



City Council Agenda Bill

<h2 style="margin: 0;">20154</h2> <p style="margin: 0;">Bill Number</p>

Subject: Authorization to enter into an easement agreement with the Washington State Department of Natural Resources necessary to construct the interim action for the R.G. Haley site.

Summary Statement: The City will construct an interim action in October and November of 2013 to contain an oil seep on the R.G Haley Site. The action includes placing an organoclay material in the intertidal area to contain the oil and protect the environment. A portion of the interim action area is located on the Department of Natural Resources (DNR) property. In order to place the material on DNR property an easement is required.

Previous Council Action: Authorization to enter into First and Second Amendments to the R.G. Haley Agreed Order (9/27/10 and 7/1/13).

Fiscal Impact: \$1,522.00

Funding Source: Solid Waste Fund

Attachments: Easement Agreement

Meeting Activity	Meeting Date	Staff Recommendation	Presented By	Time
Consent Agenda	14-Oct-2013	Authorize Contract	Amy Kraham	5

Council Committee:

Agenda Bill Contact:

Amy Kraham

Committee Actions:

Reviewed By

Amy Kraham, Project Manager
Peter Ruffatto, D.H.

Initials	Date
<i>AK</i>	10.8.13
<i>PR</i>	10/9/13
<i>AK</i>	10.8.13
<i>KL</i>	10-8-13

Legal
Mayor

Council Action:

When recorded return to:
Amy Kraham
City of Bellingham
210 Lottie Street
Bellingham, WA 98225



WASHINGTON STATE DEPARTMENT OF
Natural Resources
Peter Goldmark - Commissioner of Public Lands

AQUATIC LANDS SEDIMENT REMEDIATION EASEMENT

Easement No. 51-090393

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources (“State”), and CITY OF BELLINGHAM, a government agency/entity (“Grantee”).

Grantee seeks to fulfill Grantee’s obligation to undertake remedial action for contaminated sediments located on the real property that is the subject of this Agreement. Grantee’s obligation arises under an agreed order issued by the Washington State Department of Ecology (“Regulatory Agency”), a copy of which is attached as Exhibit C. This Agreement does not incorporate Exhibit C.

THE Parties agree as follows:

SECTION 1 GRANT OF EASEMENT

1.1 Easement Defined.

- (a) State grants and conveys to Grantee a nonexclusive easement, subject to the terms and conditions of this agreement, over, upon, and under the real property at R.G. Haley International Corporation: described in Exhibit A. In this agreement, the term “Easement” means this agreement and the rights granted; the term “Easement Property” means the real property subject to the easement.

- (b) This Easement is subject to all valid interests of third parties noted in the records of Whatcom County, or on file in the Office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or federal navigation servitude; and treaty rights of Indian Tribes.
- (c) Except as necessary for the Permitted Use, this Easement does not include any right to harvest, collect or damage any natural resource, including aquatic life or living plants, any water rights, or any mineral rights, including any right to excavate or withdraw sand, gravel, or other valuable materials.
- (d) State grants to Grantee a nonexclusive easement for construction purposes only over the property described in Exhibit B. The construction easement granted by this Section 1.1(d) shall be for the Work authorized by State pursuant to Section 7.3 of this Easement for the removal of the Existing Improvements and construction of the Grantee-Owned Improvements identified in Section 7.2. The construction easement shall terminate on the completion of such Work or March 31, 2014, whichever comes first.

1.2 Survey and Easement Property Descriptions.

- (a) Grantee prepared Exhibit A, which describes the Easement Property. Grantee warrants that Exhibit A is a true and accurate description of the Easement boundaries and the improvements to be constructed or already existing in the Easement area.
- (b) Grantee shall not rely on any written legal descriptions, surveys, plats, or diagrams (“property description”) provided by State. Grantee shall not rely on State’s approval or acceptance of Exhibit A or any other Grantee-provided property description as affirmation or agreement that Exhibit A or other property description is true and accurate. Grantee’s obligation to provide a true and accurate description of the Easement Property boundaries is a material term of this Easement.

1.3 Condition of Easement Property. State makes no representation regarding the condition of the Easement Property, improvements located on the Easement Property, the suitability of the Easement Property for Grantee’s Permitted Use, compliance with governmental laws and regulations, availability of utility rights, or access to the Easement Property.

SECTION 2 USE

2.1 Permitted Use. Grantee shall use the Easement Property for sediment remediation (the “Permitted Use”), and for no other purpose. The Permitted Use is described or shown in detail in Exhibit B.

