

HW

PL

**AGREEMENT REGARDING HYLEBOS WATERWAY SMA 421-B  
RD/RA ACTIVITIES AND EXCESS NCD SITE CAPACITY**

THIS AGREEMENT is entered into this \_\_\_ day of October, 2004 (“Effective Date”), by the PORT OF TACOMA, OCCIDENTAL CHEMICAL CORPORATION, HYLEBOS WATERFRONT PROPERTY, LLC, and AMERICAN CONSTRUCTION CO., INC.

**RECITALS**

A. The Port of Tacoma (“Port”), Occidental Chemical Corporation (“Occidental”), and Taylor Way Properties, Inc., together with other persons or entities not a party to this Agreement, have been named Potentially Responsible Parties under the Comprehensive Environmental Response, Compensation and Liability Act, as amended (42 U.S.C. Section 9601, et seq.) (“CERCLA”) with respect to the Hylebos Waterway, a portion of the Commencement Bay Nearshore/Tideflats Superfund Site in Tacoma, Washington.

B. On March 25, 2002, the United States Environmental Protection Agency (“EPA”) issued a Unilateral Administrative Order, EPA Docket No. CERCLA 10-2002-0064 (“UAO”), to the Port and Occidental requiring certain Hylebos Waterway remedial design/remedial action activities, including addressing an area of the Hylebos Waterway designated as Sediment Management Area 421-B (on and adjacent to real property owned by Taylor Way Properties, Inc.) and the construction of a nearshore confined disposal site into which dredged material from the Hylebos Waterway and other locations will be placed and contained. The nearshore confined disposal site has been and will be constructed on Port property in and on the Blair Waterway in Tacoma, Washington that is commonly known as Slip 1. EPA, the Port, and Occidental are engaged in negotiations regarding the terms whereby the UAO requirements will be converted into an anticipated consent decree for Hylebos Waterway remedial design/remedial action activities.

C. As part of implementation of the UAO (and the anticipated Port/Occidental consent decree), EPA has approved certain Sediment Management Area 421-B remedial design/remedial action activities requiring that the Port and Occidental install a cap in that location and perform long-term monitoring and maintenance to ensure the integrity of the cap. Those activities do not involve dredging and do not require any mitigation to compensate for impacts to habitat at Sediment Management Area 421-B.

D. Hylebos Waterfront Property, LLC (“HWP”) is engaged in negotiations regarding the terms whereby HWP will purchase real property from Taylor Way Properties, Inc. that is located adjacent to, and within, Sediment Management Area 421-B. Given HWP’s anticipated use of that real property, HWP has requested that the Port and Occidental seek

EPA's approval of a modification of the remedial design/remedial action activities for Sediment Management Area 421-B that would involve dredging and mitigation to compensate for impacts to habitat. In consideration of the Port's and Occidental's obtaining such approval from EPA and, in consideration of the Port's and Occidental's allowing HWP to place dredged material from Sediment Management Area 421-B in the Slip 1 nearshore confined disposal site per such EPA approval, HWP agrees: (1) to perform and pay for the modified remedial design/remedial action activities for Sediment Management Area 421-B and the placement of the resulting dredged material in the Slip 1 nearshore confined disposal site; and (2) in cooperation with the Port and Occidental, to obtain and cooperate in obtaining all EPA approvals and to satisfy all lawful conditions necessary for HWP to perform and pay for dredging, disposal of dredged material, capping (if necessary), natural recovery (if necessary), long-term monitoring and maintenance, compensatory habitat mitigation, and any other activities required with respect to Sediment Management Area 421-B under the UAO, the anticipated Port/Occidental consent decree, and/or any other regulatory enforcement mechanism arising out of or directly related to the UAO or the anticipated Port/Occidental consent decree.

E. Without admitting any fact, responsibility, fault or liability in connection with any of the matters described above, the Parties wish to enter into this Agreement in order to establish the respective rights and obligations of the Parties with respect to HWP's implementation of Sediment Management Area 421-B remedial design/remedial action activities, and for the placement and containment in the Slip 1 nearshore confined disposal site of the dredged material from Sediment Management Area 421-B, all pursuant to the UAO, the anticipated Port/Occidental consent decree, and/or any other regulatory enforcement mechanism arising out of or directly related to the UAO or the anticipated Port/Occidental consent decree.

## AGREEMENTS

In consideration of the foregoing and the mutual covenants and promises contained herein, and subject to the condition precedents set forth in Paragraph 5.1 below, the Parties hereby agree as follows:

**1. Definitions.** The following terms and phrases within quotation marks shall have the following meanings for the purposes of this Agreement:

- 1.1 "American" shall mean American Construction Co., Inc.
- 1.2 "Days" unless otherwise indicated, shall mean calendar days.
- 1.3 "Effective Date" shall mean October 15, 2004.
- 1.4 "EPA" shall mean the United States Environmental Protection Agency.

1.5 "Excess NCD Site Capacity" shall mean the disposal capacity in the NCD Site available to HWP for SMA 421-B-Dredged Material.

