site's environmental conditions were primarily created by the filling activities that pre-dated the Site's industrialization. This inaccurate impression diminishes the enormously significant role of many years of hazardous waste operations involving many spills/releases that caused contamination at the Site, including contamination co-located with historically filled areas.

Most of the Data Gap work Ecology requires under the AO/EO is directly attributable to former CleanCare facility operations. The soil vapor analysis, assessment of potential vapor intrusion into former CleanCare buildings, and a site walk with Pierce County officials and Ecology personnel were solely CleanCare related. In addition, a review of the figures attached to the Data Gap Work Plan show that many, if not most, hazardous substances identified at the Site are co-located at the former CleanCare facility and are uniquely consistent with CleanCare's operational history.

In short, this is not just a "fill" site. The Site has a long and significant hazardous waste history that occurred under Ecology and EPA oversight. That history should not be diminished by Site naming, by omission of facts, or by selective Site enforcement. The Site name should be changed (again) to a more neutral and appropriate name, such as the "Taylor Way and Alexander Avenue Area Site." In addition, the AO/EO text should be modified to include indisputable facts previously proposed by the AO Parties. That text and the supporting agency source materials were provided to Ecology on April 22, 2020.[13]

This Site Should Be Addressed, But the Site Has A Long History of Previously Accomplished Investigation, Cleanup, and Monitoring under Ecology's and EPA's Oversight.

As indicated above, the AO Parties are committed to perform the "data gap" work to fill out the enormous database of investigation and monitoring previously accomplished at the Site. Those previous investigations occurred in the context of very significant cleanup activities already completed. And, the Site has had extensive historical and ongoing groundwater sampling and monitoring.

[13] April 22, 2020, email from R. Bakemeier to G. Gurian (copied to Ecology and other parties). If the AO/EO is modified to incorporate facts previously proposed by the AO Parties, such circumstances should not be interpreted as resulting in the AO Parties having endorsed, adopted, or admitted the AO/EO Section V Findings of Fact or the AO/EO Exhibit C Parcel Ownership, Activities, and Releases Table prepared by Ecology. Even with the proposed modifications, AO/EO Section V and Exhibit C would continue to describe the Site and its factual history inaccurately and incompletely.

At CleanCare, for example, in 1999-2000 EPA (in coordination with Ecology) spent at least $4.3 million to accomplish the following:

> "EPA...removed close to two million gallons of waste from the [CleanCare facility]. The wastes were stored in 3,630 containers, 33 above ground storage tanks and 19 temporary aboveground storage tanks. In addition, EPA demolished four above ground storage tanks and installed an asphalt cap on three areas of the [CleanCare facility] covering more than 26,000 square feet. Because the [facility's] stormwater system was broken and contaminated, EPA installed an aboveground stormwater management system."[14]

After the EPA cleanup, Ecology took responsibility for the CleanCare facility back from EPA in 2000, and has since overseen significant Site activities. Much has been accomplished at the Site since then. Many of those activities were listed in Section V, Paragraphs DD and EE of the AO/EO text.

At the 17-acre BE areas of the Site, for example, BE has performed over three decades of on-going corrective action under EPA and Ecology oversight, at the cost of several million dollars, initially under EPA Resource Conservation and Recovery Act (RCRA) interim status Part A (1976) and final Part B (1988) permits, and subsequently under Ecology-issued Dangerous Waste Permit No. WAD 020257945 (originally issued in 1999). These recent activities include an ongoing interim action long-term groundwater monitoring program under the current Permit covering only areas of the BE facility associated with historic and current dangerous waste activities, including shallow aquifer and deep aquifer wells.

After over three decades of investigation, cleanup, and monitoring of the Site (performed by BE on BE-owned property and recently, by the Port on Port-acquired parcels, which together comprise approximately ninety percent of the Site), the already significant existing data demonstrate that limited additional remedial activities will be necessary to further protect human health and the environment.

Reservation of All the AO Parties' Individual Rights, Claims, Defenses, and Positions to be Asserted About the Site.

The AO Parties have in the past reserved all their individual rights, claims, defenses, and positions to be asserted about the Site. Such reservations also were included in the AO. Under no circumstances should any party (including but not limited to Ecology, the Port, and any other persons/entities liable for the Site's environmental conditions) interpret any activities by the AO Parties (individually or collectively) in executing the AO, in performing AO activities, in submitting these comments, and/or otherwise to constitute a waiver(s) of any of the AO Parties' rights, claims, defenses, and/or positions.

[14] December 2000 EPA Superfund Fact Sheet for the CleanCare Site.

Respectfully submitted this 4th day of January, 2021.

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[TWAAFA SITE PUBLIC COMMENTS ON THE AO/EO—FOR BURLINGTON ENVIRONMENTAL LLC]

COMMENTS BY BURLINGTON ENVIRONMENTAL LLC

"TAYLOR WAY & ALEXANDER AVENUE FILL AREA"

1500 Block Taylor Way E, Tacoma, Washington

Agreed Order No. DE 14260

Burlington Environmental LLC ("BE") submits these comments regarding the Agreed Order (effective December 4, 2020) recently issued by Washington's Department of Ecology ("Ecology") under the Model Toxics Control Act ("MTCA"), for the site located in Tacoma and denominated by Ecology as the "Taylor Way & Alexander Avenue Fill Area" (aka "TWAAFA") (the "Site"). Ecology invited such comments by the public regarding Agreed Order No. DE 14260 (the "AO") (among Ecology, Occidental Chemical Company, General Metals, and BE) and regarding Enforcement Order No. DE 19410 (the "EO") (issued by Ecology to the Port of Tacoma). The pertinent public comment period runs from December 7, 2020 to January 5, 2021. BE has joined the other AO Parties in separate comments submitted under a separate joint filing and reiterates its support for and adoption of the joint comments. BE respectfully submits the following comments about the AO, solely on its own behalf and requests Ecology act as indicated below.

Burlington Environmental has performed facility corrective actions at its Permitted Tacoma Facility for over 30 years.[1]

Burlington Environmental LLC ("BE") is the owner and operator of a Resource Conservation and Recovery Act ("RCRA") state dangerous waste management facility located at 1701 East Alexander Avenue, Tacoma, Washington. [2] The Washington Department of Ecology ("Ecology"), acting through the Hazardous Waste and Toxics Reduction ("HWTR") Program, issued the most recent BE dangerous waste permit ("BE Permit" or "Permit") for this facility, which became effective March 22, 2012. The Permit will expire on March 22, 2022.[3] BE intends

[1] Documents associated with Ecology permitting and oversight of the BE Permit and corrective actions performed at the BE facility are available on Ecology's facility site, as well as the TWAAFA Site webpage.

[2] EPA/state identification number WAD 020257945 (Effective 03/22/12). The BE Permit is issued pursuant to Chapter 70.105D Revised Code of Washington (RCW), the Hazardous Waste Management Act of 1976, as amended, and regulations codified in Chapter 173-303 Washington Administrative Code (WAC), and the federal Solid Waste Disposal Act of 1965 (SWDA), as amended and superseded by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), which established programs under RCRA for the federal corrective action program .

[3] The Permit will remain in effect until March 22, 2022 unless otherwise revoked, and reissued, or terminated under WAC 173-303-830, continued in accordance with WAC 173-303-806(7) or as otherwise provided in the Permit.

to renew the Permit and to continue RCRA dangerous waste treatment and storage operations at this facility, subject to Ecology's approval.[4]

By the time the current BE Permit expires, BE will have completed over thirty years of corrective actions at the facility, including remedial investigations, corrective measures studies and cleanup alternatives, and long-term monitoring of soils and groundwater as well as several interim cleanup actions, to address environmental conditions at the facility and beyond facility boundaries, in areas impacted by facility operations.[5] These investigations and cleanups have been performed under both Environmental Protection Agency ("EPA") and Ecology facility corrective action requirements, set forth in successive facility permits.

