

INTERLOCAL AGREEMENT
BETWEEN
THE CITY OF EVERETT AND PORT OF EVERETT REGARDING
IMPROVEMENTS TO PUGET SOUND OUTFALL 6
AND PUGET SOUND OUTFALL NO. 2

This Interlocal Agreement ("*Agreement*") is dated for reference purposes July 3, 2014, and is between the CITY OF EVERETT (the "*City*") and the PORT OF EVERETT (the "*Port*") (individually a "*Party*" and collectively the "*Parties*").

RECITALS

A. The City owns and operates Puget Sound Outfall No. 6 ("*PSO 6*") and Puget Sound Outfall 2 ("*PSO 2*"). A City investigation recently discovered concrete blockage in the PSO 6 pipeline, which must be fixed. In addition, a portion PSO 2 must be replaced and moved.

B. The Port also has property near the PSO 6 that is subject to flooding because of the blockage in the PSO 6 pipeline. To restore the capacity of the PSO 6, the Parties have determined that they should split the cost equally for rerouting the PSO 6 pipeline, including design, permitting and construction.

C. A portion of PSO 2 is located on Port property. The Port is currently preparing the engineering design for the Everett Shipyard Model Toxics Control Act sediment cleanup project under a Consent Decree with the Department of Ecology on that property. In conjunction with that project, the City and Port have determined that the Port will design and construct the PSO 2 improvements within its property, subject to City approval, with reimbursement from the City. The purpose of combining the PSO 2 replacement project with the cleanup project is to gain engineering and construction project efficiencies to restore the condition of the PSO 2.

D. The purpose of this Agreement is for the City and Port to formalize their understandings regarding the relocation of the two outfalls and to complete the work required to do so.

AGREEMENT

The Parties agree as follows:

SECTION 1: PSO 6 WORK

A. Design.

1. Completion of Design. The City will prepare (or will have its consultants prepare) all approvals, construction easements, easements, plans and specifications necessary to construct the PSO 6 pipeline reroute. The Port will have an opportunity to participate in design team meetings and will have a reasonable opportunity to review and comment. The Port may request that the City add additional work to the proposed PSO 6 plans and specifications, such as drainage work on the Port property (such additional work, "*Port Additional Work*"). The City will not unreasonably refuse such a request.

2. Port Approval of Design. After receiving all Port comments, the City will submit its proposed final plans and specifications (and final form of approvals and easements) to the Port for approval, which approval will not be unreasonably withheld. The proposed final plans and specifications (and final form of approvals and easements) shall be accompanied by a prominent notice specifying “Commencement of Port’s 30 Day Plans/Specifications Approval - PSO 6 Design Review Period” and shall be delivered to the attention of the Port’s Notice Contact specified in Section 3.I. below. Plans and specifications delivered without the required notice or to someone other than the designated recipient shall not constitute proper delivery. The Port must either approve or disapprove in writing the City’s proposed final plans and specifications within 30 days after they are delivered to the Port (the “*PSO 6 Design Review Period*”). If the Port does not provide the approval or disapproval to the City within the PSO 6 Design Review Period, the plans and specifications and approvals and easements are deemed approved. For the purposes of this Agreement, the term “*PSO 6 Approved Plans and Specifications*” refers to final plans and specifications that are approved under this Section 1.A.2, which includes final plans and specifications for Port Additional Work, if any. For the purposes of this Agreement, the term “*PSO 6 Work*” refers to all excavation, construction, materials, and other activities and items necessary to complete all improvements in accordance with the PSO 6 Approved Plans and Specifications, including without limitation Port Additional Work, if any.

3. Design Review Off-Ramp. If either Party determines during the PSO 6 Design Review Period, in the exercise of its reasonable discretion, that the construction of the PSO 6 work is not in its best interests or is not economical or technically feasible, then such Party may terminate Section 1 of this Agreement by delivery of written termination notice to the other Party no later than the end of the Design Review Period. In the event of such termination, the terminating Party will pay all costs incurred under Section 1 of this Agreement up to the date of termination.