1.6 "Force Majeure Event" shall mean an event that directly and adversely affects the SMA 421-B RD/RA Activities, the delivery and placement of the SMA 421-B-Dredged Material in the NCD Site, the NCD Site, the Port/Occidental Project, or the Slip 1 Schedule by delaying any Party's ability to perform responsibilities under this Agreement, and is (a) unavoidable, (b) not capable of alteration by the pertinent Party's discretionary acts, and (c) beyond the control of the Party, such as: (1) acts of God (such as earthquakes or floods) or acts of war or terrorism; (2) riots; (3) fire or other casualty not willfully caused by any Party; (4) quarantine or epidemic; (5) explosions; (6) unusually severe weather conditions which could not have been reasonably anticipated; (7) labor disputes, strikes, lockouts, injunctions; (8) national emergency; (9) efforts by third parties seeking to prevent and/or alter the SMA 421-B RD/RA Activities and/or EPA's approvals/conditions for the SMA 421-B RD/RA Activities; and/or (10) efforts by third parties to prevent and/or alter the placement and confinement of SMA 421-B-Dredged Material in the NCD Site.

1.7 HWP shall mean Hylebos Waterfront Property, LLC, a Washington limited liability company.

1.8 "HWP Delivery Period" shall mean the time frame from October 15, 2004 through November 15, 2004, unless otherwise extended pursuant to this Agreement.

1.9 "NCD Site" shall mean the Slip 1 nearshore confined disposal site into which various dredged materials shall be placed and confined pursuant to the UAO, pursuant to the anticipated Port/Occidental Consent Decree, pursuant to such other EPA-approved/imposed arrangement with the Port/Occidental, or pursuant to such other arrangement(s) made by Port/Occidental.

1.10 "Occidental" shall mean Occidental Chemical Corporation.

1.11 "Parties" shall collectively mean the Port, Occidental, HWP, and American.

1.12 "Party" shall individually mean the Port, Occidental, HWP, or American.

1.13 "Port" shall mean the Port of Tacoma.

1.14 "Port/Occidental" shall mean either the Port, Occidental and/or both.

1.15 "Port/Occidental Consent Decree" shall mean a consent decree for Hylebos Waterway remedial design/remedial action activities executed by the Port and Occidental and subsequently entered by the United States District Court for the Western District of Washington.

1.16 "Port/Occidental Project" shall mean the construction and filling of the NCD Site and implementation of Hylebos Waterway RD/RA activities (other than for SMA 421-B) to be accomplished by the Port and Occidental pursuant to the UAO, pursuant to the anticipated Port/Occidental Consent Decree, or pursuant to such other EPA-approved/imposed arrangement with the Port and Occidental. The Port/Occidental Project may also include certain other activities to be accomplished by Port/Occidental and/or by other parties that involve the placement and confinement of other material in the NCD Site. The Port/Occidental Project shall not include the SMA 421-B RD/RA Activities or the delivery/placement of SMA-421-B-Dredged Material in the NCD Site.

1.17 "Property" shall mean the real property purchased by HWP from Taylor Way Properties, Inc., as generally depicted on the map attached to this Agreement as Attachment A and as defined by the legal description attached to this Agreement as Attachment B.

1.18 "Released American/HWP Parties" shall mean American and HWP, as well as their lenders who provide acquisition, development or construction financing for the Property, together with each of American's, HWP's, and such lenders' respective officers, directors, members, managers, employees, and agents.

1.19 "Released Port/Occidental Parties" shall mean the Port, Occidental, OCC Tacoma, Inc., Mariana Properties, Inc., Glenn Springs Holdings, Inc., Detrex Corporation, Hooker/Detrex Corporation, PRI Northwest, Inc., BHP Hawaii, Inc. Pioneer Chlor Alkali Company, and Pioneer Americas LLC, together with each of their respective parent and affiliated companies, predecessors, successors, assigns, shareholders, officers, directors, members, managers, employees, and agents.

1.20 "SMA 421-A" shall mean the sediment management area generally depicted as such on the map attached to this Agreement as Attachment C.

1.21 "SMA 421-B" shall mean the sediment management area generally depicted as such on the map attached to this Agreement as Attachment C.

1.22 "SMA 421-B-Dredged Material" shall mean up to seventy-five thousand (75,000) in situ cubic yards of material that may be dredged by HWP from SMA 421-B and delivered/placed by HWP in the NCD Site during the HWP Delivery Period for confinement pursuant to this Agreement. SMA 421-B-Dredged Material shall not contain logs, concrete blocks, pilings, floating debris, any solid material greater than two (2) feet in size, or any non-sediment material that creates an oily surface sheen when placed in the NCD Site.

1.23 "SMA 421-B RD/RA Activities" shall mean all remedial design and remedial action activities as necessary to satisfy EPA's approvals and conditions for remediating contamination present at SMA 421-B on the Effective Date pursuant to the UAO, the anticipated Port/Occidental Consent Decree and/or any other regulatory enforcement

mechanism arising out of or directly related to the UAO or the anticipated Port/Occidental Consent Decree, including but not limited to sampling and analysis, dredging and excavation, dredging/excavation and transportation best management practices and controls, water quality monitoring, post-dredging confirmation sampling and analysis, disposal of dredged material, capping, natural recovery, bank stabilization, imposition of institutional controls and restrictive covenants at or on SMA 421-B and/or the Property, long-term monitoring and maintenance, evaluation and imposition of source controls for or on SMA 421-B and/or the Property, compensatory habitat mitigation, quality assurance requirements, health and safety requirements, reporting requirements, records retention, granting access to or through SMA 421-B and/or the Property as provided for in Paragraphs 2.2 and 2.3 below, payment of penalties based upon the acts or omissions of HWP or its contractors or agents, and any other activities pertinent to SMA 421-B, the Property, and/or SMA 421-B-Dredged Material that are required pursuant to the UAO, the anticipated Port/Occidental Consent Decree, and/or any other regulatory enforcement mechanism that arises out of or is directly related to the UAO or the anticipated Port/Occidental Consent Decree, all of the foregoing being without any admission of liability by HWP or American for the environmental conditions of the Hylebos Waterway, SMA 421-B, or the Property except as voluntarily assumed under the terms of this Agreement.

