

DISCUSSION DRAFT – PRIVILEGED AND CONFIDENTIAL

COMMON INTEREST AND COST-SHARING AGREEMENT

**BY AND BETWEEN THE PORT OF SEATTLE, THE CITY OF SEATTLE, AND
SOUTH PARK MARINA, L.P.**

This COMMON INTEREST AND COST-SHARING AGREEMENT (this “*Agreement*”) is made by and between the Port of Seattle, a Washington municipal corporation (the “*Port*”), the City of Seattle, a Washington code city (the “*City*”), and South Park Marina, L.P., a Washington limited partnership (“*South Park*”), who are collectively referred to as the “*Parties*,” and individually as a “*Party*.” In making this Agreement, the Parties acknowledge the following:

RECITALS

WHEREAS, the Washington Department of Ecology (“*Ecology*”) seeks to investigate sources and the areal extent of suspected contamination (“*Site Contamination*”) at and around South Park Marina, which is located generally at 8604 Dallas Avenue South in Seattle, Washington 98108 (the “*Marina*”);

WHEREAS, each Party to this Agreement has been identified as a Potentially Liable Party (“*PLP*”) by Ecology within the meaning of the Washington State Model Toxics Control Act, RCW § 70.105D *et seq.*, in connection with environmental contamination at or associated with the Marina site (Ecology facility number 44653368) (the “*Site*”);

WHEREAS, Ecology has asked the Parties to sign an Agreed Order (“*Order*”) and jointly perform a remedial investigation and other tasks required by that Order (“*RI Work*”);

WHEREAS, the Parties desire to share the costs of performing the RI Work; and

WHEREAS, the Parties share a joint and common interest in cooperating with each other to the extent permitted by law and in sharing certain information otherwise protected from disclosure by the attorney-client privilege and by the attorney work-product doctrine and/or joint-defense privilege in conducting a joint defense against any and all actual and potential claims that may be asserted against them with regard to the Site Contamination.

TERMS OF AGREEMENT

NOW THEREFORE, the Parties mutually agree as follows:

1. **JOINT DEFENSE AND COMMON INTEREST.** The Parties may, at the sole option of each, share and exchange intelligence, strategies, research, studies, data, legal theories, technical conclusions, confidences, information and documents (“*Common Interest Materials*”) to advance their negotiations with Ecology for work required under the Order. Common Interest Materials shall be clearly designated as such on the face of the document.

2. **ALL PRIVILEGES MAINTAINED.** The Common Interest Materials that the Parties exchange shall maintain all privileges from disclosure to adverse or other third parties as
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a result of the attorney-client privilege, the attorney work-product doctrine, the privileges applicable to parties with common interest, the joint-defense privilege, and other applicable privileges or confidentiality protections to the fullest extent recognized under Washington law. By this Agreement, the Parties state that in pursuit of their common interests and in joint defense against any and all actual and potential claims that may be asserted against them with regard to Site Contamination, they do not intend to waive any applicable privileges and they intend to preserve to the maximum extent permitted by Washington law the attorney-client privilege, protection under the attorney work-product doctrine, the joint-defense privilege, and all other privileges and protections that they may have. In the event of any effort by a third party to compel the disclosure of Common Interest Materials, including a request under the Washington Public Records Act, Chapter 42.56 RCW, the Party that is the subject of the records request, subpoena or other form of compulsory process shall promptly notify the other Parties so as to afford such Parties the opportunity to seek protection from the compelled disclosure of Common Interest Materials. Nothing herein shall preclude a party from producing Common Interest Materials as required by law.

3. **CONFIDENTIALITY.** Except as permitted by this agreement or otherwise required by law, the Parties agree not to disclose any Common Interest Materials received from any other Party or its counsel or technical consultants to any person or entity other than (a) attorneys and their staff representing a Party in connection with the Order or RI Work; (b) experts or consultants retained by the receiving Party in connection with the Order or RI Work; (c) insurers providing coverage related to the Site with whom a Party has a joint defense and/or confidentiality agreement; (d) employees, officers, directors, executives, or other elected representatives of the receiving Party who have responsibilities with regard to the Order or RI Work. The Parties and their counsel shall take reasonable steps to protect and preserve the confidentiality of Common Interest Materials received. Individuals permitted access to Common Interest Materials shall be advised that the information is privileged and confidential and subject to this Agreement.