Formal corrective actions at the facility commenced shortly after the EPA issued the 1993 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") "Off-Site Rule,"[6] and wherein BE had already filed for RCRA Part A interim status for the Tacoma facility. BE (then known as Chemical Processors) sought a RCRA 3008(h) interim status corrective action order from EPA Region 10 to commence formal corrective actions at the BE facility. BE required an "acceptability" determination from EPA that would allow the facility to take in remediation wastes from CERCLA sites. Following issuance of the corrective action order, BE began a formal RCRA Facility Investigation/Corrective Measures Study (RFI/CMS) to demonstrate to EPA that it was an "acceptable" facility for taking CERCLA remediation wastes from Superfund site cleanups.

Corrective actions continued under EPA supervision until 1994, at which time EPA granted final RCRA authorization (including corrective actions at dangerous waste facilities in the state required by the 1984 Hazardous and Solid Waste Amendments ("HSWA")) to the state of Washington, several years after BE had commenced corrective actions under EPA RCRA permit authority.[7] When EPA granted Ecology state authority to issue state corrective action orders under the Model Toxics Control Act of 1989, as amended ("MTCA"),[8] EPA emphasized in announcing its Final Authorization decision, that although Ecology may rely upon MTCA cleanup authority for compelling RCRA corrective action, "corrective action requirements are not being deferred to a state superfund-like authority; rather, the state authority will be used to compel RCRA corrective action requirements."[9] Thus, in order to fulfill the RCRA Section 3004(u) and (v) requirements

[4] Pursuant to RCW 70.105D.030(1)(d), Ecology is designated by the Washington State Legislature to carry out all State programs authorized by the United State Environmental Protection Agency (EPA) pursuant to the federal RCRA, 42 U.S.C. § 6901 et seq., as amended. The State had received final authorization for the RCRA permit program on January 31, 1986. EPA retained, and continues to retain, corrective action authority under HSWA; however, it authorized Ecology to include both the Dangerous Waste Regulations, and to rely upon the Model Toxics Control Act (MTCA) to implement corrective action requirements and to compel corrective actions under facility dangerous waste permits.

[5] These actions are a matter of public record maintained by Ecology and EPA Region 10 for public review and comment.

[6] The CERCLA Off-Site Rule was promulgated on September 22, 1993 (58 FR 49200). The rule requires that CERCLA wastes may only be placed in a facility operating in compliance with the Resource Conservation and Recovery Act (RCRA) or other applicable Federal or State requirements. CERCLA § 121(d)(3).

[7] EPA had previously granted Ecology RCRA state authority for dangerous waste permitting under Chapter 173-303 WAC in 1986.

[8] Chapter 70.105D RCW, and the rules adopted by Ecology to implement MTCA in Chapter 173-340-WAC.

[9] EPA published its formal delegation of final RCRA corrective action authority to the state in 59 FR 213 (November 4, 1994).

that all RCRA permits include corrective action permit conditions, EPA authorized Ecology to use MTCA orders incorporated into interim status and final RCRA permits issued pursuant to the authorized state program dangerous waste permitting regulations. EPA allowed Ecology's use of the MTCA program as a regulatory tool to fulfill RCRA obligations that EPA specifically delegated to the state. Use of the MTCA for enforcing corrective action in the BE Permit, however, does not alter the scope of RCRA statutory provisions, under which BE has performed past permit requirements (and will perform future requirements) for dangerous waste facility required corrective actions.

Scope of Corrective Action under TWAAFA AO Requirements in BE Permit.

The BE facility lies within the boundaries of the TWAAFA Site and Ecology has set forth certain requirements in the current BE Permit that include the eventual incorporation of the TWAAFA AO as MTCA requirements for future corrective actions required at the BE facility. Ecology specified in the current BE Permit, that the TWAAFA AO (once issued) be incorporated into the Permit as the applicable corrective action requirements under the Permit.[10] Current Permit facility corrective action is limited to all BE-owned contiguous property as well as releases from the facility operations BE conducts on its property. The AO, however, covers significant other property, including the abandoned CleanCare RCRA facility property and property owned by the Port of Seattle.[11] BE is concerned that Ecology may seek to enforce corrective actions upon BE under its Permit authority that could unfairly subject BE to corrective action liability greater than its Permit and statutory RCRA obligations require. Although BE does not believe that Ecology's intent in incorporating the TWAAFA Order into the BE Permit is to require corrective actions for which BE has no legal obligation under the RCRA BE Permit, the final scope of future corrective actions under the TWAAFA AO are currently undefined. As such, BE will seek terms incorporating the final TWAAFA AO into the BE Permit that limit enforcement of corrective action requirements under the BE Permit to RCRA corrective actions required (i) for environmental releases and historical contamination within the facility boundaries, and (ii) for contaminant releases beyond facility boundaries to the extent (x) such releases are sourced from the BE facility and (y) require corrective action to protect human health and the environment.[12]

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[10] The HWTR added the "Site" definition (i.e., "TWAAFA Site") in the 2012 BE Permit. The HWTR is responsible for oversight of corrective actions at the BE facility, not identifying the Permittee as a PLP under the artifice that the facility is part of a larger historical fill area that predated the development of the facility in the 1970's. BE is not a PLP for this Site because it owns property within the historical fill footprint, particularly with respect to the Clean Care parcels. As explained to Gabriel Gurian, one of the Ecology AAGs, responsible for the Site, that because "[t}he company owns property within the TWAAFA site, the company is not *a priori* a PLP for the CleanCare parcels under RCW 70.105D.040(1). The MTCA states who is strictly liable for the release or threatened release of hazardous substances at a contaminated site. Among those parties strictly liable under MTCA (i) owners and operators (ii) persons who generated hazardous wastes disposed of or treated at a facility, and (iii) persons who arranged for the treatment, storage and/or disposal of hazardous substances at a facility. Burlington/CES is not a current or former owner or operator of the CleanCare property, or a generator, transporter, or arranger for disposal or treatment of hazardous waste at the CleanCare (or its predecessor) TSD operations conducted on its property. It is more likely that the company has addressed groundwater contamination migrating onto the company's property from the CleanCare facility and its predecessor operations given known releases and poor operating practices at that facility. Letter from M. Palumbo to G. Gurian dated August 30, 2020.

[11] Citation to AO Figure showing Site boundaries and property parcels within the Site.

[12] RCRA §§ 3004(u) and (v). In issuing the 2012 BE permit, Ecology required that the BE facility permit corrective action section "incorporate" the order *to be issued within five years of the Permit effective date* for the TWAAFA Site as the corrective action enforcement mechanism, including schedules of compliance with the requirements of

BE Permit Corrective Action obligations may be unreasonably protracted based upon "Site" definition in the BE Permit.

The current BE Permit corrective action section contains different definitions for "Facility" and "Site." The definition of "Facility" includes the appropriate RCRA dangerous waste regulatory definition based upon the property boundaries of the BE dangerous waste facility. "Site" in Section 2 of the Permit (Corrective Action) means the TWAAFA Site, suggesting a considerable expansion of the "Facility" definition under the dangerous waste regulations. By employing the MTCA definitions of "Facility"[13] and "Site" in the Permit, BE could be required to continue years of investigation and cleanups to address historical contamination, primarily contamination caused by prior owners and operators on BE facility property as well as other property impacted by former owners and operators of dangerous waste operations that predate BE. Although BE is not a corporate successor to any such prior owners or operators, BE has assumed responsibility for historical contamination on its owned facility property and for RCRA corrective actions to be performed in accordance with its Permit.