1.24 "Slip 1 Schedule" shall mean the schedule established by Port/Occidental for any activities at or related to Slip 1 and/or the NCD Site.

1.25 "UAO" shall mean the Unilateral Administrative Order, EPA Docket No. CERCLA 10-2002-0064, issued to the Port and Occidental.

## **2. Parties' Responsibilities.**

2.1 In addition to (and/or to clarify) the responsibilities established in other provisions of this Agreement, Port/Occidental shall be responsible for and shall bear the costs of:

- (a) planning, design, permitting and construction of the NCD Site;
- (b) implementation of any compensatory habitat mitigation required for construction of the NCD Site;
- (c) property or easement acquisition for the NCD Site, including staging areas necessary for NCD Site construction as provided for in the final Port and Occidental contract documents to implement the Port/Occidental Project, and habitat necessary for NCD Site compensatory mitigation;
- (d) project management and coordination for NCD Site development and construction as provided for in the final Port and Occidental contract documents to implement the Port/Occidental Project;

(e) project management and coordination for scheduling and implementing dredged material deliveries and placement in the NCD Site as provided for in the final Port and Occidental contract documents to implement the Port/Occidental Project and the SMA 421-B RD/RA Activities;

(f) implementation of the long-term post-construction groundwater quality monitoring program at the NCD Site;

(g) using design documents and deliverables provided to Port/Occidental by HWP and its consultants/engineers, endeavoring to secure necessary EPA approvals/conditions for SMA 421-B RD/RA Activities and for the placement/confinement of SMA 421-B-Dredged Material in the NCD Site pursuant to the UAO and/or the anticipated Port/Occidental Consent Decree;

(h) using commercially reasonable best efforts consistent with the terms of this Agreement, facilitating actions necessary for HWP's implementation and completion of the SMA 421-B RD/RA Activities and the delivery/placement of SMA 421-B-Dredged Material in the NCD Site;

(i) responsibility for long-term monitoring of SMA 421-A pursuant to the UAO and/or the anticipated Port/Occidental Consent Decree, now that Port/Occidental have accomplished dredging of SMA 421-A and have obtained EPA approval of post-dredging confirmation sampling of SMA 421-A, all without any admission of liability by Port/Occidental for the environmental conditions of the Hylebos Waterway and/or SMA 421-A; and

(j) cooperation and reasonable assistance with HWP's efforts to obtain permits and approvals for dock installation and improvements at the Property, without expense to Port/Occidental for any activities not expressly established as Port/Occidental responsibilities elsewhere in this Agreement.

2.2 In addition to (and/or to clarify) the responsibilities established in other provisions of this Agreement, HWP shall be responsible for and shall bear the costs of:

(a) performing all sampling and analysis necessary to obtain EPA approval for the implementation and completion of SMA 421-B RD/RA Activities and for the placement and confinement of the SMA 421-B-Dredged Material in the NCD Site;

(b) preparing and providing to Port/Occidental all design documents and deliverables necessary to obtain EPA approval for the commencement, implementation and completion of SMA 421-B RD/RA Activities and for the placement and containment of the SMA 421-B-Dredged Material in the NCD Site;

(c) obtaining a surety bond prior to October 15, 2004, in the amount of one million dollars (\$1,000,000) with terms subject to Port/Occidental's reasonable approval, guaranteeing full on-schedule performance of all construction activities to be accomplished at SMA 421-B and of all construction activities required for compensatory habitat mitigation in furtherance of SMA 421-B RD/RA Activities and maintaining such surety bond in effect until completion of all such SMA 421-B construction activities and completion of all such compensatory habitat mitigation construction; provided, however, that in the event that, after using its commercially reasonable best efforts, HWP is unable to secure such bond (and Port/Occidental do not amend or waive this requirement in their absolute discretion), HWP shall not proceed with any construction activities, and this Agreement shall terminate without liability to any Party;

(d) obtaining liability insurance prior to October 15, 2004, in the amounts of three million dollars (\$3,000,000) for comprehensive general liability and three million dollars (\$3,000,000) for pollution liability, and naming the Port, Occidental and Glenn Springs Holdings, Inc. as additional insureds, as set forth in the Certificate of Insurance attached as Exhibit D, for the SMA 421-B RD/RA Activities and for the delivery and placement of SMA 421-B-Dredged Material in the NCD Site, and maintaining such insurance in effect for the full duration of the construction activities required for compensatory habitat mitigation in furtherance of SMA 421-B RD/RA Activities and of the delivery and placement of SMA 421-B-Dredged Material in the NCD Site;

(e) dredging and transporting all SMA 421-B-Dredged Material in accordance with all requirements and best management practices prescribed by EPA for the Port/Occidental Project, including but not limited to: (i) performing water quality monitoring; (ii) allowing appropriate cycle time to decant water from the dredging bucket or the transport barge within SMA 421-B; and (iii) ensuring that no spillage or releases from transport barges occur outside of SMA 421-B;

(f) performing a post-dredging SMA 421-B bathymetry survey and providing such survey to Port/Occidental;