2.2 Restrictions on Use.

- (a) Except as necessary for the Permitted Use, Grantee shall not cause or allow damage to natural resources on the Easement Property. Grantee shall not cause or allow damage to natural resources on adjacent state-owned aquatic lands.
- (b) Except as necessary for the Permitted Use, Grantee shall not cause or allow deposit of rock, sand, ballast or other similar materials the Easement Property. Grantee shall not cause or permit any filling activity of any kind on adjacent state-owned aquatic land. Grantee shall not cause or allow deposit of wood waste, refuse, garbage, waste matter (including chemical, biological, or toxic wastes), hydrocarbons, any other pollutants, or other matter on the Easement Property or adjacent state-owned aquatic land.
- (c) Grantee shall neither commit nor allow waste to be committed to or on the Easement Property or adjacent state-owned aquatic land.
- (d) Failure to Comply with Restrictions on Use.
 - (1) Grantee's failure to comply with the restrictions on use under this Paragraph 2.2 is a default subject to Section 13. Grantee shall cure the default by taking all steps necessary to remedy the failure and restore the Easement Property and adjacent state-owned aquatic lands to the condition before the failure occurred within the time for cure provided in Section 13.
 - (2) If Grantee fails to cure the default in the manner described in this Paragraph 2.2(d), State may (1) restore the state-owned aquatic lands and charge Grantee restoration costs and/or (2) charge Grantee natural resource damages. On demand by State, Grantee shall pay all restoration costs and natural resources damages.
- (e) State's failure to notify Grantee of Grantee's failure to comply with all or any of the restrictions set out in this Paragraph 2.2 does not constitute a waiver of any remedies available to State.
- (f) Grantee's compliance with this Paragraph 2.2 does not limit Grantee's liability under Section 8, below.

2.3 Conformance with Laws. Grantee shall keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding its use of the Easement Property.

2.4 Liens and Encumbrances. Grantee shall keep the Easement Property free and clear of any liens and encumbrances arising out of or relating to its use of the Easement Property, unless expressly authorized by State in writing.

2.5 Interference with Other Uses.

- (a) Grantee shall exercise Grantee's rights under this Easement in a manner that minimizes or avoids interference with the rights of State, the public or others with valid right to use or occupy the Easement Property or surrounding lands and water.

- (b) To the fullest extent reasonably possible, Grantee shall implement the Permitted Use in a manner that allows unobstructed movement in and on the waters above and around the Easement Property.
- (c) Except in an emergency, Grantee shall provide State with written notice of construction or other significant activity on Easement Property at least thirty (30) days in advance. "Significant Activity" means any activity that may affect use or enjoyment by the State, public, or others with valid rights to use or occupy the Easement Property or surrounding lands and water.
- (d) Grantee shall mark the location of any hazards associated with the Permitted Use and any Improvements in a manner that ensures reasonable notice to the public. Grantee shall mark the location and limits of the Improvements. As required by applicable regulation or the Regulatory Agency, Grantee shall facilitate amendment of official navigational charts to indicate existence and location of submerged improvements.

SECTION 3 TERM

3.1 Term Defined. The term of this Easement is Five (5) years (the "Term"), beginning on the 1st day of October, 2013 (the "Commencement Date"), and ending on the 30th day of September, 2018 (the "Termination Date"), unless terminated sooner under the terms of this Easement.

3.2 End of Term. Upon termination of this Easement, Grantee shall surrender the Easement Property to State restored to a substantially natural state, except for alterations authorized by State as a necessary element of the Permitted Use. Nothing in this Section 3.2 shall relieve Grantee of its obligation to remove Grantee-Owned Improvements at the end of the Term in accordance with Section 7.4.

SECTION 4 FEES

4.1 Fee. For the Term, Grantee shall pay to State a fee of One Thousand, Five Hundred Twenty-Two Dollars and No Cents (\$1,522.00), which is due and payable on or before the Commencement Date. Any payment not paid by State's close of business on the date due is past due.

4.2 Payment Place. Grantee shall make payment, if required, to Financial Management Division, 1111 Washington St SE, PO Box 47041, Olympia, WA 98504-7041.

SECTION 5 OTHER EXPENSES

5.1 Utilities. Grantee shall pay all fees charged for utilities in connection with Grantee's use of the Easement Property, if any.

5.2 Taxes and Assessments. Grantee shall pay all taxes, assessments, and other governmental charges, of any kind whatsoever, applicable or attributable to the Easement and the Permitted Use.

5.3 Failure to Pay. If Grantee fails to pay any of the amounts due under this Easement, State may pay the amount due, and recover its cost in accordance with Section 6.

SECTION 6 LATE PAYMENTS AND OTHER CHARGES

6.1 Late Charge. If State does not receive any payment within ten (10) days of the date due, Grantee shall pay to State a late charge equal to four percent (4%) of the amount of the payment or Fifty Dollars (\$50), whichever is greater, to defray the overhead expenses of State incident to the delay.

6.2 Interest Penalty for Past Due Fees and Other Sums Owed.

- (a) Grantee shall pay interest on the past due fee at the rate of one percent (1%) per month until paid, in addition to paying the late charges determined under Paragraph 6.1, above.
- (b) If State pays or advances any amounts for or on behalf of Grantee, Grantee shall reimburse State for the amount paid or advanced and shall pay interest on that amount at the rate of one percent (1%) per month from the date State notifies Grantee of the payment or advance. This includes, but is not limited to taxes, assessments, insurance premiums, costs of removal and disposal of unauthorized materials pursuant to Paragraph 2.2 above, costs of removal and disposal of improvements pursuant to Section 7 below, or other amounts not paid when due.

