



# City Council Agenda Bill

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| <h2 style="margin: 0;">20158</h2> <p style="margin: 0;">Bill Number</p> |
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**Subject:** Authorization to enter into an easement agreement with the Port of Bellingham 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 property managed by the Port of Bellingham through a Port Management Agreement with the Department of Natural Resources. In order to place the material on the 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:** None

**Funding Source:**

**Attachments:** Easement Agreement

| Meeting Activity | Meeting Date | Staff Recommendation | Presented By | Time |
|------------------|--------------|----------------------|--------------|------|
| Consent Agenda   | 14-Oct-2013  | Vote to Approve      | Amy Kraham   | 2    |
|                  |              |                      |              |      |

**Council Committee:**

**Agenda Bill Contact:**

Amy Kraham

**Committee Actions:**

| Reviewed By                 | Initials          | Date           |
|-----------------------------|-------------------|----------------|
| Amy Kraham, Project Manager | <i>A.K.</i>       | <i>10.9.13</i> |
| Peter Ruffatto, D.H.        | <i>SRB for PR</i> | <i>10.9.13</i> |
|                             |                   |                |
| Legal                       | <i>Ant.</i>       | <i>10.9.13</i> |
| Mayor                       | <i>KL</i>         | <i>10.9.13</i> |

**Council Action:**

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

### AQUATIC LANDS TEMPORARY EASEMENT

**THIS AGREEMENT** is made by and between the Port of Bellingham (the "Port"), and City of Bellingham (the "City").

**WHEREAS**, the City owns the real property generally described as the RG Haley Property at the foot of Cornwall Avenue in Bellingham, Washington.

**WHEREAS**, the Property and adjacent aquatic lands have been designated by the Department of Ecology as a site pursuant to chapter 70.105D RCW (the "Site").

**WHEREAS**, the City intends to conduct an interim remedial action on the Site which includes (i) removal of approximately forty (40) wood pilings in poor condition and (ii) placement of a temporary sediment cap of sand-organoclay mix, a containment berm, and armoring over the cap (the "Interim Action").

**WHEREAS**, a portion of the aquatic lands where the Interim Action will be conducted is on state-owned aquatic lands managed by the Port pursuant to chapter 79.90 RCW (the "Easement Property") under the Port Management Agreement (the "PMA") between the Port and the Department of Natural Resources ("DNR"). A record of survey dated September 19, 2013 (the "Survey") is attached hereto as Exhibit "A" which identifies the Easement Property that will be used as part of the Interim Action. The legal description of the Easement Property is attached hereto as Exhibit "B".

**WHEREAS**, the Department of Ecology has named the Port as a potentially liable party (as the term is defined in chapter 70.105 RCW and its implementing codes) for the Site.

**WHEREAS**, the Port has denied any liability for the Site.

**WHEREAS**, pursuant to the PMA without specific agreement of DNR, the Port is not authorized to allow the Interim Action on the Easement Property.

**NOW THEREFORE**, the Port and the City agree as follows:

1. **Grant of Temporary Easement** Subject to the terms and conditions of the PMA ( a copy of which has been provided to the City) and subject to the City obtaining approval from DNR, the Port hereby grants to the City a temporary non-exclusive easement to conduct the Interim Action on the Easement Property.
2. **City to Obtain DNR Approval.** It is noted that DNR has indicated that it will grant a similar five year temporary easement over and across the aquatic lands controlled by DNR and identified on the Survey. It is also noted that placement of the Interim Action is not permitted under the PMA. Therefore, the City will, prior to conducting any portion of the Interim Action on the Easement Property obtain the written agreement of DNR (to the reasonable satisfaction of the Port) that DNR has provided permission to the Port and the City to allow the Interim Action on the Easement Property and to enter into this Easement.
3. **Survey and Condition of Easement Property.** The Port makes no representation regarding accuracy of the Survey, the condition of the Easement Property, improvements located on the Easement Property, the suitability of the Easement Property for the City's Interim Action, compliance with governmental laws and regulations, availability of utility rights, or access to the Easement Property.
4. **Permitted Use.** The City shall use the Easement Property for Interim Action and for no other purpose.
5. **Conformance with Laws.** The City 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.
6. **Liens and Encumbrances.** The City 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 the Port in writing.
7. **Term.** The term of this Easement is five (5) years (the "Term"), beginning on the 1st day of October, 2013 and ending on the 30th day of September, 2018, unless terminated sooner under the terms of this Easement.
8. **End of Term .** Upon termination of this Easement, the City shall surrender the Easement Property to the Port restored to a substantially natural state with all material placed on the Easement Property as part of the Interim Action removed except for improvements that (i) DNR agrees can be left in place and (ii) the Port agrees can be left in place.
9. **Fee .** For and in consideration of the Easement, the Port shall receive a reasonable credit as against any liability of the Port for the remediation of the Site. Without limiting the foregoing, the Port has denied any liability for the Site and therefore this Easement, the Fee or

the Port's willingness to grant this Easement shall not be evidence of any such liability and shall not be admissible in any proceeding to prove such liability.