(g) delivering and placing all SMA 421-B-Dredged Material at the NCD Site in accordance with all requirements and best management practices prescribed by EPA for the Port/Occidental Project, including but not limited to: (i) compliance with water quality requirements during delivery and placement of SMA 421-B-Dredged Material at the NCD Site; and (ii) ensuring that no spillage or releases occur; provided, however, that HWP shall not be required to perform NCD Site water quality monitoring during delivery and placement of SMA 421-B-Dredged Material at the NCD Site unless necessitated by the acts or omissions of HWP or its contractors, subcontractors of any tier, or agents;

(h) addressing any releases of SMA 421-B-Dredged Material or its chemistry to Commencement Bay and its waterways during the dredging, delivery, and placement in the

NCD Site of the SMA 421-B-Dredged Material to the extent that any such release is caused by the acts or omissions of HWP or its contractors, subcontractors of any tier, or agents;

(i) executing an agreement to provide access to SMA 421-B and/or the Property for the United States on behalf of EPA, and the State of Washington, as well as each of their respective representatives (including contractors and designated representatives) for the purpose of conducting any activity related to the UAO, the anticipated Port/Occidental Consent Decree, and/or any other regulatory enforcement mechanism arising out of or directly related to the UAO or the anticipated Port/Occidental Consent Decree;

(j) negotiating in good faith with EPA and Port/Occidental with respect to certain agreements, easements, and institutional controls which may be required by EPA under the UAO and/or the anticipated Port/Occidental consent decree, and which shall be negotiated and implemented or performed without cost to Port and Occidental (except that Port and Occidental shall each bear their own attorneys' fees in connection with their participation in or monitoring of such negotiations, implementation, or performance); and

(k) implementing and completing all SMA 421-B RD/RA Activities as required, conditioned, and approved by EPA pursuant to the UAO, the anticipated Port/Occidental Consent Decree, and/or any other regulatory enforcement mechanism arising out of or directly related to the UAO or the anticipated Port/Occidental Consent Decree.

2.3 In addition to (and/or to clarify) the responsibilities established in other provisions of this Agreement, HWP shall be responsible for, but shall not incur any costs with respect to:

(a) providing Port/Occidental and their contractors and/or designated representatives with reasonable access to SMA 421-B and/or the Property, for the purpose of observing or evaluating SMA 421-B RD/RA Activities and/or for the purpose of the Port/Occidental Project, provided that (1) Port/Occidental shall give reasonable notice (which, in any non-emergency situation, shall not be less than two business days) of its desire to enter onto the Property, which notice shall include a brief description of the activities to be conducted at the Property, (2) no such activities shall interfere with the development of the Property or, after development, the business operations conducted at the Property, (3) Port and Occidental shall be solely responsible for any injury or damage to the Property or persons arising out of or related to the acts and omissions of their (and their affiliates') employees, contractors (of any tier), and agents who enter the Property as provided for in this Agreement, (4) unless such requirement is expressly waived by HWP, Port/Occidental shall provide certification to HWP that their contractors and/or designated representatives entering the Property have in place the following insurance policies (HWP shall be named as additional insured on policies required under (b) and (c)): (a) Workers' Compensation Insurance as required by federal and/or state law; (b) Comprehensive General Liability Insurance in the amount of at least \$3 million; and (c) pollution liability in the amount of at least \$3 million, and (5) unless such requirement is expressly waived by HWP, the Property shall be returned to its prior condition in the event

that any activities conducted in connection with this access right results in damage to or a change in condition of the Property;

(b) providing the United States on behalf of EPA and the State of Washington, as well as their representatives (including contractors and/or designated representatives) with access to SMA 421-B and/or the Property as required by the UAO, the anticipated Port/Occidental Consent Decree, and/or any other regulatory enforcement mechanism arising out of or directly related to the UAO or the anticipated Port/Occidental Consent Decree; and

(c) using commercially reasonable best efforts consistent with the terms of this Agreement, facilitating actions necessary for Port/Occidental's implementation and completion of the Port/Occidental Project.

### **3. HWP's Payments to Port/Occidental; American's Guarantee of Performance by HWP.**

3.1 HWP shall pay a fixed-price fee for Excess NCD Site Capacity of four hundred thousand dollars (\$400,000) to Port/Occidental (per Port/Occidental's instructions for wire transfer or payment) as follows: (a) a two hundred thousand (\$200,000) payment upon receipt of EPA approval to begin dredging per HWP's remedial design for SMA 421-B RD/RA Activities; and (b) a two hundred thousand (\$200,000) payment upon the last to occur of: (i) completion of placement of SMA 421-B-Dredged Material in the NCD Site; and (ii) HWP's receipt of the signed releases to be obtained from Arkema Inc. and General Metals of Tacoma, Inc., as provided by Paragraph 8.3, below. In no event shall HWP pay to Port/Occidental any fees for placement or containment of SMA 421-B Dredged Materials in the NCD Site as described in Paragraph 4.1 below that exceed the amounts paid by HWP pursuant to this Paragraph 3.1.

3.2 American hereby guarantees the performance of all of HWP's responsibilities under this Agreement without any admission of any fault or liability for the environmental conditions of the Hylebos Waterway, SMA 421-B, or the Property whatsoever.

