

COMMISSION AGENDA

Item No: 3A

Meeting: 4/16/20

DATE: April 1, 2020

TO: Port Commission

FROM: Eric D. Johnson, Executive Director

Sponsor: Jason Jordan, Director, Environmental and Planning Services

Project Manager: Rob Healy, Environmental Senior Project Manager

SUBJECT: Summary of mediation efforts and Amendment to the 2003 Settlement Agreement and Release – regarding Hylebos Waterway Cost Overrun Cash-out Proceeds

A. ACTION REQUESTED

Request authorization for the Executive Director or his delegate to execute an Amendment to the 2003 Settlement Agreement and Release to disburse the Hylebos Waterway Cost Overrun Cash-out Proceeds.

B. SYNOPSIS

Two years of multi-party mediation efforts are now complete. With Commission Authorization of this Amendment to an existing Settlement Agreement, the Anderson Consent Decree cost overrun settlements of \$5,249,778.25 currently in escrow will be disbursed to the four performing parties of the cleanup of the Hylebos Waterway: The Port of Tacoma, Occidental Chemical Corporation, and General Metals.

C. BACKGROUND

In September 1983, the US Environmental Protection Agency (EPA) placed the Commencement Bay Nearshore Tidelands (CB/NT) site on the National Priorities List. After EPA conducted a Remedial Investigation and Feasibility Study in the mid-1980s and issued the Record of Decision in 1989, the Port and other Potentially Responsible Parties began participating in the cleanup process. In the 1990s, EPA also decided to divide cleanup of the Hylebos into two areas: the Mouth of Hylebos and Head of Hylebos Waterway problem areas. Performing Parties for the Head of the Hylebos problem area were identified by EPA as General Metals and Arkema. Occidental Chemical Corporation and the Port were identified as the Performing Parties for the Mouth of the Hylebos problem area.

Simultaneous with cleanup planning work being conducted by the Performing Parties, EPA negotiated a cash-out Consent Decree with several non-performing PRPs (potentially responsible parties). Three PRPs remained liable for their share of costs that exceeded cash-out estimates at the time of that settlement. These parties included the United States (primarily the Navy), the City of Tacoma (Tacoma Public Utilities), and Joseph Simon & Sons.

In the 2000s, Occidental and the Port of Tacoma conducted remedial action construction in the Mouth of the Hylebos Waterway, while General Metals and Arkema conducted the remedial action construction in the Head of the Hylebos Waterway. Remedial action costs (\$102,708,412) were 55% higher than the costs estimated in the Anderson Consent Decree that were used to support cash-out settlements. Pursuant to the cost overrun, reopener provisions in the Anderson Consent Decree, cost overrun settlements were received from Joseph Simon & Sons and the City of Tacoma in 2015, and the Department of Justice in 2018, for a total amount of \$5,249,778.25. Settlement proceeds were placed in a non-interest bearing escrow account until the parties could agree on disbursement proportions.

Mediation efforts began in earnest in the Spring of 2018 with the first mediation meeting held on October 11, 2018. The multiparty negotiations were challenging with numerous mediation meetings and calls that occurred over a two-year period. Based on these negotiations the four parties have agreed to amend the existing 2003 Settlement Agreement and Release with the terms outlined below.

D. TERMS OF AGREEMENT

The basic terms of the agreement include:

- The Existing Cost Overrun Proceeds totaling \$5,249,745.25 shall be paid to the Parties as 58.5% to the Arkema/General Metals Group and 41.5% to the Port/Occidental; Arkema to receive \$1,535,550.49, General Metals to receive \$1,535,550.48, Occidental to receive \$1,089,322.14, and the Port to receive \$1,089,322.14.
- Future Cost Overrun Proceeds received on or after September 30, 2018, shall be paid to the Parties based on costs incurred.
 - Response costs incurred by the Port and Occidental pursuant to the consent decree for the Mouth of Hylebos Waterway shall be paid to the Port/Occidental Group.
 - Response costs incurred by the Port and General Metals pursuant to the consent decree for the Head of Hylebos Waterway shall be paid to the Port, and General Metals respectively, in proportion to their respective costs.
- This amendment has no impact on other written agreements, including cost-sharing agreements between various parties, and the purchase and sale agreement between the Port and Arkema.
- All Parties shall bear their own attorneys' fees and costs relating to the dispute regarding the distribution of cost overrun proceeds.

