

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**STATE OF WASHINGTON
WHATCOM COUNTY SUPERIOR COURT**

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> PORT OF BELLINGHAM, a municipal corporation, <p style="text-align: center;">Defendant.</p>	NO. CONSENT DECREE
--	---------------------------

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	JURISDICTION	4
III.	PARTIES BOUND.....	4
IV.	DEFINITIONS	5
V.	FINDINGS OF FACTS	5
VI.	WORK TO BE PERFORMED.....	7
VII.	DESIGNATED PROJECT COORDINATORS.....	9
VIII.	PERFORMANCE.....	10
IX.	ACCESS	11
X.	SAMPLING, DATA SUBMITTAL, AND AVAILABILITY.....	11
XI.	PROGRESS REPORTS	12
XII.	RETENTION OF RECORDS	13
XIII.	TRANSFER OF INTEREST IN PROPERTY	14
XIV.	RESOLUTION OF DISPUTES	14
XV.	AMENDMENT OF DECREE.....	16
XVI.	EXTENSION OF SCHEDULE.....	16
XVII.	ENDANGERMENT	18
XVIII.	COVENANT NOT TO SUE	19
XIX.	CONTRIBUTION PROTECTION	20

1	XX.	INDEMNIFICATION	20
	XXI.	COMPLIANCE WITH APPLICABLE LAWS	21
2	XXII.	REMEDIAL ACTION COSTS	23
	XXIII.	IMPLEMENTATION OF REMEDIAL ACTION.....	23
3	XXIV.	PERIODIC REVIEW	24
	XXV.	PUBLIC PARTICIPATION.....	24
4	XXVI.	DURATION OF DECREE.....	26
	XXVII.	CLAIMS AGAINST THE STATE	26
5	XXVIII.	EFFECTIVE DATE.....	26
	XXIX.	WITHDRAWAL OF CONSENT.....	26
6			
7	EXHIBIT A	Cleanup Action Plan	
	EXHIBIT B	Site Location Diagram	
8	EXHIBIT C	Engineering Design Report	
	EXHIBIT D	Schedule	
9	EXHIBIT E	Applicable Substantive Requirements of Procedurally Exempt Permits or Approvals	
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			

1 **I. INTRODUCTION**

2 A. The mutual objective of the State of Washington, Department of Ecology
3 (Ecology) and the Port of Bellingham (Port) under this Decree is to provide for remedial action
4 at a facility where there has been a release or threatened release of hazardous substances. This
5 Decree requires the Port to perform the cleanup action described in the Cleanup Action Plan
6 attached hereto as Exhibit A.

7 B. Ecology has determined that these actions are necessary to protect human health
8 and the environment.

9 C. The Complaint in this action is being filed simultaneously with this Decree. An
10 Answer has not been filed, and there has not been a trial on any issue of fact or law in this case.
11 However, the Parties wish to resolve the issues raised by Ecology’s Complaint. In addition, the
12 Parties agree that settlement of these matters without litigation is reasonable and in the public
13 interest, and that entry of this Decree is the most appropriate means of resolving these matters.

14 D. By signing this Decree, the Parties agree to its entry and agree to be bound by its
15 terms.

16 E. By entering into this Decree, the Parties do not intend to discharge non-settling
17 parties from any liability they may have with respect to matters alleged in the Complaint. The
18 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
19 sums expended under this Decree.

20 F. This Decree shall not be construed as proof of liability or responsibility for any
21 releases of hazardous substances or cost for remedial action nor an admission of any facts;
22 provided, however, that the Port shall not challenge the authority of the Attorney General and
23 Ecology to enforce this Decree.

24 G. The Court is fully advised of the reasons for entry of this Decree, and good cause
25 having been shown:

26 Now, therefore, it is **HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

1 **II. JURISDICTION**

2 A. This Court has jurisdiction over the subject matter and over the Parties pursuant
3 to the Model Toxics Control Act (MTCA), Chapter 70.105D RCW.

4 B. Authority is conferred upon the Washington State Attorney General by
5 RCW 70.105D.040(4)(a) to agree to a settlement with any potentially liable person (PLP) if,
6 after public notice and any required hearing, Ecology finds the proposed settlement would lead
7 to a more expeditious cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that
8 such a settlement be entered as a consent decree issued by a court of competent jurisdiction.

9 C. Ecology has determined that a release or threatened release of hazardous
10 substances has occurred at the Site that is the subject of this Decree.

11 D. Ecology has given notice to the Port of Ecology's determination that the Port is a
12 PLP for the Site, as required by RCW 70.105D.020(26) and WAC 173-340-500.

13 E. The actions to be taken pursuant to this Decree are necessary to protect public
14 health and the environment.

15 F. This Decree has been subject to public notice and comment.

16 G. Ecology finds that this Decree will lead to a more expeditious cleanup of
17 hazardous substances at the Site in compliance with the cleanup standards established under
18 RCW 70.105D.030(2)(e) and Chapter 173-340 WAC.

19 H. The Port has agreed to undertake the actions specified in this Decree and consents
20 to the entry of this Decree under MTCA.