For obvious reasons, Ecology's insistence on incorporating the current TWAAFA Site AO into the Permit and acceding future corrective action responsibility from the HWTR program to the Toxics Cleanup Program ("TCP") under the MTCA, is questionably beyond Ecology's HSWA delegated authority for RCRA corrective action compliance. RCRA requires corrective action obligations in a RCRA permit beyond facility property boundaries based upon clear evidence that releases from the facility operations migrated beyond facility boundaries and require corrective action. As an interim status facility, BE corrective action obligations were set forth in RCRA § 3008(h) and corresponding state dangerous waste regulations. Once the BE facility received its final dangerous waste permit, RCRA §§ 3004(u)[14] and (v)[15] became the statutory basis for corrective action obligations under EPA's delegation of authority. Those two requirements cover corrective action obligations for environmental contamination within the BE permitted facility boundaries (i.e., all contiguous property under the ownership and control of BE, the owner and

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WAC 173-303-646. Permit § 2.1. Unfortunately, such order had not been issued at the time the Permit became effective in 2012 and, therefore, could not be challenged during permit proceedings. The order was not issued within five years of the Permit effective date and corrective actions have continued uninterrupted in the interim as required by state dangerous waste regulations under the HWTR program.

[13] "Facility" as defined in the Permit and for purposes of implementing corrective actions under WAC 173-303-6420 or WAC 173-303-6430 (use of Model Toxics Act), means "all contiguous property under the control of the Permittee" under the state dangerous waste regulations; however, "Facility" also includes the MTCA definition in RCW 70.105D.020(5) which 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.) Note: MTCA regulations have been recodified under Chapter 70A-305 RCW. This provision now appears at RCW 70A.305.020(8).

[14] Section 3004(u) requires corrective action for continuing releases of hazardous waste and constituents from any "solid waste management unit" at a permitted RCRA hazardous waste treatment, storage, or disposal facility, regardless of the time at which waste was placed in such unit. Final permits issued after the effective date of HSWA were required to include corrective action obligations and contain schedules of compliance.

[15] Section 3004(v) requires corrective action beyond the permitted facility boundary and provides EPA authority to require corrective action for releases from the facility that migrate beyond the permitted facility boundary *where necessary to protect human health and the environment.* (Emphasis added.)

operator of the facility), and for facility-sourced releases that have moved beyond the facility boundary where necessary to protect human health and the environment. The application of contrary or different regulations under MTCA that substantially alter a RCRA Permittee's potential liability under a RCRA permit, would seem to be contrary to federal delegation of authority.

Since EPA's delegation of the RCRA corrective action program to the state, BE has continued to perform facility permit corrective action requirements under Ecology HWTR program direction with reference to a facility specific MTCA order. Because corrective action obligations in an associated facility permit MTCA order are enforceable permit obligations, Ecology has enforcement authority under both the BE Permit and AO requirements. By requiring incorporation of the TWAAFA AO for corrective action obligations in the BE Permit, Ecology has decided to transfer its authority under the HWTR program and dangerous waste regulations, to the TCP for implementation under the MTCA, effectively imposing additional requirements for corrective action under the BE Permit for other areas of the TWAAFA Site (e.g., increased financial assurance requirements for potential protracted corrective action liability).

BE seeks clarification of Permit Corrective Action Obligations to be performed under the TWAAFA AO.

Because Ecology intends to incorporate the TWAAFA AO into the BE Permit for corrective action enforcement, BE requests that Ecology expressly clarify that BE's corrective action obligations in BE Permit are those obligations that are appropriate under the state RCRA (HWTR) program. Because administration of the AO corrective action requirements in the BE Permit will be transferred by HWTR to the Toxics Cleanup Program to be managed under MTCA, it is critical that coordination occur to ensure that BE Permit obligations meet appropriate criteria and that corrective actions under the BE Permit are reasonably necessary to protect human health and the environment. BE has voluntarily performed corrective actions under both EPA and Ecology direction and enforcement authority for three decades. BE desires to continue to meet its RCRA and dangerous waste facility corrective action obligations set forth in current and future facility permits, hopefully, such corrective actions will not be required for additional decades.

To the extent Ecology achieves incorporation of the TWAAFA AO into the current BE Permit and any renewal permit in accordance with state requirements (e.g., SEPA, Permit amendment requirements), BE requests that the HWTR and TCP programs coordinate on all past actions, and to limit facility Permit corrective actions as appropriate under Ecology's delegated RCRA authority. This is not an admission of any liability whatsoever, as a PLP or otherwise, for any other non-BE owned properties within the TWAAFA Site. While transfer of BE facility corrective action oversight from the HWTR program to the TCP may be a more efficient and desirable way to address overlapping statutory cleanup requirements at the TWAAFA Site, Ecology should ensure such action does not unfairly or unnecessarily expand or delay final BE Permit corrective action obligations. Nearly eight years of the current BE Permit's 10-year duration has lapsed, and corrective actions have continued throughout this period without a TWAAFA Site MTCA order. BE has signed onto the TWAAFA AO as a PLP to ensure that compliance with the AO will not impose greater legal liability on BE under the facility Permit, or as an owner and operator of a permitted dangerous waste facility within the Site. The enforceable

corrective action requirements in the BE Permit should be limited to those obligations in the TWAAFA AO that are BE facility-specific corrective action requirements. Ecology personnel in these two programs should consider carefully the real effects of any deferred authority and possible issues, such as the type of supporting documentation that should be included in the administrative record for this decision, as well as issues concerning the availability and scope of administrative and judicial review. BE's expectation is that, over the long-term, duplicative Ecology oversight will be reduced and the efficiency of final corrective actions for the BE facility will be enhanced. Because the TWAAFA Site as defined under the AO, encompasses the BE RCRA-regulated operations, program priorities may differ between HTWR corrective actions for the BE facility and TCP objectives for the TWAAFA Site. In this instance, given the significant corrective actions that have been completed by BE at the BE facility, BE believes separate and continued RCRA corrective actions under the HTWR program may be unnecessary to the extent the TWAAFA cleanup under the MTCA is at least equivalent to that required under RCRA/HWTR program and state dangerous waste regulations.

Respectfully submitted,
BURLINGTON ENVIRONMENTAL LLC

Marlys Palumbo

Marlys Palumbo
Van Ness Feldman LLP
Counsel for Burlington Environmental LLC

From: Kluge, Karla <KKluge@cityoftacoma.org>
Sent: Tuesday, January 5, 2021 12:13 PM
To: Teel, Steve (ECY) <stee461@ECY.WA.GOV>
Cc: Magoon, Jana <JMAGOON@cityoftacoma.org>; Schultz, Shirley <shirley.schultz@cityoftacoma.org>
Subject: FW: Public comments invited – Taylor Way & Alexander Avenue Fill Area Legal Agreements

Steve,

Thank you for the opportunity to comment on the proposed cleanup action. Below are my comments as we discussed:

Parcels 0321352064 and 0321263045 contain known regulated wetlands that were the subject of a previous wetland violation by the Port of Tacoma. A fairly recent wetland delineation was performed by the Port's biologist Jenn Stebbings. This report has not been verified by the City; however, it is generally representative of the wetlands that have been reviewed by the City for previous permits on the subject site.

