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Seattle Department of Transportation  
PO Box 34996  
Seattle, WA 98124-4996



WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**  
Peter Goldmark - Commissioner of Public Lands

## **AQUATIC LANDS EASEMENT FOR ENHANCEMENT AND RESTORATION OF STATE OWNED AQUATIC LANDS**

### **Easement No. 51-089146**

Grantor: Washington State Department of Natural Resources  
Grantee(s): Seattle Department of Transportation  
Legal Description: Section SE 31, Township 25 North, Range 04, W.M.  
Assessor's Property Tax Parcel or Account Number: Not Applicable  
Assessor's Property Tax Parcel or Account Number for Upland parcel used in conjunction with this Easement: Not Applicable

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and SEATTLE DEPARTMENT OF TRANSPORTATION, a Government Agency/Entity ("Grantee"). State has authority to enter into this Easement under Chapter 43.12 RCW, Chapter 43.30 RCW, and Title 79 of the Revised Code of Washington (RCW).

### **BACKGROUND**

Grantee desires to use the aquatic lands commonly known as Elliott Bay, which is harbor area located in King County, Washington, from State for conservation activities intended to preserve and enhance aquatic ecosystems. State is willing to grant an easement for this purpose pursuant to the terms and conditions of this Agreement.

THEREFORE, the Parties agree as follows:

## SECTION 1 GRANT OF EASEMENT

### 1.1 Easement Defined.

- (a) State grants and conveys to Grantee a nonexclusive easement, subject to the terms and conditions of this agreement, over, upon, and under the real property at Elliott Bay: described in Exhibit A. In this agreement, the term “Easement” means this agreement and the rights granted; the term “Easement Property” means the real property subject to the easement.
- (b) This Easement is subject to all valid interests of third parties noted in the records of King County, or on file in the Office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or federal navigation servitude; and treaty rights of Indian Tribes.
- (c) This Easement does not include any right to harvest, collect or damage any natural resource, including aquatic life or living plants, any water rights, or any mineral rights, including any right to excavate or withdraw sand, gravel, or other valuable materials, except to the extent expressly permitted in Exhibit B.
- (d) This Easement does not include the right to grant easements and franchises to third parties.

### 1.2 Survey and Easement Property Descriptions.

- (a) Grantee prepared Exhibit A, which describes the Easement Property. Grantee represents that Exhibit A is a true and accurate description of the Easement boundaries and the improvements to be constructed or already existing in the Easement area. Grantee’s obligation to provide a true and accurate description of the Easement Property boundaries is a material term of this Easement.
- (b) State’s acceptance of Exhibit A does not constitute agreement that Grantee’s property description accurately reflects the actual amount of land used by Grantee. State reserves the right to retroactively adjust fees if at any time during the Term State discovers a discrepancy between Grantee’s property description and the area actually used by Grantee.
- (c) State accepts a preliminary Exhibit A upon the Commencement Date of this Easement. Grantee shall submit a final “as-built” survey and legal description for State’s approval within One Hundred Eighty (180) days of the completion of each habitat area. Upon State’s written approval, the final Exhibit A supersedes the preliminary Exhibit A. Until superseded, the preliminary Exhibit A has full legal effect.

**1.3 Condition of Easement Property.** State makes no representation regarding the condition of the Easement Property, improvements located on the Easement Property, the suitability of the Easement Property for Grantee’s Permitted Use, compliance with governmental laws and regulations, availability of utility rights, access to the Easement Property, or the existence of hazardous substances on the Easement Property.

## SECTION 2 USE

### 2.1 Permitted Use.

- (a) Grantee shall use the Easement Property for conducting the conservation activities described in Exhibit B (the “Permitted Use”), and for no other purpose.
- (b) Warranties on Permitted Use.
  - (1) Grantee warrants that no permit, law, or regulatory authority obligates Grantee to undertake the Permitted Use as mitigation.
  - (2) Grantee warrants that Grantee will not receive or gain compensatory mitigation or natural resource damage credits because of the Permitted Use.
- (c) Grantee warrants that Easement Property will be available for public recreation purposes in accordance with RCW 79.105.230.
- (d) Grantee’s breach of any warranty under Paragraph 2.1(b) is default subject to Section 14.
- (e) Restoration of Easement Property Required Under Certain Conditions
  - (1) If during or after the term of this Easement, the Permitted Use causes unintended or unanticipated consequences that are deleterious to the Easement Property or natural resources on the Property, or result in conditions that pose a threat to human health or safety, Grantee shall take all steps necessary to restore the Easement Property to the condition prior to commencement of Permitted Use.
  - (2) If Grantee fails to take action in a timely manner, State may restore the natural resources or Easement Property and charge Grantee restoration costs and/or charge Grantee for damages. On demand by State, Grantee shall pay all costs and/or damages.

### 2.2 Restrictions on Use.

- (a) The limitations in this Paragraph 2.2 apply to the Easement Property and adjacent state-owned aquatic land. Grantee’s compliance with this Paragraph 2.2 does not limit Grantee’s liability under any other provision of this Easement.
- (b) Grantee shall not cause or authorize:
  - (1) Damage to natural resources, except to the extent expressly permitted in Exhibit B,
  - (2) Waste, or
  - (3) Deposit of material, unless approved by State in writing and except to the extent expressly permitted in Exhibit B. This prohibition includes deposit of fill, rock, earth, ballast, wood waste, refuse, garbage, waste matter, pollutants of any type, or other matter.
- (c) State shall not allow other uses on the Easement Property that will interfere with the Permitted Use.

**2.3 Conformance with Laws.** Grantee shall keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding Grantee’s use of the Easement Property.