B. Permitting.

1. City to Obtain Permits. The City will apply for and obtain any necessary permits to allow for construction of the PSO 6 Work. The Port shall reasonably cooperate with the City in obtaining such permits.

2. Construction Easements. The Port will grant the City and the City’s contractors any temporary construction easements or licenses necessary for the construction of the PSO 6 Work. The City will work with the Port to identify the contractor work areas, including lay down areas in an effort to minimize disruption of ongoing marine terminal operations.

C. Procurement.

1. Construction Contract. After approval of the PSO 6 Approved Plans and Specifications and the receipt of all necessary permits for the PSO 6 Work, the City will call for bids and execute a construction contract for the PSO 6 Work in accordance with the City’s usual procurement processes and the City’s standard form construction contracts, with the Port added as an additional insured on the contractor’s required liability insurance policies. If there is Port Additional Work, the City may bid the Port Additional Work as a separate bid schedule or bid

alternate. Because the Port's marine terminals are a federally secured facility, the City will include Port-provided specifications in the contract bid document that will require the contractor to have Transportation Worker Identification Cards (TWIC) for all of its personnel that intend to work onsite and that will require compliance with all TWIC requirements and all federal security provisions.

2. Bidding Off-Ramp. Upon opening of the bids for construction of the PSO 6 Work, the Parties will meet and confer. If either Party determines, in the exercise of its reasonable discretion, that the construction of the PSO 6 Work is not economical, then such Party may terminate Section 1 of this Agreement by delivering a written termination notice to the other Party no later than five (5) days after the opening of such bids. In the event of such termination, the terminating Party will pay all costs incurred under Section 1 of this Agreement up to the date of termination.

D. Construction. The City shall complete all PSO 6 Work in accordance with the PSO 6 Approved Plans and Specifications. The Port may, at the Port's sole cost, observe and inspect the PSO 6 Work to verify that the PSO 6 Work is being performed in accordance with the PSO 6 Approved Plans and Specifications. The City and the Port shall cooperate so that the Port's observation and inspection does not hinder, restrict or delay the PSO 6 Work. The Port may attend construction meetings. With respect to PSO 6 Work that is not Port Additional Work, the City without Port approval may execute change orders to the PSO 6 Work that in total increase the cost of the PSO 6 Work by up to 10% above the amount of the original PSO 6 Work construction contract. The City will not execute change orders above such 10% without the prior approval of the Port, which will not be unreasonably withheld. With respect to Port Additional Work, the City will not execute change orders of any amount without the prior written approval of the Port.

E. Completion of PSO 6 Work. Upon completion of the PSO 6 Work other than Port Additional Work and its acceptance by the City in accordance with the City's usual acceptance processes, the PSO 6 Work other than Port Additional Work is the property of the City. With such acceptance, the City has responsibility for the maintenance and operation of the PSO 6 Work other than Port Additional Work. The costs of such maintenance and operation will be allocated between the Parties by mutual agreement.

F. Special Provision Regarding Port Additional Work. The Port will coordinate with the City so that the Port takes a lead role in the oversight and inspection of Port Additional Work and so that the Port Additional Work does not delay other PSO 6 Work. If reasonably requested by the Port, the City will during construction add by change order additional Port Additional Work to the PSO 6 Work. Upon completion of all Port Additional Work, the Port will promptly notify the City that the Port Additional Work is ready for acceptance. Upon such notice, (1) the City will accept the Port Additional Work from the contractor, (2) the Port Additional Work is the property of the Port, and (3) the Port has responsibility for the maintenance and operation of the Port Additional Work. The City and Port will cooperate to execute any documents (such as bills of sale) necessary to document the Port's ownership interest in the Port Additional Work and will cooperate to transfer to the Port any contractor or manufacturer's warranties for the Port Additional Work.

G. Permanent Easement. Upon completion of the PSO 6 Work, the City and Port will promptly execute a 30__ foot wide permanent non-exclusive easement at no cost to the City for PSO 6 Work in the form approved under Section 1.A.2 above. The permanent easement will not contain any indemnity or defense obligations relating to environmental matters.

