

PORT OF SEATTLE
MEMORANDUM

COMMISSION AGENDA

Item No.	<u>6b</u>
Date of Meeting	<u>May 24, 2011</u>

DATE: May 17, 2011

TO: Tay Yoshitani, Chief Executive Officer

FROM: Stephanie Jones Stebbins, Director, Seaport Environmental & Planning Programs
Kathy Bahnick, Seaport Environmental Programs Manager
Roy Kuroiwa, Senior Environmental Program Manager
Susan Ridgley, Senior Port Counsel

SUBJECT: Administrative Settlement Agreement and Order on Consent (ASAOC) for Removal Action Implementation at Terminal 117, an Early Action Area (EAA) for the Lower Duwamish Waterway (LDW) Superfund

Amount of This Request: \$28,183,000
(does not include cost recoveries)

Source of Funds: Tax Levy plus Cost Recovery from other funds, including grants, partner reimbursement, and insurance

Est. State and Local Taxes: \$898,000

Est. Jobs Generated: N/A

Total Project Cost: \$32,835,000
(Est. Net Costs to Port: \$ up to 17,926,000)

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ACTION REQUESTED:

Request Commission authorization for the Chief Executive Officer to execute an Administrative Settlement Agreement and Order on Consent (ASAOC) with the Environmental Protection Agency (EPA) and the City of Seattle for the Removal Action Implementation at Terminal 117, an Early Action Area (EAA) for the Lower Duwamish Waterway (LDW) Superfund.

SYNOPSIS:

For over ten years, the EPA has been investigating contamination in the Lower Duwamish Waterway Superfund Site. Terminal 117, which is contaminated from polychlorinated biphenyls (PCBs) caused by industrial uses dating from the years before the Port owned the property, was one of the sites on the Duwamish Waterway identified by the EPA as an "Early Action Area" that needed to be addressed through cleanup actions prior to a final EPA determination of cleanup requirements for the LDW as a whole. The Port performed a cleanup of T-117 in 1999, but additional PCB contamination was discovered on the uplands in 2005/2006. In response to community input, the Port agreed to clean up the property to meet unrestricted (residential) standards in 2007. The current EPA order under review and evaluation would likely be the last cleanup obligation at T-117 required by the Port. The total estimated project cost of this cleanup is \$32,835,000 with a net cost to the Port of up to \$17,926,000 after other anticipated cost recovery

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funds are factored in. The Commission authorized this funding on December 7, 2010, as part of the five-year (2011 – 2015) spending plan for the 2011 Environmental Remediation Liability Program. The cleanup is being funded by the tax levy and any cost recoveries the Port receives, such as grants, insurance and partner reimbursements.

The T-117 removal action work consists of the Remedial Design and Removal Action (RA/RD) activities associated with the cleanup design, construction, and (if necessary) long-term maintenance and monitoring of the T-117 Upland, Sediment, and Adjacent City Streets. This work is further detailed in the ASAOC's Statement of Work (SOW) and EPA's record of decision contained in its September 30, 2010, Action Memorandum.

The T-117 Early Action Area (EAA) project consists of three geographic subareas: the Sediments; the Port-owned T-117 Uplands; and the City's Adjacent Streets and Yards. The Port is taking the lead in two subareas – the Sediments and T-117 Uplands – with an estimated total cost of \$28,183,000. This estimated cost does not include anticipated cost recovery opportunities, such as Washington State Department of Ecology (Ecology) grants and the City's payment of its share pursuant to a Settlement Agreement. The City is paying all costs associated with the third subarea – the T-117 Adjacent Streets and Yards. As noted above, most of the Port's share of estimated costs were included in the five-year Environmental Remediation Liability authorization, as approved by Commission on December 7, 2010.

On June 3, 2010, the Port and City jointly submitted the T-117 Engineering Evaluation/Cost Analysis report (EE/CA) to EPA. The EE/CA defined options for cleanup of the T-117 site. EPA thereafter selected a Removal Action Alternative; its decision was memorialized in the Action Memorandum dated September 30, 2010. EPA then issued to the Port and the City a draft ASAOC for Removal Action Implementation and attached Statement of Work (SOW), which is the subject of this memo. Port staff have reviewed and negotiated the content of these documents and recommend that the Commission authorize the CEO to sign the final order.

BACKGROUND:

For over ten years, EPA has been investigating sediment contamination in the Lower Duwamish Waterway (LDW) Superfund Site. In 2003, EPA identified a number of localized contaminated areas ("Early Action Areas" or "EAAs" that needed to be addressed through cleanup actions, prior to a final EPA determination of cleanup requirements for the LDW as a whole. One such location is the LDW sediments and adjoining bank area in the vicinity of the Port property at Terminal 117, referred to as the "T-117 Upland and Sediment Site." The property has also been referred to in earlier Commission actions as "the Malarkey Asphalt Site."