E. PREVIOUS ACTIONS OR BRIEFINGS

<u>Date</u>	<u>Executive Session Briefings</u>
November 29, 2018	Mediation Update – Hylebos Cash-out Settlement Proceeds
April 24, 2019	Mediation Update – Hylebos Cash-out Settlement Proceeds
January 13, 2020	Mediation Update – Hylebos Cash-out Settlement Proceeds

F. ATTACHMENTS TO THIS REQUEST

- Computer slide presentation
- Amendment to the 2003 Settlement Agreement and Release
- 2003 Settlement Agreement and Release

G. NEXT STEPS

Port to receive the disbursed funds of \$1,089,322.14. In accordance with the Slip I Agreement that governs the Occidental/Port cost-sharing relationship for Hylebos Waterway, Occidental will receive 70%, and the Port will receive 30% of the Occidental/Port share of the Hylebos Cash-out proceeds. Following receipt of the Port disbursed funds, the Port will disburse \$435,724.75 to Occidental, leaving the Port with \$653,597.39.

Authorization to Amend the 2003 Settlement Agreement and Release – Hylebos Waterway Cost Overrun Cash-out Proceeds

Rob Healy
Environmental Senior Project Manager

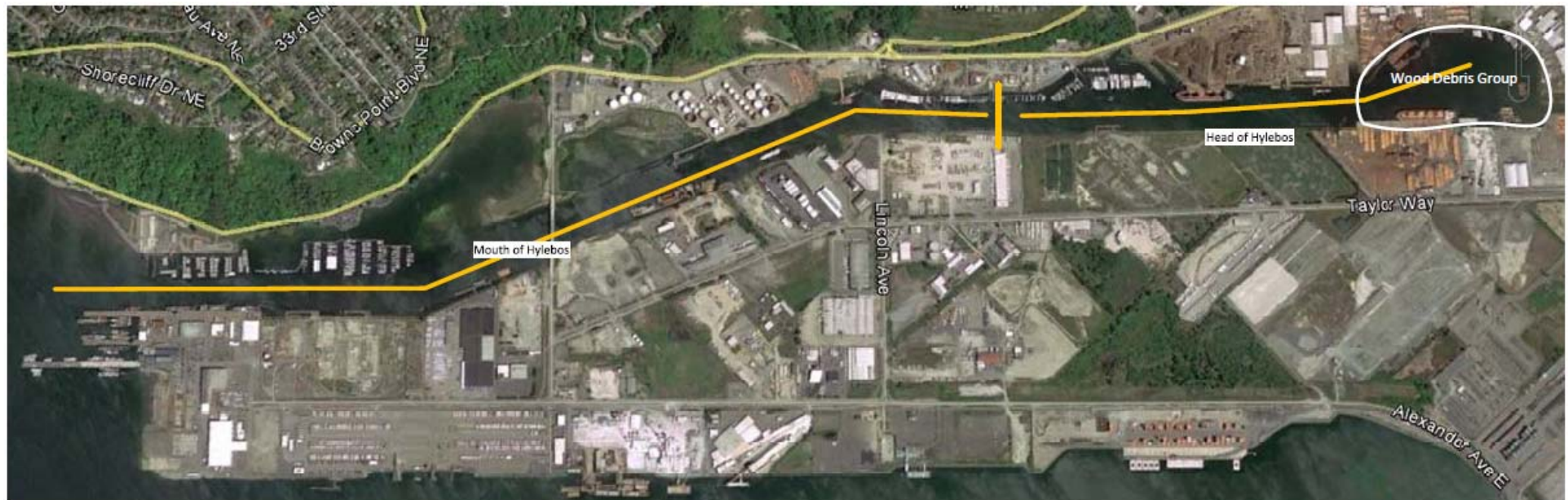


Hylebos Waterway Cost Overrun Cash-out Proceeds

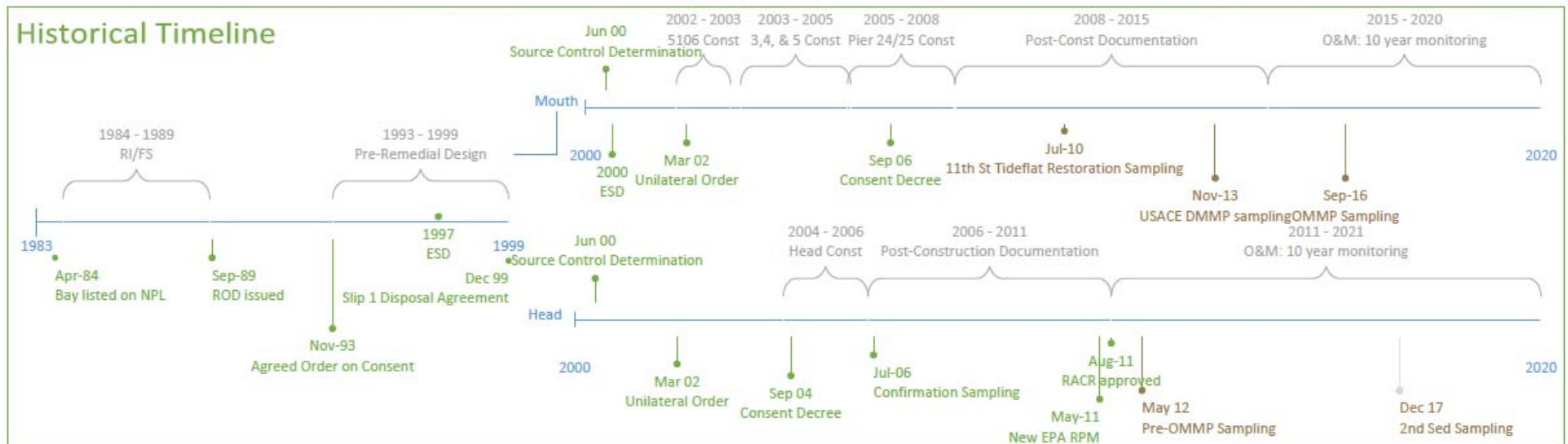


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Background



Historical Timeline



Cleanup History of the Hylebos Waterway

Summary of Hylebos Cleanup Cost Overrun Proceeds



- The combined Mouth and Head Remedial action costs (\$102,708,412) were 55% higher than the costs estimated in the Anderson Consent Decree that were used to support cash-out settlements.
- \$5,249,778.25 has been recovered from the DOD, the City of Tacoma, and Joseph Simon & Sons and has been in a non-interest bearing escrow account.