6.3 Referral to Collection Agency and Collection Agency Fees. If State does not receive payment within thirty (30) days of the due date, State may refer the unpaid amount to a collection agency as provided by RCW 19.16.500 or other applicable law. Upon referral, Grantee shall pay collection agency fees in addition to the unpaid amount.

6.4 No Accord and Satisfaction. If Grantee pays, or State otherwise receives, an amount less than the full amount then due, State may apply such payment as it elects. No endorsement or statement on any check, any payment, or any letter accompanying any check or payment constitutes accord and satisfaction.

SECTION 7 IMPROVEMENTS

7.1 Improvements Defined.

- (a) "Improvements," consistent with RCW 79.105 through 79.145, are additions within, upon, or attached to the land. This includes, but is not limited to, structures and fixtures.
- (b) "State-Owned Improvements" are Improvements made or owned by State.
- (c) "Grantee-Owned Improvements" are Improvements made by Grantee with State's consent. Grantee-Owned Improvements includes any materials deposited as part of the Permitted Use.
- (d) "Unauthorized Improvements" are Improvements made on the Easement Property without State's prior consent or Improvements made by Grantee that do not conform with plans submitted to and approved by the State.
- (e) "Improvements Owned by Others" are Improvements made by Others with a right to occupy or use the Easement Property or adjacent state-owned lands.

7.2 Existing Improvements. On the Commencement Date, the following Improvements are located on the Easement Property: approximately forty (40) wood pilings in poor condition. Proposed Improvements consist of a sediment cap of sand-organoclay mix, a containment berm, and armoring over the cap. The Proposed Improvements are Grantee-Owned Improvements.

7.3 Construction, Major Repair, Modification, and Demolition.

- (a) This Paragraph 7.3 governs construction, alteration, replacement, major repair, modification alteration, demolition and deconstruction of Improvements ("Work"). Section 11 governs routine maintenance and minor repair of Improvements and Easement Property.
- (b) Except in an emergency, Grantee shall not conduct any Work, except as described in Exhibit B, without State's prior written consent, as follows:
 - (1) State may deny consent if State determines that denial is in the best interests of the State. State may impose additional conditions reasonably intended to protect and preserve the Easement Property.
 - (2) Except in an emergency, Grantee shall submit to State plans and specifications describing the proposed Work at least sixty (60) days before submitting permit applications to regulatory authorities unless Grantee and State otherwise agree to coordinate permit applications. At a minimum, or if no permits are necessary, Grantee shall submit plans and specifications at least ninety (90) days before commencement of Work. This submittal requirement does not apply to activity described in Exhibit B.
 - (3) State waives the requirement for consent if State does not notify Tenant of its grant or denial of consent within sixty (60) days of submittal.
- (c) Grantee shall notify State of emergency Work within five (5) business days of the start of such Work. Upon State's request, Grantee shall provide State with plans and specifications or as-builts of emergency Work.
- (d) Grantee shall not commence or authorize Work until Grantee has:
 - (1) Obtained all required permits.

- (2) Provided notice of Significant Activity in accordance with Paragraph 2.5(c).
- (3) Obtained a performance and payment bond, enforceable by State, in an amount equal to one hundred twenty-five percent (125%).
- (e) Grantee shall preserve and protect State-Owned Improvements and Improvements Owned by Others, if any.
- (f) Grantee shall preserve all legal land subdivision survey markers and witness objects ("Markers.") If disturbance of a Marker will be a necessary consequence of Grantee's construction, Grantee shall reference and/or replace the Marker in accordance with all applicable laws and regulations current at the time, including, but not limited to Chapter 58.24 RCW. At Grantee's expense, Grantee shall retain a registered professional engineer or licensed land surveyor to reestablish destroyed or disturbed Markers in accordance with U.S. General Land Office standards.
- (g) Before completing Work, Grantee shall remove all debris and restore the Easement Property, as nearly as possible, to a substantially natural state, except for alterations necessary under the Permitted Use or otherwise authorized by State.
- (h) Upon completing Work, Grantee shall promptly provide State with as-built plans and specifications.

7.4 Grantee-Owned Improvements at End of Easement. Grantee-Owned Improvements shall be removed from the Property upon termination of the Easement, unless the Parties agree otherwise.

7.5 Disposition of Unauthorized Improvements.

- (a) Unauthorized Improvements belong to State, unless State elects otherwise.
- (b) State may either:
 - (1) Consent to Grantee ownership of the Improvements, or
 - (2) Charge use and occupancy fee in accordance with RCW 79.105.200 of the Improvements from the time of installation or construction and
 - (i) Require Grantee to remove the Improvements in accordance with Paragraph 7.3, in which case Grantee shall pay use and occupancy fee for the Improvements until removal,
 - (ii) Consent to Improvements remaining and Grantee shall pay use and occupancy fee for the use of the Improvements, or
 - (iii) Remove Improvements and Grantee shall pay for the cost of removal and disposal, in which case Grantee shall pay use and occupancy fee for use of the Improvements until removal and disposal.