Contamination in the T-117 area is primarily from PCBs, which were used widely for decades, including for transformers and other electric equipment, before their manufacture and use was banned in the United States in 1978. An asphalt shingle plant operated on the upland property for many decades, and, for a period of time in the 1970s, that facility used waste transformer oil as fuel. Seattle City Light appears to have been the source of a significant volume of this waste oil, which was likely tainted with PCBs. Asphalt plant mishandling of waste transformer oil is the most likely source for the majority of the PCB contamination in the vicinity of T-117.

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In 1999, the Port, under EPA supervision, carried out what was believed at the time to be a final cleanup of the upland T-117 property. In 2000, the Port completed its purchase of the property from Marlarkey. Following EPA's designation of the T-117 sediment site as an "Early Action Area," the Port and the City entered into a Memorandum of Agreement in May 2003 to jointly fund the investigation and remediation of contamination within the sediments and in the adjoining bank area. In December 2005, the Port, the City, and the EPA entered into an "Administrative Settlement Agreement and Order on Consent (ASAOC) for the T-117 Early Action Area Removal Action" to perform the work in the sediment and bank areas only. The Agreement required the Port and the City to clean up sediments, intertidal mudflats, bank, and a limited portion of the adjacent uplands.

During the investigation of the bank area, significant contamination above action levels was discovered on the T-117 uplands. In 2005, EPA and the Port agreed to pursue additional investigation of the level and extent of the contamination on the T-117 uplands through an ASAOC for the Upland Investigation. This investigation did identify additional upland areas that required remedial actions. Based on this subsequent upland investigation, in 2007 the SOW of the 2005 ASAOC was amended, and the T-117 cleanup site formally expanded to include three distinct subareas: the Sediments, T-117 Uplands, and Adjacent Streets. In addition, EPA issued a letter (April 12, 2007) directing the Port to clean up the former industrial property to meet unrestricted (e.g., residential) cleanup standards.

In addition, the 2005/2006 upland investigations also discovered elevated PCB concentrations, prompting EPA to issue the 2006 ASAOC for Time Critical Removal Action (TCRA, e.g., interim removal action). The TCRA was issued to quickly remove upland soil that contained very high concentrations of PCBs in order to: a) prevent human exposure and b) remove contaminant sources that are readily available to the waterway. This work was successfully completed in the winter of 2006.

In 2008, the Commission authorized a settlement agreement with Malarkey and the City of Seattle (among others). The relevant portion of the settlement agreement is that future costs were allocated between the City and the Port as follows: the City would pay 100 percent of the costs of the Adjacent Streets and yards, and the Port and the City would share the costs of the Sediments and Uplands, with the Port paying 60 percent of the costs and the City paying 40 percent. The Port also received \$9.8 million as part of the Malarkey/City settlement.

The basis of the final design, cleanup, and long-term monitoring and maintenance for the T-117 EAA Remedial Design and Remedial Action was presented in the T-117 Sediment, Uplands, and Adjacent Streets EE/CA, dated June 3, 2010. The final EE/CA was approved by EPA with the issuance of the EPA Action Memorandum, dated September 30, 2010. The EPA Action Memo selected Alternative 2 in the EE/CA. Alternative 2 is described as a comprehensive Upland (soil) and Sediment Removal and Backfilling (no capping) that meets unrestricted (e.g., residential) cleanup standards. The alternative provides a comprehensive soil and sediment cleanup approach that requires no significant long-term monitoring or administrative controls, regardless of the ultimate land use (e.g., industrial/commercial, residential, or other).

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PROJECT JUSTIFICATION:

The overall goal of the T-117 cleanup is to significantly reduce or eliminate the exposure of ecological and human receptors to sediment and soil contamination and thereby reduce or eliminate adverse effects on resources in the T-117 EAA. The Port has signed previous EPA orders that required that the Port perform T-117 assessment, cleanup evaluation, and past cleanup actions (e.g., the Time-Critical Removal Action [TCRA]). The current EPA order under review and evaluation would likely be the last cleanup obligation required by the Port.

PROJECT STATEMENT AND OBJECTIVES:

Project Statement:

Finalize and implement the EPA-issued ASAOC that requires the Port and City to complete the remedial design and cleanup construction, and (if necessary) long-term monitoring and maintenance of the sediment, upland, and adjacent streets of the T-117 EAA, as detailed in the SOW. This consists of the detailed analysis, design, and construction implementation of the selected Alternative No. 2, as presented in the Final EE/CA and EPA's Action Memorandum, dated September 30, 2010.

Project Objectives:

- Comply with and fulfill the requirements of the EPA's ASAOC and SOW.
- Complete the SOW tasks in accordance with the project schedule and timeline.
- These project goals and objectives align with Seaport's goal of environmental stewardship, as described further below.