10. **City's Indemnification of the Port.** To the extent permitted by law, the City will indemnify, save, defend and hold the Port harmless from any claim of personal injury or property damage made by any third party resulting from this Easement or the Interim Action to the extent and in proportion to the negligence or willful conduct of the City, its employees, consultants or contractors. Without limiting the foregoing, the City will, to the extent permitted by law, save, defend and hold the Port harmless from any claim of DNR arising from the use of the Easement Property for the Interim Action.

11. **Not a Public Dedication.** Nothing herein contained shall be deemed to be a gift or dedication of any portion of real property described herein to the general public, or for any public use or purpose whatsoever, except as may be specifically provided herein.

12. **No Third Party Beneficiary.** No other right, privilege, or immunity of any party hereto shall inure to the benefit of any third party, nor shall any third party be deemed to be a beneficiary of any of the provisions contained herein, except as specifically noted herein.

13. **Notices.** All notices, demands, requests, consents and approvals that may or are required to be given shall be in writing and directed to:

Port: Director of Environmental Programs  
Port of Bellingham  
1801 Roeder Avenue  
P.O. Box 1677  
Bellingham, WA 98227-7107

City: Amy Kraham  
City of Bellingham  
210 Lottie Street  
Bellingham, WA 98225

Delivery shall be deemed to have been duly given if delivered personally; sent by facsimile or scanned and emailed; or if mailed, deposited in the United States mail. Facsimile transmission of any signed original document and retransmission of any signed facsimile transmission shall be the same as delivery of an original document.

14. **Amendment.** No modification or amendment of this Easement may be made except by a written document approved by the Port and the City respectively.

15. **Additional Acts.** Except as otherwise provided herein, in addition to the acts and deeds recited herein and contemplated to be performed, executed and/or delivered by either party hereto, the parties agree to perform, execute and/or deliver, or cause to be performed, executed and/or delivered, any and all such further acts, deeds and assurances, which may reasonably be required to effect the purposes of this Easement.

16. **Neutral Authorship.** Each provision of this Easement has been reviewed and negotiated, and represents the combined work product of both parties hereto. No presumption or other rules of construction that would interpret the provisions of this Easement in favor of or against the party preparing the same shall be applicable in connection with the construction or interpretation of any of the provisions of this Easement.

17. **No Liability.** The Port and the City are independent governments. Except as expressly provided herein, neither party shall be liable for the acts or omissions of the other or their respective public officials, employees or agents.

18. **Interlocal Agreements Remain Binding and Enforceable.** Unless specifically noted herein, this Easement does not modify, amend or revoke any existing interlocal agreement between the Port and the City and each such interlocal agreement shall remain binding and enforceable agreements under their respective terms.

19. **Governing Law.** This Easement, and the rights of the parties hereto, shall be governed by and construed in accordance with the laws of the State of Washington and the parties agree that in any such action venue shall lie exclusively in Whatcom County, Washington.

20. **Entire Agreement.** The entire Easement between the City and the Port is contained in this Easement (including the recitals, the exhibits and the terms), and this Easement supersedes all of their previous understandings and agreements, with respect to the subject matter of this Easement, provided, however, this Easement does not supersede or amend any previous written agreements between the City and the Port unless expressly stated herein.

**THIS AGREEMENT CONTAINS VARIOUS RELEASES, INDEMNIFICATIONS AND HOLD HARMLESS AGREEMENTS BY THE PORT TO THE CITY AND THE CITY TO THE PORT**

**ADOPTED** by each government noted below in an open public meeting on the date noted.

**PORT OF BELLINGHAM**

\_\_\_\_\_  
Commission President

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Commission Secretary

**THE CITY OF BELLINGHAM**

**EXECUTED**, this the \_\_\_\_\_ day of October, 2013, for the **CITY OF BELLINGHAM**

**Approved as to Form:**

\_\_\_\_\_  
*Office of the City Attorney*

\_\_\_\_\_  
*Mayor*

**Attest:**

\_\_\_\_\_  
*Finance Director*

\_\_\_\_\_  
*Department Head*

Dated: \_\_\_\_\_

STATE OF WASHINGTON     )  
  ) ss.  
COUNTY OF WHATCOM     )

On this \_\_\_\_ day of October, 2013, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_ and \_\_\_\_\_, known to me to be the President and Secretary, respectively, of the **PORT OF BELLINGHAM**, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument on behalf of the corporation.

Given under my hand and official seal this \_\_\_\_ day of October, 2013.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington, residing at \_\_\_\_\_

STATE OF WASHINGTON     )  
  ) ss.  
COUNTY OF WHATCOM     )

On this \_\_\_\_ day of October, 2013, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_ and \_\_\_\_\_, known to me to be the \_\_\_\_\_ and \_\_\_\_\_, respectively, of the **CITY OF BELLINGHAM**, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument on behalf of the corporation.

Given under my hand and official seal this \_\_\_\_ day of October, 2013.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington, residing at \_\_\_\_\_





**EXHIBIT A  
RECORD OF SURVEY**

**EXHIBIT B**  
**LEGAL DESCRIPTION**