

Signature file

**IMPLEMENTING AGREEMENT BETWEEN
THE WASHINGTON STATE DEPARTMENT OF ECOLOGY
AND
THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION (WSDOT)
REGARDING
THE USE OF ENVIRONMENTAL COVENANT ALTERNATIVES AT WSDOT SITES**

I. INTRODUCTION

This implementing agreement is being adopted in accordance with the Memorandum of Understanding between the Washington State Departments of Ecology and Transportation Regarding Environmental Issues under Department of Ecology Jurisdiction, executed August 4, 1988. This MOU states in part “Authority is hereby granted . . . to develop and execute program specific implementing agreements.”

The Implementing Agreement (Agreement) is entered into between the Washington State Department of Ecology (Ecology) and the Washington State Department of Transportation (WSDOT), to coordinate the roles and responsibilities of each agency with respect to the use of environmental covenant alternatives authorized under Chapter 70.105D RCW, the Model Toxics Control Act (MTCA), and Chapter 64.70 RCW, the Uniform Environmental Covenants Act (UECA), on WSDOT owned properties where residual contamination remains after completion of MTCA cleanup actions. Each parcel subject to these regulations will be evaluated collaboratively between Ecology and WSDOT on a site-by-site basis to determine if it is appropriate to employ this alternative institutional control versus an environmental covenant. This Agreement does not apply to WSDOT properties that have a traditional tax parcel number such as maintenance yards and office locations. Those properties are subject to Ecology’s standard restrictive environmental covenant boilerplate and procedure in accordance with UECA and MTCA requirements.

RCW 70.105D identifies Ecology as the agency responsible for implementation of the MTCA, regarding cleanup of contaminated sites. RCW 47.01.260 imparts to WSDOT authority for planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways, including bridges and other structures, culverts, and drainage facilities and channel changes necessary for the protection of state highways. This Agreement provides a process to harmonize the statutory authorities of Ecology and WSDOT related to the implementation of institutional controls on contaminated state highway rights-of-way operated and maintained by WSDOT.

II. PURPOSE

Ecology may require institutional controls at cleanup sites or properties to assure the integrity of the cleanup and continued protection of human health and the environment. These institutional controls may restrict activities or use of property and/or resources and be described in an environmental covenant to be recorded on the property title. MTCA and UICCA and the MTCA regulation, WAC 173-340-440, describe the provisions that need to be included in an environmental covenant and the procedures for establishing such covenants.

Many properties operated by WSDOT do not have an assigned local jurisdiction tax parcel number (generally property within state highway rights-of-way). Without a parcel number, a covenant cannot be recorded with the county auditor. WAC 173-340-440(8)(b) permits an alternative system to a restrictive covenant for properties owned by state governments if the entity can demonstrate: (1) that it does not routinely file with the county recording officer based on the type of interest in real property that it has in the site; and (2) the alternative system meets the requirements of WAC 173-340-440(9). Use of an alternative system, as described here, makes sense because these restrictions become part of WSDOT's routine right-of-way management practices. As such, these restrictions are more likely to be recognized and complied with.

Ecology and WSDOT agree that in the event Ecology makes a determination pursuant to WAC 173-340-440 that an environmental covenant alternative is necessary for a WSDOT property, the following principles shall apply and will be incorporated in the relevant site documents.

III. ECOLOGY RESPONSIBILITIES

- A. Ecology agrees to facilitate an environmental covenant alternative in the form of a parcel restriction system (Parcel Restriction System) that meets MTCA requirements for providing institutional controls on WSDOT properties that Ecology has determined are necessary for a MTCA cleanup.
- B. Ecology agrees to work with WSDOT to identify and reach agreement on appropriate restrictions for specific projects and sites in a timely manner.
- C. Ecology agrees to manage the parcel restriction documents within its environmental database (ISIS) and make the link available to WSDOT for use in its parcel restriction system described in Section IV.
- D. Ecology agrees to take the lead on any required consultation with the local land use planning authorities regarding parcel activity and use restrictions implemented in accordance with this Agreement.