The wetlands are protected under the City of Tacoma TMC 13.11 as they are in their current state. The Port of Tacoma mitigated impacts to the wetlands from the violation at an offsite mitigation area located at Clear Creek in Puyallup and left the wetlands on site in a disturbed, yet still wetland, condition. TMC 13.11 requires avoidance of the critical areas first, regardless of their condition. TMC 13.11 200 Allowed Activities allows Clean up orders as follows:

TMC 13.11.200.A The purpose of this section is to allow certain activities that are unlikely to result in critical area impacts. The activities must comply with the protective standards of this chapter and provision of other local, state, and federal laws. All activities shall use reasonable methods to avoid and minimize impacts. Any incidental damage to, or alteration of, a critical area, geo-setback, management area or buffer , shall be restored or replaced the responsible party's expense.

TMC 13.11.200.B. The following activities may occur without City review or approval in compliance with the purpose stated above.

9. Onsite response, removal or remedial action undertaken pursuant to the Federal Comprehensive Environmental Repose, Compensation and Liability Act (CERCLA), or remedial action undertaken pursuant to a State Model Toxics Control Act (MTCA) order, agreed order or consent decree, or a

Department of Homeland Security order that preempt local regulations in the findings of the order. Any subsequent use of redevelopment of the property may be eligible for modification of requirements in this chapter when they are in conflict with the order, such as re-vegetation that would disturb a protective cap placed to contain contaminated soils.

In addition, these two parcels have also been active with an extremely invasive and destructive snail *Cernuella virgate* (Vineyard Snail). An infestation of over 300 acres was identified on the Blair-Hylebos Peninsula in 2006. In May 2007, a voluntary eradication program was started and other areas in the Port have been successful in eradication. This site, however, continues to contain snails that are found every year. Any earth moving activity would need to take this into account and a method of eradication of snails prior to moving vegetation or soil offsite would likely be required or recommended by the USDA and WSDA to avoid spreading the infestation. Adjacent areas are always checked very closely as the snails may move and thus, the adjacent parcels should also be reviewed for snails prior to cleanup activities.

I would be happy to provide any information that is available in the City's permits.

Thank you,

Karla Kluge
(253) 591-5773
(253) 365-4932 cell phone
Senior Environmental Specialist
Planning and Development Services
747 Market Street, 3rd Floor
Tacoma, WA 98402

We work with the community to plan and permit a safe, sustainable, livable city.

From: Schultz, Shirley <shirley.schultz@cityoftacoma.org>
Sent: Tuesday, January 5, 2021 3:30 PM
To: Kluge, Karla <KKluge@cityoftacoma.org>; Teel, Steve (ECY) <stee461@ECY.WA.GOV>
Cc: Magoon, Jana <JMAGOON@cityoftacoma.org>
Subject: RE: Public comments invited – Taylor Way & Alexander Avenue Fill Area Legal Agreements

Hi, Steve –

I had a late-breaking comment from public works, as well. Sorry for multiple emails:

- Any work in the right-of-way will require a City of Tacoma Permit. Groundwater monitoring wells in the right-of-way will require City review and approval through a Right-of-way Occupancy Permit.
- Any work in or adjacent to the Taylor Way right-of-way will need to be coordinated with the City's Taylor Way Improvement Project, which may restrict access or require extensive right-of-way restoration.

Of course that's mostly common sense stuff.

Have a great evening!

Shirley Schultz, AICP
City of Tacoma | Development Services
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www.tacomapermits.org

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People. Partnership. Performance.
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Tacoma, WA 98401-1837
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Sent Via Email

TO: Washington State Department of Ecology
Southwest Regional Office
Attention: Steve Teel, Cleanup Project Manager
Attention: Nancy Davis, Public Involvement Coordinator
PO Box 47775
Olympia, WA 98504-7775

FROM: Port of Tacoma
Jason Jordan, Director, Environmental and Planning Services

DATE: February 4, 2021

RE: Taylor Way & Alexander Avenue Fill Area Site (TWAAFA)
Enforcement Order No. DE 19410—Public Comment Period
Submittal of Port Comments

The Port of Tacoma offers these public comments to the Washington State Department of Ecology for TWAAFA Enforcement Order No. DE 19410.[1] The Port objects to Ecology's edict requiring the Port to clean up properties to which the Port has no reasonable connection. As set out further below, the Port reaffirms its position that it is not a Potentially Liable Party (PLP) for the TWAAFA Site, and that Ecology exceeded its authority in issuing Enforcement Order No. DE 19410. Nonetheless, the Port intends to work cooperatively with the other PLPs involved at this Site to advance the cleanup effort and comply with the Order in good faith. The Port reserves all rights to pursue cost recovery and reimbursement from both Ecology and other PLPs in the future.

THE PORT IS NOT A PLP FOR THE TWAAFA SITE

I. The Port Is Not A PLP under MTCA for Port-Owned Parcels within the TWAAFA Site.

The common thread cited by Ecology for including a property into the TWAAFA Order is the presence of lime solvent sludge, byproducts of auto scrapping (auto fluff), wood waste, and other lime wastes placed in the ground during the operation of Don Oline's unpermitted landfill from the late 1960s to early 1980s. Lime solvent sludge is known to contain MTCA Hazardous Substances (trichloroethylene (TCE), tetrachloroethylene

[1] The public comment period ran from December 7, 2020 to January 5, 2021. The Port requested an extension of the period to February 4, 2021. Via email communications on December 30, 2020, Ecology did not formally extend the comment period but rather agreed to accept and consider Port comments submitted by February 4, 2021, and place those comments on the Administrative Record for the TWAAFA Site and Enforcement Order.

(PCE), and vinyl chloride). Auto Fluff is sometimes associated with other MTCA Hazardous Substances (arsenic, cadmium, chromium, copper, lead, zinc, petroleum hydrocarbons, and polychlorinated biphenyls (PCBs).[2] The discussion below describes alleged TWAAFA impacts with respect to each Port Parcel named in the EO. If our facts are wrong, or this analysis is flawed, the Port requests that Ecology respond with a thorough technical and **legal** analysis clearly articulating as to why. The more complete Ecology's response, the better chance we can resolve this disagreement.

A. Port Parcels Subject to the Enforcement Order:

1. Prologis/1514 Taylor Way (f/k/a 2000 Taylor Way):

The basis for including Former Prologis Property (a/k/a 1514 Taylor Way (APNs 0321267005, 0321356008, 0321355007)) within the TWAAFA Site is described in the 2020 Enforcement Order as follows:

> The southern portion of the property remained a tidal marsh, and as filling progressed, an enclosed pond formed that extended onto the CleanCare and former Philip Services Corporation (now BE) properties. The eventual filling of the large marsh pond is believed to have been associated with the Don Oline Landfill. As described above, the Landfill material likely included hazardous substances associated with auto fluff and lime wastes. This filling likely took place after 1969 when historical photographs indicate the pond was still unfilled.

EO, Section V, ¶AA.2, p. 9. Ecology confirmed that the Prologis property was not owned by Don Oline. See EO, Exhibit C. Nonetheless, Ecology suspected that materials associated with the landfill spilled over across the Oline property boundary onto the Prologis Parcel (i.e., Oline trespassed onto Prologis and disposed of hazardous substances). Oline's unauthorized access—according to Ecology's interpretation of MTCA—renders the Port jointly and severally liable for the entire TWAAFA Site. However, the findings of fact in the EO are not informed by the comprehensive data and reporting from both Prologis and Port remediation efforts. Auto fluff and lime solvent sludge are not present on this Parcel causing impacts to soils above MTCA cleanup levels.