3.1 **NON-CONFIDENTIAL INFORMATION.** Nothing in this Agreement shall prevent the Parties from disclosing to others or using in any manner information which the Party can show:

- (a) Was known by a Party prior to the execution of this Agreement, has been published or has become a part of the public domain other than by acts, omissions, or fault of the Parties or their agents or employees in violation of this Agreement;
- (b) Has been furnished or made known to a Party by third parties (other than those acting directly or indirectly for or on behalf of the Parties) or was obtained by a Party in some manner other than pursuant to this agreement as a matter of legal right, without any applicable restrictions on its disclosure; or
- (c) Was in the Party's possession prior to disclosure thereof by or on behalf of any of the Parties.

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4. **FUTURE LITIGATION.** In any litigation between or among Parties, this Agreement shall not preclude discovery of Common Interest Materials, and this Agreement shall not preclude Parties from obtaining disclosure of Common Interest Materials or alter the obligations of Parties to disclose Common Interest Materials under applicable rules of Civil Procedure.

5. **ADDITIONAL PARTIES.** By unanimous consent, the Parties may agree to allow other persons or entities who share their joint and common interest in defending any actual or potential claims that may be asserted against them with regard to Site Contamination, and who agree to be bound by the terms of this Agreement, to join the Agreement.

6. **SEPARATE AND INDEPENDENT LEGAL REPRESENTATION.** Nothing in this Agreement shall be construed to affect the separate and independent representation of the Parties by their respective counsel. Each Party understands and acknowledges that each Party is represented exclusively by that Party's own attorneys in the above-referenced matter. While attorneys representing other Parties to this Agreement have a duty not to disclose the information disclosed to them pursuant to this Agreement, they will not act for any Party other than their own clients in the above-referenced matter. Each Party understands and agrees that this Agreement itself does not and will not create any attorney-client relationship with any other Party's attorneys.

7. **INDIVIDUAL CONSULTANTS.** Nothing in this Agreement shall be construed to affect the separate and independent ability of the Parties and their counsel to obtain consulting services, including any environmental consultants, hired directly or indirectly by a Party, or its attorneys, agents, or contractors, in connection with Site Contamination ("**Individual Consultants**"). As may be necessary to effectuate the purposes of this Agreement, the Parties acknowledge that Common Interest Materials may be shared with Individual Consultants as agents and/or representatives of the Parties, to the extent the Party does not otherwise violate the provisions of this Agreement. The Parties intend that the privilege and confidentiality protections in this Agreement shall apply to the maximum extent permitted by law to information generated by and shared with Consultants.

8. **JOINT CONSULTANT.** The Parties will work in good faith to select a consultant to represent the Parties with the Department of Ecology and to perform work associated with negotiating and implementing the Order and the RI Work. The Joint Consultant's scope of work to complete the RI Work and a budget for the RI Work shall be determined by unanimous consent of the Parties. Following the selection of the Joint Consultant, pursuant to the process described in 8.1 below, and approval of the budget and scope of work, the Parties will endeavor to direct the RI Work by unanimous consent. If the Parties fail to reach consensus within a reasonable time, the Parties may proceed only after consultation with and direction from Ecology.

8.1 **CONTRACTING.**

(a) Selection. The City of Seattle will enter into and oversee contracts with the Joint Consultant on behalf of the Parties. The City will follow its regular

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contracting procedures to advertise for and select potential consultants except as described herein. In addition to the City, the Port and South Park Marina shall participate in interviewing potential consultants. The Parties shall select a consultant from the pool of applicants by unanimous consent. Unless otherwise agreed, in no event shall the Joint Consultant be a consultant previously retained by any Party in connection with the Site or with the T117 Early Action Area.