### **4. Guaranteed Excess NCD Site Capacity for Placement during the HWP Delivery Period; Placement Requirements; Volume Measurement; Standby and Delay Costs; Compliance with Port/Occidental Directives.**

4.1 Port/Occidental hereby guarantee HWP not less than the Excess NCD Site Capacity necessary for seventy-five thousand (75,000) in situ cubic yards of HWP's SMA 421-B-Dredged Material delivery and placement during the HWP Delivery Period. The HWP Delivery Period may coincide with the placement of material in the NCD Site other than SMA 421-B-Dredged Material. Port/Occidental will coordinate HWP's delivery and placement of SMA 421-B-Dredged Material with the delivery and placement of other material, if any, including but not limited to material from the Port/Occidental Project. Port/Occidental may need or wish to change the Slip 1 Schedule as it is implemented, and

shall retain the ability and absolute discretion to do so for all components of the Slip 1 Schedule other than the HWP Delivery Period; notwithstanding the foregoing, Port/Occidental shall not take any action that delays or prevents the delivery and placement of the SMA 421-B-Dredged Material at the NCD Site such that delivery and placement cannot be completed within the HWP Delivery Period without a commensurate extension of the end date of the HWP Delivery Period for such period of time of delayed or prevented delivery and placement to the extent attributable to such Port/Occidental action.

4.2 After the delivery of SMA 421-B-Dredged Material to the NCD Site, all SMA 421-B-Dredged Material shall be placed by HWP within the NCD Site at elevations below +9 feet Mean Lower Low Water. HWP's placement of the SMA 421-B-Dredged Material in the NCD Site shall be accomplished pursuant to, and in accordance with, the existing Water Quality Certificate for the NCD Site issued by EPA to Port/Occidental for the Port/Occidental Project. In the event that additional control measures not delineated by the existing Water Quality Certificate are required by EPA to accomplish the placement of the SMA 421-B-Dredged Material in the NCD Site based upon the composition of the SMA 421-B-Dredged Material or other reason not within the control of, or the fault of, Port/Occidental, then HWP shall be responsible for all costs associated with the implementation of such additional control measures.

4.3 The number of in situ cubic yards of SMA 421-B-Dredged Material placed in the NCD Site shall be determined by comparing the design survey SMA 421-B bathymetry to the post-dredging survey SMA 421-B.

4.4 Port/Occidental and HWP shall consult with each other and use their commercially reasonable best efforts to eliminate or minimize standby and delay, and associated costs (e.g., work interruption, production delays, barge waiting before placement, placement delays, agency penalties, etc.) that may be incurred by the Parties to accomplish the placement of SMA 421-B-Dredged Material in the NCD Site. Such consultation shall include, but shall not be limited to, the participation of a HWP representative in construction conferences convened by Port/Occidental during the HWP Delivery Period. HWP and its contractors shall comply with any EPA and/or Port/Occidental directives to interrupt, delay, stop, or modify SMA 421-B RD/RA Activities and/or SMA 421-B-Dredged Material delivery to and placement in the NCD Site due to water quality issues, due to safety issues (including but not limited to Port safety rules and requirements), due to consent decree requirements, due to agency order or directive requirements, due to permit requirements, due to issues pertinent to the Port/Occidental Project's Construction Quality Assurance Plan, and/or due to issues pertinent to the Permitting and Site Access Plan. If such EPA and/or Port/Occidental directives, and/or any other circumstances, result in delays to the SMA 421-B RD/RA Activities and/or to delivery to and/or placement in the NCD Site of SMA 421-B-Dredged Material, then the Parties shall bear their own standby and delay costs. In circumstances of such delays, if any, the end date for the HWP Delivery Period shall be extended for a commensurate period of time of such delays, except to the extent that any

delay is caused by the acts or omissions of HWP, or its contractors, subcontractors of any tier, or agents.

## **5. Conditions Precedent; Agreement Termination.**

5.1 All of the obligations of the Parties under this Agreement shall be conditioned upon the occurrence of all of the following events on or before the following deadline dates: (a) EPA shall issue, on or before October 15, 2004, all EPA approvals necessary to accomplish the SMA 421-B RD/RA Activities and the placement of the SMA 421-B-Dredged Material in the NCD Site during the HWP Delivery Period, and all such EPA approvals shall be acceptable to the Parties in their respective absolute discretions (as demonstrated by the Parties' exchange of written notices accepting or rejecting such EPA approvals on or before 5:00 p.m. Pacific time on October 15, 2004); and (b) HWP shall commence SMA 421-B RD/RA Activities, including dredging at SMA 421-B, not later than October 18, 2004. In the event that any one or more of such conditions precedent fail to occur, this Agreement shall terminate and no Party shall be deemed in default, and any funds paid to Port/Occidental by HWP pursuant to Paragraph 3.1 above shall be returned in full. However, the Parties may mutually agree to an extension or extensions of the deadline dates for such conditions precedent.

## **6. HWP's Agreement Termination Right.**

6.1 HWP may terminate this Agreement in HWP's absolute discretion anytime prior to 5:00 p.m. Pacific time on October 15, 2004, by providing the Port and Occidental with written notice of HWP's decision to terminate this Agreement. In that circumstance, this Agreement shall terminate and no Party shall be deemed in default, and any funds paid to Port/Occidental by HWP pursuant to Paragraph 3.1 above shall be returned in full.