In support of the Port's position, a detailed account of the investigation and remediation of the Prologis property, and Ecology's involvement in those efforts, is set out below.

Cleanup History of Prologis Property:

[2] Wood waste and other lime wastes are solid wastes but are not considered hazardous substances.

Prior to Ecology allegations that the Prologis property is part of the Oline landfill, the only known release of hazardous substances on Prologis was a petroleum release documented in 1990. The release was remediated, and Ecology made a finding for "No Further Action" during June 2000. Shortly after Ecology made its NFA determination for the petroleum release, the property owner (Prologis) began planning for the redevelopment of the property. Prompted by a 2001 preconstruction meeting with the owner, City of Tacoma representatives contacted Ecology to discuss concerns associated with aerial photographs suggesting historical filling. Ecology raised concerns with the City about the planning for new development without the proponent undertaking additional investigation for subsurface contamination. (Prol-1, p 351). Following Prologis' inquiry, Ecology provided a sketch in 2001—roughly inferred from aerial photographs—purporting to show the extent of filling on Prologis property. (Prol-1, p 344-43). Ecology alleged that the depicted area and neighboring parcels were used as a historic industrial landfill as follows: "A variety of wastes were deposited as fill in these areas, including lime solvent sludge and wood waste. Also found in some areas are auto fluff from demolished cars, and slag deposits from the Asarco operation in Tacoma. The pattern of contamination, spanning multiple parcels, is referred to as the "Oline Landfill". (Prol-1, 342).

Ecology issued a March 22, 2004 Notice of Potential Liability to Prologis because the Prologis property "may have been part of the old Don Oline Landfill (boundaries of the landfill are unknown)"[3] and because "contaminated groundwater is being migrated [sic] onto the Prologis property from CleanCare site." (Prol-1, 280). Prologis promptly responded on March 29, 2004, noting that contaminated groundwater migrated onto the property from CleanCare, an off-site source. (Prol-1, p 283). Consequently, Prologis asserted that it should not be liable under MTCA by virtue of the "plume clause" in RCW 70.105D.020(12)(b)(iv).[4] Nevertheless, Prologis accepted designation as a PLP for purposes of entering discussions with Ecology for an agreed order (AO) to investigate its property.

For purposes of the AO, Prologis developed a workplan for the completion of a Remedial Investigation and Feasibility Study for the property, incorporating extensive comments by Ecology. (Prol-1, p 247; Prol-1, p 234). Ecology indicated during its public outreach for the AO, e.g., Fact Sheets, that the purpose of the workplan was to determine if petroleum hydrocarbons, volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), and metals resulting from operations at the adjacent Don Oline landfill were present at Prologis. Ecology asserted that Oline's property was filled

[3] To clarify, when Ecology refers to landfill boundaries, the reference in this case must be the extent of where landfilled materials came to be located, not the actual boundaries of Oline's landfill properties.
[4] Note that this provision is set out in MTCA under the definition of "owner" which is currently cited as 70.105D.020(22)(b)(iv) due to the addition of statutory definitions to this section since 2004, the date of the letter.

with lime solvent sludge wastes from Hooker Chemical, auto fluff from General Metals, and other wastes; and this filling activity may extend onto the adjacent Prologis site. Ecology also speculated that groundwater contamination from CleanCare (a former treatment storage and disposal (TSD) facility) could potentially extend onto the Prologis site. (Prol-1, p243; Prol-1, p192; Prol-1, p182).

Prologis entered Agreed Order DE 04-TCPSRO1160 to implement the workplan on January 19, 2005 (Prol-1, p213). During the AO public comment process, Ecology announced its approach to area-wide groundwater impacts. (Prol-1, p 175). Ecology recognized that other contaminated sites are present in this area (CleanCare Corporation, Phillip Services, and Emerald Services[5]) and widespread groundwater contamination exists because of past land uses, backfill materials and industrial activities. Consequently, Ecology planned to address the groundwater contamination as an area-wide issue collectively involving multiple properties—rather than properties individually—because of the intermingled groundwater plumes. See also Prologis Agreed Order (Prol-3, Scope of Work, last paragraph). Ecology noted that it would bring all PLPs under one agreed order and was in the process of identifying PLPs for the CleanCare Corporation site. After completing this effort, Ecology planned to negotiate a single agreed order with multiple PLPs to address area-wide groundwater contamination (Prol-1, p176-177).

The Prologis Remedial Investigation was submitted to Ecology on June 6, 2006 (Prol-1,p 77). After Ecology comments were discussed and incorporated, Ecology approved the RI/FS on December 19, 2006, confirming the scope of work associated with AO was complete. (Prol-1,p 63) (Prol-1, p 37). **The results of the investigation and exchange of comments showed—with Ecology concurrence—that neither auto fluff nor lime solvent sludge were encountered on the Prologis property**.

Just prior to its approval of the RI/FS, Ecology issued an Early Notice Letter of Potential Liability to Prologis for the CleanCare site on October 6, 2006, under its area-wide enforcement plan. (Prol-5) Prologis' December 12, 2006 response (Prol-1, p 42) explains why the property should not be included in the current AO and EO for the TWAAFA Site. Pertinent sections follow:

> Prologis disputes its status as a PLP for the regional groundwater "facility" identified in your letter. Specifically, it does not appear that there are any hazardous substances present in soils at the Prologis facility that could account for the groundwater contamination observed at the CleanCare facility and other properties which are allegedly part of the area-wide groundwater facility referenced in your letter. Thus, under the "plume clause" of MTCA, Prologis

[5] Ecology provided an electronic copy of a March 1, 2006 Early Notice Letter to Emerald Services, citing the same reports Ecology cited in early notice letters to Ecology and the Port for conditions beyond the boundaries of the Prologis property (Prol-2). No follow-up response or liability determination has been located.

does not believe there is credible evidence to support designation as a PLP. Furthermore, Prologis has and continues to cooperate with Ecology in connection with ongoing remedial activities concerning contaminated groundwater and has addressed its responsibility for soils through performance of the terms of Agreed Order No. DE 04TCPSR-1160.

Ecology's designation of Prologis as a PLP is based upon a number of factual allegations contained in your October 6, 2006 letter. Set forth below are the relevant Ecology allegations together with Prologis' response.

Page 1: Ecology believes that a portion of the Prologis property was part of the old Don Oline Landfill and/or Landfill activities were extended (spilled over) onto Prologis property.

Response: *Recent investigations by Prologis established that only a small portion of the filling that occurred at the Don Oline landfill extended onto the Prologis site. The RI for the Prologis site indicated that the affected area was very minor, on the order of ½ acre or less, and limited to the upper foot of surface soils. Furthermore, the levels of contamination were relatively low and would not support a conclusion that groundwater impacts above applicable regulatory limits resulted from any disposal activities on Prologis's property.*

Page 2: The boundary of the old Don Oline landfill may extend onto Prologis property (on the eastern side of CleanCare). Boring and well logs on CleanCare property show the presence of auto fluff and lime solvent sludge. The approximate extent of auto fluff and lime solvent sludge is shown on figure 11-1. In addition, test pit TP-4 excavated on Prologis property showed the presence of white paste-like waste, indicating that the old Don Oline landfill boundary may extend onto the Prologis property (Enclosure 1).

