STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

| | | |
|---|---|---|
| In the Matter of Remedial Action by: | ) | AGREED ORDER |
| | ) | FOR RI/FS |
| Port of Bellingham | ) | No. DE 1090 |

TO: Port of Bellingham
P.O. Box 1677
Bellingham, Washington 98225

I.

Jurisdiction

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

II.

Findings of Fact

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

1. The I&J Waterway (former Olivine Hilton Sediment) Site is located in the vicinity of the 1000 block of Hilton Avenue in Bellingham. The site consists of contaminated marine sediments located within the I&J Waterway and the berth areas adjacent to and in the vicinity of the above-listed address.

2. Between the early 1900s and 1940, prior to ownership by the Port, the upland and berth areas were owned by the Whatcom Falls Mill Company. Whatcom Falls Mill Company operated a lumber mill in that location.

3. The Port is the current owner of the upland areas along the south side of the I&J Waterway and of the waterway berth area. The Port has owned those properties since 1944.

4. Since 1944, the upland properties along the waterway have been used for industrial activities by other parties that were tenants of the Port. Between 1947 and 1962, a lumber mill was operated by Bayshore Lumber at the head of the waterway. That mill was later operated from 1963 to 1972 by H&H products. Operation of both mills included log handling within the waterway. Between 1963 and 1992, the Olivine Corporation operated a rock crushing plant for the mineral olivine. Fugitive dusts and wastewaters from that plant were released to the I&J Waterway at times during plant operation. Between 1946 and 1959, North Pacific Frozen Products operated a frozen foods processing plant. Between 1959 and the present, Bornstein Seafoods has operated a seafood processing facility. The Bornstein building was destroyed by fire in 1985 and was rebuilt in the same location.

5. The state of Washington is the owner of the aquatic lands within the I&J Waterway. A federal navigation channel is located within the I&J Waterway.

6. An environmental site assessment was conducted by Landau Associates, Inc., in 1994. The assessment consisted of review of site history, upland and sediment sampling and analysis. In 1995, Harding Lawson Associates conducted additional investigation which included installation of four groundwater water monitoring wells, excavation of three test pits and collection of four sediment core samples. The results of the 1994 and 1995 investigations indicate polynuclear aromatic hydrocarbons (PAHs) in the soil exceed Model Toxics Control Act (MTCA) cleanup level, and chromium in the groundwater exceeds MTCA cleanup level. Sediment sampling detected the presence of hazardous substances, including bis (2-ethylhexyl) phthalate, in waterway and berth area sediments. The Port reported this information to Ecology. Ecology added the site to its list of Confirmed and Suspected Contaminated Sites. The site was

named as Olivine Hilton. Ecology issued Early Notice Letters for the Olivine Hilton site in 1996 to the Port and to the Olivine Corporation.

7. In 1998, Ecology conducted a Site Hazard Assessment and placed the Olivine Hilton site on the Hazardous Sites List.

8. In 1998, the Port commissioned a sediment study of the sediments portion of the Olivine Hilton site. The scope of the study was developed in coordination with Ecology under the Voluntary Cleanup Program. The report from that study (Phase 2 Report) was completed in January of 2001 and summarizes new and existing sediment sampling data, reported as the Olivine Sediments Site.

9. The Phase 2 Report documents the presence of hazardous substances in site surface sediments including phthalate compounds, polynuclear aromatic hydrocarbon (PAH) compounds, nickel, wood waste and other anthropogenic debris. Phthalate compounds, phenol and PAH compounds were present in sediment samples at concentrations above Sediment Management Standards (SMS) numeric Sediment Quality Standards. Nickel, wood waste and debris are subject to regulation by Ecology as Other Deleterious Substances under the Sediment Management Standards and do not have numeric criteria. Bioassay tests were performed in two locations and exceeded SMS Sediment Quality Standards for biological effects at those locations. Elevated levels of mercury associated with the Whatcom Waterway site and elevated levels of methylphenol compounds associated with on-site or off-site activities are also present in site subsurface sediments.

10. Based on the existing data, it appears that the Olivine Hilton upland area contamination is not related to Olivine Hilton sediment contamination in the I-J Waterway. In

2002, Ecology and the Port agreed to split the Olivine-Hilton site into two separate sites: Olivine Hilton Upland and Olivine Hilton Sediment. The Port agreed to continue the Upland area cleanup under Voluntary Cleanup Program, and work with Ecology on the Olivine Hilton Sediment site under an Agreed Order.

11. Ecology sent the Port a preliminary Potentially Liable Person (PLP) notice letter on July 24, 2002, for Olivine-Hilton Sediment site, and issued a final PLP determination letter to the Port on September 25, 2002.

12. In September 2003, Ecology defined a new site as the "Central Waterfront Site," that incorporated and combined four sites previously known as the Olivine Hilton Upland Site, the Roeder Avenue Landfill Site, the Colony Wharf Site, and the Chevron Site. Concurrently, Ecology issued formal notice that the Port of Bellingham and other parties were PLPs for the Central Waterfront Site.

13. In March 2004, Ecology renamed Olivine-Hilton Sediment site, including contaminated marine sediments adjacent to the 1000 block of Hilton Avenue, as the I&J Waterway Site.

14. Ecology issued a final PLP determination letter to Bornstein Seafoods for I&J Waterway site on June 10, 2004.

15. In order to protect human health and the environment and to prevent the release or threatened release of hazardous substances from the I&J Waterway Site, the development of a remedial investigation and feasibility study (RI/FS) is required.

III.

Ecology Determinations

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

1. The Port of Bellingham is an "owner or operator" as defined at RCW 70.105D.020(11) of a "facility" as defined in RCW 70.105D.020(4).

