

# COMMISSION AGENDA

Item No: 7B

Meeting: 9/17/20

**DATE:** September 2, 2020

**TO:** Port Commission

**FROM:** Eric D. Johnson, Executive Director

Sponsor: Jason Jordan, Director, Environmental and Planning Services

Project Manager: Sarah Weeks, Environmental Project Manager I

**SUBJECT:** Project Authorization for work associated with the Parcel 1B Earley Business Center Cleanup Action, and enter into Grant Agreement Agreed Order

## A. ACTIONS REQUESTED

1. Request project authorization in the amount \$100,000 for a total authorized amount of \$2,363,000, for work associated with Parcel 1B Earley Business Center, Master Identification No. 095208.
2. Request authorization to enter into a grant agreement with the Washington State Department of Ecology for \$1,548,000, for Parcel 1B Earley Business Center, Master Identification No. 095208.

## B. SYNOPSIS

Washington State Department of Ecology (Ecology) has changed their expectations for the investigation and environmental cleanup of the Earley Business Center. The Port and Ecology entered an Agreed Order<sup>1</sup> (Order) for completion of a Remedial Investigation, Feasibility Study (RIFS), and draft Cleanup Action Plan (dCAP) in 2013. In 2017, Ecology provided written notice that the provisions of the Order had been met. Following the assignment of a new Ecology project manager in 2019 the Port received an informal request to supplement the Remedial Investigation (RI), followed shortly by a formal notification that Ecology is rescinding their prior approval of the Order. It is now Ecology's position that the requirements of the Order have not been fully satisfied and that additional work is required. The Port strongly disagrees with Ecology's revised assessment.

Additional project funds are needed to engage the Port project team (staff, consultant, and legal support) to negotiate a path forward with Ecology.

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<sup>1</sup> Agreed Order DE 9553, signed on April 2, 2013.



## C. BACKGROUND

The Earley Business Center (EBC) was historically operated as a shipyard. The shipyard produced ships for the war effort during WWI and WWII, and at its peak roughly 30,000 people worked at the yard. The Port purchased the property in 1960 and leased the property to a ship-breaking company that operated on the site for 24 years. The property is currently leased to various tenants for commercial and industrial use. Releases of metals and petroleum during ship building and breaking contaminated the soil and groundwater.

Ecology issued a Potential Liable Party status letter to the Port in 2012. On January 17, 2013, Commission approved contract authorization and entry into an Agreed Order with Ecology for completion of a Remedial Investigation, Feasibility Study (RIFS), and draft Cleanup Action Plan (dCAP). In May 2014, Commission approved project authorization in the amount of \$1,438,000 to complete the commitments of the AO.<sup>2</sup> From 2013 to 2017 the work was completed. In April 2017, the previous Ecology PM notified Port staff that the provisions of the AO had been met.<sup>3</sup>

In November 2018, the Port and Ecology reached agreement on the terms of the Consent Decree (CD), for implementation of the cleanup.<sup>4</sup> The same month Port staff presented the CD and cleanup design scope and budget in public session to the Port of Tacoma Commission. The Commission authorized CEO, John Wolfe, to sign the CD, and authorized design funds.<sup>5</sup>

In January 2019, the Ecology PM retired. Rather than beginning the public review process and signing and executing the CD, Ecology decided to delay for reasons related to staffing.<sup>6</sup> In the interim, with no Ecology project manager, the Port decided to move forward with design based on schedule concerns and the condition of the Blair shoreline. Repairs to the shoreline were previously delayed due to the Site investigation work.

In August 2019, a new Ecology PM was hired. In late 2019 Ecology verbally indicated concerns with the work to date but did not provide substantive criticism. To help facilitate the Port's understanding of Ecology's concerns the Port requested that Ecology send a draft letter detailing the technical issues.

In February 2020, the new Ecology PM sent a draft comment letter on the RIFS. The letter presented high level concerns with previous work and requested that additional investigation be performed.<sup>7</sup> In early April 2020 the Port requested and received Ecology's comments in

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<sup>2</sup> Meeting date, May 1, 2014.

<sup>3</sup> Coleman, Marv, Department of Ecology. 2016 *RE: Approval Letter*. Email to Rob Healy, Port of Tacoma. June 6.

<sup>4</sup> Coleman, Marv, Department of Ecology. 2018. *FW: Earley Business Center – CAP & CD*. Email to Sarah Weeks, November 20.

<sup>5</sup> Meeting date, November 29, 2018.

<sup>6</sup> Communication with Rebecca Lawson, Department of Ecology, at the February 2019 quarterly meeting between Port of Tacoma staff and Department of Ecology staff.

<sup>7</sup> Smith, Sandy, Department of Ecology. 2020. *Remedial Investigation and Feasibility Study Report, RIFS Data Gaps, Earley Business Center, Parcel 1B, Port of Tacoma, Tacoma, WA, FS ID Number 2762715*. Letter addressed to Sarah Weeks, Port of Tacoma. February 18.



three appendices referenced in their draft letter, which amounted to an additional 20 pages of detailed technical comments. In Port staff's initial review of Ecology's technical comments, it is clear the new PM's professional judgement differs from the previous PM. The purpose of an RIFS is to select a remedial action that is protective of human health and environment. How much data is necessary to make that selection is a fundamental question of the cleanup process. An environmental professional's judgment of "enough" varies. Were the new Ecology PM in place during the original investigation, the comments could have been easy to accommodate.