(b) **Billing.** The City will provide copies of the Joint Consultant and Ecology invoices to all Parties prior to payment of each invoice, and will pay each invoice after receiving authorization from each Party, provided that any objections to an invoice must be delivered to the City in writing within ten (10) calendar days of receipt of the invoice by the objecting Party. The City may presume approval of an invoice if no objection is received within ten (10) calendar days. The City will prepare and submit a final pro rata invoice for Each Party, following the 10-day review period. Each Party will reimburse the City for its share of each invoice within sixty (60) calendar days of receiving the pro rata invoice and backup supporting the charges indicated on the invoice sufficient to meet the contracting requirements of each Party. In the event of a timely objection to an invoice, the Parties will confer within fourteen (14) calendar days concerning the objection. Following good faith discussions concerning the objection, if the City does not agree with the objection and wishes to pay the invoice in full, the other parties shall each reimburse the City for their shares of the invoice within sixty (60) days of receiving such invoice. If the parties reach an agreement on an alternative to paying the invoice in full, the City shall communicate that agreement with the Joint Consultant and the Parties shall pay their respective shares of the revised invoice total within sixty (60) days of the City's communication of that agreement.

8.2 **ACCESS TO INFORMATION.** Each Party shall have full and equal access to the Joint Consultant(s) and to all data, results, reports, and other documents or information supplied to or developed by the Joint Consultant, subject to the confidentiality provisions of this Agreement.

9. **SHARED COSTS.** The Parties will share the costs of the RI Work and may, upon further written agreement or amendment of this Agreement, share the costs of certain additional specified tasks relating to the investigation and remediation of Site Contamination. "**Shared Costs**" as agreed to under this Paragraph 9 shall mean (a) Joint Consultant invoices approved by all Parties as part of the RI Work; (b) Ecology oversight costs, if any; and (c) any other costs subsequently agreed to in writing by the Parties. Shared Costs shall not include any legal expenses, attorney fees, or other legal or Individual Consultant costs associated with a Party's independent activities relating to the Site. Unless a different contribution percentage ("**Contribution Percentage**") amount is agreed to in writing by the Parties for a given task, the Parties participating in this Agreement shall contribute equal shares to Shared Costs on an interim basis, which at the time of execution is as follows: (i) South Park Marina, **33.33 percent (%)**; (ii) the City, **33.33 percent (%)**; and (iii) the Port, **33.33 percent (%)**. In the event that any Party withdraws or is in material breach of this Agreement, the remaining participating Parties

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shall contribute equal shares to the Shared Costs. The Contribution Percentages in no way reflect any final, negotiated allocation of responsibility for costs associated with investigating and remediating any Site Contamination and shall not be asserted as such. Such preliminary division of Shared Costs shall not be admissible evidence in any proceeding except to establish that such amounts have in fact been contributed by the respective Parties. The Parties recognize and agree that any Contribution Percentages agreed to pursuant to this Paragraph 0 are compromise percentages and do not represent the Parties' view of the ultimate allocation of any liability for any costs associated with investigating and remediating any Site Contamination. Nothing in this Paragraph 0 or elsewhere in the Agreement should be construed as an admission of liability by any Party to any percentage or extent. A Party's failure to timely pay its share of the Shared Costs constitutes a material breach of this Agreement. A Party in material breach of this Agreement shall no longer participate in any decision-making under Paragraph 8 until and unless such unpaid Shared Costs are resolved.

10. **PAST REMEDIAL ACTION COSTS.** Nothing in this Agreement shall preclude any Party that has incurred remedial action costs in connection with the Site prior to execution of this Agreement from seeking recovery of the same, in whole or in part, from any other Party or Parties as allowed by law and equity.