Response: *While it appears that a minor amount of filling activities at the Don Oline landfill may have extended onto Prologis property in the area of TP-4,* ***neither autofluff nor lime solvent sludge was observed at the Prologis site*** *(emphasis added). The material in TP-4, while a waste, is free of solvents and was tested to be a non-hazardous waste. Ecology does not have credible evidence that hazardous substances (i.e., not solid waste) from the Don Oline landfill are present at the Prologis property. This is substantiated by information we reviewed in Ecology's PLP files. Hart-Crowser's 1986 report entitled "Preliminary Assessment of Past Practices in the Vicinity of the Poligen Facility, Port of Tacoma, Washington, contains a figure (Figure 1) that delineates the approximate extent of areas at CleanCare suspected to include Hooker (Occidental) Sludge Pond Wastes, Oily Wastes and Lime Wastes. A copy is included. Note that the area of these wastes, as well as the estimated boundary of General Metal's Auto Fluff, did not extend onto the Prologis property. Instead, what did extend onto Prologis property was fill containing woodwaste and*

concrete, i.e. solid wastes and not hazardous wastes. Extensive sampling during the RI supports this conclusion.

Page 2: Ecology believes that the groundwater contamination is an area wide issue that involves intermingled plumes with properties adjacent to CleanCare (Enclosure 3).

Response: *Ecology is correct that the predominant source of groundwater contamination in the area emanates from CleanCare and that Prologis is downgradient of CleanCare. However, the Prologis RI demonstrated that the COCs at CleanCare have not migrated onto the Prologis property. Ecology has no credible evidence of an "area wide groundwater problem" that involves migration onto Prologis property.*

As you know, RCW 70.105D.20(12)(F)(iv) defines "Owner or Operator" and excludes from its definition "any person who has ownership interest in, operates or exercises control over real property where a hazardous substance has come to be located solely as a result of migration of the hazardous substance to the real property through the groundwater from a source off the property." This is precisely what occurred at the Prologis property. Thus, Prologis should not be considered a PLP for regional groundwater contamination. "

Ecology apparently did not respond to the specifics raised in Prologis' letter, but did acknowledge on October 8, 2007 that Ecology no longer considered Prologis to be a PLP for the release at the TWAAFA Site—now that the Port has acquired the property—and Prologis no longer possesses an ownership interest. The letter mentions that the December 12, 2006 letter was received and evaluated by Ecology but provides no information on the specifics of Ecology's evaluation. (Prol-6), (Prol-1, p 42). The Port respectfully requests that Ecology provide its evaluation in the responsiveness summary to this Enforcement Order.

The Port purchased the property from Prologis on January 10, 2007. The Port subsequentially received two very different Notice and PLP determinations from Ecology. The first Notice of Potential Liability dated May 23, 2007 (Prol-1, p24) and Determination of Potentially Liable Person Status dated July 9, 2007 (Prol-1, p21) refer only to the Prologis property. The only credible evidence cited to support this determination is the October 3, 2006 Remedial Investigation, Prologis Taylor Way Property by Floyd Snider. Ecology does not mention a "regional groundwater facility" or "Don Oline Landfill" in its liability determination -- in stark contrast to the October 6, 2006 notice to Prologis. (Prol-5). The Port logically assumed that Ecology correctly found the plume clause exemption discussion in Prologis' December 12, 2006 letter (Prol-1, p 42) persuasive.

Ecology subsequently issued an August 8, 2007 Notice of Potential Liability (Prol-7) expanding the Port's purported liability for the Prologis property also includes its newly

christened Taylor Way and Alexander Avenue Fill Area (TWAAFA) Site. Ecology cited the same list of reports included in the October 6, (Prol-5) 2006 liability determination to Prologis in support of its position, but did not mention or otherwise address Prologis' contrary assertions (Prol-1, p 42, Prol-1, p 65 [Comments 11 and 12]; Prol-1 p115-118). The Port did not respond within the requested time frame and Ecology named the Port to be a PLP for the TWAAFA Site.

Since that time, the Port—through Agreed Order DE 13921 (July 31, 2017)—remediated the former Prologis property to address relatively minor impacts associated with former operations on the property unrelated to the Oline landfill and CleanCare. The continuity (rather the lack thereof) of lime solvent sludge and auto fluff present at the former Oline landfill and the Prologis property remains unchanged. The Port responsibly engaged in corrective action at the Prologis property and returned it to productive use. Data collected during the cleanup process confirm that the only link to TWAFFA could potentially be groundwater contamination migrating onto the property (although existing data show that is unlikely). Nonetheless, Ecology broadly casts its TWAAFA liability net over the Port based on the inferred presence of lime solvent sludge and auto fluff containing hazardous substance above MTCA cleanup levels based entirely on historical aerial photography. The credible evidence showing the absence of lime solvent sludge and auto fluff in more recent data apparently received little consideration in Ecology's TWAAFA liability determinations.

There are no soil impacts associated with the Oline Landfill at the Prologis property that renders the Port a PLP for the TWAAFA Site. Any area-wide contaminated groundwater migrating onto Prologis, requires Ecology and liable PLPs to address that problem, not the Port. Application of the "plume clause" exemption should absolve the Port from being named a PLP for such impacts.

2. Potter Property/1801 Alexander Avenue

The basis for including 1801 Alexander Avenue (APN 0321352063) is described in the 2020 Enforcement Order as follows:

> [B]oring logs confirm that auto fluff and lime wastes were present. Unlined waste oil storage and treatment ponds from the now BE Tacoma property extended onto the Potter property. In November 2000, BE constructed a 104-foot long trench on the parcel to recover light non-aqueous phase liquid (LNAPL) petroleum hydrocarbon contamination on the groundwater surface. This contamination originated from the historic waste oil pond on the adjacent BE Tacoma Property.

EO, Section V. ¶ BB, p.11. The former owner disputed its proposed status as PLP for a regional groundwater "facility" in Ecology's October 6, 2006 letter in a response dated November 17, 2006. (Pott-1) (Pott-2). The response noted that data indicate no hazardous substances in excess of applicable limits in the soils that originate at the Potter Property could cause or contribute to the groundwater contamination observed in the area, and any groundwater impacts migrated onto the Potter property. Thus, under the "plume clause" of MTCA, credible evidence supporting its designation as a PLP is lacking.

Ecology's October 9, 2007 Determination of Potentially Liable Person Status acknowledged widespread and significant contamination on Potter caused by an off-site source originating at BE Tacoma. (Pott-3). Ecology noted that TPH contamination from the former waste oil pond on Parcel A is often present as an LNAPL in wells and soil borings on the Potter Property. However, Ecology disagreed that the plume clause exemption applied to Potter because Ecology personnel observed auto fluff and lime waste during the installation of soil borings GP-31 and GP-17. The boring logs also recorded petroleum odors in the auto fluff. Ecology further noted that "(s)ince auto fluff and/or lime waste were prominent fill materials in the Taylor Way and Alexander Avenue Fill Area Site, the presence of these hazardous substances in boring logs on the Potter Property shows that the Taylor Way and Alexander Avenue Fill Area Site includes the Potter Property. These hazardous substances did not migrate to the Potter Property via groundwater migration from an off-property source, a required element for the Plume Clause."