21 **III. PARTIES BOUND**

22 This Decree shall apply to and be binding upon the Parties to this Decree, their successors
23 and assigns. The undersigned representative of each party hereby certifies that he or she is fully
24 authorized to enter into this Decree and to execute and legally bind such party to comply with
25 this Decree. The Port agrees to undertake all actions required by the terms and conditions of this
26 Decree. No change in ownership or corporate status shall alter the Port's responsibility under

1 this Decree. The Port shall provide a copy of this Decree to all agents, contractors, and
2 subcontractors retained to perform work required by this Decree, and shall ensure that all work
3 undertaken by such agents, contractors, and subcontractors complies with this Decree.

4 **IV. DEFINITIONS**

5 Unless otherwise specified herein, all definitions in RCW 70.105D.020 and
6 WAC 173-340-200 shall control the meanings of the terms in this Decree.

7 A. Site: The Site is referred to as the Blaine Marina, Inc. Site, FS ID 2888. The Site
8 constitutes a Facility under RCW 70.105D.020(8). The Site is defined by where a hazardous
9 substance, other than a consumer product in consumer use, has been deposited, stored, disposed
10 of, or placed, or otherwise came to be located.

11 B. Parties: Refers to the State of Washington, Department of Ecology and the Port
12 of Bellingham.

13 C. Consent Decree or Decree: Refers to this Consent Decree and each of the exhibits
14 to this Decree. All exhibits are integral and enforceable parts of this Consent Decree.

15 **V. FINDINGS OF FACTS**

16 Ecology makes the following findings of fact without any express or implied admissions
17 of such facts by the Port.

18 A. Based on factors currently known to Ecology, the Site is generally located 214
19 Sigurdson Avenue, Blaine, Washington, in the western portion of Blaine Harbor Industrial area
20 and consists of approximately 0.9 acre. A diagram of the Site is attached as Exhibit B, the Site
21 Location Diagram.

22 B. The Site was created in the late 1930s when aquatic lands were dredged to create
23 a boat harbor and small boat marina. The dredged material was used to create an upland
24 industrial area armored with timber bulkheads, although in some areas riprap was used instead
25 of, or in conjunction with, the bulkheads. The marina was expanded several times since its
26

1 original construction, but the footprint of the upland industrial area has remained largely
2 unchanged. Relevant historical information includes, but is not limited to, the following:

3 1. Blaine Marina, Inc. (the tenant) leased the Site property from the Port
4 from the 1950s until May 2015. In 1956 the tenant installed three aboveground
5 storage tanks (“ASTs”) to store gasoline and diesel fuel for dispensing at the
6 fueling dock, and also for filling tanker trucks for delivery of home heating oil.
7 The tank farm fueling facility had been operated continuously from 1956 to May
8 2015. Fuel lines ran from the ASTs through the bulkhead and beneath the
9 overwater building to the fueling station located on an existing pier where marine
10 vessels were fueled.

11 2. On May 2, 1990, a documented spill of 500 to 700 gallons of diesel fuel
12 occurred. The spill was reportedly contained and removed by vactor truck.
13 Another spill reportedly occurred sometime prior to 1986, although no written
14 records of the spill are available. Additionally, the tenant reported that a fuel line
15 elbow leading to the fuel dock was leaking and needed to be replaced.

16 C. Releases of hazardous substances have occurred at the Site. The following
17 hazardous substances at the Site have been detected at concentrations above MTCA cleanup
18 levels and are addressed in the CAP and under this Decree

- 19 • Gasoline- and diesel- range petroleum hydrocarbons (TPH-G and TPH-D), benzene,
20 ethylbenzene, xylenes (BTEX), and total naphthalene in soil.
- 21 • TPH-G, TPH-D, benzene, and total naphthalene in groundwater.
- 22 • Benzene and 1,3-butadiene in soil vapor.

23 D. On May 25, 2012, the Port entered into an Agreed Order with Ecology (No. 9000)
24 to Complete an Interim Action, Remedial Investigation, Feasibility Study (“RI/FS”), and Draft
25 Cleanup Action Plan. The Interim Action was completed in 2012 to repair a failing section of
26 bulkhead. The Public Review RI/FS went out for public notice and comment from May 18, 2015

1 to June 16, 2015. After review of the public comments, Ecology determined that the RI/FS are
2 final documents in August 2015.

3 E. The Public Review Cleanup Action Plan went out for public notice and comment
4 from December 12, 2016 to January 25, 2017. After review of the public comments, Ecology
5 determined the Cleanup Action Plan (CAP) is a final document in May 2017.

6 F. On May 5, 2017, the Port entered into the First Amendment to Agreed Order No.
7 DE 9000 with Ecology to complete remedial design work for final cleanup action at the Site.
8 The Engineering Design Report for the Site was conducted as part of the scope of work under
9 the First Amendment to Agreed Order No. DE 9000 and is attached as Exhibit C.

10 G. As documented in the Cleanup Action Plan (CAP) (Exhibit A), the cleanup action
11 to be implemented at the Site includes the excavation and offsite disposal/treatment of
12 approximately 3,000 tons of soil, light non-aqueous phase liquid (“LNAPL”) recovery from the
13 open excavation, extension of the sheetpile bulkhead that was installed as an interim action,
14 implementation of Site-wide bioremediation to achieve groundwater cleanup levels (“CLs”),
15 removal of the AST system and adjacent buildings, installation and maintenance of a cover
16 containment layer to prevent direct contact with contamination within areas not subject to
17 contaminated soil excavation and offsite disposal, monitored natural attenuation once CLs are
18 achieved along the shoreline, implementation of institutional controls to ensure long-term
19 integrity of the containment system and/or prevent the use of Site groundwater as a drinking
20 water source until soil and groundwater cleanup levels are met throughout the Site.