**2.4 Liens and Encumbrances.** Grantee shall keep the Easement Property free and clear of any liens and encumbrances arising out of or relating to its use of the Easement Property, unless expressly authorized by State in writing.

**2.5 Interference with Other Uses.**

- (a) Grantee shall exercise Grantee's rights under this Easement in a manner that minimizes or avoids interference with the rights of State, the public, or others with valid right to use or occupy the Easement Property or surrounding lands and water.
- (b) To the fullest extent reasonably possible, Grantee shall place and construct Improvements in a manner that allows unobstructed movement in and on the waters above and around the Easement Property.
- (c) Except in an emergency, Grantee shall provide State with written notice of construction or other significant activity on Easement Property at least thirty (30) days in advance. "Significant Activity" means any activity that may affect use or enjoyment by the State, public, or others with valid rights to use or occupy the Easement Property or surrounding lands and water.
- (d) Grantee shall mark the location of any hazards associated with the Permitted Use and any Improvements in a manner that ensures reasonable notice to the public.

**SECTION 3 TERM**

**3.1 Term Defined.** This Easement shall remain in place until terminated in accordance with Section 14. The Commencement Date shall be August 1, 2013.

**3.2 End of Term.**

- (a) Upon the expiration or termination of this Easement, Grantee shall surrender the Easement Property to State in the same or better condition as on the Commencement Date and except for alterations necessary under the Permitted Use or otherwise authorized by State.
- (b) If Easement Property is in worse condition on the surrender date than on the Commencement Date, the following provisions apply.
  - (1) State shall provide Grantee a reasonable time to take all steps necessary to remedy the condition of the Easement Property. State may require Grantee to enter into a right-of-entry or other use authorization prior to the Grantee entering the Easement Property if Easement has terminated.
  - (2) If Grantee fails to remedy the condition of the Easement Property in a timely manner, State may take any steps reasonably necessary to remedy Grantee's failure. Upon demand by State, Grantee shall pay all costs of State's remedy, including but not limited to the costs of removing and disposing of any material deposited improperly on the Easement Property, lost revenue resulting from the condition of the Easement Property, and any administrative costs associated with State's remedy.

## SECTION 4 FEES

**4.1 Fee.** Grantee is not obligated to pay fees unless Grantee breaches warranties under Paragraph 2.1(b), (c) or (e). If Grantee fails to cure a default caused by a breach of such warranties in accordance with Paragraph 14.1(a) of this Easement, in addition to any other remedy available to State, Grantee shall pay to State a fee of Eight Hundred Thousand Dollars (\$800,000.00). If Grantee's breach of a warranty under Paragraph 2.1(b), (c), or (e) affects less than all or substantially all of the Easement, within sixty (60) days of receiving notice of breach from State, Grantee may request that State pro-rate the fee identified in this Paragraph in accordance with the percentage of the Easement affected, and State shall not unreasonably deny the request. Grantee shall have the burden of demonstrating whether and to what extent the breach affects less than all the easement. Any payment not paid by State's close of business on the date due is past due.

**4.2 Payment Place.** Grantee shall make payment, if any, to Financial Management Division, 1111 Washington St SE, PO Box 47041, Olympia, WA 98504-7041.

## SECTION 5 OTHER EXPENSES

**5.1 Taxes and Assessments.** Grantee shall pay all taxes, assessments, and other governmental charges, of any kind whatsoever, applicable or attributable to the Easement and the Permitted Use.

**5.2 Failure to Pay.** If Grantee fails to pay any of the amounts due under this Easement, State may pay the amount due, and recover its cost in accordance with Section 6.

## SECTION 6 LATE PAYMENTS AND OTHER CHARGES

**6.1 Failure to Pay.** Failure to pay any fees or other expenses is a default by Grantee; State may seek remedies in Section 14 as well as late charges and interest as provided in this Section 6.

**6.2 Late Charge.** If State does not receive any payment within ten (10) days of the date due, Grantee shall pay to State a late charge equal to four percent (4%) of the unpaid amount or Fifty Dollars (\$50), whichever is greater, to defray the overhead expenses of State incident to the delay.

**6.3 Interest Penalty for Past Due Fees and Other Sums Owed.**

- (a) Grantee shall pay interest on the past due fee at the rate of one percent (1%) per month until paid, in addition to paying the late charges determined under Paragraph 6.2. Fees not paid by the close of business day on the due date will begin accruing interest the day after the due date.
- (b) If State pays or advances any amounts for or on behalf of Grantee, Grantee shall reimburse State for the amount paid or advanced and shall pay interest on that amount at the rate of one percent (1%) per month from the date State notifies Grantee of the payment or advance. This includes, but is not limited to taxes, assessments, insurance premiums, costs of removal and disposal of unauthorized

materials pursuant to Paragraph 2.2 above, costs of removal and disposal of improvements pursuant to Section 7 below, or other amounts not paid when due.

**6.4 Referral to Collection Agency and Collection Agency Fees.** If State does not receive payment within thirty (30) days of the due date, State may refer the unpaid amount to a collection agency as provided by RCW 19.16.500 or other applicable law. Upon referral, Grantee shall pay collection agency fees in addition to the unpaid amount.

**6.5 No Accord and Satisfaction.** If Grantee pays, or State otherwise receives, an amount less than the full amount then due, State may apply such payment as it elects. No endorsement or statement on any check, any payment, or any letter accompanying any check or payment constitutes accord and satisfaction.