H. Cost Sharing.

1. Equal Split. Except for Port Additional Work and except in the case of an off-ramp termination, the Parties will equally split all expenses related to the PSO 6 Work, including for example all surveying, designing, permitting, and construction costs. This equal split also includes all costs arising from or relating to any claims asserted against the City by construction contractors relating to the PSO 6 Work. In the event of such a claim, the Parties will meet and confer, and the City will not settle such a claim without the prior approval of the Port, which will not be unreasonably withheld.

2. Port Additional Work. The Port will pay 100% of costs related to the Port Additional Work, including, for example, all surveying, designing, permitting, and construction costs. This also includes all costs arising from or relating to any claims asserted against the City by construction contractors relating to the Port Additional Work. In the event of such a claim, the Parties will meet and confer, and the City will not settle such a claim without the prior approval of the Port, which will not be unreasonably withheld.

3. Site Damage. The City and the City's contractor shall protect all Port facilities, and, if damaged, will make any and all repairs to the reasonable satisfaction of the Port. The City will pay the cost of all such repairs to the extent of the City's fault or the fault of the City's contractors and agents

4. Staff Costs. Each party will bear the costs of its own PSO 6 staff work.

5. Billing Procedure. The City will invoice the Port for the Port's share of PSO 6 Work expenses. The Parties anticipate that the City will invoice the Port as the City makes payments to PSO 6 Work consultants and contractors. An invoice will document in reasonable detail the amounts expended by the City related to the PSO 6 Work. Upon completion and acceptance of the PSO 6 Work and resolution of contractor claims (if any), the Parties will true-up the payments, so that each Party has paid 50% of the expenses related to the PSO 6 Work, except for expenses related to Port Additional Work, which will be borne by the Port.

I. Use of Off-Ramps. The Parties acknowledge that the work regarding PSO 6 is necessary work and the parties together have budgeted funding in the general amount of \$400,000 for the estimated total cost of the work. The Parties agree that the necessity of the work must be taken into account when a Party considers using an off-ramp under Sections 1.A.3 and 1.C.2 above.

SECTION 2: PSO 2 WORK

A. Design.

1. Completion of Design. As stated in Recital C above, the Parties have decided to integrate the PSO 2 work to the Port's Everett Shipyard project, which will provide engineering design and construction efficiencies. Accordingly, the Port will prepare (or will have its consultants prepare) all approvals, construction easements, easements, plans and specifications necessary to construct the PSO 2 work. The City will have an opportunity to participate in design team meetings and will have a reasonable opportunity to review and comment. The Parties anticipate that the PSO 2 work will include replacement of the segment of the CSO line that is located between the bulkhead and the tie-back anchor (dead man) and replacement of the CSO line located between the tie-back anchor and West Marine View drive. PSO 2 work is also anticipated to include replacement and other work relating to the pipeline that runs approximately parallel to PSO 2.

2. City Approval of Design. After receiving all City comments, the Port will submit its proposed final plans and specifications (and final form of approvals and easements) to the City for approval, which approval will not be unreasonably withheld. The proposed final plans and specifications (and final form of approvals and easements) shall be accompanied by a prominent notice specifying "Commencement of Port's 30 Day Plans/Specifications Approval - PSO 2 Design Review Period" and shall be delivered to the attention of the City's notice contact specified in Section 3.I. below. Plans and specifications delivered without the required notice or to someone other than the designated recipient shall not constitute proper delivery. The City must either approve or disapprove in writing the Port's proposed final plans and specifications within 30 days after they are delivered to the Port (the "***PSO 2 Design Review Period***"). If the City does not provide the approval or disapproval to the Port within the PSO 2 Design Review Period, the plans and specifications and approvals and easements are deemed approved. For the purposes of this Agreement, the term "***PSO 2 Approved Plans and Specifications***" refers to final plans and specifications that are approved under this Section 2.A.2. For the purposes of this Agreement, the term "***PSO 2 Work***" refers to all excavation, construction, materials, and other activities and items necessary to complete all improvements in accordance with the PSO 2 Approved Plans and Specifications. The Port acknowledges and agrees that the City review and approval under this section is only for the purposes of this Agreement is not review or approval of plans and specifications as may be required under the City's usual municipal processes, such as, for example, building permits and planning department review.

