

After Signature Return To:
Washington Department of Fish and Wildlife
Real Estate Services
600 Capitol Way North
Olympia, Washington 98501-1091
Attn: Elyse Woodruff

Document Title: Land Use Agreement
WDFW Inventory No. 120255
Landowner: The State of Washington, Department of Fish and Wildlife
Permittee: Port of Bellingham
Legal Description: A portion of S 32, T 39N, R 02E

LAND USE AGREEMENT

FOR WETLAND MITIGATION

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISH AND WILDLIFE (hereinafter “WDFW”), for valuable consideration and subject to the terms and conditions set forth below, hereby enters into this Agreement with the Port of Bellingham, a Washington State public port authority, whose address is P. O. Box 1677, Bellingham, WA 98227 (hereinafter “Permittee”), concerning certain real property owned by WDFW and located within the SE ¼ of Section 32, Township 39 North, Range 2 East, W.M. (hereinafter “the Premises”) in Whatcom County, Washington, as more particularly described below, and as depicted on Exhibit A hereto.

A strip of land, 50 feet wide and 1,200 feet long in the Southeast quarter of the Southeast quarter of Section 32, Township 39 North, Range 3 East W.M., in Whatcom County, Washington, as shown on the attached Exhibit A.

THIS AGREEMENT IS MADE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

SECTION 1 OCCUPANCY

- 1.01 Permitted Use.** WDFW agrees that Permittee shall have the right to use the Premises for wetland mitigation work including weed eradication, planting, maintenance and invasive plant control as set forth in Exhibit B hereto or as permitted by the WDFW site manager (the “Mitigation Work”) No other use of the Premises is permitted.
- 1.02 Term.** The term of this Agreement shall be five (5) years, commencing on June 1, 2020 and expiring on June 1, 2025.
- 1.03 No Warranty.** Permittee expressly recognizes that the Premises are located within lands owned and operated by WDFW for wildlife habitat and public recreation. WDFW makes no warranty of quiet enjoyment of the Premises. This Agreement is granted without warranty, either express or implied, regarding the condition of the Premises or its suitability for Permittee’s purposes. WDFW shall not be subject to any liability whatsoever on account of any shortage or defect in any part of the Premises. Permittee represents that it has investigated the Premises and accepts the Premises “as is” in the current condition.
- 1.04 Limited Rights.** No provision of this Agreement is intended nor may be deemed to transfer any

real property from WDFW to Permittee. WDFW permits only those rights and privileges set forth in this Agreement during the term hereof. WDFW retains jurisdiction over its property in all other respects. WDFW retains the right of access to the Premises at all times. This Agreement shall not be deemed or construed to be an exclusive right; it does not prohibit WDFW from granting rights to other public or private entities, providing these agreements do not interfere with the operations of Permittee authorized herein. WDFW expressly reserves the rights to any trees, minerals, oil and gas resources, or any other valuable materials on the Premises.

- 1.05 No Assignment or Sublet.** Neither this Agreement, nor the rights, benefits and obligations set forth herein, may be assigned or sublet by Permittee in whole or in part.

SECTION 2 CONSTRUCTION AND REPAIR

- 2.01 Improvements.** Permittee may plant, construct and maintain wetland enhancements as submitted per the Permits including Land Disturbance (LDP 2018-00067) and Mitigation (MIT 2018-00075) from Whatcom County Planning and Development Services.
- 2.02 Compliance with Codes.** Permittee is responsible, at Permittee's sole cost, to cause all work on the Premises during the term of this Agreement to be performed in accordance with all applicable laws, codes, and requirements of those governmental agencies having jurisdiction. Permittee shall supply copies of all permits and other approvals to WDFW immediately upon request.
- 2.03 No Liens.** Permittee may not suffer or permit any lien for work, labor, services, materials, or any other reason arising out of or related to the Permittee's or its agents actions, to be filed as an interest against the Premises.