## SECTION 7 IMPROVEMENTS

### 7.1 Improvements Defined.

- (a) “Improvements,” consistent with RCW 79.105 through 79.145, are additions within, upon, or attached to the land. This includes, but is not limited to, structures and fixtures.
- (b) “Personal Property” means items that can be removed from the Easement Property without (1) injury to the Easement Property, adjacent state-owned lands or Improvements or (2) diminishing the value or utility of the Easement Property, adjacent state-owned lands or Improvements.
- (c) “State-Owned Improvements” are Improvements made or owned by State. State-Owned Improvements includes any construction, alteration, or addition to State-Owned Improvements made by Grantee.
- (e) “Unauthorized Improvements” are Improvements made on the Easement Property by the Grantee without State’s prior consent or Improvements made by Grantee that do not conform with plans submitted to and approved by the State.
- (f) “Improvements Owned by Others” are Improvements made by Others with a right to occupy or use the Easement Property or adjacent state-owned lands.

**7.2 Existing Improvements.** On the Commencement Date, no Improvements are located on the Easement Property.

### 7.3 Construction, Major Repair, Modification, and Demolition.

- (a) Grantee shall construct no Improvements and make no modification of the Easement Property (“Work”) except as described in Exhibit B.
- (b) Grantee shall preserve and protect State-Owned Improvements, if any, and Improvements Owned by Others, if any.
- (c) Before completing Work, Grantee shall remove all debris and restore the Easement Property, as nearly as possible, to a substantially natural state, except for alterations necessary under the Permitted Use or otherwise authorized by State.
- (d) Upon completing Work, Grantee shall promptly provide State with as-built plans and specifications as defined in Section 1.2 of this easement.

**7.4 Standards for Work.**

- (a) Grantee shall not use or install treated wood at any location above or below water.
- (b) Grantee shall not use or install tires at any location above or below water.
- (c) Grantee shall not conduct in-water Work during time periods prohibited for such work under WAC 220-110-271, Prohibited Work Times in Saltwater, as amended, or as otherwise directed by the Washington Department of Fish and Wildlife (WDFW).

**7.5 Improvements at End of Term.** Improvements installed by Grantee with State's approval merge with the Property upon termination of the Easement, unless the Parties agree otherwise. Ownership of Improvements does not alter Grantee's obligations under Paragraph 2.1(c/d/e).

**7.6 Disposition of Unauthorized Improvements.**

- (a) Unauthorized Improvements belong to State, unless State elects otherwise.
- (b) State may either:
  - (1) Consent to Grantee ownership of the Improvements, or
  - (2) Charge use and occupancy fee in accordance with RCW 79.105.200 of the Improvements from the time of installation or construction and
    - (i) Require Grantee to remove the Improvements in accordance with Paragraph 7.3, in which case Grantee shall pay use and occupancy fee for the Improvements until removal,
    - (ii) Consent to Improvements remaining and Grantee shall pay use and occupancy fee for the use of the Improvements, or
    - (iii) Remove Improvements and Grantee shall pay for the cost of removal and disposal, in which case Grantee shall pay use and occupancy fee for use of the Improvements until removal and disposal.

**7.7 Disposition of Personal Property.**

- (a) Grantee retains ownership of Personal Property unless Grantee and State agree otherwise in writing.
- (b) Grantee shall remove Personal Property from the Easement Property by the Termination Date. Grantee is liable for any damage to the Easement Property and to any Improvements that may result from removal of Personal Property.
- (c) State may sell or dispose of all Personal Property left on the Easement Property after the Termination Date.
  - (1) If State conducts a sale of Personal Property, State shall apply proceeds first to the State's administrative costs in conducting the sale, second to payment of amount that then may be due from the Grantee to the State, and State shall pay the remainder, if any, to the Grantee.
  - (2) If State disposes of Personal Property, Grantee shall pay for the cost of removal and disposal.

## SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION

### 8.1 Definitions.

- (a) “Hazardous Substance” means any substance that is now regulated or in the future becomes regulated under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. 9601 *et seq.*; Washington’s Model Toxics Control Act (“MTCA”), Chapter 70.105 RCW ; Washington’s Sediment Management Standards, WAC Chapter 173-204; the Washington Clean Water Act, RCW 90.48, and associated regulations; and the federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, and associated regulations, including future amendments to those laws and regulations.
- (b) “Release or threatened release of Hazardous Substance” means a release or threatened release as defined under any law described in Paragraph 8.1(a).
- (c) “Utmost care” means such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances; the standard of care established under MTCA, RCW 70.105D.040.

### 8.2 General Conditions.

- (a) Grantee’s obligations under this Section 8 extend to the area in, on, under, or above:
  - (1) The Easement Property and
  - (2) Adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances may arise from Grantee’s use of the Easement Property.
- (b) Standard of Care.
  - (1) Grantee shall exercise the utmost care with respect to Hazardous Substances.
  - (2) In relation to the Permitted Use, Grantee shall exercise utmost care for the foreseeable acts or omissions of third parties with respect to Hazardous Substances, and the foreseeable consequences of those acts or omissions, to the extent required to establish a viable, third-party defense under the law, including – but not limited to – RCW 70.105D.040.

### 8.3 Current Conditions and Duty to Investigate.

- (a) State makes no representation about the condition of the Easement Property. Hazardous Substances may exist in, on, under, or above the Easement Property or adjacent state-owned lands.
- (b) This Easement does not impose a duty on State to conduct investigations or supply information to Grantee about Hazardous Substances, provided, however, this Easement does not alter State’s obligations to respond to requests for public documents under the Public Records Act, RCW 42.56. State will cooperate with Grantee’s requests for public records and endeavor to provide the requested records promptly.
- (c) Grantee is responsible for conducting sufficient inquiries and gathering sufficient information concerning the Easement Property and the existence, scope, and location of any Hazardous Substances on the Easement Property or on adjacent lands to allow Grantee to meet Grantee’s obligations under this Easement.