## **7. Deadline for SMA 421-B-Dredged Material Placement and Termination of Right to Use Excess NCD Site Capacity.**

7.1 HWP's right under this Agreement to use Excess NCD Site Capacity for HWP's SMA 421-B-Dredged Material delivery and placement during the HWP Delivery Period shall terminate as of the end of the HWP Delivery Period on November 15, 2004, unless Port/Occidental elect in their absolute discretion to extend the November 15, 2004, deadline, except as provided for in Paragraph 7.2 below.

7.2 In the event that HWP's placement of SMA-421-B-Dredged Material in the NCD Site is delayed past the November 15, 2004 deadline established by Paragraph 7.1, above, due to (i) the fault of Port/Occidental, (ii) as set forth in Paragraph 4.1 or 4.4 above (except to the extent that any delay is caused by the acts or omissions of HWP), or (iii) Force Majeure; then in any such case, the November 15, 2004 deadline shall be extended for the period of time of delay solely attributable to the foregoing and no Party shall be deemed in default.

**8. Release of Certain Liabilities Potentially Attributable to the Released American/HWP Parties.**

8.1 Except with respect to obligations of HWP and American provided for in this Agreement, the Port and Occidental release and covenant not to sue the Released American/HWP Parties for any and all claims arising out of or relating to Port/Occidental response costs, damages, remedial or other obligations, or other liability for releases of hazardous substances from the Property that occurred prior to HWP's ownership of the Property.

8.2 Except with respect to the lenders among the Released American/HWP Parties, the release and covenant not to sue by the Port and Occidental provided by Paragraph 8.1, above, shall not include, and the Port and Occidental reserve any and all claims regarding, the following: (a) releases of hazardous substances caused by, or occurring as a result of, SMA 421-B RD/RA Activities; (b) releases of hazardous substances caused by, or occurring as a result of, the delivery and/or placement of SMA 421-B-Dredged Material in the NCD Site to the extent such release is the fault (whether by act or omission) of HWP or any of its contractors or subcontractors of any tier; (c) releases of hazardous substances at the Property (and migration of such releases) and/or from activities associated with the Property's operations occurring after HWP's purchase of the Property; (d) hazardous substances buried at subsurface depths in the Hylebos Waterway and located within areas designated by EPA for no action; (e) hazardous substances in areas of the Hylebos Waterway designated by EPA for natural recovery; and (f) any other matters reserved by the United States in the anticipated Port/Occidental Consent Decree that limit or condition the covenants not to sue or to take administrative action granted to Port/Occidental by the United States, including but not limited to the United States' pre-certification reservations, the United States' post-certification reservations, the United States' general reservation of rights, the United States work takeover provisions, the United States reservation of all rights to take any and all response actions authorized by law, and any related provisions. Neither HWP nor American nor any of the parties released in Paragraph 8.1 above admits to any liability whatsoever for any of the items set forth in this Paragraph 8.2.

8.3 Port/Occidental shall obtain from Arkema Inc. and General Metals of Tacoma, Inc. written releases of claims against the Released American/HWP Parties for all Hylebos Waterway response costs incurred by Arkema Inc. and/or General Metals of Tacoma, Inc.

8.4 None of the Released American/HWP Parties shall be liable for any claims, damages, response costs or other losses or consequences arising out of or related to the construction or operation of the NCD Site, including but not limited to releases of hazardous substances from, or other environmental conditions related to, the construction or operation of the NCD Site, except that HWP and its contractors and subcontractors of any tier shall remain liable for any such claims, damages, response costs or other losses or consequences to the extent they result from their negligent acts or omissions or willful misconduct.

## **9. Release of Certain Liabilities Potentially Attributable to the Released Port/Occidental Parties.**

9.1 Except with respect to obligations of Port/Occidental provided for in this Agreement, American and HWP release and covenant not to sue the Released Port/Occidental Parties for any and all claims, damages, response costs or other losses arising out of or relating to the SMA 421-B RD/RA Activities, the placement/confinement of SMA 421-B-Dredged Material in the NCD Site, the Hylebos Waterway, the Property, or the Port/Occidental Project.

## **10. Communications and Notices.**

10.1 Port/Occidental shall be the primary communicators with EPA regarding SMA 421-B RD/RA Activities and the placement of SMA 421-B-Dredged Materials in the NCD Site. Accordingly, all design documents and deliverables prepared by HWP and/or its consultants/engineers shall be provided to Port/Occidental for submission to EPA. Port/Occidental shall make reasonable efforts in advance of any Port/Occidental communications directly with EPA regarding SMA 421-B RD/RA Activities and the placement of SMA 421-B-Dredged Materials in the NCD Site, and HWP shall have the right to participate in any such communications. In the event that HWP and/or American desire to communicate with EPA regarding SMA 421-B RD/RA Activities and the placement of SMA 421-B-Dredged Materials in the NCD Site, HWP and/or American shall make reasonable efforts in advance to allow Port/Occidental to participate in such communications. The Parties shall provide each other with copies of all written communications and documents exchanged with EPA regarding SMA 421-B RD/RA Activities and the placement of SMA 421-B-Dredged Materials in the NCD Site. Notwithstanding any other provision of this Paragraph 10.1, Port/Occidental shall not be entitled to make any binding commitment with respect to any aspect of the SMA 421-B RD/RA Activities that has not been (a) expressly included in design documents and deliverables prepared by HWP, or (b) approved in writing by HWP.