3. Design Review Off-Ramp. If either Party determines during the PSO 2 Design Review Period, in the exercise of its reasonable discretion, that the construction of the PSO 2 work is not in its best interests or is not economical or technically feasible, or if the Port determines it will not proceed with the Everett Shipyard project, then such Party may terminate Section 2 of this Agreement by delivery of written termination notice to the other Party no later than the end of the Design Review Period. In the event of such termination, the terminating Party will pay 100% of the costs incurred under Section 2 of this Agreement up to the date of termination and any other reasonable costs associated with the removing the PSO 2 work from the Everett Shipyard design package (e.g., engineering costs associated with removing PSO 2

work from the plans and specifications, engineering redesign services to accommodate the change, etc.).

B. Permitting. The Port will apply for and obtain any necessary permits to allow for construction of the PSO 2 Work. The City acknowledges that the Port Everett Shipyard project is being conducted under a Department of Ecology Consent Decree schedule and must be conducted within the 2014/2015 in-water work window. Accordingly, the City shall fast track with the Port in obtaining permits necessary for the PSO 2 work.

C. Procurement.

1. Construction Contract. After approval of the PSO 2 Approved Plans and Specifications and the receipt of all necessary permits for the PSO 2 Work, the Port will call for bids and execute a construction contract for Everett Shipyard project (including the PSO 2 Work) in accordance with the Port's usual procurement processes and the Port's standard form construction contracts, except that:

(a) The PSO 2 Work will be a separate bid schedule in the Everett Shipyard project bid package. The bid package will inform bidders that the bid award will be determined based upon bidders' total bid amounts for the entire Everett Shipyard project, including the PSO 2 Work schedule. However, the bid package may also state that, if it is determined not to award the PSO 2 Work (see Section C.2 below), then the bid award will be determined based upon bidders' total bid amounts for the entire Everett Shipyard project, but not including the PSO 2 Work schedule.

(b) The contract will state that the PSO 2 Work may be removed from the project by unilateral deductive change order, in which case (i) the contract value will decrease by the amount of the PSO 2 Work Schedule and (ii) the contractor's entitlement to compensation for the removal of the PSO 2 Work from the project will be strictly limited to reimbursement for costs already directly incurred by the contractor for PSO 2 Work, such as purchased by contractor prior to the date of the deductive change order.

(c) The construction contract will contain a provision requiring the City be added as an additional insured on the contractor's required liability insurance policies.

(d) The construction contract will contain a clause acceptable to the City that allows the Port to assign all contractor's and manufacturer's warranties from the Port to the City.

2. Bidding Off-Ramps. Upon opening of the bids for construction of the Everett Shipyard project, the Parties will meet and confer.

(a) City Off-Ramp. If the City determines, in the exercise of its sole discretion, to not proceed with the PSO 2 Work, then the City may terminate Section 2 of this Agreement by delivering a written termination notice to the Port no later than two (2) days after the opening of such bids and the City's receipt of the bid results, in which case the Port will

remove the PSO 2 Work schedule from the Port's Everett Shipyard project. In the event of such termination, the City will pay 100% of the costs incurred under Section 2 of this Agreement up to the date of termination and any other reasonable costs associated with the removing the PSO 2 Work from the Everett Shipyard project (e.g., engineering redesign services to accommodate the change, etc.).

(b) Port Off-Ramp. If the Port determines, in the exercise of its sole discretion, to not proceed with the Everett Shipyard project, then this Section 2 terminates. In the event of such termination, the Port will pay 100% of the costs incurred under Section 2 of this Agreement up to the date of termination.

D. Construction. The Port shall complete all PSO 2 Work in accordance with the PSO 2 Approved Plans and Specifications. The Port will coordinate with the City so that the City takes a lead role in the oversight and inspection of PSO 2 Work. The City may attend construction meetings. The Port without City approval may execute change orders to the PSO 2 Work that in total increase the cost of the PSO 2 Work by up to 10% above the amount of the original PSO 2 Work construction contract. The Port will not execute change orders above such 10% without the prior approval of the City, which will not be unreasonably withheld.