#### **8.4 Use of Hazardous Substances.**

- (a) Grantee, its contractors, agents, employees, guests, invitees, or affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances, except in accordance with all applicable laws.
- (b) Grantee shall not undertake, or allow others to undertake by Grantee's permission, acquiescence, or failure to act, activities that:
  - (1) Result in a release or threatened release of Hazardous Substances, or
  - (2) Cause, contribute to, or exacerbate any contamination exceeding regulatory cleanup standards whether the regulatory authority requires cleanup before, during, or after Grantee's use of the Easement Property.
- (c) If use of Hazardous Substance related to the Permitted Use results in a violation of an applicable law Grantee shall submit to State any plans for remedying the violation and cleanup any contamination as required under Section 8.9.

#### **8.5 Management of Contamination.**

- (a) Grantee, its contractors, agents, employees, guests, invitees, or affiliates shall not undertake activities that damage or interfere with the operation of remedial or restoration activities on the Easement Property.
- (b) Grantee shall take reasonable steps to avoid or reduce: human or environmental exposure to contaminated sediments and mechanical or chemical disturbance of on-site habitat mitigation. For purposes of this Subsection 8.5(b) reasonable steps may include access restrictions, fish consumption advisories, and use restrictions and advisories for water bodies.
- (c) Grantee, its contractors, agents, employees, guests, invitees, or affiliates shall not interfere with access by:
  - (1) Employees and authorized agents of the Environmental Protection Agency, the Washington State Department of Ecology, health department, or other similar environmental agencies; and
  - (2) Potentially liable or responsible parties who are the subject of an order or consent decree that requires access to the Easement Property. Grantee may negotiate an access agreement with such parties, but Grantee may not unreasonably withhold such agreement.

#### **8.6 Notification and Reporting.**

- (a) Grantee shall immediately notify State if Grantee becomes aware of any of the following:
  - (1) A release or threatened release of Hazardous Substances that Grantee reports or is required to report to the Washington Department of Ecology (DOE);
  - (2) Any new discovery of or new information about a problem or liability related to, or derived from, the presence or release of any Hazardous Substance;
  - (3) Any lien or regulatory action arising from the foregoing;
  - (4) Any actual or alleged violation of any federal, state, or local statute, ordinance, rule, regulation, or other law pertaining to Hazardous Substances;
  - (5) Any notification from the US Environmental Protection Agency (EPA) or the DOE that remediation or removal of Hazardous Substances is or may be required at the Easement Property.

- (b) Grantee's duty to report under Paragraph 8.6(a) extends to the Easement Property, adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances arises from the Grantee's use of the Easement Property, and any other property used by Grantee in conjunction with Grantee's use of the Easement Property where a release or the presence of Hazardous Substances on the other property would affect the Easement Property.
- (c) Grantee shall provide State with copies of all documents concerning environmental issues associated with the Easement Property, and submitted by Grantee to any federal, state or local authorities. Documents subject to this requirement include, but are not limited to, applications, reports, studies, or audits for National Pollution Discharge and Elimination System Permits (NPDES); Army Corps of Engineers permits; State Hydraulic Project Approvals (HPA); State Water Quality certification; Substantial Development permit; and any reporting necessary for the existence, location, and storage of Hazardous Substances on the Easement Property.

### **8.7 Indemnification.**

- (a) "Liabilities" as used in this Subsection 8.7 means any claims, demands, proceedings, lawsuits, damages, costs, expenses, fees (including attorneys' fees and disbursements), penalties, or judgments that are asserted by third parties against Grantor or that are incurred by Grantor in order to comply with applicable laws and regulations.
- (b) Grantee shall fully indemnify, defend, and hold State harmless from and against any Liabilities that arise out of, or relate to:
  - (1) The use, storage, generation, processing, transportation, handling, or disposal of any Hazardous Substance by Grantee, its contractors, agents, invitees, guests, employees, affiliates, licensees, or permittees occurring anytime Grantee uses or has used the Easement Property;
  - (2) The release or threatened release of any Hazardous Substance, or the exacerbation of any Hazardous Substance contamination resulting from any act or omission of Grantee, its contractors, agents, employees, guests, invitees, or affiliates occurring anytime Grantee uses or has used the Easement Property.
- (c) Grantee shall fully indemnify, defend, and hold State harmless for any Liabilities that arise out of or relate to Grantee's breach of obligations under Subsection 8.5.
- (d) Third Parties.
  - (1) Grantee has no duty to indemnify State for acts or omissions of third parties unless Grantee fails to exercise the standard of care required by Paragraph 8.2(b)(2). Grantee's third-party indemnification duty arises under the conditions described in Subparagraph 8.7(d)(2).
  - (2) If an administrative or legal proceeding arising from a release or threatened release of Hazardous Substances finds or holds that Grantee failed to exercise care as described in Subparagraph 8.7(d)(1), Grantee shall fully indemnify, defend, and hold State harmless from and against any liabilities arising from the acts or omissions of third parties in relation to the release or

threatened release of Hazardous Substances. This includes any liabilities arising before the finding or holding in the proceeding.

- (e) Grantee is obligated to indemnify under the Subsection 8.7 regardless of whether a permit or license authorizes the discharge or release of Hazardous Substances.
- (f) Grantee's obligations under this indemnity provision shall not exceed the appropriation authorized at the time Grantee must fulfill its indemnity obligations and nothing in this Easement may be considered as insuring that Grantee will appropriate sufficient funds in the future to fulfill its indemnity obligations. Appropriated funds that are subject to this indemnity obligation include, but are not limited to, funds in the Licensee's self-insurance program and in the Judgment Claims Subfund (00126) established by Ordinance 124088, and future moneys appropriated for the same purposes.