10.2 The Parties shall provide each other with prompt written notice of any events implicating the terms or provisions of this Agreement, including but not limited to:

(a) the Parties' respective notices on or before 5:00 p.m. Pacific time on October 15, 2004, as provided by Paragraph 5.1, above, of acceptance or rejection of the terms of EPA's approvals necessary to accomplish the SMA 421-B RD/RA Activities and the placement of the SMA 421-B-Dredged Material in the NCD Site during the HWP Delivery Period;

(b) HWP's notice on or before 5:00 p.m. Pacific time on October 15, 2004, as provided by Paragraph 6.1, above, if any, of termination of this Agreement;

(c) notice of EPA's approval of the commencement of SMA 421-B RD/RA Activities by HWP;

(d) HWP's notice of commencement of the SMA 421-B RD/RA Activities, including dredging at SMA 421-B;

(e) HWP's notices of deliveries of SMA 421-B-Dredged Material to the NCD Site;

(f) HWP's notice of completion of delivery and placement of the SMA 421-B-Dredged Material at the NCD Site;

(g) HWP's notice of completion of construction activities within SMA 421-B and HWP's notice of completion of compensatory habitat mitigation construction, as anticipated by Paragraph 2.2(c), above, and any such notice of completion from EPA provided to Port/Occidental;

(h) notices of directives, if any, by EPA and/or Port/Occidental to interrupt, delay, stop, or modify SMA 421-B RD/RA Activities and/or SMA 421-B-Dredged Material delivery to and placement in the NCD Site, as anticipated by Paragraph 4.3, above;

(i) notices, if any, pertinent to the surety bond and liability insurance provided by Paragraphs 2.2(c) and 2.2(d), above;

(j) HWP's notice, if any, of HWP's inability to complete placement of all SMA 421-B-Dredged Material in the NCD Site prior to the November 15, 2004, deadline established by Paragraph 7.1, above;

(k) default under this Agreement;

(l) termination of this Agreement;

(m) a Force Majeure Event as provided in Paragraph 11, below; and

(n) any releases of hazardous substances from the NCD Site.

All notices shall be sent by personal delivery, facsimile (with confirmation receipt) to the numbers indicated below, or first class or registered or certified mail, postage prepaid and addressed as indicated below (or to such other addresses or facsimile numbers as the Parties may designate by notice to the other Party):

**If to the Port, at:**

Port of Tacoma

P.O. Box 1837

Tacoma, Washington 98401-1837

Attention: Suzanne Dudziak

Fax No.: (253) 428-8679

Direct Telephone No.: (253) 383-9453

**With a copy to:**

Robert Goodstein  
Goodstein Law Group, PLLC  
1001 Pacific Avenue, Suite 400  
Tacoma, Washington 98402  
Fax No.: (253) 779-4411  
Direct Telephone No.: (253) 779-4000

**If to Occidental, at:**

Occidental Chemical Corporation  
Legal Department  
5005 LBJ Freeway  
Dallas, Texas 75244  
Attention: John R. Wheeler  
Fax No.: (972) 404-3647  
Direct Telephone No.: (972) 404-3923

**And at:**

Occidental Chemical Corporation  
c/o Glenn Springs Holdings, Inc.  
2480 Fortune Drive, Suite 300  
Lexington, Kentucky 40509  
Attention: F. Allen Meek, Jr.  
Fax No.: (859) 543-2171  
Direct Telephone No.: (859) 543-2153

**With a copy to:**

Robert F. Bakemeier  
Bakemeier, P.C.  
7525 S.E. 24<sup>th</sup> Street, Suite 610  
Island Corporate Center  
Mercer Island, Washington 98040  
Fax No.: (206) 230-0602  
Direct Telephone No.: (206) 230-0600

**If to HWP, at:**

HWP  
411 – 13<sup>th</sup> St.  
Everett, Washington 98201  
Attention: Steven Brannon  
Fax No.: (425) 339-4155  
Telephone No.: (425) 259-0118

**With a copy to:**

Barry G. Ziker  
Salter Joyce Ziker, PLLC  
1601 Fifth Avenue, Suite 2040  
Seattle, WA 98101  
Fax No.: (206) 957-5961  
Telephone No.: (206) 957-5952

**If to American, at:**

American Construction Co., Inc.  
411 – 13<sup>th</sup> St.  
Everett, Washington 98201  
Attention: Steven Brannon  
Fax No.: (425) 339-4155  
Telephone No.: (425) 259-0118

**With a copy to:**

Barry G. Ziker  
Salter Joyce Ziker, PLLC  
1601 Fifth Avenue, Suite 2040  
Seattle, WA 98101  
Fax No.: (206) 957-5961  
Telephone No.: (206) 957-5952

**11. Force Majeure.** Any delay by the Port, Occidental or HWP, other than the payment of money, shall not constitute a default hereunder and shall not be subject to the provisions of Paragraph 7.2, above, if and to the extent the cause for such delay was due to a Force Majeure Event. Any Party claiming a delay due to a Force Majeure Event shall give written notice of such Force Majeure Event to the other Party within five (5) days of discovering such Force Majeure Event, and in such written notice shall provide a written description of such event to the other Parties, including:

(a) the date and description of the occurrence giving rise to the claim of a Force Majeure Event;

(b) a statement of the nature of the impacts on the performance of the Party or its contractors or subcontractors;

(c) the relief sought by the Party claiming the Force Majeure Event; and

(d) the actions taken in attempts to prevent or mitigate the effects of any delay or impact to performance.

Any Party claiming a delay due to a Force Majeure Event shall take all reasonable actions to prevent or mitigate the effects of any such delay.