7.6 Disposition of Existing Improvements. Grantee shall remove Existing Improvements in accordance with the plans and specifications for the Work approved by State in accordance with Section 7.3(b) of this Easement.

SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION

8.1 Definitions.

- (a) "Hazardous Substance" means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup
- (b) "Release or threatened release of Hazardous Substance" means a release or threatened release as defined under any law described in Paragraph 8.1(a) or any similar event defined under any such law.
- (c) "Utmost care" means the standard of care applicable under MTCA, RCW 70.105D.040.

8.2 General Conditions.

- (a) Grantee's obligations under this Section 8 extend to the area in, on, under, or above:
 - (1) The Easement Property and
 - (2) Adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances may arise from Grantee's use of the Easement Property.
- (b) Standard of Care.
 - (1) Grantee shall exercise the utmost care with respect to Hazardous Substances.
 - (2) In relation to the Permitted Use, Grantee shall exercise utmost care for the foreseeable acts or omissions of third parties with respect to Hazardous Substances, and the foreseeable consequences of those acts or omissions.

8.3 Current Conditions and Duty to Investigate.

Grantee is responsible for conducting all appropriate inquiry and gathering sufficient information concerning the Easement Property and the existence, scope, and location of any Hazardous Substances on the Easement Property or on adjacent lands that allows Grantee to meet Grantee's obligations for sediment remediation.

8.4 Use of Hazardous Substances.

- (a) Grantee, its, contractors, agents, employees, guests, invitees, or affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances, except in accordance with all applicable laws or as authorized by the Regulatory Agency.
- (b) Grantee shall not undertake, or allow others to undertake by Grantee's permission, acquiescence, or failure to act, activities that:
 - (1) Result in a release or threatened release of Hazardous Substances, or
 - (2) Cause, contribute to, or exacerbate existing contamination.
- (c) If use of Hazardous Substance related to the Permitted Use results in a violation of an applicable law:

- (1) Grantee shall submit to State any plans for remedying the violation, and
- (2) Grantee shall implement any measures State may require to restore the Easement Property in addition to measures required by the Regulatory Agency or other regulatory authorities to remedy the violation.

8.5 Management of Contamination.

- (a) Grantee is responsible for management of Permitted Use and any contamination the Permitted Use is intended to remediate.
- (b) Grantee is responsible for all monitoring and maintenance of the Permitted Use required by any regulatory authority, order, agreement or decree.

8.6 Notification and Reporting.

- (a) Grantee shall immediately notify State if Grantee becomes aware of any of the following:
 - (1) A release or threatened release of Hazardous Substances;
 - (2) Any new discovery of or new information about a problem or liability related to, or derived from, the presence of any Hazardous Substance;
 - (3) Any lien or action arising from the foregoing;
 - (4) Any actual or alleged violation of any federal, state, or local statute, ordinance, rule, regulation, or other law pertaining to Hazardous Substances;
 - (5) Any notification from the US Environmental Protection Agency (EPA) or the Washington State Department of Ecology (DOE) that additional remediation or removal of Hazardous Substances is or may be required at the Easement Property.
- (b) Grantee's duty to report under Paragraph 8.6(a) extends to the Easement Property, adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances could arise from the Easement Property.
- (c) Grantee shall provide State with copies of all documents concerning environmental issues associated with the Easement Property, and submitted by Grantee to any federal, state or local authorities.

8.7 Indemnification.

- (a) "Liabilities" as used in this Paragraph 8.7 means any claims, demands, proceedings, lawsuits, damages, costs, expenses, fees (including attorneys' fees and disbursements), penalties, or judgments.
- (b) Grantee shall fully indemnify, defend, and hold State harmless from and against any Liabilities that arise out of, or relate to the Permitted Use.
- (c) Grantee's indemnification obligations survive termination of the Easement.

8.8 Reservation of Rights.

- (a) For any environmental liabilities not covered by the indemnification provisions of Paragraph 8.7, the Parties expressly reserve and do not waive or relinquish any rights, claims, immunities, causes of action, or defenses relating to the presence,

release, or threatened release of Hazardous Substances that either Party may have against the other under law.

- (b) This Easement affects no right, claim, immunity, or defense either Party may have against third parties, and the Parties expressly reserve all such rights, claims, immunities, and defenses.
- (c) The provisions under this Section 8 do not benefit, or create rights for, third parties.
- (d) The allocations of risks, liabilities, and responsibilities set forth above do not release either Party from, or affect the liability of either Party for, claims or actions by federal, state, or local regulatory agencies concerning Hazardous Substances or the Permitted Use.