### **8.8 Reservation of Rights.**

- (a) For any environmental liabilities not covered by the indemnification provisions of Subsection 8.7 or the cleanup provisions of Section 8.9, the Parties expressly reserve and do not waive or relinquish any rights, claims, immunities, causes of action, or defenses relating to the presence, release, or threatened release of Hazardous Substances that either Party may have against the other under law.
- (b) This Easement affects no right, claim, immunity, or defense either Party may have against third parties, and the Parties expressly reserve all such rights, claims, immunities, and defenses.
- (c) The provisions under this Section 8 do not benefit, or create rights for, third parties.
- (d) The allocations of risks, liabilities, and responsibilities set forth above do not release either Party from, or affect the liability of either Party for, claims or actions by federal, state, or local regulatory agencies concerning Hazardous Substances.

### **8.9 Cleanup.**

- (a) If Grantee's Permitted Use, or Grantee's breach of its obligations under this Easement, results in contamination of the Easement Property with Hazardous Substances, Grantee shall, at Grantee's sole expense, promptly take all actions necessary to report, investigate and remediate the Hazardous Substances in accordance with applicable law. Remedial actions may include, without limitation, treatment, removal, and containment.
- (b) Grantee's obligation to undertake a cleanup under Section 8 is limited to those instances where the Hazardous Substances exist in amounts that exceed the threshold limits of any applicable regulatory cleanup standards under Environmental Laws.
- (c) Grantee shall cooperate with the State in development of plans for remedial actions and Grantee shall not proceed with remedial actions without State approval of final plans, which shall not be unreasonably withheld, unless Grantee is ordered to proceed by a court or a regulatory agency with jurisdiction. Grantee's completion of a remedial actions is not an implied release from or waiver of any obligation for Hazardous Substances under this Easement.

### **8.10 Sampling by State, Reimbursement, and Split Samples.**

- (a) Grantee shall conduct sediment sampling, if required, in accordance with Exhibit B.
- (b) State may conduct sampling, tests, audits, surveys, or investigations (“Tests”) of the Easement Property at any time to determine the existence, scope, or effects of Hazardous Substances.
- (c) If such Tests, along with any other information, demonstrate the existence, release, or threatened release of Hazardous Substances arising out of Grantee’s Permitted Use or any violation of Grantee’s obligations under this Lease, Grantee shall promptly reimburse State for all costs associated with such Tests.
- (d) State shall not seek reimbursement for any Tests under this Subsection 8.10 unless State provides Grantee written notice of its intent to conduct any Tests at least thirty (30) calendar days prior to undertaking such Tests, except when such Tests are in response to an emergency. Grantee shall reimburse State for Tests performed in response to an emergency if State has provided such notice as is reasonably practical and Grantee would be required to reimburse State under section (c).
- (e) Grantee is entitled to observe State’s collection of samples and obtain split samples of any Test samples obtained by State, but only if Grantee provides State with written notice requesting such samples within twenty (20) calendar days of the date of Grantee’s receipt of notice of State’s intent to conduct any non-emergency Tests. Grantee solely shall bear the additional cost, if any, of split samples. Grantee shall reimburse State for any additional costs caused by split sampling within thirty (30) calendar days after State sends Grantee a bill with documentation for such costs.
- (f) Within sixty (60) calendar days of a written request (unless otherwise required pursuant to Paragraph 8.6(c), above), either Party to this Easement shall provide the other Party with validated final data, quality assurance/quality control information, and chain of custody information, associated with any Tests of the Easement Property performed by or on behalf of State or Grantee. There is no obligation to provide any analytical summaries or the work product of experts.

## **SECTION 9 ASSIGNMENT**

Grantee shall not assign any part of Grantee’s interest in this Easement or the Easement Property without State’s prior written consent, which State shall not unreasonably condition or withhold. State reserves the right to reasonably change the terms and conditions of this Easement upon State’s consent to assignment.

## **SECTION 10 INDEMNITY, FINANCIAL SECURITY, INSURANCE**

### **10.1 Indemnity.**

- (a) Grantee shall indemnify, defend, and hold State, its employees, officers, and agents harmless from any Claims arising out of the Permitted Use or activities related to the Permitted Use by Grantee, its contractors, agents, invitees, guests, employees, affiliates, licensees, or permittees.

- (b) “Claim” as used in this Paragraph 10.1 means any financial loss, claim, suit, action, damages, expenses, fees (including attorneys’ fees), penalties, or judgments attributable to bodily injury, sickness, disease, death, and damages to tangible property, including, but not limited to, land, aquatic life, and other natural resources. “Damages to tangible property” includes, but is not limited to, physical injury to the Easement Property and damages resulting from loss of use of the Easement Property.
- (c) State shall not require Grantee to indemnify, defend, and hold State harmless for claims that arise solely out of the willful or negligent act of State or State’s elected officials, employees, or agents.
- (d) Grantee waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold State and its agencies, officials, agents, or employees harmless.
- (e) Section 8, Environmental Liability/Risk Allocation, exclusively governs Grantee’s liability to State for Hazardous Substances and its obligation to indemnify, defend, and hold State harmless for Hazardous Substances.
- (f) Grantee’s obligations under this indemnity provision shall not exceed the appropriation authorized at the time Grantee must fulfill its indemnity obligations and nothing in this Easement may be considered as insuring that Grantee will appropriate sufficient funds in the future to fulfill its indemnity obligations. Appropriated funds that are subject to this indemnity obligation include, but are not limited to, funds in the Licensee’s self-insurance program and in the Judgment Claims Subfund (00126) established by Ordinance 124088, and future moneys appropriated for the same purposes.

