

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

In the Matter of Remedial Action by:)
)
)
City of Bellingham and) AGREED ORDER
Port of Bellingham) FOR RI/FS
)
) No. DE _____

TO: City of Bellingham
210 Lottie Street
Bellingham, Washington 98225

Port of Bellingham
P.O. Box 1677
Bellingham, WA 98227-1677

I.

Jurisdiction

This Agreed Order ("Order") is issued pursuant to the authority of RCW 70.105D.050(1).

II.

Findings of Fact

The Washington State Department of Ecology ("Ecology") makes the following Findings of Fact, without admission of such facts by the City of Bellingham (City) and the Port of Bellingham (Port).

1. The Cornwall Avenue Landfill, is located at the south end of Cornwall Avenue in Bellingham, Washington (the "Site"). A portion of the Site is located on state-owned land currently managed by the Washington

State Department of Natural Resources (“DNR”). A separate portion of the Site is located on land presently owned by Georgia Pacific Corporation (or its wholly owned subsidiary, Georgia Pacific West, Inc.).

2. The history of leases and subleases for state-owned land at the Site involves many different parties, leaseholds and time periods. The relevant historical information includes, but is not limited to, the following:

a. The Port leased land at the Site from DNR from 1946 to 1965. The City subleased that land from the Port from 1954 through 1962 for use as a municipal landfill.

b. In 1962 the City entered into a sublease with American Fabricators (another Port tenant) and continued operation of the municipal landfill at the Site through 1965.

c. Frank Brooks Manufacturing Company leased land at the Site from DNR from 1965 to 1976.

d. Georgia Pacific Corporation (or its wholly owned subsidiary, Georgia Pacific West, Inc.) began leasing land at the Site from DNR in 1985 and is the current lessee.

3. The ownership and leasing history for the fee-owned portion of the Site are similarly complicated. The relevant historical information includes, but is not limited to, the following:

a. The Port purchased the fee-owned portion of the Site from the Bloedel Donovan Lumber Mill in 1947 and leased it to the City from 1953 to 1956 as a landfill.

b. In 1961 the Port sold the fee-owned portion of the Site to American Fabricators, Inc. Ownership passed to Frank Brooks Manufacturing Company, Inc. in 1965 and to Georgia Pacific Corporation in 1985. The property is now owned by Georgia Pacific Corporation (or its wholly owned subsidiary, Georgia Pacific West, Inc.).

4. In 1993 Ecology conducted sediment sampling at the Site. Based on that sampling, Ecology added the Site to its list of Confirmed and Suspected Contaminated Sites. Ecology issued Early Notice Letters on August 31, 1995 to the City, Port and DNR.

5. In 1995 Ecology conducted a Site Hazard Assessment and placed the Site on the Hazardous Sites List. In 1996, Ecology listed the Site on its Sediment Management Standards Contaminated Sediment Site List.

6. In 1995 DNR conducted an investigation into the historical uses and the then current environmental status of the Site. The results of that investigation are presented in the following report:

Tetra Tech, Inc. and Historical Research Associates, Inc., 1995, Initial Characterization of Contaminants and Uses at the Cornwall Avenue Landfill in Bellingham Bay, Prepared for the Attorney General of Washington, June 30, 1995

7. Between 1996 and the present the Port, in cooperation with the City and DNR, has performed two investigations at the Site under Ecology's Voluntary Cleanup Program. The results of those investigations are presented in the following documents:

(i) Landau Associates, 1997, *Report, Expanded Site Investigation, Cornwall Avenue Landfill Investigation, Bellingham, Washington.*

(ii) Landau Associates, 2000, *Report, Focused Remedial Investigation/Feasibility Study, Cornwall Avenue landfill, Bellingham, Washington, October 3, 2000.*

8. The above-listed investigations by the Port have confirmed the presence of hazardous substances in Site groundwater, surface water, soil and/or sediments above state standards, including arsenic, copper, lead, mercury, silver, zinc, cyanide, polychlorinated biphenyls ("PCB"), bis(2-ethylhexyl)phthalate, polycyclic aromatic hydrocarbon ("PAH") compounds and fecal coliform.

9. The investigations conducted by the Port to date constitute remedial actions as defined in RCW 70.105D.020(11).

10. In order to protect human health and the environment and to prevent the release or threatened release of hazardous substances from the Site, Ecology has determined that a Remedial Investigation and Feasibility Study (RI/FS) should be developed for Site groundwater, surface water, soil and sediments pursuant to WAC 173-340-350 and WAC 173-204-560.