8.9 Additional Cleanup.

- (a) If Grantee's act, omission, or breach of obligation under Paragraph 8.4 results in a release of Hazardous Substances, Grantee shall, at Grantee's sole expense, promptly take all actions necessary or advisable to clean up the Hazardous Substances in accordance with applicable law or required by the Regulatory Agency. Cleanup actions include, without limitation, removal, containment, and remedial actions.
- (b) Grantee's obligation to undertake a cleanup under Section 8 is limited to those instances where the Hazardous Substances exist in amounts that exceed the threshold limits of any applicable regulatory cleanup standards.

SECTION 9 ASSIGNMENT

Grantee shall not assign any part of Grantee's interest in this Easement or the Easement Property or grant any rights or franchises to third parties without State's prior written consent.

SECTION 10 INDEMNITY, FINANCIAL SECURITY, INSURANCE

10.1 Indemnity. Each Party is responsible for the actions and inactions of itself and its own officers, employees, and agents acting within the scope of their authority.

10.2 Insurance Terms.

- (a) Insurance Required.
 - (1) At its own expense, Grantee shall procure and maintain during the Term of this Easement, the insurance coverages and limits described in this Paragraph 10.2 and in Paragraph 10.3, Insurance Types and Limits.
 - (2) Unless State agrees to an exception, Grantee shall provide insurance issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. Grantee may submit a request to the risk manager for the Department of Natural Resources for an

- exception to this requirement. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies must comply with Chapter 48.15 RCW and 284-15 WAC.
- (3) The State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees must be named as an additional insured on all general liability, excess, umbrella, property, builder's risk, and pollution legal liability insurance policies.
 - (4) All insurance provided in compliance with this Easement must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.
- (b) Waiver.
- (1) Grantee waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this Easement covers these damages.
 - (2) Except as prohibited by law, Grantee waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this Easement.
- (c) Proof of Insurance.
- (1) Grantee shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with insurance requirements specified in this Easement and, if requested, copies of policies to State.
 - (2) The certificate(s) of insurance must reference additional insureds and the Easement number.
 - (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.
- (d) State must receive written notice before cancellation or non-renewal of any insurance required by this Easement, in accordance with the following:
- (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State forty-five (45) days' advance notice of cancellation or non-renewal.
 - (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State thirty (30) days' advance notice of cancellation or non-renewal.
- (e) Adjustments in Insurance Coverage.
- (1) State may impose changes in the limits of liability for all types of insurance as State deems necessary.
 - (2) Grantee shall secure new or modified insurance coverage within thirty (30) days after State requires changes in the limits of liability.
- (f) If Grantee fails to procure and maintain the insurance described above within fifteen (15) days after Grantee receives a notice to comply from State, State may either:

- (1) Deem the failure an Event of Default under Section 14, or
 - (2) Procure and maintain comparable substitute insurance and pay the premiums. Upon demand, Grantee shall pay to State the full amount paid by State, together with interest at the rate provided in Paragraph 6.2 from the date of State's notice of the expenditure until Grantee's repayment.
- (g) General Terms.
- (1) State does not represent that coverage and limits required under this Easement will be adequate to protect Grantee.
 - (2) Coverage and limits do not limit Grantee's liability for indemnification and reimbursements granted to State under this Easement.
 - (3) The Parties shall use any insurance proceeds payable by reason of damage or destruction to Easement Property first to restore the Easement Property, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Grantee.

10.3 Insurance Types and Limits.

- (a) General Liability Insurance.
 - (1) Grantee shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Easement Property and/or arising out of the Permitted Use and, if necessary, commercial umbrella insurance with a limit of not less than One Million Dollars (\$1,000,000) per each occurrence. If such CGL or MGL insurance contains aggregate limits, the general aggregate limit must be at least twice the "each occurrence" limit. CGL or MGL insurance must have products-completed operations aggregate limit of at least two times the "each occurrence" limit.
 - (2) CGL insurance must be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent coverage). All insurance must cover liability arising out of premises, operations, independent contractors, products completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a business contract) and contain separation of insured (cross-liability) condition.
 - (3) MGL insurance must have no exclusions for non-owned watercraft.
- (b) Workers' Compensation.
 - (1) State of Washington Workers' Compensation.
 - (i) Grantee shall comply with all State of Washington workers' compensation statutes and regulations. Grantee shall provide workers' compensation coverage for all employees of Grantee. Coverage must include bodily injury (including death) by accident or disease, which arises out of or in connection with the Permitted Use or related activities.

- (ii) If Grantee fails to comply with all State of Washington workers' compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Grantee shall indemnify State. Indemnity includes all fines; payment of benefits to Grantee, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
 - (2) Longshore and Harbor Workers' Act. The Longshore and Harbor Workers' Compensation Act (33 U.S.C. Section 901 *et. seq.*) may require Grantee to provide insurance coverage for longshore and harbor workers other than seaman. Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Grantee is fully responsible for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Grantee is responsible for all civil and criminal liability arising from failure to maintain such coverage.
 - (3) Jones Act. The Jones Act (46 U.S.C. Section 688) may require may require Grantee to provide insurance coverage for seamen injured during employment resulting from negligence of the owner, master, or fellow crew members. Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Grantee is fully responsible for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Grantee is responsible for all civil and criminal liability arising from failure to maintain such coverage.
- (c) Employer's Liability Insurance. Grantee shall procure employer's liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than One Million Dollars (\$1,000,000) each accident for bodily injury by accident or One Million Dollars (\$1,000,000) each employee for bodily injury by disease.