**10.2 Insurance Terms.**

- (a) Insurance Required.
  - (1) Grantee certifies that it is self-insured for all the liability exposures, including but not limited to employers’ liability and business auto liability, and its self-insurance plan satisfies all State requirements, and its self-insurance plan provides coverage equal to that required in this Paragraph 10.2 and by Paragraph 10.3, Insurance Types and Limits. Grantee shall provide to State evidence of its status as a self-insured entity. Upon request by State, Grantee shall provide a written description of its financial condition and/or the self-insured funding mechanism. Grantee shall provide State with at least thirty (30) days’ written notice prior to any material changes to Grantee’s self-insured funding mechanism.
  - (2) All self-insurance provided in compliance with this Lease must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.
- (b) Waiver.
  - (1) Grantee waives all rights against State for recovery of damages to the extent self-insurance maintained pursuant to this Lease covers these damages.
  - (2) Except as prohibited by law, Grantee waives all rights of subrogation against State for recovery of damages to the extent that they are covered by self-insurance maintained pursuant to this lease.

- (c) Proof of Insurance.
  - (1) Grantee shall provide State with a certification of self-insurance executed by a duly authorized representative of Grantee, showing compliance with insurance requirements specified in this Easement.
  - (2) The certificate(s) of insurance must reference the Easement number.
  - (3) Receipt of such certification of self-insurance by State does not constitute approval by State of the terms of such policies.
- (d) Grantee must provide State no less than 30 days notice if Grantee's self-insurance program is cancelled or materially reduced
- (e) Adjustments in Insurance Coverage.
  - (1) State may impose changes in the limits of liability for all types of insurance as State deems necessary.
  - (2) Grantee shall provide a certification that meets the requirements of Section 10.2(c)(1) and demonstrates coverage in compliance with the Easement within thirty (30) days after State requires changes in the limits of liability.
- (f) If Grantee fails to provide the certification described above within fifteen (15) days after Grantee receives a notice to comply from State, State may either:
  - (1) Deem the failure an Event of Default under Section 14, or
  - (2) Procure and maintain comparable substitute insurance and pay the premiums. Upon demand, Grantee shall pay to State the full amount paid by State, together with interest at the rate provided in Paragraph 6.2 from the date of State's notice of the expenditure until Grantee's repayment.
- (g) General Terms.
  - (1) State does not represent that coverage and limits required under this Lease are adequate to protect Grantee.
  - (2) Coverage and limits do not limit Grantee's liability for indemnification and reimbursements granted to State under this Lease.
  - (3) The Parties shall use any self-insurance or other insurance proceeds payable by reason of damage or destruction to property first to restore the real property covered by this Lease, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Grantee.

### **10.3 Insurance Types and Limits.**

- (a) General Liability Insurance.
  - (1) Grantee shall maintain self-insurance with a limit of not less than One Million Dollars (\$1,000,000) per each occurrence and an aggregate limit of not less than twice any limit established for each occurrence.
- (b) Workers' Compensation.
  - (1) State of Washington Workers' Compensation.
    - (i) Grantee shall comply with all State of Washington workers' compensation statutes and regulations. Grantee shall provide workers' compensation coverage for all employees of Grantee. Coverage must include bodily injury (including death) by accident or disease, which arises out of or in connection with Grantee's use, occupation, and control of the Easement Property.

- (ii) If Grantee fails to comply with all State of Washington workers' compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Grantee shall indemnify State. Indemnity shall include all fines; payment of benefits to Grantee, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
- (2) Longshore and Harbor Workers' and Jones Acts. Longshore and Harbor Workers' Act (33 U.S.C. Section 901 *et seq.*) and/or the Jones Act (46 U.S.C. Section 688) may require Grantee to provide insurance coverage in some circumstances. Grantee shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with law. Grantee is responsible for all civil and criminal liability arising from failure to maintain such coverage.
- (c) Employers' Liability Insurance. Grantee shall maintain self-insurance that is equivalent to employers' liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than One Million Dollars (\$1,000,000) each incident for bodily injury by accident or One Million Dollars (\$1,000,000) each employee for bodily injury by disease.

## **SECTION 11 ROUTINE MAINTENANCE AND REPAIR**

**11.1 State's Repairs.** This Easement does not obligate State to make any alterations, maintenance, replacements, or repairs in, on, or about the Easement Property, during the Term.

**11.2 Grantee's Repairs and Maintenance.**

- (a) Routine maintenance and repair are acts intended to prevent a decline, lapse or, cessation of the Permitted Use and associated Improvements.
- (b) At Grantee's sole expense, Grantee shall keep and maintain all Improvements installed by Grantee and the Easement Property as it relates to the Permitted Use in good order and repair, in a safe condition, and in accordance with Paragraph 7.4 Standards for Work. State's consent is not required for routine maintenance or repair.
- (c) At Grantee's own expense, Grantee shall make any additions, repairs, alterations, maintenance, replacements, or changes to the Easement Property or to any Improvements on the Easement Property that any public authority requires because of the Permitted Use.
- (d) Upon completion of maintenance activities, Grantee shall remove all debris and restore the Easement Property, as nearly as possible, to the condition prior to the commencement of work.

## SECTION 12 DAMAGE OR DESTRUCTION

### 12.1 Notice and Repair.

- (a) In the event of any known damage to or destruction of the Easement Property or any Improvements, Grantee shall promptly give written notice to State. State does not have actual knowledge of the damage or destruction of the Easement Property or any Improvements without Grantee's written notice.
- (b) Unless otherwise agreed in writing, Grantee shall promptly reconstruct or repair the Property and Improvements as nearly as possible to its condition immediately prior to the damage or destruction in accordance with Section 7 and Grantee's additional obligations in Exhibit B, if any.