PROJECT SCOPE OF WORK AND SCHEDULE:

Scope of Work:

The scope of work that will be performed by the Port (and the City) is defined by the 2011 ASAOC as follows:

1. Respondents shall perform, at a minimum, all actions necessary to implement the Statement of Work (SOW); and
2. The actions to be implemented generally include, but are not limited to, the implementation of the Action Memorandum for T-117 EAA dated September 30, 2010, as set forth in the SOW.

The scope presented in the SOW requires Remedial Design and associated documents. This includes producing the Design Report, 15/30/60/90/100% Design Documents, and supporting deliverables such as Community Health and Safety and Compliance Monitoring Plan. The SOW also requires Removal Action (i.e., cleanup construction) and associated documents. This includes implementation of the physical cleanup itself, and production of a Construction Documentation Report and As-Built plans. A Long-Term Monitoring & Maintenance Plan is required by the SOW; however, no time frame for monitoring has been provided; therefore, one year following completion of Removal Action is assumed for this project.

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Schedule:

	<u>Start</u>	<u>Finish</u>
Pre-Design	April 2011	July 2011
Data Gaps and Field Work	June 2011	July 2011
Design and Bid Package	June 2011	May 2012
Permits	June 2011	June 2012
Removal Action (Cleanup)	February 2013	February 2014
Compliance Monitoring	Completion of cleanup	Until EPA closeout

FINANCIAL ANALYSIS:

Terminal 117 Clean-up Project Estimate and Sources of Funding

Previous Amounts Spent on Early Action Cleanup	\$4,652,000
Current Request for Authorization	<u>\$28,183,000</u>
Estimated Total Project Costs	<u>\$32,835,000</u>
Estimated/Actual Sources of Funding:	
City of Seattle (40% share of contracted and oversight costs)	\$11,292,000
Malarkey/City Settlement ¹	\$1,645,000
Grant Funding from WA Dept of Ecology (Port Share)	\$846,000
Future Grant Funding- Committed	\$1,127,000
Port of Seattle ²	<u>\$17,925,000</u>
(Possible Future Grant Funding – Uncommitted)	\$7,480,000
Total Sources of Funding	<u>\$32,835,000</u>

Note 1: Total cash settlement from the Malarkey/City Settlement was \$9.805 million (net of legal fees). Of the total, \$1.645 million will be used for non-grant eligible clean-up related costs.

Note 2: Port is also seeking recovery from insurance.

Cost Estimate Associated with this Agreed Order:

The actual cost for the cleanup design and implementation, including compliance monitoring, is expected to vary, depending on actual site conditions, labor and material costs at the time of construction, and any changed conditions or requirements established by the oversight agencies (EPA and Ecology). However, based on the final 2010 EE/CA and the findings of the EPA Action Memo, the total estimated costs for this work will be approximately \$28,183,000.

Source of Funds:

The cost to implement the T-117 Remedial Design and Removal Action were included in the Commission's 2011 Environmental Remediation Liability spending authorization, approved on December 7, 2010, for 2011 costs. The five-year forecast (April 2011 through June 2015) for T-117 Remedial Design/Removal Action, prior to any cost recovery from outside parties, ranges from \$28,000,000 through \$30,000,000. Any additional clean-up costs that may be required as the project

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moves forward will be recorded as a liability and a non-operating expense in accordance with Port Policy AC-9. These amounts will be reported annually to the Commission via routine Environmental Remediation Liability reports and spending authorization requests.

The Port's tax levy will pay the costs for the environmental cleanup project that are not ultimately covered by cost-sharing agreements, insurance, grants, or other cost recovery sources. Under an existing cost sharing settlement agreement, the City of Seattle will pay 40 percent of the contracted and agency oversight costs (approximately \$11,292,000). In addition, Port staff continues to pursue grant funding from Ecology for the design and construction work. Finally, another source of expected future funding includes expected reimbursements from the Port's insurance.

Net Costs to Port:

The cost summary table above presents a breakdown of all the paid, committed, and/or anticipated total costs and recoveries associated with the T-117 cleanup, including both prior and future design and cleanup activities. As shown, the total (start to finish) Port cost is approximately \$32,835,000. The total received, requested, and anticipated cost recovery funds (not including insurance or uncommitted grant requests) is approximately \$14,910,000. Therefore, the net cost to the Port to complete the T-117 EAA cleanup work is expected to be up to approximately \$17,926,000.

ECONOMIC IMPACTS AND BUSINESS PLAN OBJECTIVES:

In addition to the numerous environmental and public health benefits, this cleanup action will enhance future use of T-117 by reducing or likely eliminating the possibility that future cleanup orders or actions will disrupt future site use, including site restoration, tenant operations, or future owner's activities. The completion of this Removal Action will also open up alternative land use considerations for the Port, including the potential for creating habitat as mitigation to offset the Port's Natural Resource Damage Assessment liability.