10.4 Financial Security.

- (a) At its own expense, Grantee shall procure and maintain during the Term of this Easement, a corporate security bond or provide other financial security that State may approve ("Security"). Grantee shall provide Security in an amount equal to Zero Dollars (\$0.00), which secures Grantee's performance of its obligations under this Easement. Grantee's failure to maintain the Security in the required amount during the Term is a breach of this Easement.
- (b) All Security must be in a form acceptable to the State.
 - (1) Bonds must be issued by companies admitted to do business within the State of Washington and have a rating of A-, Class VII or better, in the most recently published edition of Best's Reports, unless State approves an exception.. Grantee may submit a request to the risk manager for the Department of Natural Resources for an exception to this requirement.
 - (2) Letters of credit, if approved by State, must be irrevocable, allow State to draw funds at will, provide for automatic renewal, and comply with RCW 62A.5-101, *et. seq.*

- (3) Savings account assignments, if approved by State, must allow State to draw funds at will.
- (c) Adjustment in Amount of Security.
 - (1) State may require an adjustment in the Security amount:
 - (i) At the same time as revaluation, if any,
 - (ii) As a condition of approval of assignment of this Easement,
 - (iii) Upon a material change in the condition or disposition of any Improvements, or
 - (iv) Upon a change in the Permitted Use.
 - (2) Grantee shall deliver a new or modified form of Security to State within thirty (30) days after State has required adjustment of the amount of the Security.
- (d) Upon any default by Grantee in its obligations under this Easement, State may collect on the Security to offset the liability of Grantee to State. Collection on the Security does not (1) relieve Grantee of liability, (2) limit any of State's other remedies, (3) reinstate or cure the default or (4) prevent termination of the Easement because of the default.

SECTION 11 ROUTINE MAINTENANCE AND REPAIR

11.1 State's Repairs. This Easement does not obligate State to make any alterations, maintenance, replacements, or repairs in, on, or about the Easement Property, during the Term.

11.2 Grantee's Repairs and Maintenance.

- (a) Routine maintenance and repair are acts intended to prevent a decline, lapse or, cessation of the Permitted Use.
- (b) At Grantee's sole expense, Grantee shall keep and maintain all Grantee-Owned Improvements and the Easement Property as it relates to the Permitted Use in good order and repair and in a safe condition in accordance with any directives from the Regulatory Agency or any order, agreement, or decree. State's consent is not required for routine maintenance or repair.
- (c) At Grantee's own expense, Grantee shall make any additions, repairs, alterations, maintenance, replacements, or changes to the Easement Property or to any Improvements on the Easement Property that any public authority requires because of the Permitted Use.
- (d) Upon completion of maintenance activities, Grantee shall remove all debris and restore the Easement Property, as nearly as possible, to the condition prior to the commencement of work.

SECTION 12 DAMAGE OR DESTRUCTION

12.1 Notice and Repair.

- (a) In the event of any known damage to or destruction of the Easement Property or any Improvements, Grantee shall promptly give written notice to State. State does not have actual knowledge of the damage or destruction of the Easement Property or any Improvements without Grantee's written notice.
- (b) Grantee shall promptly reconstruct, repair, or replace any Improvements in accordance with any directive from the Regulatory Agency and Paragraph 7.3, Construction, Major Repair, Modification, and Demolition, as nearly as possible to its condition immediately prior to the damage or destruction.

12.2 State's Waiver of Claim. State does not waive any claims for damage or destruction of the Easement Property unless State provides written notice to Grantee of each specific claim waived.

12.3 Insurance Proceeds. Grantee's duty to reconstruct, repair, or replace any damage or destruction of the Easement Property or any Improvements on the Easement Property is not conditioned upon the availability of any insurance proceeds to Grantee from which the cost of repairs may be paid. The Parties shall use insurance proceeds, if any, in accordance with Paragraph 10.2(g)(3).

SECTION 13 DEFAULT AND REMEDIES

13.1 Default Defined. Grantee is in default of this Easement on the occurrence of any of the following:

- (a) Failure to comply with any order, decree, or agreement issued by the Regulatory Agency to the Grantee in connection with the Permitted Use.
- (b) Failure to comply with any law, regulation, policy, or order of any lawful governmental authority in connection with the Permitted Use;
- (c) Failure to comply with any provision of this Easement.

13.2 Cure Period. State shall provide Grantee written notice of breach. Grantee shall have sixty (60) days after receiving notice to cure. State may extend the cure period if breach is not reasonably capable of cure within sixty (60) days.

13.3 State's Damages. Grantee is responsible for any damages that State incurs as a result of Grantee's default.

SECTION 14 TERMINATION

This Easement terminates in accordance with Section 3 or by mutual agreement of the Parties.