IV. WSDOT RESPONSIBILITIES

A. WSDOT agrees to implement a Parcel Restriction System that meets MTCA requirements for its properties that Ecology determines require a restrictive covenant. The Parcel Restriction System consists of the following components:

1. Parcel Restrictions Document and Sample Site-Specific Covenant Provisions (Exhibits A and B)

WSDOT agrees to use the model Parcel Restrictions document attached hereto as **Exhibit A** and by this reference incorporated herein when establishing parcel restrictions, with the specific restrictions tailored to the Site-Specific Covenant Provisions, attached hereto as **Exhibit B**, remaining after cleanup. Both parties to this Agreement recognize it may be necessary to modify the model Parcel Restrictions language depending on site-specific circumstances. When necessary to do so, to the extent feasible, the initiating agency shall first consult with the other agency to discuss the proposed changes. Ecology reserves the right to refuse to approve a Parcel Restrictions document that deviates substantially from the model Parcel Restriction template. The Parcel Restrictions document will be linked as appropriate to the documents and databases described in this section.

2. WSDOT Right-of-Way (ROW) Manual (Exhibit C)

Excerpts from the ROW Manual attached hereto as **Exhibit C** and by this reference incorporated herein, provide guidance on real estate acquisition, title, appraisal, and property management. The ROW Manual requires all staff and contractors to review the ROW Plan Sheet for land use restrictions and follow those restrictions.

3. WSDOT ROW Plan Sheet (Exhibit D)

ROW plans are used as the basis to acquire and dispose of real estate and other property rights. They are referred to in legal instruments and are permanently filed for public record at WSDOT Headquarters. A sample ROW Plan Sheet, attached hereto as **Exhibit D** and by this reference incorporated herein, includes site specific information regarding the nature of the contamination, disturbance-related restrictions for the parcel, and a link to the associated cleanup site webpage and Parcel Restrictions document in Ecology's environmental sites database.

4. WSDOT Utilities Manual (Exhibit E)

An excerpt from the Utilities Manual, attached hereto as **Exhibit E** and by this reference incorporated herein, provides guidance for accommodation and project

delivery in regards to utilities within state-owned highway ROW in a manner that does not interfere with the free and safe flow of traffic or impair the highway's visual quality. Information is provided about the preparation of utility agreements, permits, and service agreements. The Utilities Manual will include a requirement for all staff to check for use restrictions on the ROW Plan Sheet(s) in the proposed project area and provide notice to the utility owner of those use restrictions and the responsibility of their contractor(s) to be in compliance.

5. Real Estate Services Database

The Real Estate Services Database is a comprehensive list of all of WSDOT's parcels. This database will also be updated to include site specific information and link to the Parcel Restrictions document in Ecology's environmental sites database.

- B. WSDOT agrees not to convey any interest in any portion of the Property subject to parcel restrictions pursuant to this Agreement without providing for the continued adequate and complete operation, maintenance, and monitoring of remedial actions and continued compliance with the restrictions in the Parcel Restrictions System. WSDOT agrees to require that, within 30 days after conveyance, the party accepting title must record an Ecology-approved environmental covenant with the appropriate county auditor(s).
- C. Pursuant to RCW 70.105D.050(3) and WAC 173-340-550, Ecology is required to recover its costs for remedial actions, including costs incurred while managing the alternative system of parcel restrictions described in this Agreement. Costs reasonably attributable to the site include direct activities, support costs, and interest charges. This includes Ecology's costs of working with WSDOT to identify and implement site-specific restrictions under this Agreement. If WSDOT is a *Potentially Liable Person* pursuant to RCW 70.105D for a site that is subject to this Agreement, WSDOT agrees to reimburse such costs through site-specific settlements, orders, and voluntary clean-up program agreements.

V. CONSISTENCY WITH APPLICABLE STATUTES

- A. Nothing in this Agreement shall be construed to enlarge or reduce WSDOT's obligation (including financial obligations) to comply with all applicable state and federal laws, including MTCA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
- B. Nothing in this Agreement shall be construed to restrict in any way WSDOT's authority and responsibilities under Title 47 RCW (Public Highways and Transportation).

- C. Nothing in this Agreement shall be construed to restrict in any way Ecology’s authority to fulfill its oversight and enforcement responsibilities under MTCA or other applicable state laws.

VI. DISPUTE RESOLUTION

In the event that a dispute arises under this Agreement, the parties shall make all reasonable efforts to resolve the dispute at the staff level. The parties may request the assistance of section managers if the dispute is not resolved in a timely manner. If the dispute is still not resolved, the dispute shall be determined by a Dispute Board in the following manner. WSDOT and Ecology Program Managers from the respective programs will form a Dispute Board. The Program Managers shall jointly appoint an additional member to the Dispute Board. The Dispute Board shall review the facts, agreement terms, and applicable statutes and rules, and then make a determination. The determination of the Dispute Board shall be final and binding on WSDOT and Ecology. The cost of resolution will be borne by each party paying its own cost. Failure to resolve a dispute at a specific site does not negate this Agreement.