21 VI. WORK TO BE PERFORMED

22 This Decree contains a program designed to protect human health and the environment
23 from the known release, or threatened release, of hazardous substances or contaminants at, on,
24 or from the Site. All remedial actions conducted by the Port under this Decree shall be done in
25 accordance with Chapter 173-340 WAC.

1 A. The Port shall perform all tasks set forth in the Cleanup Action Plan (CAP)
2 (Exhibit A) and implement the CAP in accordance with the schedule set forth in Exhibit D. The
3 CAP requires:

4 1. Decommissioning, demolition, and disposal of the AST, fueling system
5 and adjacent buildings.

6 2. Excavation and either treatment or disposal of approximately 3,000 tons
7 of heavily contaminated soil from within the lateral limits of free-phase LNAPL.

8 3. After source removal, installation and maintenance of a temporary
9 containment system of a combination of soil and pavement to prevent human contact
10 with contaminated soil left in place until the Site cleanup action is complete.

11 4. It is anticipated that institutional controls will not be required following
12 completion of the cleanup action. If the cleanup action requires more time than currently
13 estimated then institutional controls will be implemented to ensure the integrity of
14 capping system and other cleanup equipment is maintained to protect contact with
15 contaminated media, protect the integrity of the cleanup action, and prevent the use of
16 Site groundwater as a drinking water source until the Site cleanup standards are achieved.

17 5. Extension to the north of the sheetpile bulkhead that was installed as an
18 interim action, if needed. The need for installation of the sheetpile bulkhead will be
19 determined after source removal and following review of the bioremediation program.

20 6. Implementation of a bioremediation program after source removal to
21 reduce concentrations of indicator hazardous substances (IHS) until groundwater cleanup
22 standards are achieved.

23 7. Implementation of MNA after bioremediation to address residual
24 concentrations of petroleum hydrocarbons exceeding soil and/or groundwater cleanup
25 standards, if needed.
26

1 8. Compliance monitoring to confirm that cleanup standards have been
2 achieved and to confirm the long-term effectiveness of the cleanup actions at the Site in
3 accordance with the Compliance Monitoring Plan (“CMP”).

4 B. Except in the case of an emergency, the Port agrees not to perform any remedial
5 actions at the Site outside the scope of this Decree without prior written approval of Ecology. In
6 the case of an emergency, the Port must notify Ecology of the event and remedial action(s) as
7 soon as practical, but no later than twenty-four (24) hours after discovery of the emergency.

8 C. All plans or other deliverables submitted by the Port for Ecology’s review and
9 approval under the CAP (Exhibit A) or the Schedule (Exhibit D) shall, upon Ecology’s approval,
10 become integral and enforceable parts of this Decree.

11 D. If the Port learns of a significant change in conditions at the Site, including but
12 not limited to a statistically significant increase in contaminant and/or chemical concentrations
13 in soil or groundwater relative to preceding incremental performance monitoring data, the Port
14 within seven (7) days of learning of the change in condition, shall notify Ecology in writing of
15 said change and provide Ecology with any reports or records (including laboratory analyses,
16 sampling results) relating to the change in conditions.

17 **VII. DESIGNATED PROJECT COORDINATORS**

18 The project coordinator for Ecology is:

19 Cris Matthews
20 Toxics Cleanup Program
21 913 Squalicum Way #101
22 Bellingham, Washington 98225
23 (360) 715-5232

24 The project coordinator for the Port is:

25 Ben Howard
26 Port of Bellingham
 1801 Roeder Avenue

1 Bellingham, Washington 98227
2 (360) 676-2500

3 Each project coordinator shall be responsible for overseeing the implementation of this
4 Decree. Ecology's project coordinator will be Ecology's designated representative for the Site.
5 To the maximum extent possible, communications between Ecology and the Port and all
6 documents, including reports, approvals, and other correspondence concerning the activities
7 performed pursuant to the terms and conditions of this Decree shall be directed through the
8 project coordinators. The project coordinators may designate, in writing, working level staff
9 contacts for all or portions of the implementation of the work to be performed required by this
10 Decree.

11 Any party may change its respective project coordinator. Written notification shall be
12 given to the other party at least ten (10) calendar days prior to the change.

13 **VIII. PERFORMANCE**

14 All geologic and hydrogeologic work performed pursuant to this Decree shall be under
15 the supervision and direction of a geologist or hydrogeologist licensed by the State of
16 Washington or under the direct supervision of an engineer registered by the State of Washington,
17 except as otherwise provided for by Chapters 18.220 and 18.43 RCW.

18 All engineering work performed pursuant to this Decree shall be under the direct
19 supervision of a professional engineer registered by the State of Washington, except as otherwise
20 provided for by RCW 18.43.130.