III.

Ecology Determinations

Ecology makes the following Determinations, without admission or agreement of the accuracy or completeness of the determinations by the City and the Port.

1. The City is a past "owner or operator," as defined at RCW 70.105D.020(11), of a "facility" as defined in RCW 70.105D.020(4).
2. The Port is a past "owner or operator," as defined at RCW 70.105D.020(11), of a "facility" as defined in RCW 70.105D.020(4).
3. The facility is known as the Cornwall Avenue Landfill and is located at the south end of Cornwall Avenue in Bellingham, Washington.
4. The substances found at the facility as described above are "hazardous substances" as defined at RCW 70.105D.020(7).
5. Based on the presence of these hazardous substances at the facility and all factors known to the Ecology, there is a release or threatened release of hazardous substances from the facility, as defined at RCW 70.105D.020(19).
6. By letters dated December 12, 2002, Ecology notified the City of Bellingham and the Port of Bellingham of their status as "potentially liable persons" under RCW 70.105D.040 after notice and opportunity for comment.

7. Pursuant to RCW 70.105D.030(1) and 70.105D.050, the Department may require potentially liable persons to investigate or conduct other remedial actions with respect to the release or threatened release of hazardous substances, whenever it believes such action to be in the public interest.

8. Based on the foregoing facts, Ecology believes the remedial action required by this Order is in the public interest.

IV.

Work to be Performed

Based on the foregoing Facts and Determinations, it is hereby ordered that the City and Port complete a Remedial Investigation/ Feasibility Study (RI/FS) for the site pursuant to WAC 173-340-350 and WAC 173-204-560, as follows:

1. Produce a draft RI/FS (Ecology Review Draft RI/FS) for Ecology review and comment. The Ecology Review Draft of the RI/FS shall be submitted to Ecology within 90 days of the effective date of this order. All data collected as part of the RI/FS shall be submitted to Ecology in SEDQUAL and EIM electronic data formats.

2. Submit a revised RI/FS to Ecology addressing Ecology review comments on the Ecology Review Draft RI/FS. The Revised Draft will be submitted to Ecology within 45 days of receiving Ecology's comments, unless Ecology comments require additional sampling. If

additional sampling is required the Revised Draft RI/FS will be submitted to Ecology within 45 days of receipt of the analytical results.

3. After Ecology has determined that the Revised Draft RI/FS has adequately addressed Ecology's comments, Ecology will make the draft available to the public. This "Public Review Draft" of the RI/FS will be made available for public review consistent with WAC 173-340-600(13)(c). Following completion of the review period, Ecology will prepare a responsiveness summary if any public comments are received.

4. Within 45 days of Ecology's responsiveness summary, the City and Port shall submit a revised RI/FS addressing issues raised during public comment. After determining that public comments have been adequately addressed, Ecology will declare the RI/FS final (the "Final RI/FS").

5. During performance of this Order, the City and Port will submit written quarterly progress reports to Ecology. The progress reports will summarize work performed during the reporting period, and the work anticipated during the following quarter.

V.

Terms and Conditions of Order

1. Definitions

Unless otherwise specified, the definitions set forth in ch. 70.105D RCW and ch. 173-340 WAC shall control the meanings of the terms used in this Order.

2. Public Notices

WAC 173-340-600(10)(c) requires a 30 day public comment period before this agreed order on a state RI/FS becomes effective. Ecology shall be responsible for providing such public notice and reserves the right to modify or withdraw any provisions of this Order should public comment disclose facts or considerations which indicate to Ecology that the Order is inadequate or improper in any respect.

3. Remedial Action Costs

The City and Port shall pay to Ecology costs incurred by Ecology pursuant to this Order. These costs shall include work performed by Ecology or its contractors for investigations, remedial actions, and Order preparation, oversight and administration. Ecology costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). The City and Port shall pay the required amount within 90 days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general description of work performed will be provided upon request. Itemized statements shall be prepared quarterly. The Port and City may invoke the Dispute Resolution process under §V , paragraph (9) of this Order if it disagrees with Ecology's oversight cost charges. Failure to pay Ecology's uncontested costs and costs for which a final decision has been issued under the Dispute Resolution process within 90 days of receipt of the

itemized statement of costs or the date of the Dispute Resolution final decision will result in interest charges.