STRATEGIC OBJECTIVES:

- This project will achieve the strategic objective of accomplishing cleanup of the Port's property, as required by state and federal agencies.
- Obtain the maximum cost recovery for design and cleanup expenses from state grants, insurance, and other responsible parties such as the City of Seattle.
- Provide community outreach and participation during all aspects of the cleanup design and implementation.
- Evaluate opportunities to enhance local job creation and resource utilization.
- Evaluate and consider sustainable and 'green' remediation and construction technologies and practices.

ENVIRONMENTAL SUSTAINABILITY/COMMUNITY BENEFITS:

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), EPA reviews cleanup projects to ensure that they meet the substantive requirements of federal and state laws and regulations that are applicable or relevant and appropriate. Elimination of unacceptable levels of risk to human health and the environment caused by the presence of contaminants in soil, groundwater, and sediment is not only required by state and federal law, but it

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is the hallmark of responsible environmental stewardship, from the perspectives of both the surrounding communities and the customers that we serve.

TRIPLE BOTTOM LINE:

State and federal laws require elimination of unacceptable levels of environmental risk caused by the presence of contaminants in soil, groundwater, and sediment. From the perspective of the surrounding communities and the customers that we serve, the Port's participation in site remediation is the hallmark of responsible environmental stewardship.

ALTERNATIVES CONSIDERED and THEIR IMPLICATIONS:

- Refuse to enter into EPA's ASAOC. If the Port decides not to enter into the ASAOC, EPA could issue a unilateral enforcement order under CERCLA that would require the Port to conduct the cleanup, and in addition possibly impose other financial fines and penalties. Alternatively, if EPA simply looked to the City to pay all costs, the City might bring a claim against the Port, based on the terms of our Settlement Agreement.
- **Agree to enter into EPA's Agreed Order.** Port staff has reviewed the terms of the ASAOC and SOW and have determined that the required work aligns with the work described in the Port's EE/CA and EPA's Action Memorandum. Staff believes that the Agreed Order's terms would provide more efficient and cost-effective cleanup procedures than would be imposed through a unilateral order. **This is the recommended alternative.**

OTHER DOCUMENTS ASSOCIATED WITH THIS REQUEST:

Administrative Settlement Agreement and Order on Consent, with attached Statement of Work (ASAOC and SOW), issued by EPA in May 2011.

PREVIOUS COMMISSION ACTIONS AND BRIEFINGS:

August 24, 1999: Commission approved the purchase and sale agreement for the acquisition of the Malarkey Asphalt Property at a cost of \$176,400 and implementation of required environmental cleanup measures on adjoining Port property at a cost not to exceed \$800,000.

June 11, 2002: Commission approved expenditure of \$1,500,000 previously reserved for aquatic sediment management and revision of the existing contract with Windward Environmental, Inc., to provide services required by the Environmental Protection Agency's Order on Consent to continue work on the Lower Duwamish Sediments Superfund site and the East Waterway Sediment Operable Unit of the Harbor Island Superfund site.

August 24, 2004: Commission approved execution of the Memorandum of Agreement (Cost Allocation) between the Port and the City of Seattle for Malarkey Early Action Area.

October 11, 2005: Commission approved execution of (1) Administrative Settlement Agreement and Order on Consent for Removal Action at the T-117 Early Action Area and (2) Administrative Settlement Agreement and Order on Consent for the T-117 Upland Investigation (TCRA).

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September 25, 2007: Commission approved execution of (1) Amended SOW to the 2005 Administrative Settlement Agreement and Order on Consent for Removal Action T-117 Early Action Area and (2) First Amendment to the MOA with the City of Seattle regarding cost-sharing to conduct this Work.

October 27, 2008: Commission authorized the Chief Executive Officer to Sign a Settlement Agreement with the Malarkey Parties, the Duwamish Parties, the City of Seattle, and King County regarding T-117 Site and Lower Duwamish Site Cleanup Costs, and Natural Resource Damage Liability.

May 3, 2010: Commission authorized the Chief Executive Officer to execute a Category III contract to obtain consultant and subcontracted services and support for: design services, construction and monitoring support, and post-construction monitoring of a pending Environmental Protection Agency (EPA) Administrative Settlement Agreement and Order on Consent (ASAOC) for Removal Action Implementation at Terminal 117 (subject of this memo).

December 1, 2010: Commission approval of the five-year spending plan for the Environmental Remediation Liability (ERL) Program for Seaport, Real Estate, and Airport for 2011 through 2015. This authorization includes the costs to perform the T-117 Removal Action Implementation work, subject of this memo and referenced EPA ASAOC and SOW.