21 All construction work performed pursuant to this Decree shall be under the direct
22 supervision of a professional engineer or a qualified technician under the direct supervision of a
23 professional engineer. The professional engineer must be registered by the State of Washington,
24 except as otherwise provided for by RCW 18.43.130.

1 Any documents submitted containing geologic, hydrologic, or engineering work shall be
2 under the seal of an appropriately licensed professional as required by Chapters 18.220 and 18.43
3 RCW.

4 The Port shall notify Ecology in writing of the identity of any engineer(s) and
5 geologist(s), contractor(s) and subcontractor(s), and others to be used in carrying out the terms
6 of this Decree, in advance of their involvement at the Site.

7 **IX. ACCESS**

8 Ecology or any Ecology authorized representative shall have access to enter and freely
9 move about all property at the Site that the Port either owns, controls, or has access rights to at
10 all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs, and
11 contracts related to the work being performed pursuant to this Decree; reviewing the Port's
12 progress in carrying out the terms of this Decree; conducting such tests or collecting such
13 samples as Ecology may deem necessary; using a camera, sound recording, or other documentary
14 type equipment to record work done pursuant to this Decree; and verifying the data submitted to
15 Ecology by the Port. The Port shall make all reasonable efforts to secure access rights for those
16 properties within the Site not owned or controlled by the Port where remedial activities or
17 investigations will be performed pursuant to this Decree. Ecology or any Ecology authorized
18 representative shall give reasonable notice before entering any Site property owned or controlled
19 by the Port unless an emergency prevents such notice. All Parties who access the Site pursuant
20 to this section shall comply with any applicable health and safety plan(s). Ecology employees
21 and their representatives shall not be required to sign any liability release or waiver as a condition
22 of Site property access.

23 **X. SAMPLING, DATA SUBMITTAL, AND AVAILABILITY**

24 With respect to the implementation of this Decree, the Port shall make the results of all
25 sampling, laboratory reports, and/or test results generated by it or on its behalf available to
26 Ecology. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted to Ecology in

1 both printed and electronic formats in accordance with Section XI (Progress Reports), Ecology's
2 Toxics Cleanup Program Policy 840 (Data Submittal Requirements), and/or any subsequent
3 procedures specified by Ecology for data submittal.

4 If requested by Ecology, the Port shall allow Ecology and/or its authorized representative
5 to take split or duplicate samples of any samples collected by the Port pursuant to the
6 implementation of this Decree. The Port shall notify Ecology seven (7) days in advance of any
7 sample collection or work activity at the Site. Ecology shall, upon request, allow the Port and/or
8 its authorized representative to take split or duplicate samples of any samples collected by
9 Ecology pursuant to the implementation of this Decree, provided that doing so does not interfere
10 with Ecology's sampling. Without limitation on Ecology's rights under Section IX (Access),
11 Ecology shall notify the Port prior to any sample collection activity unless an emergency
12 prevents such notice.

13 In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be
14 conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to be
15 conducted, unless otherwise approved by Ecology.

16 **XI. PROGRESS REPORTS**

17 Unless otherwise directed by Ecology, the Port shall submit to Ecology written quarterly
18 Progress Reports that describe the actions taken during the previous quarter to implement the
19 requirements of this Decree. All Progress Reports shall be submitted by the tenth (10th) day of
20 the month in which they are due after the effective date of this Decree. Unless otherwise specified
21 in writing by Ecology, Progress Reports and any other documents submitted pursuant to this
22 Decree shall be sent by electronic mail, in a PDF format, to Ecology's project coordinator. The
23 Progress Reports shall include the following:

- 24 A. A list of on-site activities that have taken place during the quarter;
25 B. Description of any sample results which deviate from the norm;

1 C. Detailed description of any deviations from required tasks not otherwise
2 documented in project plans or amendment requests;

3 D. Description of all deviations from the Cleanup Action Plan and Schedule
4 (Exhibits A and D) during the current quarter and any planned deviations in the upcoming
5 quarter;

6 E. For any deviations in schedule, a plan for recovering lost time and maintaining
7 compliance with the schedule;

8 F. All raw data (including laboratory analyses) received during the previous quarter
9 (if not previously submitted to Ecology), together with a detailed description of the underlying
10 samples collected; and

11 G. A list of planned activities and deliverables for the upcoming quarter.
12

13 **XII. RETENTION OF RECORDS**

14 During the pendency of this Decree, and for ten (10) years from the date this Decree is
15 no longer in effect as provided in Section XXVI (Duration of Decree), the Port shall preserve all
16 records, reports, documents, and underlying data in its possession relevant to the implementation
17 of this Decree and shall insert a similar record retention requirement into all contracts with
18 project contractors and subcontractors. Upon request of Ecology, the Port shall make all records
19 available to Ecology and allow access for review within a reasonable time.

20 Nothing in this Decree is intended by the Port to waive any right it may have under
21 applicable law to limit disclosure of documents protected by the attorney work-product privilege
22 and/or the attorney-client privilege. If the Port withholds any requested records based on an
23 assertion of privilege, the Port shall provide Ecology with a privilege log specifying the records
24 withheld and the applicable privilege. No Site-related data collected pursuant to this Decree
25 shall be considered privileged.
26

1 **XIII. TRANSFER OF INTEREST IN PROPERTY**

2 No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest
3 in any portion of the Site shall be consummated by the Port without provision for continued
4 operation and maintenance of any containment system, treatment system, and/or monitoring
5 system installed or implemented pursuant to this Decree.

