

COMMON INTEREST, COST-SHARING, AND TOLLING AGREEMENT

BY AND BETWEEN THE PORT OF SEATTLE AND THE BOEING COMPANY

This COMMON INTEREST AND COST-SHARING AGREEMENT (this “*Agreement*”) is made by and between the Port of Seattle, a Washington municipal corporation (the “*Port*”) and The Boeing Company (“*Boeing*”), 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 and remediate contamination (“*Site Contamination*”) at and around the property known as Terminal 115 South, which is formerly the site of Boeing Plant 1, located generally at 6000 West Marginal Way SW in Seattle, Washington 98108 (the “*Terminal*”);

WHEREAS, Ecology has identified each Party to this Agreement as a Potentially Liable Party (“*PLP*”) 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 Terminal site (Ecology facility number _____) (the “*Site*”);

WHEREAS, Ecology has asked the Parties to sign an Agreed Order (“*Order*”) and jointly prepare a remedial investigation, feasibility study, cleanup action plan, and other tasks required by that Order (“*RI/FS Work*”);

WHEREAS, although the Parties specifically deny Ecology’s claims and allegations, they 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;

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

WHEREAS, a Party may have potential claims and causes of action against the other concerning the Site (“*Claims*”).

TERMS OF AGREEMENT

NOW THEREFORE, the Parties mutually agree as follows:

1. **JOINT DEFENSE AND COMMON INTEREST.** The Parties agree to cooperate with one another to effectuate the purposes of this Agreement. The Parties may, at the sole option of each, share and exchange intelligence, strategies, research, studies, data, technical conclusions, confidences, information and or other documents prepared by their respective counsel concerning legal theories (collectively, “*Common Interest Materials*”) to advance their negotiations with Ecology for work required under the Order. Common Interest Materials should be clearly designated as such on the face of the document.

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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 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 Site, Order or RI/FS Work; (b) experts or consultants retained by the receiving Party in connection with the Site, Order or RI/FS Work; (c) employees, officers, directors, executives, or other elected representatives of the receiving Party who have responsibilities with regard to the Site, Order, or RI/FS 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 Common Interest Materials 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.

4. **FUTURE LITIGATION.** In any litigation between or among Parties, this Agreement shall not preclude discovery of Common Interest Materials, and this Agreement shall

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not preclude Parties from attempting to obtain disclosure of Common Interest Materials or alter the obligations, if any, 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/FS Work. The Joint Consultant's scope of work to complete the RI/FS Work and a budget for the RI/FS 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/FS Work by unanimous consent. If the Parties fail to reach consensus within a reasonable time, the Parties may proceed by approval of any two of the Parties.

8.1 **CONTRACTING.**

(a) **Selection.** The Port will enter into and oversee contracts with the Joint Consultant on behalf of the Parties. The Port will follow its regular contracting procedures to advertise for and select potential consultants except as described herein. Boeing may participate in interviewing potential consultants. The Parties shall endeavor in good faith to select a consultant from the pool of applicants by unanimous consent.

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(b) **Billing.** The Parties will endeavor in good faith to negotiate the Joint Consultant's contract such that the Joint Consultant will submit its invoices both parties for direct payment of their respective shares of the work. Invoices shall indicate the total amount due and the 50% share for each Party. In the event that such an arrangement is not possible or practical, the Joint Consultant will submit its invoices to the Port, and the Port will provide copies of the Joint Consultant invoices to Boeing prior to payment of each invoice. The Port will pay each invoice after receiving authorization from Boeing, provided that any objections to an invoice must be delivered to the Port in writing within ten (10) calendar days of receipt of the invoice by the objecting Party. The Port may presume approval of an invoice if no objection is received within ten (10) calendar days. Boeing will reimburse the Port for its share of each invoice within sixty (60) days of receiving such invoice. 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 Port does not agree with the objection and wishes to pay the invoice in full, Boeing shall reimburse the Port for its share 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 Port 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 receipt of the original invoice.

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/FS 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 both Parties as part of the RI/FS Work; (b) Ecology oversight costs, if any; (c) Port staff costs associated with procurement and administration of the Joint Consultant contract; and (d) 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 shall contribute to Shared Costs as follows: (i) Boeing, **fifty percent (50%)** and (ii) the Port, **fifty percent (50%)**. The Contribution Percentages in no way reflect any final 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 9 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 9 or elsewhere in the Agreement

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should be construed as an admission of liability by any Party, or to any allocation percentage or extent.

10. **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 without providing reasonable notice to 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. For avoidance of doubt, a Party may communicate by e-mail with Ecology regarding routine and uncontroversial Project implementation details without advance notice to the other Parties, provided that the other Parties are include in copy in each such e-mail communication.

11. **TOLLING AGREEMENT AND COVENANT NOT TO SUE.** In consideration of the mutual undertakings in this Agreement, and unless and until this Agreement is terminated, each Member, for so long as it remains a Member, covenants not to sue the other Members or their officers, directors, employees or agents with respect to any claims or liabilities concerning any costs incurred under this Agreement, as long as the Member against whom a claim could be made has not withdrawn, except for claims relating to the enforcement of this Agreement or claims for contribution in defense of third party claims concerning costs incurred or activities performed under this Agreement. The terms hereof are not intended and shall not be construed to prevent any Member from pursuing, or as a waiver of, any demand, right, or action that any Member may have unrelated to costs incurred or activities performed under this Agreement. Any claim or defense based on the passage of time including, but not limited to, statute of limitations, statute of repose, estoppel, waiver, laches, or other time-related claim or defense applicable to any Claim that is not already barred by the passage of time as of the Effective Date shall be and hereby is tolled as between the Parties, and the period between the Tolling Agreement and withdrawal from this Agreement will not be included in computing the time relevant to any time-related claim or defense.

12. **WITHDRAWAL.** Any Party may withdraw from this Agreement upon prior thirty (30)-day written notice to the 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/FS Work until completion of the RI/FS 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 would 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.

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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 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 16):

If to the Port of Seattle:

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

Copy to:

Roy Kuroiwa
Senior Environmental Program Mgr
Port of Seattle
Pier 69, 2711 Alaskan Way
P.O. Box 1209
Seattle, WA 98111
Phone: (206) 787-3814
E-mail: kuroiwa.roy@portseattle.org

If to Boeing:

Thomas J. Wilcox
Senior Counsel, EHS Law Group
Office of the General Counsel
The Boeing Company
P.O. Box 3707
MC 11-509
Seattle, WA 98124

Copy to:

Joseph L. Flaherty
The Boeing Company
Environmental Remediation
MC 1P-310
Phone: (206) 769-5987
E-mail: joseph.l.flaherty@boeing.com

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Phone: (425) 373-2201

E-mail: thomas.j.wilcox@boeing.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. **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.

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 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.

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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 is effective as of September 1, 2018.

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

PORT OF SEATTLE

THE BOEING COMPANY

Stephen P. Metruck
Executive Director

Thomas J. Wilcox
Senior Counsel, EHS Law Group