**12.2 State's Waiver of Claim.** State does not waive any claims for damage or destruction of the Easement Property unless State provides written notice to Grantee of each specific claim waived.

**12.3 Insurance Proceeds.** Grantee's duty to reconstruct or repair any damage or destruction of the Easement Property or any Improvements on the Easement Property is not conditioned upon the availability of any insurance proceeds to Grantee from which the cost of repairs may be paid. The Parties shall use insurance proceeds in accordance with Paragraph.10.2(g)(3).

## SECTION 13 CONDEMNATION

In the event of condemnation, the Parties shall allocate the award between State and Grantee based upon the ratio of the fair market value of (1) Grantee's rights in the Easement Property and (2) State's interest in the Easement Property and State-Owned Improvements, if any. In the event of a partial taking, the Parties shall compute the ratio based on the portion of Easement Property or Improvements taken. If Grantee and State are unable to agree on the allocation, the Parties shall submit the dispute to binding arbitration in accordance with the rules of the American Arbitration Association.

## SECTION 14 REMEDIES AND TERMINATION

### 14.1 Breach.

- (a) State may terminate this Easement upon Grantee's failure to cure a breach of its terms within sixty (60) days of State's written notice of breach.
- (b) For nonmonetary breach not capable of cure within sixty (60) days, State will not unreasonably withhold approval of a reasonable alternative cure schedule. Grantee must submit a cure schedule with thirty (30) days of a notice of breach. State shall not terminate if State approves the schedule and Grantee works diligently and in good faith to execute the cure. State may terminate if Grantee fails to timely submit a schedule or fails to cure in accordance with an approved schedule.

- (c) If breach arises from Grantee's failure to comply with restrictions on Permitted use under Paragraph 2.2, State may, without terminating this Easement, restore the natural resources or Easement Property and charge Grantee restoration costs and/or charge Grantee damages. On demand by State, Grantee shall pay all costs and/or damages.

**14.2 Termination by Nonuse.** If Grantee does not execute the Permitted Use on the Easement Property in the three (3) successive years following the Commencement Date, this Easement terminates without further action by State. Grantee's rights revert to State upon Termination by Nonuse.

**14.3 Termination by Completion of Obligations.** Grantee may terminate this Easement upon providing State with sixty (60) days written confirmation that all obligations described in Paragraph 2.1(b) are complete and accepted by all necessary agencies or parties. Grantee shall comply with Paragraph 3.2, End of Term.

**14.4 Termination by Priority Harbor Area Use.** The Easement Property consists of harbor area which under Article XV of the Washington State Constitution is forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce. Such harbor area uses are "Priority Harbor Area Uses" which may terminate the Easement in accordance with this Section. If State receives an application to use the Easement Property for a Priority Harbor Area Use and determines that the proposed Priority Harbor Area Use is in the public interest, State may terminate this Easement by providing sixty (60) days' notice in writing to Grantee, provided that the proposed Priority Harbor Area use is in compliance with the City of Seattle Shoreline Master Program and all other applicable laws and regulations.

**14.5 Remedies Not Exclusive.** The remedies specified under this Section 14 are not exclusive of any other remedies or means of redress to which the State is lawfully entitled for Grantee's breach or threatened breach of any provision of this Easement.

## SECTION 15 NOTICE AND SUBMITTALS

Following are the locations for delivery of notice and submittals required or permitted under this Easement. Any Party may change the place of delivery upon ten (10) days written notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES  
Shoreline District Aquatics  
950 Farman Ave N  
Enumclaw, WA 98022-9282

Contact: Laurel Kanawyer, Aquatic Land Manager  
Phone: 253-441-0904  
Fax: 360-825-1672  
Email: [laurel.kanawyer@dnr.wa.gov](mailto:laurel.kanawyer@dnr.wa.gov)

Grantee: SEATTLE DEPARTMENT OF TRANSPORTATION  
PO Box 34996  
Seattle, WA 98124-4996

Contact: Mark Mazzola, Environmental Manager  
Phone: 206-733-9117  
Fax: 206-615-1237  
Email: [mark.mazzola@seattle.gov](mailto:mark.mazzola@seattle.gov)

The Parties may deliver any notice in person, by facsimile machine, or by certified mail. Depending on the method of delivery, notice is effective upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three (3) days after mailing. All notices must identify the Easement number. On notices transmitted by facsimile machine, the Parties shall state the number of pages contained in the notice, including the transmittal page, if any.

## SECTION 16 MISCELLANEOUS

**16.1 Authority.** Grantee and the person or persons executing this Easement on behalf of Grantee represent that Grantee is qualified to do business in the State of Washington, that Grantee has full right and authority to enter into this Easement, and that each and every person signing on behalf of Grantee is authorized to do so. Upon State's request, Grantee shall provide evidence satisfactory to State confirming these representations.

**16.2 Successors and Assigns.** This Easement binds and inures to the benefit of the Parties, their successors, and assigns.

**16.3 Headings.** The headings used in this Easement are for convenience only and in no way define, limit, or extend the scope of this Easement or the intent of any provision.

**16.4 Entire Agreement.** This Easement, including the exhibits and addenda, if any, contains the entire agreement of the Parties. This Easement merges all prior and contemporaneous agreements, promises, representations, and statements relating to this transaction or to the Easement Property.