11. **COMMUNICATIONS.** A Party shall not initiate ex parte communications that do not include the other Parties with any employees or representatives of Ecology regarding any aspect of the Site, including the Order and the RI Work, without including the other Parties and giving them an opportunity to participate in the communication. The Parties shall confer in good faith prior to any planned phone calls or meetings with regulatory authorities to agree on specific talking points, positions, and/or messages to convey. In the event an employee or representative of Ecology contacts a Party or its Individual Consultant regarding the Site, that Party shall promptly notify the other Parties and forward any written communications to all Parties.

12. **WITHDRAWAL.** Any Party may withdraw from this Agreement upon prior thirty (30)-day written notice to all other Parties. Any withdrawing Party and that Party's counsel shall continue to be bound by this Agreement with regard to any Common Interest Materials received, learned, or obtained at any time prior to the effective date of the withdrawal, and this Agreement shall continue to protect all applicable privileges and the confidentiality of Common Interest Materials disclosed to both the withdrawing Party and that Party's counsel. Any withdrawing Party shall continue to be responsible for Shared Costs as described in Paragraph 9 above, and shall continue to pay its share of RI Work until completion of the RI Work as determined by Ecology.

13. **EQUITABLE REMEDIES.** The Parties agree that the rights, privileges, and interests intended to be protected by this Agreement are unique and any violation of this Agreement may result in irreparable harm and injury to the other Parties. The Parties specifically agree that the terms of this Agreement may be enforced through appropriate injunctive relief, specific performance, or other equitable relief; provided that no action to enforce this Agreement may be brought by any Party without first having referred the dispute to mediation.

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14. **DURATION OF AGREEMENT.** This Agreement, including its provisions on the use and confidentiality of Common Interest Materials, shall remain in full force and effect notwithstanding any settlement or resolution of claims related to Site Contamination. The provisions of this Agreement governing the use and confidentiality of Common Interest Materials shall continue to apply to any employee of any Party or its counsel who ceases to be employed by that Party, and to any expert, consultant, terminated counsel, agent, or contractor who worked on behalf or under the direction of any Party or its counsel.

15. **USE OF AGREEMENT.** This Agreement, the contents hereof, or the preliminary division of any Shared Costs shall not be admissible evidence in any proceeding without the written consent of all Parties, except as stated in § 9, and except to enforce the terms of this Agreement, to prove the existence of this Agreement or the common interest or joint defense privilege by providing a copy of this Agreement and asserting the common interest or joint defense privilege to a court of competent jurisdiction, or as required by law or court order.

16. **HEADINGS NOT CONTROLLING.** The paragraph headings included herein are for reference only and are not a part of this Agreement. The headings shall not control or alter the meaning of this Agreement as set forth in the text.

17. **NOTICES.** All notices, requests, consents, claims, demands, waivers, and any other such communications shall be in writing and shall be deemed to have been given (i) when delivered by hand (with written confirmation of receipt); (ii) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (iii) on the date sent by facsimile or e-mail (with confirmation of transmission); or (iv) on the third (3rd) day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective Parties at the following addresses (or at such other address for a Party as shall be specified in a notice given in accordance with this Section 17):

If to the Port of Seattle:
Elizabeth C. Black
Senior Port Counsel
Pier 69, 2711 Alaskan Way
P.O. Box 1209
Seattle, WA 98111
Phone: (206) 787-4697
E-mail: black.e@portseattle.org

Copy to:
Thomas A. Newlon
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-4109
Phone: (206) 386-7677
E-mail: thomas.newlon@stoel.com

If to the City of Seattle:
Allison Crowley
PO Box 34023
Seattle, WA 98124-4023
Phone: 206-684-3167
E-mail: Allison.crowley@seattle.gov

Copy to:
Tad Shimazu
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
Phone: (206)-233-2151

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E-mail: Tad.Shimazu@seattle.gov

If to South Park Marina, L.P.:
South Park Marina, L.P.
Attn.: Guy Crow, Managing Partner
8604 Dallas Avenue South
Seattle, WA 98108
Phone: (206) 762-3880
Email: crow45@aol.com

Copy to:
Karr Tuttle Campbell P.S.
Attn.: Thomas D. Adams
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
Phone: (206) 224-8026
Facsimile: (206) 682-7100
E-mail: tadams@karrtuttle.com

Any Party may change the address to which notices, requests, demands, claims, waivers, and any other such communications under this Agreement are to be delivered by giving the other Parties notice in the manner set forth above. Any Party may make service on the other Parties by sending or delivering a copy of the process to the Parties to be served at the address and in the manner provided for the giving of notices above.