**12. Dispute Resolution.** In the event the Parties disagree about the meaning, interpretation or application of this Agreement, they shall meet promptly, in person, to resolve such dispute. If they cannot resolve the dispute within ten (10) days from the date of their meeting, the Parties shall submit the dispute to confidential non-binding mediation. Within thirty (30) days of the expiration of such ten (10) day period, the Parties shall confer and mutually agree on a mediator. If such mediation fails to resolve the dispute, the Parties may subsequently pursue any and all rights and remedies. The Parties shall share the costs and expenses of the mediator equally, and shall bear their own mediation costs and expenses. For the purpose of sharing such costs and expenses of the mediator, the Port and Occidental shall collectively constitute one (1) Party and HWP and American shall collectively constitute one (1) Party.

**13. Denial of Liability.** Neither this Agreement nor any information submitted or any action taken by any Party pursuant to this Agreement shall constitute, be interpreted, construed or used as evidence of any admission of liability, law or fact, a waiver of any right or defense, nor an estoppel against a Party by any other Party as between themselves or by any person not a Party.

**14. Relationship of the Parties.** Each Party represents that it has sought and obtained any appropriate legal advice it deems necessary prior to entering into this Agreement. No Party shall act or be deemed to act as legal counsel or representative of the other Party, unless expressly retained by such Party for such purpose, and, except for such express retention, no attorney/client relationship is intended to be created between the Parties. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between the Parties. Each Party represents that the Parties have participated jointly in the negotiation and drafting of this Agreement. In the event any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement.

**15. Assignment; Binding Effect.** No Party shall assign or transfer this Agreement without the prior written approval of all other Parties, which approval shall not be unreasonably withheld. This Agreement shall extend to, be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

**16. Non-Waiver.** The failure of any Party to enforce its rights under any provision of this Agreement shall not be construed to be a waiver of such provision. No waiver of any breach of this Agreement shall be effective unless contained in a writing signed by a duly authorized officer or representative of the Party sought to be charged with the waiver and no such waiver shall be held to be a waiver of any other breach or any other right arising under this Agreement.

**17. Severability.** If any provision of this Agreement is deemed invalid or unenforceable, the balance of this Agreement shall remain in full force and effect.

**18. Entire Agreement; Amendment; No Impact Upon Other Agreements.** This Agreement constitutes the entire agreement between the Parties concerning the subject matter hereof and supersedes all prior communications, representations, proposals, understandings or agreements, either written or oral, between the Parties with respect to such subject matter. This Agreement may not be modified or amended, in whole or in part, except by a writing signed by the duly authorized officers or representatives of the Parties. This Agreement shall not modify or amend the terms of other agreements executed by the Parties, including but not limited to the Slip 1 Disposal Site Agreement executed by the Port and Occidental, as amended or as to be amended. Furthermore, by executing this Agreement, Occidental does not intend to, and hereby affirms that it does not, amend or alter any of the previously existing agreements and/or legal relationships between Occidental and any other person or entity.

**19. Third-Party Beneficiaries Limited.** This Agreement is intended by the Parties for their sole and exclusive benefit, subject to the following sentence. The Parties expressly do not intend to benefit any other third party, and expressly do not intend to create any other third-party beneficiaries to this Agreement, except for (a) the other Released American/HWP Parties and the other Released Port/Occidental Parties, as respectively defined above in Paragraphs 1.18 and 1.19, and for the limited purpose of the releases provided by Paragraphs 8 and 9, and (b) the EPA and the State of Washington, and for the limited purpose of the access provided for in Paragraphs 2.2(i) and 2.3(b).

**20. Governing Law; Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. Venue shall be in Pierce County, Washington.

**21. Authority.** Each Party represents and warrants that it has all requisite power to enter into and be bound by the terms and conditions of this Agreement and to carry out its respective obligations hereunder and that the execution and delivery of this Agreement and the performance of each Party's obligations hereunder have been duly authorized by all necessary action (corporate or otherwise) of such Party.

**22. Counterparts; Recitals; Headings.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The Recitals are not merely descriptive but are terms of this Agreement. The headings and subheadings contained in this Agreement are used solely for convenience and do not constitute a part of the Agreement, nor should they be used to aid in any manner in the construction or interpretation of this Agreement.

**23. Attachments.** The attachments referenced in this Agreement, listed below, and attached shall be incorporated by reference and constitute part of the terms of this Agreement.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the dates set forth below. Each person signing this Agreement represents that he or she has been duly authorized to enter into this Agreement by the entity on whose behalf he or she has executed this Agreement.

**PORT OF TACOMA**

By: Robert I. Goodstein  
Name: ROBERT I. GOODSTEIN  
Its: GENERAL COUNSEL  
Date: 10/15/04

**OCCIDENTAL CHEMICAL CORPORATION**

By: Joy Ellen Drisko  
Name: Joy Ellen Drisko  
Its: Vice President  
Date: 10/14/04

**HYLEBOS WATERFRONT PROPERTY, LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**AMERICAN CONSTRUCTION CO., INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**AGREEMENT REGARDING HYLEBOS WATERWAY SMA 421-B  
RD/RA ACTIVITIES AND EXCESS NCD SITE CAPACITY**

**ATTACHMENTS**

- A. Map Generally Depicting the Property
- B. Property Legal Description
- C. Map Generally Depicting SMA 421-A and SMA 421-B.
- D. Certificate of Insurance