VII. PERIOD OF AGREEMENT, AMENDMENT, AND TERMINATION

This Agreement shall be effective on the date it is signed by WSDOT, and will remain in effect until amended or terminated as provided herein. This Agreement, and the procedure and Parcel Restrictions document referenced in this Agreement, shall be jointly reviewed by Ecology and WSDOT at least once every five years and may be updated upon mutual agreement of both parties to this Agreement. Either party may terminate this Agreement by notifying the other party of its intent to do so at least 90 days in advance of such termination.

VIII. EXHIBITS

- 1. A – Parcel Restriction Document
- 2. B – Sample Site-Specific Covenant Provisions
- 3. C – Excerpt from the WSDOT Right of Way Manual
- 4. D – Sample WSDOT Right of Way Plan Sheet
- 5. E – Excerpt from the WSDOT Utilities Manual

Washington State
Department of Ecology

Jeff Johnston for
Program Manager, Toxics Cleanup Program

Date: 10/28/16 Jim Pencowski

Washington State
Department of Transportation

Meghan White
Director, Environmental Services

Date: 4/14/16

EXHIBIT A

PARCEL RESTRICTIONS

This document is part of the alternative system used by the Washington State Department of Transportation (“WSDOT” or “Department”) to implement institutional controls pursuant to the Model Toxics Control Act (“MTCA”), Chapter 70.105D RCW and MTCA regulations, WAC 173-340-440 on parcel(s) of property owned by the Department. The following institutional controls and/or restrictions shall be implemented congruently with RCW 47.01.260, allowing the Department to retain its legal authority to design, build, operate and maintain the highway system. The purpose of this document is to describe the specific institutional controls that will be implemented at the Property. Accordingly, nothing in this document shall operate to either enlarge or reduce WSDOT’s obligation to comply with all applicable state and federal laws, including MTCA and CERCLA.

The Property that is the subject of these restrictions is part or all of a site commonly known as (Site Name), FSID #_. The Property is legally described in Exhibit A, and illustrated in Exhibit B, both of which are attached (hereafter “Property”). If there are differences between these two Exhibits, the legal description in Exhibit A shall prevail.

The Property is the subject of remedial action under MTCA. The restrictions on use described in this document are required because residual contamination remains on the Property after completion of remedial actions. Records describing the extent of residual contamination and remedial actions conducted are available through the Washington State Department of Ecology (“Ecology”). These include the following documents: (List Reports).

Specifically, the following principal contaminants remain on the Property:

| Medium | Principal Contaminants Present |
|------------------------|-------------------------------------|
| Soil | General description of contaminants |
| Groundwater | General description of contaminants |
| Surface Water/Sediment | General description of contaminants |

Section 1. General Restrictions and Requirements.

The following general restrictions and requirements shall apply to the Property:

- a. Interference with Remedial Action.** WSDOT shall not engage in any activity on the Property that may impact or interfere with the remedial action. If any highway operation, maintenance, inspection or monitoring is determined to impact or interfere with the remedial action, no activities will commence without prior written approval from Ecology.
- b. Protection of Human Health and the Environment.** Except as authorized by Section 2 (b) of this Parcel Restrictions document, WSDOT shall not engage in any activity on the Property that may threaten continued protection of human health or the environment without prior written approval from Ecology. This includes, but is not limited to, any activity that results in the release of residual contamination that was contained as a part of the remedial action or that exacerbates or creates a new exposure to residual contamination remaining on the Property.

EXHIBIT A

c. Continued Compliance Required. WSDOT shall not convey any interest in any portion of the Property without providing for the continued adequate and complete operation, maintenance and monitoring of remedial actions and continued compliance with these restrictions.

d. Leases. WSDOT shall restrict any lease for any portion of the Property to uses and activities consistent with these restrictions and notify all lessees of the restrictions on the use of the Property.

e. Amendment to this Parcel Restrictions document. WSDOT must notify and obtain approval from Ecology at least sixty (60) days in advance of any proposed activity or use of the Property in a manner that is inconsistent with these restrictions. Before approving any proposal, Ecology must issue a public notice and provide an opportunity for the public to comment on the proposal. If Ecology approves the proposal, the restrictions will be amended to reflect the change.