6 Prior to the Port’s transfer of any interest in all or any portion of the Site, and during the
7 effective period of this Decree, the Port shall provide a copy of this Decree to any prospective
8 purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least thirty (30)
9 days prior to any transfer, the Port shall notify Ecology of said transfer. Upon transfer of any
10 interest, the Port shall notify all transferees of the restrictions on the activities and uses of the
11 property under this Decree and incorporate any such use restrictions into the transfer documents.

12 **XIV. RESOLUTION OF DISPUTES**

13 A. In the event a dispute arises as to an approval, disapproval, proposed change, or
14 other decision or action by Ecology’s project coordinator, or an itemized billing statement under
15 Section XXII (Remedial Action Costs), the Parties shall utilize the dispute resolution procedure
16 set forth below.

17 1. Upon receipt of Ecology’s project coordinator’s written decision, or the
18 itemized billing statement, the Port has fourteen (14) days within which to notify
19 Ecology’s project coordinator in writing of its objection to the decision or itemized
20 statement.

21 2. The Parties’ project coordinators shall then confer in an effort to resolve
22 the dispute. If the project coordinators cannot resolve the dispute within fourteen (14)
23 days, Ecology’s project coordinator shall issue a written decision.

24 3. The Port may then request regional management review of the decision.
25 This request shall be submitted in writing to the Northwest Region Toxics Cleanup
26

1 Program Section Manager within seven (7) days of receipt of Ecology's project
2 coordinator's written decision.

3 4. Ecology's Regional Section Manager shall conduct a review of the
4 dispute and shall endeavor to issue a written decision regarding the dispute within
5 thirty (30) days of the Port's request for review.

6 5. If the Port finds Ecology's Regional Section Manager's decision
7 unacceptable, the Port may then request final management review of the decision. This
8 request shall be submitted in writing to the Toxics Cleanup Program Manager within
9 seven (7) days of receipt of the Regional Section Manager's decision.

10 6. Ecology's Toxics Cleanup Program Manager shall conduct a review of
11 the dispute and shall endeavor to issue a written decision regarding the dispute within
12 thirty (30) days of the Port's request for review of the Regional Section Manager's
13 decision. The Toxics Cleanup Program Manager's decision shall be Ecology's final
14 decision on the disputed matter.

15 B. If Ecology's final written decision is unacceptable to the Port, the Port has the
16 right to submit the dispute to the Court for resolution. The Parties agree that one judge should
17 retain jurisdiction over this case and shall, as necessary, resolve any dispute arising under this
18 Decree. Under RCW 70.105D.060, Ecology's investigative and remedial decisions shall be
19 upheld unless they are arbitrary and capricious.

20 C. The Parties agree to only utilize the dispute resolution process in good faith and
21 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.
22 Where either party utilizes the dispute resolution process in bad faith or for purposes of delay,
23 the other party may seek sanctions.

24 D. Implementation of these dispute resolution procedures shall not provide a basis
25 for delay of any activities required in this Decree, unless Ecology agrees in writing to a schedule
26 extension or the Court so orders.

1 E. In case of a dispute, failure to either proceed with the work required by this
2 Decree or timely invoke dispute resolution may result in Ecology's determination that
3 insufficient progress is being made in preparation of a deliverable, and may result in Ecology
4 undertaking the work under Section XXIII (Implementation of Remedial Action).

5 **XV. AMENDMENT OF DECREE**

6 The project coordinators may agree to minor changes to the work to be performed
7 without formally amending this Decree. Minor changes will be documented in writing by
8 Ecology.

9 Substantial changes to the work to be performed shall require formal amendment of this
10 Decree. This Decree may only be formally amended by a written stipulation among the Parties
11 that is entered by the Court, or by order of the Court. Ecology will provide its written consent
12 to a formal amendment only after public notice and opportunity to comment on the formal
13 amendment. Such amendment shall become effective upon entry by the Court. Agreement to
14 amend the Decree shall not be unreasonably withheld by any party.

15 When requesting a change to the Decree, the Port shall submit a written request for
16 amendment to Ecology for approval. Ecology shall indicate its approval or disapproval in
17 writing and in a timely manner after the written request for amendment is received. If Ecology
18 determines that the amendment to the Decree is a substantial change, then the Decree must be
19 formally amended. Reasons for the disapproval of a proposed amendment to the Decree shall
20 be stated in writing. If Ecology does not agree to the requested change, the disagreement may
21 be addressed through the dispute resolution procedures described in Section XIV (Resolution of
22 Disputes).

23 **XVI. EXTENSION OF SCHEDULE**

24 A. The Port's request for an extension of schedule shall be granted only when a
25 request for an extension is submitted in a timely fashion, generally at least thirty (30) days prior
26

1 to expiration of the deadline for which the extension is requested, and good cause exists for
2 granting the extension. All extensions shall be requested in writing. The request shall specify:

- 3 1. The deadline that is sought to be extended;
- 4 2. The length of the extension sought;
- 5 3. The reason(s) for the extension; and
- 6 4. Any related deadline or schedule that would be affected if the extension
7 were granted.