SECTION 3 OPERATION AND MAINTENANCE

- 3.01 Maintenance and Repair.** Permittee shall, at its sole cost and expense, keep and maintain the Premises and all improvements appurtenant thereto in good order and repair and in a clean, safe, sanitary and attractive condition. Permittee shall not stockpile any materials on site. Permittee's use of the Premises shall not interfere with WDFW's operations on its surrounding lands. Except as required to complete the Mitigation Work, no provision of this Agreement is intended nor shall be deemed to grant the right to cut, remove, burn, or dispose of trees or other vegetation on the Premises without the prior, express written approval of, and payment of compensation to WDFW. All repairs to the Premises and the improvements thereon are the responsibility of Permittee and shall be at Permittee's sole cost.
- 3.02 Utilities.** Permittee is responsible, at its sole cost, for all utility service to the Premises.
- 3.03 Compliance with Applicable Laws and Permitting Requirements.** Permittee shall comply with all applicable laws, rules, regulations and permitting requirements of WDFW and all other governmental authorities for any and all of Permittee's activities at the Premises. Permittee shall supply copies of all permits and other approvals to WDFW immediately upon request. Permittee shall not conduct nor allow its agents to conduct unlawful acts or activities on the Premises. Before commencing any Mitigation Work at the Premises that involves disturbing the ground, Permittee shall provide proof to WDFW that it has complied with the legal requirements involving cultural and archaeological resources and has received a clearance letter from the Washington Department of Archaeology and Historic Preservation. This Agreement is not a substitute for any other permits.
- 3.04 Hazardous Substances.** Permittee shall not allow in or around the Premises any substance now or hereinafter regulated by any governmental authority as hazardous, toxic, dangerous, or harmful

(hereinafter "hazardous substance"), unless said hazardous substance is necessary to carry out the Mitigation Work authorized by this Agreement and is handled in compliance with all applicable legal requirements. Permittee shall reimburse WDFW immediately upon demand for any and all cleanup costs and any and all other charges, fees, costs, fines, and penalties (civil and criminal) imposed on WDFW by any governmental authority for hazardous substances released or discharged by Permittee or its agents in or around the Premises.

3.05 Permittee shall not interfere with WDFW's obligations and/or duties regarding the Premises under the state funding contracts that provided for its acquisition in 1975 and 1983:

Recreation & Conservation Office Contract No. 74-616A and 840601A. Specifically, Permittee shall not impair WDFW's obligation to keep the Premises open, safe, and inviting for outdoor recreational use by all segments of the public at reasonable hours and times of the year.

**SECTION 4
COMPENSATION**

4.01 Fee. Permittee shall pay to WDFW a nonrefundable fee of \$1,500.00 per year for 5 years, totaling \$7,500. Permittee shall pay the yearly fee on or before May 31 of each year during the term of this Agreement.

4.02 Maintenance and Weed Control. Permittee shall not take any action, nor permit its agents to take any action, which will obstruct or close public access to any trails on the Premises. In the event the Permittee or its agents' action close or otherwise damage the Premises, Permittee will restore the area as close as possible to its prior condition as soon as reasonably possible after the damage and/or closure. Permittee shall provide noxious weed control to the Premises as required by the approving authorities of the mitigation site in coordination with the WDFW site manager.

**SECTION 5
INDEMNITY AND INSURANCE**

5.01 Indemnity. To the extent permitted by law, Permittee shall indemnify, defend, and hold harmless WDFW and its officials, agents and employees from and against any and all liabilities, losses, claims, damages, costs and expenses (including, but not limited to, attorneys' and consultants' fees) for property damage and personal injury arising from the acts or omissions of Permittee and its contractors, employees, and agents at the Premises in any manner associated with the Mitigation Work. These obligations shall not apply to the sole negligence of WDFW and, in the event of concurrent negligence, they shall be reduced by the proportion of WDFW's concurrent negligence.

5.02 Insurance. During the term of this Agreement that involves construction or maintenance, Permittee shall buy and maintain liability insurance that is acceptable to WDFW and is sufficient to insure Permittee and WDFW against liability for bodily injury and property damage arising from all Permittee's Mitigation Work on the Premises, including, but not limited to, the use of vehicles and equipment. Minimum amounts of insurance shall be two million dollars (\$2,000,000.00) for injury to any one person and two million dollars (\$2,000,000.00) property damage for any one occurrence. All policies shall name Permittee and "THE WASHINGTON DEPARTMENT OF FISH AND WILDLIFE" as insureds and shall carry a ten-day notification-of-cancellation clause. At intervals of five years or more, increases in the minimum amounts may be determined by WDFW, at its option, provided said increases shall not exceed the rate of inflation as established by the U.S. Department of Labor consumer price index.

**SECTION 6
TERMINATION AND CANCELLATION**

6.01 Permittee shall be solely responsible for conditions and requirements imposed on the Premises as a result of Permittee's use of the area for mitigation purposes.