Section 2. Specific Restrictions, Prohibitions, and Requirements.

In addition to the general restrictions in Section 1, the following additional specific restrictions and requirements shall apply to the Property.

a. Land Use. The remedial action for the Property is based on a cleanup designed for commercial property. As such, the Property shall be used in perpetuity only for highway right-of-way purposes and for commercial land uses as that term is defined in the rules promulgated under Chapter 70.105D RCW. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, parks, grazing of animals, and growing of food crops.

b. Containment of Soil/Waste Materials. The remedial action for the Property is based on containing contaminated soil under a cap consisting of asphalt road and concrete sidewalk located as illustrated in **Exhibits B and C**. The primary purpose of this cap is to minimize the potential for contact with contaminated soil and to minimize the leaching of contaminants to groundwater. As such, the following restrictions shall apply within the area illustrated in **Exhibits B and C**.

Any activity on the Property that will compromise the integrity of the cap including: drilling; digging; piercing the cap with sampling device, post, stake or similar device; grading; excavation; installation of underground utilities; removal of the cap; or, application of loads in excess of the cap load bearing capacity is prohibited, except as follows:

i. If the activity occurs 5 feet or less below ground surface, WSDOT shall promptly repair any damage to the cap by replacing the damaged area with similar materials and submit written documentation to Ecology documenting these repairs within ninety (90) days of completing the repairs.

ii. If the activity occurs more than 5 feet below ground surface, WSDOT shall consult with Ecology before the activity on appropriate precautions and restoration procedures, including appropriate disposal of contaminated materials encountered during excavation. Unless otherwise agreed to by Ecology during the consultation, WSDOT shall promptly repair any damage to the

EXHIBIT A

cap by replacing the damaged area with similar materials and submit written documentation to Ecology documenting these repairs within ninety (90) days of completing the repairs.

c. Stormwater facilities. To minimize the potential for mobilization of contaminants remaining in the soil and groundwater on the Property, no stormwater infiltration facilities or ponds shall be constructed on the property.

d. Vapor/gas controls. The residual contamination on the Property includes volatile chemicals that may generate harmful vapors. As such, the following restrictions shall apply on the Property to minimize the potential for exposure to these vapors:

No building or other permanent enclosed structure shall be constructed on the Property/within this area.

e. Groundwater use. The groundwater beneath the Property remains contaminated and shall not be extracted for any purpose other than temporary construction dewatering, investigation, monitoring or remediation. Drilling of a well for any water supply purpose is strictly prohibited. Groundwater extracted from the property for any purpose shall be considered potentially contaminated and any discharge of this water shall be done in accordance with state and federal law.

Section 3. Access.

a. WSDOT shall maintain clear access to all remedial action components necessary to construct, operate, inspect, monitor and maintain the remedial action.

b. WSDOT freely and voluntarily grants Ecology and its authorized representatives, upon reasonable written notice, the right to enter the Property at reasonable times as agreed upon by both parties to evaluate the effectiveness of these restrictions and associated remedial actions, and enforce compliance with these restrictions and those remedial actions, including the right to take samples, inspect any remedial actions conducted on the Property, and to inspect related records.

c. No right of access or use by a third party to any portion of the Property is conveyed by this instrument.

Section 4. Notice Requirements.

a. Conveyance of Any Interest. WSDOT, when conveying any interest in any part of the property, including but not limited to title, easement, leases, and security or other interests, must:

i. Notify Ecology at least thirty (30) days in advance of the conveyance.

ii. Include in the conveying document a notice in substantially the following form, as well as a complete copy of these restrictions:

NOTICE: THIS PROPERTY IS SUBJECT TO USE RESTRICTIONS DETAILED BY THE WASHINGTON STATE DEPARTMENT OF ECOLOGY ON JULY 15, 2015 AND AVAILABLE AT THE ECOLOGY FACILITY SITE DATABASE UNDER ECOLOGY SITE ID No. __. USES AND ACTIVITIES ON THIS PROPERTY MUST

EXHIBIT A

COMPLY WITH THE RESTRICTIONS, A COMPLETE COPY OF WHICH IS ATTACHED TO THIS DOCUMENT.