The Port believes Ecology's analysis flawed by conflating the presence of autofluff and lime wastes (that are admittedly solid wastes), with the presence of hazardous substances at concentrations exceeding applicable limits. Drafts of Ecology's October 9, 2007 Determination of Potentially Liable Person Status provided in response to the Port's public record request show some internal debate around whether the plume clause applies as follows:

> [Steve and Kaia—do they have a point here? Is there evidence to show that TPH migrated from off-property via gw? Are we sure that TPH at this property comes from the auto fluff deposited there?] [The TPH contamination from the former waste oil pond on Parcel A is often present as an LNAPL in wells and soil borings on the Potter Property. But oily soils that are part of the auto fluff deposits **also** have TPH contamination that appears to be separate from the LNAPL plume from Parcel A. Auto fluff samples from all over the fill area have these oily soils (as well as wires, bits of upholstery, rubber foam, and pieces of taillights). kp]

(Pott-4). A close examination of the GP-31 and GP-17 concentration data shows why some within Ecology may have been reluctant to dismiss the plume clause exemption at Potter. Only one of the two borings indicating autofluff (GP-17) contained sample results with petroleum concentrations exceeding Ecology's most stringent Method "A" soil cleanup criteria (i.e. TPH as gasoline) (Pott-5, p76, Table 13). Detectable concentrations of volatile organic chemicals characteristic of gasoline (benzene, toluene, ethylbenzene and xylenes) were not present. Testing for aliphatic petroleum hydrocarbons was not performed, and so comparison to other applicable MTCA criteria (Method B and C) was not performed. The samples from GP-31 and GP-17 do not support the presence of lime solvent sludge from Hooker/Occidental Chemical because chlorinated solvents were not detected. These data show that the presence of solid waste (i.e. lime waste and autofluff) are not in of themselves reliable and credible evidence that hazardous substances are present at concentrations exceeding MTCA cleanup criteria. The laboratory-reported concentration data shows that autofluff containing petroleum above MTCA cleanup criteria at Potter is -- at best-- a *de minimis* isolated occurrence.

In contrast, the MTCA requirement for the removal of LNAPL that has migrated onto the Potter property from BE Tacoma — and unrelated to the Don Oline Landfill — is absolute (WAC 173-340-360(2)(A)). BE is already addressing this plume through its separate on-going TSD facility corrective action obligations — BE has a separate AO for that purpose. Moreover, BE already has an access agreement in place with the Port to allow BE consultants entry onto the Potter Property for continued monitoring of the petroleum plume. Given the situation, Ecology should 1) allow BE's corrective action already underway to address the Potter Property impacts, and 2) exclude the property from the TWAAFA Site entirely, or at the very least recognize that the Port is not a TWAAFA PLP for the Potter Property. As discussed supra, the Port should not be named a PLP for the groundwater contamination at this property due to the "plume clause" exemption.

3. Hylebos Marsh

The basis for including Hylebos Marsh (APNs 0321263045, 0321352064) is described in the 2020 Enforcement Order as follows:

> These parcels comprise a wetlands/marsh and other undeveloped land that the Port purchased from the City of Tacoma in 2008. Historical observations indicate the parcels were used for periodic dumping and filling from approximately 1946 until at least 1991. Lime waste was observed in 1991 in surficial materials in the eastern portion of this area, and auto fluff is suspected to be locally present based on observations of rubber material in a 1991 boring log. A 1967 aerial photo shows a heavily used road running NE-SW across the parcels

> from Alexander Avenue, which was likely used for transporting lime waste and other materials to the Don Oline Landfill areas.

EO, Section V. ¶ CC, p. 12.

It is critical to note that Ecology has never issued a Determination of Potentially Liable Person Status for the Hylebos Marsh property to the Port, or to any other party. The 2007 PLP determination letter issued to the Port by Ecology in November 2007, and cited in the EO, implicates the Port only by virtue of its current ownership of the Prologis property. **It does not include any reference to the Hylebos Marsh property**. EO, Section VI, Par. H, p. 15. Ecology decided sometime after 2007 to include the Hylebos Marsh property in the TWAAFA Site.

Without a separate determination of the Port's PLP status specific to the Hylebos Marsh property, Ecology — by issuing this EO — is in direct violation of its own regulation — that expressly states that Ecology "shall issue its determination [of potentially liable person status] before an enforcement order can become effective." WAC 173-340-540. Determination of liable person status requires Ecology to go through the process set out at WAC-340-500 allowing for a party's opportunity to comment prior to Ecology's issuing a determination of potentially liable status. In sidestepping this requirement, Ecology is violating the Port's due process right under the regulations to be heard. Moreover, existing clear and convincing evidence, i.e., Hylebos Marsh data described *infra*, demonstrates that Ecology has no basis, no supportable credible evidence, to justify such a determination. Consequently, it is the Port's position that the EO is not enforceable against the Port, at least with respect to the Hylebos Marsh property, until and unless Ecology issues a PLP determination.

Notwithstanding the legal consequences of Ecology's actions (or lack thereof), the Port has already implemented provisions of the Data Gap Work Plan (Exhibit B of Enforcement Order DE 19410) relevant to the Hylebos Marsh and provided reports of findings to Ecology (as well as to the other PLPs) in March and April 2020 (Hyle-1, Hyle-2). This investigation did not identify any hazardous substances in shallow soil at concentrations exceeding Ecology's most stringent Method "A" soil cleanup criteria. The data confirm that neither auto fluff nor lime solvent sludge are impacting the soils on the Hylebos Marsh property. Hazardous substances measured in the groundwater during this investigation are not associated with shallow fill soils located on the Hylebos Marsh Property; rather impacts result from migration through the groundwater from an upgradient source off the Hylebos Marsh Property.[6] Given this evidence, the Port cannot be a TWAAFA PLP since no there are no TWAAFA related impact to soils (i.e., no auto fluff containing hazardous substances or solvent sludge is present) and the plume clause should absolve the Port from liability for migrating groundwater.

[6] Note that BE's adjacent TSD facility is immediately upgradient from the Marsh property.

B. The Port Is Not a PLP for the Three Port Parcels Subject to the EO.

Contrary to Ecology's assertions otherwise, the Port is not a PLP under MTCA by virtue of its current ownership of the three Port Parcels. None of the soil impacts at the three properties justify,[7] to the extent groundwater is impacted, the statutory definition of "Owner or Operator" at RCW 70.105D.20(22)((b)(iv). Excluded from this definition is "any person who has ownership interest in, operates or exercises control over real property where a hazardous substance has come to be located solely as a result of migration of the hazardous substance to the real property through the groundwater from a source off the property." The "plume clause" exemption applies to each of the Port's properties. To the extent groundwater contamination is migrating onto the Marsh Property (or any other Port property) and the impacted portions of the properties are deemed part of the TWAAFA Site as a result, it should be up to Ecology and the responsible PLPs to further investigate and remediate as warranted. The Port's primary MTCA obligation in this regard should be to allow access as needed to accomplish remedial action as a non-PLP landowner of property within the Site. See RCW 70.105D.20(22)(b)(iv)(D).

II. Ecology's Interpretation of MTCA Violates the Port's Right to Due Process.

Under Ecology's expansive interpretation of MTCA, Ecology believes it can pick and choose among persons it determines are PLPs—no matter how tenuous the relationship to the Site—and require that PLP to clean up the entire TWAAFA Site through under its concept of joint and several liability. In this case, the Port relationship to Don Oline's former properties—which collectively includes CleanCare and BE properties—is less than tenuous, its non-existent. The Port has never owned or operated these Oline properties previously used for his landfill activities. Furthermore, empirical data show that the TWAFFA hazardous wastes of concern i.e., auto fluff and solvent sludge, were not disposed by Oline on Port properties at levels resulting in soil impacts above MTCA clean up levels. Ecology disregards this data—without sufficiently explaining its justification in doing so—and continues to point to outdated and speculative evidence (e.g., inferences from aerial photographs) not supported by actual data collected from these properties. (Prol-8, Prol-9, Prol-10, Prol-11) To the extent any of the Port properties are impacted by contaminated groundwater migrating onto Port properties from upgradient TWAAFA properties, as discussed *supra,* the plume clause exempts the Port from liability. Given these facts, Ecology issuance of the EO is not defensible.