E. Completion of PSO 2 Work. Upon completion of the PSO 2 Work, the City will promptly notify the Port that the PSO 2 Work is ready for acceptance. Upon such notice, (1) the Port will accept the PSO 2 Work from the contractor, (2) the PSO 2 Work is the property of the City, and (3) the City has responsibility for the maintenance and operation of the PSO 2 Work. The costs of such maintenance and operation will be allocated between the Parties by mutual agreement. The City and Port will cooperate to execute any documents (such as bills of sale) necessary to document the City's ownership interest in the PSO 2 Work and will cooperate to transfer to the City any contractor or manufacturer's warranties for the PSO 2 Work.

F. Permanent Easement. Upon completion of the PSO 2 Work, the City and Port will promptly execute a 30___ foot wide permanent non-exclusive easement at no cost to the City for the PSO 2 Work in the form approved under Section 2.A.2 above. Except for a provision substantively the same as Section 3 of this Agreement, the permanent easement will not contain any indemnity or defense obligations relating to environmental matters.

G. Cost Sharing.

1. City Pays for PSO 2 Work. Except in the case of an off-ramp termination by the Port, the City will pay all expenses related to the PSO 2 Work, including for example all surveying, designing, permitting, and construction costs. This includes all costs arising from or relating to any claims asserted against the Port by construction contractors relating to the PSO 2 Work. In the event of such a claim, the Parties will meet and confer, and the Port will not settle such a claim without the prior approval of the City, which will not be unreasonably withheld.

2. Staff Costs. Each party will bear the costs of its own PSO 2 staff work.

3. Billing Procedure. The Port will invoice the City for the PSO 2 Work. The Parties anticipate that the Port will invoice the City as the Port makes payments to PSO 2 Work consultants and contractors. An invoice will document in reasonable detail the amounts

expended by the Port related to the PSO 2 Work. Upon completion and acceptance of the PSO 2 Work and resolution of contractor claims (if any), the Parties will true-up the payments, so that the City has paid 100% of the expenses related to the PSO 2 Work.

H. Use of Off-Ramps. The Parties acknowledge that the work regarding PSO 2 is necessary work, and the City has budgeted about \$300,000 for work described in Section 2. The Parties agree that the necessity of the work must be taken into account when a Party considers using an off-ramp under Sections 2.A.3 and 2.C.2 above.

SECTION 3: ENVIRONMENTAL INDEMNITY

A. Indemnification by City. To the extent that PSO 2 after completion of construction under Section 2.E above discharges directly and/or indirectly onto Port property or facilities, the City shall indemnify, defend, and hold harmless the Port and its employees, commissioners, representatives, tenants, invitees, agents and consultants (all such persons collectively, "Port Persons"), from and against any and all claims, liabilities, loss, demands, liens, costs and expenses including reasonable attorneys' fees, agency orders, requirements or enforcement actions, suits and causes of action, and damages including but not limited to any claim for damage to property or injury or death of any persons (collectively, the "Claims") arising from the presence on Port property or any adjacent property of any Hazardous Substance (as that term is defined in Section 3.C. below) that was released onto, in or under the Port property from PSO 2 after completion of construction under Section 2.E above. Notwithstanding the foregoing, the City shall not have any obligation to indemnify, defend or hold harmless Port Persons for any Claims arising from (1) Hazardous Substances released or allowed by Port Persons into PSO 2 or into the drainage area of PSO 2 or (2) Hazardous Substances released on Port property that enter into PSO 2, when such release is by any person other than the City; provided, that in the event the City asserts such limitations on its contractual indemnity apply, it shall have the burden of proof on the issue(s) of whether the exceptions to the City's indemnity responsibility are applicable.

B. Baseline Sampling. During the design and permitting of the PSO 2 Work, the City and Port will discuss the desirability and feasibility of conducting baseline sampling. If both the City and Port determine to conduct baseline sampling, the City and Port will equally split the sampling cost. If one party wants to conduct baseline sampling and the other does not, the party wanting the sampling may conduct the sampling at its sole cost, and the other party will fully cooperate with the sampling. Any baseline sampling performed will be coordinated with the Department of Ecology Toxics Cleanup Program.