- iii. Unless otherwise agreed to in writing by Ecology, provide Ecology with a complete copy of the executed document within thirty (30) days of the date of execution of such document.
 - iv. In the case of conveyance of title, require that within 30 days after conveyance the party accepting title must file with the county auditor an environmental covenant approved by Ecology.
- b. Reporting Violations.** Should WSDOT become aware of any violation of these restrictions, WSDOT shall promptly report such violation to Ecology.
- c. Emergencies.** For any emergency or significant change in site conditions due to Acts of Nature (for example, flood, fire, response to a vehicular accident or other emergency condition in the right of way) resulting in an inability to adhere to these restrictions, WSDOT is authorized to respond to such an event in accordance with state and federal law. WSDOT must notify Ecology of the event and response actions planned or taken as soon as practical but no later than within 24 hours of the discovery of the event.
- d.** Any required written notice, approval, or communication shall be personally delivered or sent by first class mail to the following persons. Any change in this contact information shall be submitted in writing to Ecology and WSDOT.

| | |
|--|--|
| Contact Name (or his/her successor) Hazardous Materials Program Manager Office -- Cell – Email Address | Contact Name (or his/her successor) Ecology Toxics Cleanup Program P.O. Box 47600 Olympia, WA 98504 – 7600 Office <u>email address</u> |
|--|--|

As an alternative to providing written notice and change in contact information by mail, these documents may be provided electronically in an agreed upon format at the time of submittal.

Section 5. Modification or Termination.

- a. If the conditions at the site requiring these restrictions have changed or no longer exist, then WSDOT may submit a request to Ecology that these restrictions be amended or terminated.

EXHIBIT A

Exhibit A

LEGAL DESCRIPTION

All that portion of the hereinafter described Parcel "A" lying Southerly and Easterly of the following line description:

EXHIBIT A

Exhibit B

PROPERTY MAP

(Required)

EXHIBIT A

Exhibit C

MAP ILLUSTRATING LOCATION OF RESTRICTIONS

While a map illustrating the location of the restrictions is required, WSDOT has the option of creating a separate map or including this information in Exhibit B.

More than one map may be necessary to illustrate the area subject to restrictions. For example, the area encompassing a soil cap may be different than the area where vapor or groundwater contamination is a concern.

The area subject to the restrictions, if less than the entire property, should be a contiguous area with even boundaries that follow physical features on the site so the boundary can be easily discerned in the field.

EXHIBIT B

EXAMPLE SITE-SPECIFIC COVENANT PROVISIONS

a. Land Use.¹

Option 1 Industrial Land Use: The remedial action for the Property is based on a cleanup designed for industrial property. As such, the Property shall be used in perpetuity only for industrial uses, as that term is defined in the rules promulgated under Chapter 70.105D RCW. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, parks, grazing of animals, growing of food crops, and non-industrial commercial uses.

Option 2 Commercial Land Use: The remedial action for the Property is based on a cleanup designed for commercial property. As such, the Property shall be used in perpetuity only for commercial land uses as that term is defined in the rules promulgated under Chapter 70.105D RCW. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, parks, grazing of animals, and growing of food crops.

Option 3 Park: The remedial action for the Property is based on a cleanup designed for a public park. As such, the Property shall be used in perpetuity only for a public park. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, grazing of animals, and growing of food crops.

Option 4 [Specify other land use limitations as appropriate.]

b. Containment of Soil/Waste Materials.²

[Use where contaminated soil or solid or hazardous waste remains on the property.]

The remedial action for the Property is based on containing contaminated soil **[and waste materials]** under a cap consisting of **[Insert a description of the cap]**³ and located as illustrated in **[Exhibit B/C]**⁴. The primary purpose of this cap is to **[Insert purpose of cap]**.⁵ As such, the following restrictions shall apply within the area illustrated in **[Exhibit B/C]**⁶:

Option 1 [Use where a cap is required.] Any activity on the Property that will compromise the integrity of the cap including: drilling; digging; piercing the cap with sampling device, post, stake or similar device; grading; excavation; installation of underground utilities; removal of the cap; or, application of loads in excess of the cap load bearing capacity, is prohibited without prior written approval by Ecology. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to the cap. Unless an alternative plan has been approved by Ecology in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

¹ Use one of these restrictions only if the underlying zoning allows the use.

² Waste materials means solid wastes as defined in Chapter 70.95 RCW or hazardous wastes as defined in Chapter 70.105 RCW and the rules promulgated under these statutes.