6.02 WDFW, at its option, may cancel this Agreement if Permittee has not complied with any of the terms or conditions of this Agreement or has made unauthorized use of the Premises. WDFW shall

notify Permittee of any of Permittee's alleged breaches of the Agreement in writing at the address specified in Section 7.07 below and allow Permittee thirty (30) days to correct the condition. Unless the correction is made to WDFW's reasonable satisfaction, this Agreement shall be cancelled and all rights conveyed by this Agreement shall automatically revert to WDFW without necessity of further legal action. Permittee shall be responsible for all penalties, liabilities, and responsibilities associated with the mitigation requirements. Permittee shall not be entitled to a refund of fees or other amounts paid to WDFW prior to the date of termination by WDFW. In the event WDFW cancels this Agreement, Permittee shall not be liable to WDFW for any further compensation payments as set forth under Paragraph 4.01 herein.

- 6.03 Surrender of the Premises.** In the event of termination or cancellation of this Agreement, addition Permittee shall immediately vacate and deliver up the Premises to WDFW and all rights of the Permittee hereunder shall immediately cease.
- 6.04 Improvements.** Upon completion of mitigation requirements, or at the end of all renewal periods, all plantings and improvements shall become the property of WDFW without further process.
- 6.05 Scope of Relief.** WDFW shall be entitled to injunctive relief, both prohibitive and mandatory, in addition to other relief, including, without limitation, specific performance of the terms and conditions of this Agreement. These remedies are cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.
- 6.06 No Waiver.** WDFW's forbearance to exercise its rights under this Agreement in the event of any default by Permittee shall not be deemed or construed to be a waiver by WDFW of such term or condition or of any of WDFW's rights under this Agreement. No delay or omission by WDFW in the exercise of any right or remedy shall impair such right or remedy or be construed to be a waiver.

SECTION 7 GENERAL PROVISIONS

- 7.01 Governing Law.** This Agreement shall be construed, interpreted and enforced pursuant to the laws of the State of Washington.
- 7.02 Venue.** In the event of a lawsuit involving this Agreement, jurisdiction and venue shall be proper only in the State of Washington, Thurston County Superior Court.
- 7.03 Severability.** If any covenant or provision of this Agreement shall be adjudged void, such adjudication shall not affect the validity, obligation, or performance of any other covenant or provision, or part thereof.
- 7.04 Waiver of Wildlife Damage Claims.** Permittee does hereby waive forever the right to bring against WDFW a wildlife damage claim under RCW 77.36 (or any successor provision) related to the Premises and any improvements thereon.
- 7.05 No Partnership or Employment.** WDFW is not a partner nor a joint venturer with Permittee in connection with Permittee's activities conducted on the Premises and WDFW shall have no obligation with respect to Permittee's liabilities and debts. Permittee and its employees are not employees or agents of WDFW and shall not hold themselves out as such.
- 7.06 Amendments.** Any revision or amendment to this Agreement shall be made by mutual agreement, in writing, and executed by the authorized representatives of the parties hereto.
- 7.07 Notices and Payments.** All requests and notices to WDFW and Permittee shall be in writing and sent by registered or certified mail to the address specified below. Notice shall be effective upon delivery. Payments shall be made to WDFW at the address below.

To WDFW: Washington Dept. of Fish and Wildlife
Real Estate Services
600 Capitol Way North
Olympia, Washington 98501-1091

To Permittee: Port of Bellingham
Attn: Environmental and Planning Services
1801 Roeder Ave.
P. O. Box 1677
Bellingham, WA 98227-1677

7.08 Entire Agreement. This document contains the entire agreement between the parties and no statement, promise, representation, inducement, or agreement made by either party, or its respective officers, employees, or agents, that is not contained in this written document shall be valid, binding or enforceable.

7.09 Permittee's Signatory. The person executing this Agreement on behalf of Permittee represents that he/she is authorized to do so and represents and warrants this Agreement is a legal, valid, and binding obligation on behalf of Permittee.

IN WITNESS WHEREOF, the parties hereto mutually have agreed upon the terms and conditions of this instrument and have caused it to be executed on this day as below subscribed.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

5/11/20

Date


Cynthia Wilkerson, Lands Division Manager

PORT OF BELLINGHAM

6/3/20
Date


By: Rob Fix
Title: Executive Director

EXHIBIT A
2020 WDFW LAND USE AGREEMENT