SECTION 15 NOTICE AND SUBMITTALS

15.1 Notice. Following are the locations for delivery of notice and submittals required or permitted under this Easement. Any Party may change the place of delivery upon ten (10) days written notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES
Orca-Straits District
919 N. Township Street
Sedro-Woolley, WA 98284

Grantee: CITY OF BELLINGHAM
210 Lottie Street
Bellingham, WA 98225

The Parties may deliver any notice in person, by facsimile machine, or by certified mail. Depending on the method of delivery, notice is effective upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three (3) days after mailing. All notices must identify the Easement number. On notices transmitted by facsimile machine, the Parties shall state the number of pages contained in the notice, including the transmittal page, if any.

15.2 Contact Persons. On the Commencement Date, the following persons are designated day-to-day contact persons. Any Party may change the Contact Person upon reasonable notice to the other.

State: Dennis Clark, Field Assistant Division Manager
Telephone: 360-854-2805
Fax: 360-856-2150
E-mail: dennis.clark@dnr.wa.gov

Grantee: Amy Kraham, Environmental Remediation Project Manager
Telephone: 360-778-8278
Fax: 360-778-8271
E-mail: akraham@cob.org

SECTION 16 MISCELLANEOUS

16.1 Authority. Grantee and the person or persons executing this Easement on behalf of Grantee represent that Grantee is qualified to do business in the State of Washington, that Grantee has full right and authority to enter into this Easement, and that each and every person signing on behalf of Grantee is authorized to do so. Upon State's request, Grantee shall provide evidence satisfactory to State confirming these representations. This Easement is entered into by State pursuant to the authority granted it in Chapter 43.12 RCW, Chapter 43.30 RCW, and Title 79 RCW and the Constitution of the State of Washington.

16.2 Successors and Assigns. This Easement binds and inures to the benefit of the Parties, their successors, and assigns.

16.3 Headings. The headings used in this Easement are for convenience only and in no way define, limit, or extend the scope of this Easement or the intent of any provision.

16.4 Entire Agreement. This Easement, including the exhibits and addenda, if any, contains the entire agreement of the Parties. This Easement merges all prior and contemporaneous agreements, promises, representations, and statements relating to this transaction or to the Easement Property.

16.5 Waiver. The waiver of any breach or default of any term, covenant, or condition of this Easement is not a waiver of such term, covenant, or condition; of any subsequent breach or default of the same; or of any other term, covenant, or condition of this Easement. State's acceptance of payment is not a waiver of any preceding or existing breach other than the failure to pay the particular payment that was accepted.

16.6 Cumulative Remedies. The rights and remedies of State under this Easement are cumulative and in addition to all other rights and remedies afforded by law or equity or otherwise.

16.7 Time is of the Essence. TIME IS OF THE ESSENCE as to each and every provision of this Easement.

16.8 Language. The word "Grantee" as used in this Easement applies to one or more persons, as the case may be. The singular includes the plural, and the neuter includes the masculine and feminine. If there is more than one Grantee, their obligations are joint and several. The word "persons," whenever used, includes individuals, firms, associations, and corporations. The word "Parties" means State and Grantee in the collective. The word "Party" means either or both State and Grantee, depending on context.

16.9 Invalidity. The invalidity, voidness, or illegality of any provision of this Easement does not affect, impair, or invalidate any other provision of this Easement.

16.10 Applicable Law and Venue. This Easement is to be interpreted and construed in accordance with the laws of the State of Washington. Any reference to a statute means that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this Easement is in the Superior Court for Thurston County, Washington.

16.11 Recordation. At Grantee's expense and no later than thirty (30) days after receiving the fully-executed Easement, Grantee shall record this Lease in the county in which the Property is located. Grantee shall include the parcel number of the upland property used in conjunction with the Property, if any. Grantee shall provide State with recording information, including the date of recordation and file number.

16.12 Modification. No modification of this Easement is effective unless in writing and signed by the Parties. Oral representations or statements do not bind either Party.

16.13 Survival. Any obligations of Grantee not fully performed upon termination of this Easement do not cease, but continue as obligations of the Grantee until fully performed.

16.14 Exhibits. All referenced exhibits are incorporated in this Easement unless expressly identified as unincorporated.

THIS AGREEMENT requires the signature of all Parties and is effective on the date of the last signature below.