18. **COUNTERPARTS; SIGNATURES.** This Agreement may be executed in any number of identical counterparts, notwithstanding that all Parties have not signed the same counterpart, with the same effect as if all Parties had signed the same document. All counterparts shall be construed as and shall constitute one and the same agreement. Signature images transmitted electronically on this Agreement will be fully binding and effective for all purposes.

19. **AUTHORIZATION AND EXECUTION.** By executing this Agreement, the undersigned certify that they have authority to bind their respective entities to the terms of this Agreement and are signing on behalf of their respective entities as shown below.

20. **FINAL AND COMPLETE EXPRESSION.** This Agreement is the final and complete expression of the Parties concerning the subjects covered by this Agreement and this Agreement supersedes and replaces all prior agreements, discussions, representations, and drafts, all of which are merged into, and superseded by, this Agreement.

21. **AMENDMENT AND SEVERABILITY OF AGREEMENT.** If any provision of this Agreement is found invalid or unenforceable, then the balance of this Agreement shall remain in full force and effect. This Agreement may not be amended or modified except in a writing executed by each Party.

22. **GOVERNING LAW.** This Agreement was entered into under the laws of the State of Washington. If it becomes necessary to interpret any of the Agreement's terms, it is the intent of the Parties that the laws of the State of Washington shall apply, without giving effect to the provisions thereof relating to conflicts of laws or choice of laws.

23. **BINDING EFFECT.** This Agreement is binding upon and inures to the benefit of the Parties and their respective heirs, legatees, representatives, successors, transferees, and assigns. Furthermore, this Agreement shall automatically apply to substitute or associated

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counsel who may appear on behalf of any Party, which substitute or associated counsel shall thereupon become a party to and be bound by this Agreement.

24. **THIRD PARTIES; NO WAIVER ON DEFAULT.** Nothing in this Agreement shall be construed to waive any rights, claims, or privileges that any Party shall have against any person or entity who is a non-participant to this Agreement, Ecology, or any other person or entity. This Agreement is for the sole and exclusive use of the Parties hereto, and none of the provisions of this Agreement shall be deemed to be for the benefit of any other person or entity. A failure to act on any default by any Party shall not be deemed a waiver to protest any future defaults hereunder.

25. **FULL UNDERSTANDING; INDEPENDENT LEGAL COUNSEL.** The Parties each acknowledge, represent, and agree that they have read this Agreement; that they fully understand the terms thereof; that they have been fully advised by their legal counsel and other advisors with respect thereto; that it is executed by them upon the advice and recommendation of their independent legal counsel; and that if any subsequent ambiguity is found in this Agreement it shall not be interpreted against any Party, as all Parties participated in the drafting of this Agreement.

26. **EFFECTIVE DATE.** This Agreement applies to all future exchanges of Common Interest Materials among the Parties and incorporates the prior intent and practices of the Parties, as well as prior exchanges of Common Interest Materials, and is effective as of September 1, 2018.

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IN WITNESS WHEREOF, the Parties below have caused this Agreement to be executed effective as of the date set forth in Paragraph 26 above.

SOUTH PARK MARINA

KARR TUTTLE CAMPBELL

Guy Crow, Owner

Thomas D. Adams
Partner

CITY OF SEATTLE

CITY OF SEATTLE

Client

Tad Shimazu
Assistant City Attorney

PORT OF SEATTLE

STOEL RIVES LLP

Thomas Tanaka
Acting General Counsel

Thomas A. Newlon
Partner

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