- Mediation efforts were initiated in the Spring of 2018 and will conclude upon Authorization of this action.

Terms of the Agreement Hylebos Settlement Amendment



- The Existing Cost Overrun Proceeds totaling \$5,249,745.25 shall be paid to the Parties as 58.5 % to the Arkema/General Metals Group and 41.5% to the Port/Occidental; Arkema to receive \$1,535,550.49, General Metals to receive \$1,535,550.48, Occidental to receive \$1,089,322.14, and the Port to receive \$1,089,322.14.
- Future Cost Overrun Proceeds received on or after September 30, 2018, shall be paid to the Parties based on costs incurred pursuant to the respective Mouth and Head Consent Decrees.
- This amendment has no impact on other written agreements, including cost sharing agreements between various parties, and the purchase and sale agreement between the Port and Arkema.
- All Parties shall bear their own attorneys' fees and costs relating to the dispute regarding the distribution of cost overrun proceeds.

Next Steps Hylebos Settlement Amendment



- Port to receive the disbursed funds of \$1,089,322.14
- In accordance with the Slip I Agreement that governs the Occidental/Port cost-sharing relationship for Hylebos Waterway, Occidental will receive 70%, and the Port will receive 30% of the Occidental/Port share of the Hylebos Cash-out proceeds. Following receipt of the Port disbursed funds, the Port will disburse \$435,724.75 to Occidental leaving the Port with \$653,597.39.

Conclusion

Hylebos Settlement Amendment



Request authorization for the Executive Director or his delegate to execute an Amendment to the 2003 Settlement Agreement and Release to disburse the Hylebos Waterway Cost Overrun Cash-out Proceeds.