4. Designated Project Coordinators

The project coordinator for Ecology is:

Name: Lucille T. McInerney, P.E., Environmental Engineer
Address: Department of Ecology
Northwest Regional Office
5190 160th Avenue S.E.
Bellevue, Washington 98004-5452
Phone: 425-649-7272

The project coordinator for the City of Bellingham is:

Name: Dick McKinley, Public Works Director
Address: City of Bellingham
210 Lottie Street
Bellingham, Washington 99225
Phone: 360-676-6961

The project coordinator for the Port of Bellingham is:

Name: Mike Stoner, Director of Environment
Address: Port of Bellingham
P.O. Box 1677
Bellingham, WA 98227
Phone: 360-676-2500

The project coordinator(s) shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology and the City and the Port, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the project coordinator(s). Should Ecology or the City or Port change project

coordinator(s), written notification shall be provided to Ecology or the City or Port at least ten (10) calendar days prior to the change.

5. Performance

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a professional engineer or hydro geologist, or similar expert, with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. The City and Port shall notify Ecology as to the identity of such engineer(s) or hydro geologist(s), and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site. The City and Port shall provide a copy of this Order to all agents, contractors and subcontractors retained to perform work required by this Order and shall ensure that all work undertaken by such agents, contractors and subcontractors will be in compliance with this Order.

Except where necessary to abate an emergency situation, the City and Port shall not perform any remedial actions at the Site outside that required by this Order unless Ecology concurs, in writing, with such additional remedial actions.

6. Access

Ecology acknowledges that neither the Port nor the City own any property within the Site and therefore cannot grant access to Ecology or provide authority to Ecology to grant access to any other person, firm or entity. However, neither the Port nor the City shall impede Ecology or any Ecology authorized

representative from gaining authority to enter the Site. Moreover, in gaining access for the Port and the City, the Port and the City shall use all reasonable efforts to include authority for Ecology and any Ecology authorized representative to enter and freely move about the Site at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the progress in carrying out the terms of this Order; conducting such tests or collecting samples as Ecology or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by the City and Port.

Subject to the limitation noted above, by signing this Agreed Order, the City and Port agree that this Order constitutes reasonable notice of access to the Port and to the City, and agree not to impede access to the Site at all reasonable times for purposes of overseeing work performed under this Order. Ecology shall allow split or replicate samples to be taken by the City and Port during an inspection unless doing so interferes with Ecology's sampling. The City and Port shall allow split or replicate samples to be taken by Ecology and shall provide seven (7) days notice before any sampling activity.

The Port and the City shall use best efforts to obtain access to the Site. If such best efforts fail to produce an access agreement, Ecology shall make reasonable efforts to facilitate consistent with Ecology regulatory and statutory authorities.

7. Public Participation

The City and Port shall prepare and/or update a public participation plan for the site. Ecology shall maintain the responsibility for public participation at the site. The City and Port shall help coordinate and implement public participation for the site.

8. Retention of Records

The City and Port shall preserve in a readily retrievable fashion, during the pendency of this Order and for ten (10) years from the date of completion of the work performed pursuant to this Order, all records, reports, documents, and underlying data in its possession relevant to this Order. Should any portion of the work performed hereunder be undertaken through contractors or agents of the City and Port, then the City and Port agree to include in their contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9. Dispute Resolution

In the event a dispute arises as to an approval, disapproval, proposed modification or other decision or action by Ecology's project coordinator, the parties shall utilize the dispute resolution procedure set forth below. Upon receipt of the Ecology project coordinator's decision, the Defendant has fourteen (14) days within which to notify Ecology's project coordinator of its objection to the decision.

A. The parties' project coordinators shall then confer in an effort to resolve the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days, Ecology's project coordinator shall issue a written decision.

B. Defendant may then request Ecology management review of the decision. This request shall be submitted in writing to the Northwest Region Section Manager for the Toxics Cleanup Program within seven (7) days of receipt of Ecology's project coordinator's decision.

C. Ecology's Section Manager shall conduct a review of the dispute and shall issue a written decision regarding the dispute within thirty (30) days of the Defendant's request for review. The Section Manager's decision shall be Ecology's final decision on the disputed matter.

10. Reservation of Rights/No Settlement

This Agreed Order is not a settlement under ch. 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against the City or Port to recover remedial action costs paid to and received by Ecology under this Agreed Order. In addition, Ecology will not take additional enforcement actions against the City and Port to require those remedial actions required by this Agreed Order, provided the City and Port comply with this Agreed Order.