2. The facility is known as the I&J Waterway Site and is located in the marine sediments of the I&J Waterway and berth areas in the vicinity of the 1000 block of Hilton Avenue in Bellingham, Washington 98225. The facility includes contaminated sediments within the I&J Waterway and associated berth areas.

3. The substances found at the facility as described above are "hazardous substances" as defined at RCW 70.105D.020(7).

4. Based on the presence of these hazardous substances at the facility and all factors known to Ecology, there is a release or threatened release of hazardous substances from the facility, as defined at RCW 70.105D.020(19).

5. By letter dated September 25, 2002, Ecology notified the Port of Bellingham of its status as a "potentially liable person" for the I&J Waterway Site (Olivine Hilton Sediment) under RCW 70.105D.040 after notice and opportunity for comment.

6. 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.

7. 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 the Port of Bellingham take the following remedial actions and that these actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein.

1. Purpose & Scope of the RI/FS (the "Work").

The purpose of the Work will be to conduct sediment investigations and complete a Final RI/FS for site sediments pursuant to WAC 173-340-350 and WAC 173-204-560.

2. Description of the Work

2a. Sediments RI/FS

The Port will produce a draft RI/FS (Ecology Review Draft RI/FS) for Ecology review and comment. The Ecology Review Draft of the RI/FS will be submitted to Ecology within 210 days of the effective date of this order. The Ecology Review Draft will identify a Preferred Remedial Alternative for sediment cleanup at the site and will meet MTCA (WAC 173-340-350) and SMS (WAC 173-204-560) requirements for a sediments RI/FS. All chemical and biological data collected as part of the RI/FS will be submitted to Ecology in SEDQUAL electronic data format.

The Port will submit a revised RI/FS (Public Review Draft) to Ecology addressing

Ecology review comments on the Ecology Review Draft RI/FS. The Public Review Draft will be submitted to Ecology within 45 days of receiving Ecology's comments.

The 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.

Within 45 days of Ecology's responsiveness summary, the Port will submit a revised RI/FS (Final RI/FS) addressing issues raised during public comment.

3. Progress Reports

During performance of this Order, the 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 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 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. Failure to pay Ecology's costs within 90 days of receipt of the itemized statement of costs will result in interest charges.

4. Designated Project Coordinators.

The project coordinator for Ecology is:

Name: Sunny Lin Becker, P.E.

Address: Department of Ecology
Northwest Regional Office
3190 160th Avenue SE
Bellevue, WA 98008-5452

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

The project coordinator(s) shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology 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 Port change project coordinator(s), written notification shall be provided to Ecology or the 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 hydrogeologist, or similar expert, with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. The Port shall notify Ecology as to the identity of such engineer(s) or hydrogeologist(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 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 Port shall not perform any remedial actions at the I&J Waterway Site outside that required by this Order unless Ecology concurs, in writing, with such additional remedial actions.

6. Access.

Ecology or any Ecology authorized representative shall have the authority 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 Port. By signing this Agreed Order, the Port agrees that this Order constitutes reasonable notice of access, and agrees to allow 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 Port during an inspection unless doing so interferes with Ecology's sampling. The Port shall allow split or replicate samples to be taken by Ecology and shall provide seven (7) days notice before any sampling activity.

7. Public Participation

The 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 Port shall help coordinate and implement public participation for the site.

8. Retention of Records.

The 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 Port, then the 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.

The Port may request Ecology to resolve disputes which may arise during the implementation of this Order. Such request shall be in writing and directed to the signatory, or his/her successor(s), to this Order. Ecology resolution of the dispute shall be binding and final. The Port is not relieved of any requirement of this Order during the pendency of the dispute and remains responsible for timely compliance with the terms of the Order unless otherwise provided by Ecology in writing.

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 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 Port to require those remedial actions required by this Agreed Order, provided the Port complies with this Agreed Order.

Ecology reserves the right, however, to require additional remedial actions at the Site should it deem such actions necessary.

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 I&J Waterway Site.

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 Port to stop further implementation of this Order for such period of time as needed to abate the danger.

11. Transference of Property

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by the Port without provision for continued implementation of all requirements of this Order and implementation of any remedial actions found to be necessary as a result of this Order.

Prior to transfer of any legal or equitable interest The Port may have in the site or any portions thereof, the Port shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest. At least thirty (30) days prior to finalization of any transfer, The Port shall notify Ecology of the contemplated transfer.

12. Compliance with Other Applicable Laws.

12a. All actions carried out by the 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.

12b. Pursuant to RCW 70.105D.090(1), 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).

The Port has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order. In the event the Port determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, it shall promptly notify Ecology of this determination. Ecology shall determine whether Ecology or the Port shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, the 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 Port and on how the Port must meet those requirements. Ecology shall inform the Port in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. The Port shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination.

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.

12c. 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(1) 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 Port shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

VI.

Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon receipt by the Port of written notification from Ecology that the Port has 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:

1a. The Attorney General may bring an action to enforce this Order in a state or federal court.

1b. 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.

1c. In the event the Port refuses, without sufficient cause, to comply with any term of this Order, the 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.

1d. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under Section 6 of ch. 70.105D RCW.

Effective date of this Order: Jan. 18, 2005

| PORT OF BELLINGHAM | STATE OF WASHINGTON<br>DEPARTMENT OF ECOLOGY |
|---|---|
| By _____ | By _____ |
| Mr. James Darling | Steven M. Alexander |
| Executive Director | Regional Manager, Northwest Regional Office |
| Date 12-16-04 | Date 1.13.05 |

cc: TCP, Cost Recovery Coordinator