³ Such as: an X foot thick layer of clean soil; an engineered cap consisting of X inches of clean soil overlying a X mil thick geomembrane and/or clay layer; asphalt pavement; an X square foot building, etc.]

⁴ Be very clear in describing or diagramming where the contamination is located relative to a legally defined benchmark such as a property line or survey monument; or use a legal description.

⁵ Such as: minimize the potential for contact with contaminated soil; minimize leaching of contaminants to groundwater and surface water; prevent runoff from contacting contaminated soil; minimize airborne contaminants. A cap may have multiple purposes.

⁶ NOTE: More than one exhibit may be necessary to illustrate the area restricted by this and other limitations.

EXHIBIT B

Option 2 [Use when contamination is left behind under a building.]

The Grantor shall not alter or remove the existing structures on the Property in any manner that would expose contaminated soil **[and waste materials]**, result in a release to the environment of contaminants, or create a new exposure pathway, without prior written approval of Ecology. Should the Grantor propose to remove all or a portion of the existing structures illustrated in **[Exhibit B/C]** so that access to the underlying contamination is feasible, Ecology may require treatment or removal of the underlying contaminated soil **[and waste materials]**.

Option 3: [Use when periodic inspections of a cap/building are included.]

The Grantor covenants and agrees that it shall annually, or at another time as approved in writing by Ecology, inspect the **[cap/building]** and report within thirty (30) days of the inspection the condition of the **[cap/building]** and any changes to the **[cap/building]** that would impair its performance.

c. Stormwater facilities. [Use when infiltration needs to be controlled to minimize leaching from soil or waste materials, or spreading of groundwater contamination.]

To minimize the potential for mobilization of contaminants remaining in the **[soil/waste materials/groundwater]** on the Property, no stormwater infiltration facilities or ponds shall be constructed **[on the Property] OR [within the area of the Property illustrated in Exhibit B/C]**. All stormwater catch basins, conveyance systems, and other appurtenances located within this area shall be of water-tight construction.⁷

d. Vapor/gas controls. [Use when vapors or methane gas are a concern.]

The residual contamination on the Property includes **[volatile chemicals that may generate harmful vapors] AND/OR [biodegradable wastes/chemicals that may generate methane, a combustible gas]**. As such, the following restrictions shall apply **[on the Property] OR [within the area of the Property illustrated in Exhibit B/C]** to minimize the potential for exposure to these vapors:

Option 1 No building or other enclosed structure shall be constructed **[on the Property/within this area]**.

Option 2 Any building or other enclosed structure constructed **[on the Property/within this area]** shall be constructed with a sealed foundation and with a **[vapor/gas]** control system installed and maintained to prevent the migration of **[vapors/gas]** into the building or structure.

e. Groundwater Use. [Use when groundwater use restrictions are required.]

The groundwater beneath **[the Property] OR [within the area of the Property illustrated in Exhibit B/C]** remains contaminated and shall not be extracted for any purpose other than temporary construction dewatering, investigation, monitoring or remediation. Drilling of a well for any water supply purpose is strictly prohibited. Groundwater extracted **[from the Property/within this area]** for any purpose shall be considered potentially contaminated and any discharge of this water shall be done in accordance with state and federal law.

⁷ NOTE: Most local ordinances require on-site infiltration of runoff. If redevelopment of the Property is anticipated, the cleanup plan should reserve an area for this infiltration to occur without exacerbating leaching of residual soil contamination or enhancing movement of contaminants within the groundwater.

EXHIBIT B

f. **Sediments.** [Use for sediment cleanup sites.]⁸

The residual contamination on the Property includes contaminated sediments. As such, the following restrictions shall apply to minimize potential disturbance of these sediments [on the Property] OR [within the area of the Property illustrated in Exhibit B/C]:

Option 1 [Use where a cap is required.] Any activity [on the Property/within this area] that will compromise the integrity of the cap including: drilling; digging; piercing the cap with sampling device, post, stake or similar device; excavation; installation of buried utilities; removal of the cap; or, application of loads in excess of the cap load bearing capacity, is prohibited without prior written approval by Ecology. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to the cap. Unless an alternative plan has been approved by Ecology in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

Option 2 No docks or other structures shall be constructed [on the Property/within this area] without prior written approval of Ecology.