8 B. The burden shall be on the Port to demonstrate to the satisfaction of Ecology that
9 the request for such extension has been submitted in a timely fashion and that good cause exists
10 for granting the extension. Good cause may include, but may not be limited to:

- 11 1. Circumstances beyond the reasonable control and despite the due
12 diligence of the Port including delays caused by unrelated third parties or Ecology, such
13 as (but not limited to) delays by Ecology in reviewing, approving, or modifying
14 documents submitted by the Port;
- 15 2. Acts of God, including fire, flood, blizzard, extreme temperatures, storm,
16 or other unavoidable casualty; or
- 17 3. Endangerment as described in Section XVII (Endangerment).

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

21 C. Ecology shall act upon any written request for extension in a timely fashion.
22 Ecology shall give the Port written notification of any extensions granted pursuant to this Decree.
23 A requested extension shall not be effective until approved by Ecology or, if required, by the
24 Court. Unless the extension is a substantial change, it shall not be necessary to amend this
25 Decree pursuant to Section XV (Amendment of Decree) when a schedule extension is granted.
26

1 D. At the Port's request an extension shall only be granted for such period of time
2 as Ecology determines is reasonable under the circumstances. Ecology may grant schedule
3 extensions exceeding ninety (90) days only as a result of:

4 1. Delays in the issuance of a necessary permit which was applied for in a
5 timely manner;

6 2. Other circumstances deemed exceptional or extraordinary by Ecology; or

7 3. Endangerment as described in Section XVII (Endangerment).

8 **XVII. ENDANGERMENT**

9 In the event Ecology determines that any activity being performed at the Site under this
10 Decree is creating or has the potential to create a danger to human health or the environment,
11 Ecology may direct the Port to cease such activities for such period of time as it deems necessary
12 to abate the danger. The Port shall immediately comply with such direction.

13 In the event the Port determines that any activity being performed at the Site under this
14 Decree is creating or has the potential to create a danger to human health or the environment, the
15 Port may cease such activities. The Port shall notify Ecology's project coordinator as soon as
16 possible, but no later than twenty-four (24) hours after making such determination or ceasing
17 such activities. Upon Ecology's direction, the Port shall provide Ecology with documentation
18 of the basis for the determination or cessation of such activities. If Ecology disagrees with the
19 Port's cessation of activities, it may direct the Port to resume such activities.

20 If Ecology concurs with or orders a work stoppage pursuant to this section, the Port's
21 obligations with respect to the ceased activities shall be suspended until Ecology determines the
22 danger is abated, and the time for performance of such activities, as well as the time for any other
23 work dependent upon such activities, shall be extended, in accordance with Section XVI
24 (Extension of Schedule), for such period of time as Ecology determines is reasonable under the
25 circumstances.
26

1 Nothing in this Decree shall limit the authority of Ecology, its employees, agents, or
2 contractors to take or require appropriate action in the event of an emergency.

3 **XVIII. COVENANT NOT TO SUE**

4 A. Covenant Not to Sue: In consideration of the Port's compliance with the terms
5 and conditions of this Decree, Ecology covenants not to institute legal or administrative actions
6 against the Port regarding the release or threatened release of hazardous substances at the Site as
7 detailed in Exhibit B and the hazardous substances detailed in Section V.C (Findings of
8 Fact). This Covenant Not to Sue does not cover any other hazardous substance or area. Ecology
9 retains all of its authority relative to any hazardous substance or area not covered by this Decree.

10 This Covenant Not to Sue shall have no applicability whatsoever to:

- 11 1. Criminal liability;
- 12 2. Liability for damages to natural resources; or
- 13 3. Any Ecology action, including cost recovery, against PLPs not a party to
14 this Decree.

15 Pursuant to RCW 70.105D.040(4)(c), the Court shall amend this Covenant Not to Sue if
16 factors not known at the time of entry of this Decree are discovered and present a previously
17 unknown threat to human health or the environment.

18 B. Reopeners: Ecology specifically reserves the right to institute legal or
19 administrative action against the Port to require it to perform additional remedial actions at the
20 Site and to pursue appropriate cost recovery, pursuant to RCW 70.105D.050, under any of the
21 following circumstances:

- 22 1. Upon the Port's failure to meet the requirements of this Decree.
 - 23 2. Failure of the remedial action to meet the cleanup standards identified in
24 the Cleanup Action Plan (CAP) (Exhibit A).
- 25
26

1 of action to the extent arising out of the negligent acts or omissions of the State of Washington,
2 or the employees or agents of the State, in entering into or implementing this Decree.

3 **XXI. COMPLIANCE WITH APPLICABLE LAWS**

4 A. All actions carried out by the Port pursuant to this Decree shall be done in
5 accordance with all applicable federal, state, and local requirements, including requirements to
6 obtain necessary permits, except as provided in RCW 70.105D.090. At this time there are
7 applicable federal, state, or local requirements that have been identified as being applicable to
8 the actions required by this Decree. The Port has a continuing obligation to identify additional
9 applicable federal, state, and local requirements which apply to actions carried out pursuant to
10 this Decree, and to comply with those requirements. As additional federal, state, and local
11 requirements are identified by Ecology or the Port, Ecology will document in writing if they are
12 applicable to actions carried out pursuant to this Decree, and the Port must implement those
13 requirements.