**16.5 Waiver.**

- (a) The waiver of any breach or default of any term, covenant, or condition of this Easement is not a waiver of such term, covenant, or condition; of any subsequent breach or default of the same; or of any other term, covenant, or condition of this Easement. State's acceptance of payment is not a waiver of any preceding or existing breach other than the failure to pay the particular payment that was accepted.
- (b) The renewal of the Easement, extension of the Easement, or the issuance of a new Easement to Grantee, does not waive State's ability to pursue any rights or remedies under the Easement.

**16.6 Cumulative Remedies.** The rights and remedies of State under this Easement are cumulative and in addition to all other rights and remedies afforded by law or equity or otherwise.

**16.7 Time is of the Essence.** TIME IS OF THE ESSENCE as to each and every provision of this Easement.

**16.8 Language.** The word “Grantee” as used in this Easement applies to one or more persons, as the case may be. The singular includes the plural, and the neuter includes the masculine and feminine. If there is more than one Grantee, their obligations are joint and several. The word “persons,” whenever used, includes individuals, firms, associations, and corporations. The word “Parties” means State and Grantee in the collective. The word “Party” means either or both State and Grantee, depending on context.

**16.9 Invalidity.** The invalidity, voidness, or illegality of any provision of this Easement does not affect, impair, or invalidate any other provision of this Easement.

**16.10 Applicable Law and Venue.** This Easement is to be interpreted and construed in accordance with the laws of the State of Washington. Any reference to a statute means that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this Easement is in the Superior Court for Thurston County, Washington.

**16.11 Recordation.** At Grantee’s expense and no later than thirty (30) days after receiving the fully-executed Easement, Grantee shall record this Easement in the county in which the Easement Property is located. Grantee shall include the parcel number of the upland property used in conjunction with the Easement Property, if any. Grantee shall provide State with recording information, including the date of recordation and file number. If Grantee fails to record this Easement State may record the Easement and Grantee shall pay the costs of recording upon State’s demand.

**16.12 Modification.** No modification of this Easement is effective unless in writing and signed by the Parties. Oral representations or statements do not bind either Party.

**16.13 Survival.** Any obligations of Grantee not fully performed upon termination of this Easement do not cease, but continue as obligations of the Grantee until fully performed.

**16.14 Exhibits.** All referenced exhibits are incorporated in this Easement unless expressly identified as unincorporated.

THIS AGREEMENT requires the signature of all Parties and is effective on the date of the last signature below.

SEATTLE  
DEPARTMENT OF TRANSPORTATION

Dated: \_\_\_\_\_, 20\_\_

By: PETER HAHN

Title: Director

Address: PO Box 34996  
Seattle, WA 98124-4996

Phone: 206-684-5000

STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES

Dated: \_\_\_\_\_, 20\_\_

By: PETER GOLDMARK

Title: Commissioner of Public Lands

Address: Shoreline District Aquatics  
950 Farman Ave N  
Enumclaw, WA 98022-9282

Approved as to form this  
18 day of June 2013  
Terence Pruit, Assistant Attorney General

REPRESENTATIVE ACKNOWLEDGMENT

STATE OF WASHINGTON )  
 ) ss  
County of )

I certify that I know or have satisfactory evidence that PETER HAHN is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the DIRECTOR of SEATTLE DEPARTMENT OF TRANSPORTATION to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: \_\_\_\_\_

(Seal or stamp)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name)

Notary Public in and for the State of Washington,  
residing at \_\_\_\_\_

My appointment expires \_\_\_\_\_



## EXHIBIT A

### Preliminary

Figures	Recording Number
A	20130812900004
B	20130812900005

### Final

#### Legal Description

Habitat Area A: Waterfront Park (Pier 58)

Habitat Area B: Seattle Aquarium (Between Piers 60 and 62)

#### “As Built” Surveys

Habitat Area A Recording Number:

Habitat Area B Recording Number:

**EXHIBIT B**  
**PLAN OF OPERATIONS**

1. DESCRIPTION OF PERMITTED USE

A. Existing Conditions

The sites have no existing facilities or improvements. The substrate on both sites is sandy with some small kelp beds attached to riprap and debris.

B. Proposed Conditions.

Grantee has secured the following permits:

- SEPA Compliance issued by City of Seattle on 3/6/2013
- Section 401 Water Quality Certification #9829 issued by Dept of Ecology on 4/1/2013
- Hydraulic Project Approval Control #126724-1 issued by WA Dept of Fish and Wildlife on 5/2/2013
- Marine Mammal Protection Act Letter of Authorization to be issued by NOAA Fisheries (PENDING)
- Coastal Zone Management Act #NWS 2011-778-WRD issued by Dept of Ecology 8/8/2013
- Shoreline Substantial Development Permit #3013171 issued by Seattle Dept of Planning and Development/Dept of Ecology on 7/30/13
- Section 10/404 including ESA, Section 106 Compliance, and Magnuson-Stevens Fishery Conservation and Management Act EFH Consultation #NWS 2011-778-WRD to be issued by USACE, NOAA Fisheries, and USFWS (PENDING)
- PATON Permit or Conditional Approval Letter to be issued by USCG (PENDING)

Between Piers 57 and 59: Grantee proposes one shell and gravel substrate enhancement feature.

Between Piers 60 and 61: Grantee proposes to install one habitat bench made of marine mattresses with a rock toe and sand sloping waterward from the seawall. Grantee also proposes one shell and gravel substrate enhancement feature.

2. ADDITIONAL OBLIGATIONS

- (1) Grantee shall post the Easement Property with no-wake advisories.
- (2) Grantee shall remove all trash and unauthorized fill, including concrete blocks or pieces, bricks, asphalt, metal, treated wood, glass, floating debris, and paper, in and around the applicant's project area and deposit at an approved upland disposal site. Removal must be complete as required by HPA Control #126724-1 issued by WA Department of Fish and Wildlife on 5/2/2013.