

**LOWER DUWAMISH WATERWAY GROUP  
MEMORANDUM OF AGREEMENT**

**SECOND AMENDMENT**

THIS SECOND AMENDMENT to the Lower Duwamish Waterway Group Memorandum of Agreement (“MOA”), dated June 9, 2000, is made and entered into by and among the Port of Seattle, City of Seattle, King County, and The Boeing Company, collectively referred to as the “Lower Duwamish Waterway Group” or “LDWG” and individually as “Member” or “Members.” The date of this amendment is \_\_\_\_\_.

This Second Amendment to the MOA (“2<sup>nd</sup> Amendment”) provides for the performance of the Enhanced Natural Recovery/Amended Carbon Pilot Study (“ENR/AC Pilot Study” or “Project”), as described in Attachment A (Statement of Work). This 2<sup>nd</sup> Amendment also updates MOA contracting, invoicing and grant procedures to reflect current LDWG practices.

All terms and provisions in the MOA remain in effect, except as expressly supplemented and modified herein.

**AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing, the LDWG Members mutually agree and covenant as follows:

**1. Contracting Responsibility**

King County has agreed to hire a consultant (“Consultant”) to design the ENR/AC Pilot Study for the LDWG. King County also has agreed to hire a contractor (“Contractor”) to construct the ENR/AC Pilot Study for LDWG. Design and construction of the ENR/AC Pilot Study shall be according to Attachment A, the Statement of Work (SOW), and any modifications to the SOW that are approved by the LDWG and EPA.

**2. Effective Date and Condition Subsequent**

This 2<sup>nd</sup> Amendment shall become effective when all four Members have signed it. This 2<sup>nd</sup> Amendment shall remain in effect until completion of the ENR/AC Pilot Study or until it is terminated by the LDWG.

**3. Enhanced Natural Recovery/Carbon 2nd Amendment Pilot Study**

**3.1 Allocation of Shared ENR/AC Pilot Study Costs**

The LDWG Members hereby agree to pay the Shared ENR/AC Pilot Study Costs (as defined in Section 3.2) by allocating such costs on an interim equal (*per capita*) basis, pending a final allocation. Each Member shall be severally, and not jointly, liable for this interim allocation of Shared ENR/AC Pilot Study Costs. A performing Member reserves all rights of action against a defaulting or non-

performing Member for recovery of Shared ENR/AC Pilot Study Costs under all applicable statutes and theories of law or equity. The Members agree that such payments do not constitute an allocation of responsibility for investigation or cleanup of the Lower Duwamish Waterway. Members reserve their right to seek an allocation or contribution different from that set forth in Section 2.1 of this 2nd Amendment from other Members and to seek an allocation or contribution from persons or entities not a Member to the MOA.

### **3.2 Definition of Shared ENR/AC Pilot Study Costs**

Shared ENR/AC Pilot Study Costs shall mean: 1) payments, including payments associated with changes to original contracts that are agreed to by the Members or required by the EPA, to the Consultant hired to design the study and to the Contractor hired to construct it; 2) EPA and Ecology oversight costs applicable to the ENR/AC Pilot Study; 3) costs associated with implementing changes or additional work required during and/or after completion of the Pilot Study that are mandated by the EPA; and 4) solely for the purposes of this 2<sup>nd</sup> Amendment, Shared Costs shall include costs for King County's construction management and payment for appropriate access, easement, or similar agreements, as necessary to implement the ENR/AC Pilot Study.

### **3.3 Procedure for Payments.**

3.3.1 The County shall pay the Consultant and the Contractor according to the terms of their contracts with the County. The County shall invoice the other LDWG Member's their *per capita* shares of those payments and the County's internal costs described in Section 3.2. The invoices shall distinguish the County's internal costs from the payments to the Consultant and Contractor and shall indicate the name and job title of each County staff member whose costs are included. Invoices will include sufficient backup and detail concerning the work performed to comply with each Member's cost recovery requirements. Each Member shall transmit to the County's Designated Representative, as set forth in Section 24 of the MOA, its part of the Shared ENR/AC Pilot Study Costs, within thirty (30) days of receiving an invoice with appropriate backup from the County.

3.3.2 The Port shall continue in its role as contracting agent for LDWG's consultants other than the Consultant to be retained by the County pursuant to this 2nd Amendment. The procedures established in MOA section 2.3, 3.4 and 4.4 are hereby modified as follows: the Port shall pay the LDWG consultants' invoices according to the terms of their contracts with the Port. The Port shall invoice the other LDWG Member's their *per capita* shares of those payments. Each Member shall transmit to the Port its portion of the LDWG consultant costs within thirty (30) days of receiving an invoice with appropriate backup from the Port.