In correspondence to Ecology, dated July 31, 2020 and October 21, 2020, the Port presented several lines of evidence as well as legal defenses with respect to Port

[7] An isolated incidence of remnant solid waste, i.e., at Potter, does not suffice.

Parcels establishing that the Port is not joint and severally liable with the other PLPs to clean up the TWAAFA Site, and that Ecology actions in this matter violate the Port's due process rights.[8] The Port will not reiterate all the points made in those letters but is compelled to present the following highlights:

- Ecology misconstrues the phrase "otherwise come to be located" in the MTCA statutory definition of "facility". Ecology asserts that because contamination originating from the highly contaminated Oline/CleanCare property potentially "came to be located" on Port-owned properties, the Port is jointly and severally liability for all investigation and remediation costs involving that property. 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. *See* October 21, 2020 letter to Ecology, p.2.

- Ecology has no reasonable basis to issue the EO to the Port, especially given that there are three major polluting PLPs already signing onto an Agreed Order to perform the work at the TWAAFA Site. The Port has offered access to its properties as needed to accomplish work under their AO. Ecology's insistence that the Port be a part of the cleanup effort at CleanCare is unreasonable and comes at significant cost to the public. *See* July31, 2020 letter to Ecology, p.2.

- Ecology points to the Port's ability to seek cost recovery from the other PLPs as justification for inequitably forcing the Port to subsidize the other PLPs' remedial action costs incurred under the AO. The Port recognizes that it has cost recovery claims against the other PLPs — the MTCA's private right of action is a valuable tool for cost recovery — but that does not suffice to make the Port whole, especially in this case. If forced to incur costs associated with the former CleanCare property, any action to recover those costs will be extremely complex due to CleanCare's past use as a TSD facility where numerous generators sent significant quantities of hazardous wastes (including Ecology) for disposal. Cost recovery involving cleanup of the CleanCare TSD facility is a legal quagmire that should not be foisted onto the Port's shoulders.

III. MTCA's Third-Party Trespass Defense Shields the Port from Liability.

[8] Letters sent to Ecology dated July 31, 2020 and October 21, 2020, are incorporated by reference into the Port's submittal to the Administrative Record.

MTCA provides that any person that "who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by: . . . (iii) An act or omission of a third party **(including but not limited to a trespasser)**" is exempt from liability under MTCA. RCW 70.105.105D).040(3)(a)(iii)(emphasis added). Any wastes from the Oline Landfill that spilled over onto the Port's parcels constitutes a "trespass" by Don Oline. The Port satisfies the requisite statutory criteria — the Port has no connection or contractual relationship with Oline, and the Port has acted with the utmost care with respect to these wastes (e,g., the Port has investigated and remediated its Parcels as warranted to satisfy MTCA) — to qualify for the defense.

The fact the Port knew Oline's wastes could potentially impact Port Parcels at the time of their acquisition is immaterial to the trespass defense. In contrast to CERCLA (and its case law re third-party claims), the third-party trespass defense is not linked to whether the party has knowledge.[9] MTCA has no such criteria applicable to the trespass defense. Rather, MTCA sets out the so-called innocent purchaser defense separately—see RCW 70.105D.040(3)(b)—where knowledge of the contamination at the time of acquisition is material to that defense. If a purchaser knew that contamination was present on the property at the time of purchase, that defense is not typically available. However, the MTCA third-party trespass defense does not include this factor among the qualifying criteria set out in the statute. *See* RCW 70.105.105D).040(3)(a)(iii). Thus, the Port is entitled to this defense which shields the Port entirely from MTCA liability related to the TWAAFA Site.

IV. Ecology's Insistence that the Don Oline Landfill PLPs Clean up the CleanCare Property is Inequitable.

For decades since the 1970s, Ecology has regulated hazardous waste management activities at CleanCare. Ecology's long delay in taking enforcement action against CleanCare owners and operators (and any other party associated with known releases originating at CleanCare) has allowed those parties to avoid liability for the consequence of their actions and the cleanup of the property. Ecology has pursued a selective and limited Site enforcement strategy, despite the PLPs requests that Ecology pursue more parties among the many, many targets known to Ecology. Indeed, Ecology's long history of Site investigations and enforcement activities (particularly involving the CleanCare and BE Parcels described in the AO/EO at Section V) show Site activities and hazardous substance releases for specific owners, operators, generators, and transporters known to Ecology. As the regulator of the facility, Ecology should have required CleanCare to address the conditions giving rise to Ecology's past costs while CleanCare was operating its facility. If Ecology does not expand its enforcement strategy in the context of the AO/EO, Ecology should begin to do so immediately to prepare for the next phase

[9] Under CERCLA the third party defense does not expressly include "trespass". *See* CERCLA §107(b).

of Site activities (implementation of a Cleanup Action Plan). And, it is particularly appropriate for Ecology to pursue other parties as soon as possible for recovery of Ecology's $352,302.05 in past remedial costs (described as "deferred" by Ecology in Section VIII of the AO/EO "until the negotiation of the next formal agreement for the Site"). As the AO/EO Parties have previously demonstrated to Ecology, nearly all of Ecology's past costs relate to hazardous waste and material abandoned by CleanCare, stormwater management at the facility, and management of above-ground structures that were solely related to the former CleanCare operations. These remedial action costs arose from historical operations completely unrelated to alleged liabilities attributed to the AO/EO Parties.

Ecology's actions with respect to naming TWAAFA PLPs has been irregular at best. In 2007, the Port considered acquisition of CleanCare. At that time, Ecology considered the CleanCare Site property, portions of the BE facility, the Prologis Site, and the Potter Property parcel to comprise the TWAAFA Site. (Clean-2). In preparation for an ambitious terminal and infrastructure development project, the Port pursued the acquisition of numerous properties, on the Blair/Hylebos Peninsula, many of which were contaminated, including the CleanCare Site. (Clean-1, p871). After learning of the Port's plans, Ecology notified the Port that it would be named a PLP for CleanCare **if** the Port acquired the property. (Clean-1, p869). From 2007 through 2009, the Port and Ecology began planning for the acquisition, remediation, and redevelopment of CleanCare and other contaminated properties. (Clean-1, p820, 808, 805, 802, 797, 792, 792, 790, 789, 782, 780, 779). In March 2009, however, the Port informed Ecology that the terminal redevelopment project would be much smaller than initially planned. (Clean-1, p770), and that the Port no longer intended to acquire CleanCare. (Clean-1, p765).

Ecology did not mention at that time its intent to impose liability onto the Port to clean up CleanCare property regardless of whether the Port acquired the property. It wasn't until 2016 that Ecology decided to compel the Port to clean up the CleanCare property as well as the entire TWAAFA Site through its expansive interpretation of joint and several liability. It is not clear when or why Ecology changed its position. The Port requests a thorough explanation from Ecology with respect to its decision making in this regard.

V. The Port Reserves the Right to Seek Recourse Against Ecology and other PLPs.

Notwithstanding the above comments, the Port reserves the right to assert all claims and defenses against Ecology allowable under MTCA, including the right to seek reimbursement of its costs under RCW 70.105D.050(2). Additionally, the Port reserves all rights to seek cost recovery from the three PLPs that signed onto the AO. The Port currently has a prima facie case against each of the three PLPs under RCW 70.105D.080—MTCA's private right of action provision—to recover remedial action

costs and attorney fees the Port has already incurred, and will incur in the future, with respect to Port Parcels.