C. Definition of Hazardous Substance. As used in this Agreement, the term "Hazardous Substance" shall mean (i) any "hazardous substance" under the Washington Model Toxics Control Act (chapter 70.105D RCW) as amended from time to time and regulations promulgated thereunder; (ii) any substance the presence of which is prohibited by any federal, state, county, municipal or other local governmental statutes, regulations, ordinances or resolutions; and (iii) other substances deemed hazardous, toxic, a pollutant, or contaminant, which by any federal, state, county, municipal or other local governmental statutes, regulations,

ordinances or resolutions require special handling or notification in its collection, storage, treatment or disposal.

SECTION 4: GENERAL PROVISIONS

A. Administration. Each Party to this Agreement shall serve as an administrator of this Agreement for the purposes of compliance with RCW 39.34.030 for each Party's respective actions in performance of this Agreement.

B. Duration/Expiration. This Agreement expires upon completion of the true-ups set forth in Sections 1.H.3 and 2.H.3 above.

C. Governing Law. The laws of the State of Washington, without giving effect to principles of conflict of laws, govern all matters arising out of or relating to this Agreement.

D. Venue. The Parties shall bring any litigation arising out of or relating to this Agreement only before the Snohomish County Superior Court.

E. Complete Agreement. This Agreement constitutes the entire agreement of the parties relating to the subject matter of this Agreement. This Agreement supersedes and replaces all other written or oral agreements thereto.

F. Amendment. No amendment to this Agreement will be effective unless in writing and signed by the Mayor of the City and by an authorized representative of the Port.

G. Waiver. No waiver of satisfaction of any condition or nonperformance of an obligation under this Agreement will be effective unless it is in writing and signed by the party granting the waiver, and no such waiver will constitute a waiver of satisfaction of any other condition or nonperformance of any other obligation.

H. Severability. If any provision of this Agreement is unenforceable to any extent, the remainder of this Agreement, or the application of that provision to any persons or circumstances other than those as to which it is held unenforceable, will not be affected by that unenforceability and will be enforceable to the fullest extent permitted by law.

I. Notice. For a notice under this Agreement to be valid, it must be in writing and the sending party must use one of the following methods of delivery: (A) personal delivery to the address stated below; (B) first class postage prepaid U.S. Mail to the address stated below; or (C) nationally recognized courier to the address stated below, with all fees prepaid.

Notice to City	Notice to Port
City of Everett Public Works Attn: Heather Griffin, P.E. 3200 Cedar St.	Port of Everett Attn. Erik Gerking, P.G. 1200 Craftsman Way

Everett, WA 98201	Everett, Washington 98206
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A party may change its address by delivering written notice to the other party of the new address.

J. Attorneys Fees and Costs. The prevailing party in any action brought to enforce any obligations under this Agreement shall be entitled to recover from the non-prevailing party or parties an amount equal to the reasonable attorneys fees and costs incurred by the prevailing party, including without limitation any costs incurred on appeal or in any bankruptcy proceeding.

K. No Third-Party Beneficiaries. The provisions of this Agreement are for the sole benefit of the parties to this Agreement. No other persons have any rights or remedies under this Agreement.

L. Compliance with the Washington State Public Records Act. The parties acknowledge they are subject to the Public Records Act, chapter 42.56 RCW. Both parties shall cooperate with each other so that each may comply with all of its obligations under the Public Records Act.

M. Recording of this Agreement. This Agreement shall be recorded or otherwise made available to the public in accordance with RCW 39.34.040.

CITY OF EVERETT

By: Ray Stephanson
Ray Stephanson, Mayor

Date: 6/12/2014

APPROVED AS TO FORM:

ATTEST:

James D. Iles
James D. Iles, City Attorney
Date: 6/11/14

Sharon Fuller
Sharon Fuller, City Clerk
Date: 6/12/2014

PORT OF EVERETT

By: John M. Mohr

Name: John M. Mohr

Title: Executive Director

Date: 7/3/2014