A. Ecology reserves the right; however, to require additional remedial actions at the Site should it deem such actions necessary. The Port and City expressly reserves their rights with regard to any future agency action.

B. Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the releases or threatened releases of hazardous substances from the Site.

C. In the event Ecology determines that conditions at the Site are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order the City and Port to stop further implementation of this Order for such period of time as needed to abate the danger. Any verbal order by Ecology to stop work shall be followed within forty eight (48) hours of such verbal order by written confirmation from Ecology to the City and Port of such verbal order.

D. Nothing herein shall be a waiver of the City or Port's right to pursue any other responsible party for costs associated herewith.

11. Extension of Schedule

A. An extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least 30 days prior to expiration of the deadline for which the extension is requested, and good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed.

B. An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. A requested extension shall not be effective until approved by Ecology. Ecology shall act upon any written request for extension in a timely fashion. It shall not be necessary to formally amend this Order when a schedule extension is granted.

C. The burden shall be on the City and Port to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause includes, but is not limited to, the following:

(1) Circumstances beyond the reasonable control and despite the due diligence of the City and Port including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by the City and Port; or

(2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or

(3) Endangerment of the health or welfare of the people on the site or in the surrounding area or to the environment.

However, neither increased costs of performance of the terms of the Decree nor changed economic circumstances shall be considered circumstances beyond the reasonable control of the City and Port.

D. Ecology may extend the schedule for a period not to exceed ninety (90) days, except where an extension is needed as a result of:

(1) Delays in the issuance of a necessary permit which was applied for in a timely manner; or

(2) Other circumstances deemed exceptional or extraordinary by Ecology; or

(3) Endangerment of the health or welfare of the people on the Site or in the surrounding area or to the environment.

Ecology shall give the City and Port written notification in a timely fashion of any extensions granted pursuant to this Order.

12. Compliance with Other Applicable Laws

A. All actions carried out by the City and Port pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in paragraph B of this section.

B. Pursuant to RCW 70.105D.090(I), the substantive requirements of chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals are to be included in the work documents approved by Ecology for this remedial action. Ecology has determined that the work under this Order does not implicate laws or regulations covered under RCW 70.105D.090(1).

C. The City and Port have a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(I) would otherwise be required for the remedial action under this Order. In the event the City and Port determine that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, they shall promptly notify Ecology of this determination. Ecology shall determine whether Ecology or the City and Port shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, the City and Port shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the remedial action. Ecology shall make the final determination on the additional substantive requirements that must be met by the City and Port and on how the City and Port must meet those requirements. Ecology shall inform the City and Port in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. The City and Port

shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination.

D. Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.

E. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(l) would result in the loss of approval from a federal agency which is necessary for the State to administer any federal law, the exemption shall not apply and the City and Port shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(l), including any requirements to obtain permits.

13. Indemnification

To the extent permitted by law, the City and Port agree to indemnify and save and hold Ecology , its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property arising from or on account of acts or omissions of the City and Port, its officers, employees, agents, or contractors in entering into and implementing this Order. However, the City and Port shall not indemnify Ecology nor save nor hold its employees and agents harmless from any claims or causes of action arising out of the negligent acts or omissions of Ecology, its employees and agents .

VI.

Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon receipt by the City and Port of written notification from Ecology that the City and Port have completed the remedial activity required by this Order, as amended by any modifications, and that all other provisions of this Agreed Order have been complied with.

VII.

Enforcement

1. Pursuant to RCW 70.105D.050, this Order may be enforced as follows:

A. The Attorney General may bring an action to enforce this Order in a state or federal court.

B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for investigative and remedial actions and orders related to the Site.

C. In the event the City and Port refuse, without sufficient cause, to comply with any term of this Order, the City and Port will be liable for:

(1) up to three times the amount of any costs incurred by the state of Washington as a result of its refusal to comply; and

(2) civil penalties of up to \$25,000 per day for each day it refuses to comply.

D. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70.105D.060.

Effective date of this Order: _____

CITY OF BELLINGHAM

PORT OF BELLINGHAM

By _____
The Honorable Mark Asmundson
Mayor, City of Bellingham

By _____
Mr. James Darling
Executive Director
Port of Bellingham

Date _____

Date _____

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

By _____
Steven M. Alexander
Toxics Cleanup Program Regional Manager
Northwest Regional Office

Date _____

cc: TCP, Cost Recovery Coordinator