CITY OF BELLINGHAM

Dated: _____, 20__

KELLI LINVILLE
Mayor
210 Lottie Street
Bellingham, WA 98225

Approved as to Form

Attest:

AMY KRAHAM
Office of the City Attorney

BRIAN HENSHAW
Acting Finance Director

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

Dated: _____, 20__

KRISTIN SWENDDAL
Division Manager
Aquatic Resources Division
1111 Washington Street SE
Olympia, WA 98504

Approved as to Form this
23 day of September, 2013
Terrence Fruit, Assistant Attorney General

EXHIBIT A

Agreement Number 51-090393

Recording number of final DNR approved survey in Whatcom County: AF#2130902103

Legal description of the Property: Interim Action Area Description

That portion of the Bellingham Harbor Area, per the "1971 Supplemental Map of Bellingham Harbor", lying within a portion of the northeast quarter of Section 36, Township 38 north, Range 2 east, W.M., described as follows;

Commencing at City of Bellingham Monument #588, being a 2" brass disc w/drill hole set in concrete at the intersection of Cornwall Ave. & Pine St., from which City of Bellingham monument #5604 bears S47°22'02"W 1106.94 feet, thence S51°10'55" W 870.67 feet to the point of beginning;

Thence N23°09'25"W 55.97 feet; more or less to the south margin of the Port Management Area (PMA); thence along said south margin S56°22'46"W 71.74 feet; thence departing said south margin S25°02'49"E 16.10 feet; thence N89°24'01"E 4.31 feet; thence S82°02'43"E 16.70 feet; thence S50°45'00"E 4.60 feet; thence S15°57'11"W 13.83 feet; thence S81°07'26"E 6.54 feet; thence S85°05'56"E 6.36 feet; thence S23°12'01"E 6.97 feet; thence S72°02'47"E 3.69 feet; thence N66°28'46"E 7.13 feet; thence N64°40'32"E 6.51 feet; thence N20°38'59"E 13.96 feet; thence N47°37'52"E 5.54 feet; thence N75°17'05"E 8.22 feet; thence N44°53'35"E 8.32 feet, more or less, to the point of beginning.

Containing 3,475 square feet, more or less.

Situate in Whatcom County, Washington.

EXHIBIT B

1. DESCRIPTION OF PERMITTED USE

- A. **Existing Facilities.** Approximately forty (40) wood pilings in poor condition.
- B. **Proposed Facilities.** Grantee has submitted to State plans and specifications for Work shown in Attachment 1 to this Exhibit B, which is not incorporated in this Easement. State grants its consent to this Work as provided under Paragraph 7.3(b) of the Easement, except that Grantee shall conform all Work to all other requirements of Section 7 of this Easement.
- C. **Temporary Construction Easement.** State grants a non-exclusive easement for construction purposes for the following area:

That portion of the Bellingham Harbor Area, per the "1971 Supplemental Map of Bellingham Harbor", lying within a portion of the northeast quarter of Section 36, Township 38 north, Range 2 east, W.M., described as follows;

Commencing at City of Bellingham Monument #5604, being a 2" aluminum disc w/nipple set in concrete, from which City of Bellingham Monument #588 bears N47°22'02"E 1106.94 feet, thence N39°59'08"E 103.31 feet to the point of beginning;

Thence N39°00'26"W 72.00 feet; thence N50°59'34"E 35.35 feet; thence N07°03'24"E 11.53 feet; thence N50°59'34"E 15.37 feet; thence N90°00'00"E 19.27 feet; thence S39°00'26"E 101.09 feet, more or less, to the Inner Harbor Line; thence along said Inner Harbor Line S42°01'46"W 74.91 feet; thence departing said Inner Harbor Line N39°00'26"W 44.89 feet, more or less, to the point of beginning.

Containing 8,403 square feet, more or less.

Situate in Whatcom County, Washington.

2. ADDITIONAL OBLIGATIONS

- A. Grantee shall submit electronic copies of all reports regarding implementation and monitoring of the Interim Action prepared by and for the Grantee to State within 30 days of completion of each report.
- B. Grantee shall follow the following best management practices for removal of creosote-treated pilings:

1. WORK SURFACE AND CONTAINMENT

Work surface on the upland staging area shall include a containment basin for all treated materials. Creosote shall be prevented from re-entering the water. Uncontaminated water run-off can return to the beach/water.

- a. Containment basin shall be constructed of durable plastic sheeting with continuous sidewalls supported by hay bales, ecology blocks, other non-contaminated materials, or support structure to contain all sediment and creosote. Containment basin shall be lined with oil absorbent boom.
- b. Containment basin shall be removed and disposed in accordance with BMP #3.B or in another manner complying with applicable federal and state regulations.
- c. Upon removal from substrate the pile shall be moved expeditiously into the containment basin. The pile shall not be shaken, hosed-off, left hanging to drip or any other action intended to clean or remove adhering material from the pile.

2. DEBRIS CAPTURE IN WATER OR ON BEACH

- a. Debris contained within boom surrounding project site shall be removed at the end of each work day or immediately if waters are rough and there is a chance that debris may escape the boom.
- b. To the extent possible, all sawdust shall be prevented from contacting beach, bed, or waters of the state. For example, tarps can be placed around the pilings during sawing to capture sawdust.
- c. Any sawdust that enters the water shall be collected immediately and placed in the containment basin.

3. DISPOSAL OF PILING, SEDIMENT, AND CONSTRUCTION RESIDUE

- a. Piles shall be cut into lengths as required by the disposal company.
- b. Cut up piling, sediments, absorbent pads/boom, construction residue and plastic sheeting from containment basin shall be packed into container. For disposal, ship to an approved Subtitle D Landfill.
- c. Creosote-treated materials shall not be re-used.