14 B. All actions carried out by the Port pursuant to this Decree shall be done in
15 accordance with relevant and appropriate requirements identified by Ecology. At this time no
16 relevant and appropriate requirements have been identified as being applicable to the actions
17 required by this Decree. If additional relevant and appropriate requirements are identified by
18 Ecology or the Port, Ecology will document in writing if they are applicable to actions carried
19 out pursuant to this Decree, and the Port must implement those requirements.

20 C. Pursuant to RCW 70.105D.090(1), the Port may be exempt from the procedural
21 requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws
22 requiring or authorizing local government permits or approvals. However, the Port shall comply
23 with the substantive requirements of such permits or approvals. For permits and approvals
24 covered under RCW 70.105D.090(1) that have been issued by local government, the Parties
25 agree that Ecology has the non-exclusive ability under this Decree to enforce those local
26 government permits and/or approvals. The exempt permits or approvals and the applicable

1 substantive requirements of those permits or approvals, as they are known at the time of entry of
2 this Decree, have been identified in Exhibit E.

3 The Port has a continuing obligation to determine whether additional permits or
4 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
5 action under this Decree. In the event either Ecology or the Port determines that additional
6 permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the
7 remedial action under this Decree, it shall promptly notify the other party of this determination.
8 Ecology shall determine whether Ecology or the Port shall be responsible to contact the
9 appropriate state and/or local agencies. If Ecology so requires, the Port shall promptly consult
10 with the appropriate state and/or local agencies and provide Ecology with written documentation
11 from those agencies of the substantive requirements those agencies believe are applicable to the
12 remedial action. Ecology shall make the final determination on the additional substantive
13 requirements that must be met by the Port and on how the Port must meet those requirements.
14 Ecology shall inform the Port in writing of these requirements. Ecology shall inform the Port in
15 writing of these requirements. Once established by Ecology, the additional requirements shall
16 be enforceable requirements of this Decree. The Port shall not begin or continue the remedial
17 action potentially subject to the additional requirements until Ecology makes its final
18 determination.

19 C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the
20 exemption from complying with the procedural requirements of the laws referenced in
21 RCW 70.105D.090(1) would result in the loss of approval from a federal agency that is necessary
22 for the state to administer any federal law, the exemption shall not apply and the Port shall
23 comply with both the procedural and substantive requirements of the laws referenced in RCW
24 70.105D.090(1), including any requirements to obtain permits or approvals.
25
26

1 **XXII. REMEDIAL ACTION COSTS**

2 The Port shall pay to Ecology costs incurred by Ecology pursuant to this Decree and
3 consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology or
4 its contractors for, or on, the Site under Chapter 70.105D RCW, including remedial actions and
5 Decree preparation, negotiation, oversight, and administration. These costs shall include work
6 performed both prior to and subsequent to the entry of this Decree. Ecology’s costs shall include
7 costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2).
8 For all costs incurred, the Port shall pay the required amount within thirty (30) days of receiving
9 from Ecology an itemized statement of costs that includes a summary of costs incurred, an
10 identification of involved staff, and the amount of time spent by involved staff members on the
11 project. A general statement of work performed will be provided upon request. Itemized
12 statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay
13 Ecology’s costs within ninety (90) days of receipt of the itemized statement of costs will result
14 in interest charges at the rate of twelve percent (12%) per annum, compounded monthly.

15 In addition to other available relief, pursuant to RCW 19.16.500, Ecology may utilize a
16 collection agency and/or, pursuant to RCW 70.105D.055, file a lien against real property subject
17 to the remedial actions to recover unreimbursed remedial action costs.

18 **XXIII. IMPLEMENTATION OF REMEDIAL ACTION**

19 If Ecology determines that the Port has failed without good cause to implement the
20 remedial action, in whole or in part, Ecology may, after notice to the Port, perform any or all
21 portions of the remedial action or at Ecology’s discretion allow the Port opportunity to correct.
22 In an emergency, Ecology is not required to provide notice to the Port, or an opportunity for
23 dispute resolution. The Port shall reimburse Ecology for the costs of doing such work in
24 accordance with Section XXII (Remedial Action Costs), provided that the Port is not obligated
25 under this section to reimburse Ecology for costs incurred for work inconsistent with or beyond
26 the scope of this Decree.

1 Except where necessary to abate an emergency situation or where required by law, the
2 Port shall not perform any remedial actions at the Site outside those remedial actions required
3 by this Decree to address the contamination that is the subject of this Decree, unless Ecology
4 concurs, in writing, with such additional remedial actions pursuant to Section XV (Amendment
5 of Decree). In the event of an emergency, or where actions are taken as required by law, the Port
6 must notify Ecology in writing of the event and remedial action(s) planned or taken as soon as
7 practical but no later than within twenty-four (24) hours of the discovery of the event.