3.3.3 The Port shall continue being responsible for distributing invoices for each Member's share of EPA's and Ecology's oversight costs applicable to the Agreed Order. The Port shall pay valid EPA and Ecology oversight cost invoices upon

receipt of appropriate invoice backup. Following payment of such invoices, the Port shall distribute invoices to the other Members for each of those Members' respective shares of the oversight cost payment to the agencies. Each Member shall transmit to the Port's Designated Representative, as set forth in Section 24 of the MOA, its part of each EPA and Ecology invoice, payable to the Port, within thirty (30) days of receipt by the Member. If backup is not provided by the agency or there is a dispute of any part of the oversight charges, the disputed amounts shall be held in escrow, in accordance with EPA and Ecology dispute resolution procedure requirements. The Port shall transmit the payments of undisputed amounts to EPA or Ecology. Individual Members will pay any interest charges that are due to EPA or Ecology because of that Member's payment being late.

### **3.4 Selection of ENR/AC Pilot Study Design Consultant and Contractor**

3.4.1 The County will comply with its own and all other applicable statutes regarding hiring of consultants and contractors by governmental entities in advertising for and selecting the Consultant for design of the ENR/AC Pilot Study and the Contractor for construction of the study. Members will have a reasonable opportunity to provide the County with input on the qualifications and specifications for both of those contracts as described in Section 3.4.2 and 3.4.3 below.

3.4.2 Each Member will have one representative on the selection committee for the Design Consultant. Before candidates for the Design Consultant are interviewed and scored, each Member shall identify any candidate that has done work for the Member related to the Duwamish and the Members shall reach an agreement concerning which consultants have a conflict of interest based on their work for individual Members. The County shall execute a contract with the ENR/AC Pilot Study Design Consultant that is selected using the agreed upon selection process.

3.4.3 The County is required by statute to award the contract for the Contractor to construct the Pilot Study to the lowest responsive and responsible bidder. Members will be given the opportunity to review the bids and to give the County input on which of the bidders is responsible per bid qualification language, however the County will select the Contractor based on its public bidding process.

### **3.5 Oversight of the Design Consultant**

3.5.1 Decisions regarding design of the ENR/AC Pilot Study will be made by consensus of the Members. Such decisions will be communicated to the consultant by the County's project manager.

3.5.2 The Consultant hired to design the ENR/AC Pilot Study will not communicate with third parties, including EPA or Ecology personnel, without first notifying the LDWG Technical Committee and receiving its authorization for

the communication. Such authorization will be made by consensus of the Members and communicated by the County's project manager.

3.5.3 All documents, including but not limited to analytical data, that are prepared, developed or generated by the Consultant shall be provided to all Members and shall be subject to review by all Members prior to submission to EPA or any other third party. Members shall be given at least fifteen business days to review and comment on drafts of work by the Consultant that are going to be provided to EPA or any other third party, unless EPA's deadlines require that a shorter review time be provided. The Consultant shall compile all Member comments and distribute to all Members. The County project manager will direct the consultant on needed consensus changes to work products.

### **3.6 Oversight of the Construction Contractor**

During construction of the ENR/AC Pilot Study, the County will have oversight responsibility for day to day decisions concerning the work. The County will also have authority to make decisions in emergency situations when it is not practical to confer with the Members before a decision must be made. Contractor change orders that increase costs and that are not emergencies must be approved by consensus of the Members through their representatives on the LDWG Technical Committee. Such increased costs will be shared according to Section 3.1 and 3.2 above. In the event of an emergency situation requiring action prior to communication to other Members, the County shall communicate information concerning the emergency to the other Members as soon as it is practicable under the circumstances to do so. The County will provide the other Members with weekly updates concerning the work, upon request of one or more other Members, during the construction portion of the work, and will communicate information on any changes or unexpected developments as soon as possible.

#### **4. Responsibility for Changes to the Schedule**

The Members are jointly responsible for delays to the Project schedule including delays related to acquisition of property rights required for construction of the Project.

#### **5. Cooperation on Model Toxics Control Act Grants**

The Members will coordinate and cooperate concerning the documentation of costs that are eligible for partial reimbursement through Model Toxics Control Act grants ("Grants").

IN WITNESS WHEREOF, the Members hereby enter into this 2nd Amendment. Each person signing this 2nd Amendment represents and warrants that he or she has been duly authorized to enter into this 2nd Amendment by the corporation or municipality on whose behalf it is indicated that the person is signing.

**THE PORT OF SEATTLE**

**KING COUNTY**

\_\_\_\_\_  
Tay Yoshitani

\_\_\_\_\_  
Pam Elardo

**THE CITY OF SEATTLE**

**THE BOEING COMPANY**

\_\_\_\_\_  
Dave Schuchardt

\_\_\_\_\_  
Brian Anderson