Option 3 No dredging shall be allowed [on the Property/within this area] without prior written approval of Ecology.

Option 4 No ships or boats shall be allowed to anchor or use side thrusters [on the Property/within this area]. A no wake zone shall be enforced and ships and boats shall be limited to a draft depth of [XX] feet [on the Property/within this area].

Option 5 No digging for clams, setting of crab pots or fishing nets, anchoring of mooring buoys or channel markers, or similar activities that could disturb the surface of the sediment shall be allowed [on the Property/within this area] without prior written approval of Ecology.

g. **Monitoring.** [Use for long-term protection of monitoring devices.]

Several [groundwater monitoring wells, vapor probes, etc.] are located on the Property to monitor the performance of the remedial action. The Grantor shall maintain clear access to these devices and protect them from damage. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to any monitoring device. Unless Ecology approves of an alternative plan in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

h. **Other.**

[Add other property-specific use or activity restrictions and affirmative obligations that are necessary but not identified above. Examples include special remedy-specific requirements such as restrictions on structures over leachate/groundwater collection systems, or protection requirements for cut-off walls or sheet piling.]

⁸ NOTE: Sediment restrictions are currently evolving. Additional guidance can be found in Ecology's Sediment Cleanup Users Manual II (SCUM II), Publication No. 12-09-057, located at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1209057.html>

EXHIBIT C

Note – Highlighted text is the proposed language additions to relevant sections of the current ROW Manual

Excerpts from WSDOT Right of Way Manual M 26-01.08

Chapter 1-8 Right of Way Plans

A. Right of way plans are the official state documents used as the basis to acquire and dispose of real estate and other property rights. The plans are referred to in legal instruments and are permanently filed for public record at the Transportation Headquarters Building.

It is the responsibility of the region to assemble data and prepare plans for the acquisition of right of way, including easements, permits, and any substantiating documentation necessary for completion of the plans. These activities are further outlined in the *Plans Preparation Manual M 22-31*.

B. The Region Real Estate Services Manager (RESM):

1. Assures that right of way data of the types listed in this chapter are made available to the region engineering staff, including assessor's information and title reports as requested.
2. Assists the Regional Administrator (or designee) in identifying and assigning right of way parcel numbers to the affected ownerships shown on the right of way plans.
3. Determines the types and extent of the property and/or property rights required (e.g., fee, easement, temporary easement, permit).
4. Assures that right of way plans are complete to the extent that the necessary data are depicted thereon.

Chapter 6-15 Toxic/Hazardous Waste Situations

Initial site assessments and preliminary site investigations should have already been conducted before the Property and Acquisition Specialist (PAS) is assigned the property. Chapter 4 contains information on the indications of a contaminated site.

- A. When the appraisal indicates the possibility of the property being contaminated, the PAS will consult with the Environmental Service Office (ESO), the Region RES Manager, and the Acquisition and Title Section Manager for the appropriate method of mitigating the risk to WSDOT. Items F and G below provide direction.
- B. When a potential hazardous waste or contamination situation is observed or indicated, the PAS will complete a hazardous waste checklist and submit it to the Region RES Manager.

EXHIBIT C

- C. The Region RES Manager will forward the hazardous waste checklist to the ESO, and send a copy to the project engineer and the project development engineer. When a contaminated site is discovered at this stage of the right of way project, there could be significant project delays. It is imperative the project managers be notified.
- D. ESO will report back with its assessment and estimates for costs to clean up the contamination.
- E. The Region Appraisal Supervisor should be consulted to determine if the appraisal needs to be revised. If so, a new offer will need to be presented.
- F. Several methods of cleanup procedures can be used. These will be unique to each parcel and the following list is not meant to be the only methods available. Each method should be discussed with the Region RES Manager and Acquisition and Title Section Manager to assure proper risk assessment and avoidance is applied.
 - 1. The property will be purchased as if clean and the PAS withholds the cleanup costs from the compensation. The risk is the estimate may over or understate the cleanup costs. Depending on the confidence of the ESO in the estimate and the potential for additional contamination, an indemnity clause may be needed in the deed.
 - 2. The property is purchased as if clean and the property owner agrees to an indemnity clause in the deed. This means the owner will be liable for any future cleanup costs.
 - 3. The funds to acquire the property can be placed in escrow. The property owner then cleans up the contamination using draws on the escrowed funds to pay for the cleanup. This method will only work on early acquisitions or shelf projects as there is not usually sufficient time to clean up a site in our construction schedule. Once the site is cleaned to ESO's satisfaction, the remaining funds can be released. Indemnity language may or may not be needed in the deed, depending on the risk of future cleanup costs.
 - 4. If the appraisal used contaminated sales, the diminution of value due to the contamination is recognized and no indemnity language would be needed in the deed. It is extremely unusual that this situation will occur without extensive environmental investigation and very substantial sales comparisons in the appraisal.
 - 5. Prospective Purchasers Agreements - The Washington State Department of Ecology has a procedure for resolving the liability for a particular site prior to the purchase of the site. This procedure involves entering into what is known as a prospective purchaser agreement. Through this process, the agency is able to negotiate with Ecology prior to purchase to limit the extent of the agency's responsibility.
 - 6. When access rights only are acquired, there is no need for an indemnity clause or a deduction for cleanup costs.