8 **XXIV. PERIODIC REVIEW**

9 So long as remedial action continues at the Site, the Parties agree to review the progress
10 of remedial action at the Site, and to review the data accumulated as a result of monitoring the
11 Site as often as is necessary and appropriate under the circumstances. Unless otherwise agreed
12 to by Ecology, at least every five (5) years after the initiation of cleanup action at the Site the
13 Parties shall meet to discuss the status of the Site and the need, if any, for further remedial action
14 at the Site. At least ninety (90) days prior to each periodic review, the Port shall submit a report
15 to Ecology that documents whether human health and the environment are being protected based
16 on the factors set forth in WAC 173-340-420(4). Under Section XVIII (Covenant Not to Sue),
17 Ecology reserves the right to require further remedial action at the Site under appropriate
18 circumstances. This provision shall remain in effect for the duration of this Decree.

19 **XXV. PUBLIC PARTICIPATION**

20 Ecology shall maintain the responsibility for public participation at the Site. However,
21 the Port shall cooperate with Ecology, and shall:

22 A. If agreed to by Ecology, develop appropriate mailing lists, prepare drafts of public
23 notices and fact sheets at important stages of the remedial action, such as the submission of work
24 plans, remedial investigation/feasibility study reports, cleanup action plans, and engineering
25 design reports. As appropriate, Ecology will edit, finalize, and distribute such fact sheets and
26 prepare and distribute public notices of Ecology's presentations and meetings.

1 B. Notify Ecology's project coordinator prior to the preparation of all press releases
2 and fact sheets, and before meetings focused on remedial action work to be performed at the Site
3 with the interested public and/or local governments. Likewise, Ecology shall notify the Port
4 prior to the issuance of all press releases and fact sheets, and before meetings focused on
5 remedial action work to be performed at the Site with the interested public and/or local
6 governments. For all press releases, fact sheets, meetings, and other outreach efforts by the Port
7 that do not receive prior Ecology approval, the Port shall clearly indicate to its audience that the
8 press release, fact sheet, meeting, or other outreach effort was not sponsored or endorsed by
9 Ecology.

10 C. When requested by Ecology, participate in public presentations on the progress
11 of the remedial action at the Site. Participation may be through attendance at public meetings to
12 assist in answering questions, or as a presenter.

13 D. When requested by Ecology, arrange and/or continue information repositories at
14 the following locations:

- 15 1. Bellingham Public Library
16 210 Central Avenue
Bellingham, Washington 98225
- 17 2. Ecology's Northwest Regional Office
18 3190 160th Avenue SE
Bellevue, Washington 98008-5452
- 19 3. Ecology's Bellingham Field Office
20 913 Squalicum Way #101
Bellingham, Washington 98225

21 At a minimum, copies of all public notices, fact sheets, and documents relating to public
22 comment periods shall be promptly placed in these repositories. A copy of all documents related
23 to this Site shall be maintained in the repository at Ecology's Northwest Regional Office in
24 Bellevue, Washington.

1 **XXVI. DURATION OF DECREE**

2 The remedial program required pursuant to this Decree shall be maintained and continued
3 until the Port has received written notification from Ecology that the requirements of this Decree
4 have been satisfactorily completed. This Decree shall remain in effect until dismissed by the
5 Court. When dismissed, Section XII (Retention of Records), Section XVIII (Covenant Not to
6 Sue), and Section XIX (Contribution Protection) shall survive.

7 **XXVII. CLAIMS AGAINST THE STATE**

8 The Port hereby agrees that it will not seek to recover any costs accrued in implementing
9 the remedial action required by this Decree from the State of Washington or any of its agencies;
10 and further, that the Port will make no claim against the State Toxics Control Account, the Local
11 Toxics Account, the Environmental Legacy Stewardship Account, or a MTCA Cleanup
12 Settlement Account for any costs incurred in implementing this Decree. Except as provided
13 above, however, the Port expressly reserves its right to seek to recover any costs incurred in
14 implementing this Decree from any other PLP. This section does not limit or address funding
15 that may be provided under WAC 173-322A.

16 **XXVIII. EFFECTIVE DATE**

17 This Decree is effective upon the date it is entered by the Court.

18 **XXIX. WITHDRAWAL OF CONSENT**

19 If the Court withholds or withdraws its consent to this Decree, it shall be null and void at
20 the option of any party and the accompanying Complaint shall be dismissed without costs and
21 without prejudice. In such an event, no party shall be bound by the requirements of this Decree.
22

23 STATE OF WASHINGTON
24 DEPARTMENT OF ECOLOGY

ROBERT W. FERGUSON
Attorney General

25
26 _____
JAMES J. PENDOWSKI

IVY ANDERSON, WSBA 30652

1 Program Manager
2 Toxics Cleanup Program
3 (360) 407-7177

Assistant Attorney General
(360) 586-4619

4 Date: _____

Date: _____

5 PORT OF BELLINGHAM

CHMELIK SITKIN & DAVIS P.S.

6 _____
7 ROBERT FIX
8 Executive Director
9 (360) 676-2500

FRANK J. CHMELIK, WSBA #13969
HOLLY M. STAFFORD, WSBA #40674
Attorney for Defendant
Port of Bellingham
(360) 671-1796

10 Date: _____

Date: _____

11
12
13 ENTERED this _____ day of _____ 20____.

14
15 _____
16 JUDGE
17 Whatcom County Superior Court