EXHIBIT C

- G. ESO and RES will need to work together to assure the appropriate measures are used in the cleanup of the property. ESO will process all Department of Ecology filings. For any contamination remaining on an acquired property, either as a result of purchasing property as if clean as in #2 above or any other reason, a notation shall be added to the Right of Way Plan. The notation will state:

“Parcel [number] contains residual contamination and the following uses are restricted: [list restrictions]. For additional information on this parcel, refer to the WSDOT Inventory Control Number [number], and by entering the Ecology Facility Site ID number [number] in the Ecology TCP Web Reporting Database located at: <https://fortress.wa.gov/ecy/tcpwebreporting/report.aspx>. All staff and contractors must check for, and follow all use restrictions.”

The restrictions listed on the Right of Way Plan Sheet must be followed by WSDOT employees and contractors. Using these two identifiers, the Real Estate Database will be updated to reflect the location and type of contamination, and will include the statement:

“Additional information on this parcel can be found by entering the Ecology Facility Site ID Number [number] in the Ecology TCP Web Reporting database located at: <https://fortress.wa.gov/ecy/tcpwebreporting/report.aspx>.”

Chapter 11-7.2.B Disposal Processing

1. Regional Administrator’s (or designee) electronic approval attesting that the following statements are true:
 - a. The lands will not be needed for transportation purposes in the foreseeable future.
 - b. The right of way being retained is adequate under present day standards for the transportation facility.
 - c. The release will not adversely affect the facility or the traffic using it.
 - d. The lands to be disposed of or relinquished are not suitable for retention to restore, preserve, or improve the scenic beauty adjacent to the highway.
 - e. The lands to be disposed of or relinquished are not suitable for inclusion into our wetlands inventory.

EXHIBIT C

- f. The lands to be disposed of or relinquished are not needed for a park and ride lot, flyer stop, or similar facility to accommodate high occupancy vehicles.
- g. No hazardous material or highway waste is present on the site and any necessary cleanup has been completed. If hazardous material or contamination is present, as indicated by a notation on the Right of Way Plan and in the Real Estate Services Database, this information must be disclosed in the *Real Property Transfer Disclosure Statement* required pursuant to Chapter 64.06 RCW. Filing of an environmental covenant (as approved by the Department of Ecology) by the property owner must occur within 30 days after transfer of title of the property and must be made a condition of the property transfer.
- h. Specific information regarding rights to be reserved.
- i. If interstate, NEPA documentation is signed and/or approved by Region Environmental Services.

EXHIBIT E

Utilities Manual – Chapter 700.07 Environmental Requirements

(3) Potential Problems and Common Requirements

A utility inspector should always be alert to the following potential problems:

(a) Hazardous Waste and Spill Prevention

Contaminants brought on-site by the utility, as well as contaminated water and soil encountered during excavation are to be contained and/or removed from the job site, and the Region Environmental Office, other appropriate region authority, or the headquarters Hazardous Materials Program, is to be notified. Existing contamination, residual contamination from a cleanup, or portions of a contaminated site, in the right of way may be indicated by a notation on the Right of Way Plan. Therefore the utility inspector must review the Right of Way Plan sheet[s] for potential for contamination to exist in the area of utility work. The notation will include information on the nature of contamination and include specific use restrictions to protect the integrity of the cleanup and limit the risk of exposure of hazardous substances. The utility should have a Spill Kit on-site and, in some cases, a Spill Prevention, Control, and Countermeasures (SPCC) Plan.