Port staff have met with the new Ecology PM and the PM's manager multiple times to express our frustration, technical merits, and concern about Ecology walking back from their previous position. On April 29, 2020, Ecology sent the Port a formal notification that the requirements of the Agreed Order<sup>8</sup> (AO) have not been fully satisfied and that additional work is required. On May 5, 2020, the Port sent a formal letter to the program manager for Ecology's Toxics Cleanup Program, stating our position that the Agreed Order was satisfied, given the previous PM's notice that the AO commitments had been met, and substantial changes, like additional RI work, can only be accomplished through an amendment to the Order.<sup>9</sup> The letter also requested a meeting with Ecology. The Port and Ecology met on June 1. Technical and legal issues were raised at the meeting, disagreements over the status of the Order, the Site definition, and protectiveness of the selected remedy were discussed.

On July 6, the Port received notification that our Oversight Remediation Action Grant application for the 2019-2021 biennium received supplemental funding. The grant awards \$1,548,000 in project funding. Grant funds must be matched by the Port at 100%.

## **D. PROJECT DETAILS**

### ***Scope of Project:***

- Agreed Order DE 9553 Commitments
  - Prior Investigations Report
  - Remedial Investigation
  - Interim Action (UST removal)
  - Feasibility Study
  - Cleanup Action Plan

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<sup>8</sup> Smith, Sandy, Department of Ecology. 2020. *Agreed Order DE 9553, Earley Business Center, Parcel 1B, Port of Tacoma, Tacoma, WA, FS ID Number 2762715*. Letter addressed to Sarah Weeks, Port of Tacoma. April 29.

<sup>9</sup> Jordan, Jason, Port of Tacoma. 2020. *Agreed Order DE 9553 – Earley Business Center, 401 Alexander Ave Business Center, Port of Tacoma, Dispute Resolution – AO Section VIII.J*. Letter addressed to Rebecca Lawson, Department of Ecology. May 5.



- Consent Decree Commitments (unsigned by Ecology)
  - Implement the Cleanup Action Plan, this includes the Engineering Design Report, compliance monitoring plans, construction plans and specifications, construction progress reporting, and implementation of institutional controls.

***Scope of Work for This Request:***

Reach a compromise with Ecology on a path forward. This will require support from legal counsel and the project's environmental consultant. We anticipate two meetings with Ecology to discuss: 1) the definition of the Site; 2) data gaps. Consultant support will include development of figures and supporting technical information, and attendance at meetings with Ecology. Legal support will include engaging the Attorney General, advocating for the Port on the issue of the Site definition, and attendance at meetings with Ecology.

**E. FINANCIAL SUMMARY**

**Estimated Cost of Project**

The total project cost including cleanup implementation is currently estimated at \$7,078,000.

**Estimated Cost for This Request**

The total estimated cost for the scope of this request is \$100,000. The MID for the investigation was closed in 2018 and project authorization of \$1,438,000, was spent in full. The MID has been re-opened to track project cost associated with resolving the current investigation-related dispute with Ecology. If the cost of this estimate is anticipated to exceed the authorized amount, additional Commission authorization will be requested.

Authorization for cleanup design and cost recovery was approved by Commission in November 2018, bringing the total project authorization to \$2,263,000. Due to the uncertainty introduced by the new Ecology PM, all design spending was stopped in December 2019; design plans are currently at 60%. Remedial construction costs are estimated at \$4,715,000 (not included below).

In addition to grant funding, project funds will be recovered via claims made against potential liable parties, Todd Shipyards (i.e. Vigor Marine as current successor to Todd), the US Navy, and Zidell Dismantling.

**Cost Details**

Parcel 1B (EBC)	MID	This Request	Total Previous Requests	Total Estimated Project Costs	Cost to date	Remaining Costs
Investigation	95208	\$ 100,000	\$ 1,438,000	\$ 1,538,000	\$ 1,448,332	\$ 100,000
Cost Recovery	101287.02	\$0	\$ 230,000	\$ 230,000	\$ 58,545	\$ 171,455
Remediation Design	101287.01	\$0	\$ 595,000	\$ 595,000	\$ 279,742	\$ 315,258
<b>TOTALS</b>	<b>--</b>		<b>\$ 2,263,000</b>	<b>\$ 2,363,000</b>	<b>\$ 1,786,619</b>	<b>\$ 486,713</b>



\$12,124 has been spent on Port staff time responding to Ecology since the May 1, 2020 Friday Packet notification to Commission

#### **Source of Funds**

The current Capital Investment Plan (CIP) allocates \$15,000 for MID No. 095208. The CIP will be updated during the 2021 budget process with an additional \$85,000.

#### **Financial Impact**

Project costs will be expensed as incurred. Grant income will be recorded as non-operating revenue at the time reimbursement is requested.

### **F. ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS**

Alternative 1) Do Nothing. In response, Ecology could issue an Enforcement Order.

Alternative 2) This request.

#### **Alternative 2 is the recommended course.**

### **G. PREVIOUS ACTIONS OR BRIEFINGS**

- 1990s-era EBC environmental work (building demolitions, underground storage tank (UST) removals, and Phases I and II Environmental Site Investigations);
- 2007 – Pier 24/25 cleanup work required under the Mouth of the Hylebos Consent Decree, as part of the Commencement Bay Nearshore Tidelands Superfund site cleanup;
- 2008 – Environmental and geotechnical investigations related to the Blair-Hylebos Peninsula Terminal Redevelopment Project;
- 2009 – Underground Storage Tank (UST) Removal & Soil Remediation Project (a portion of which occurred within the EBC).

Work completed since 2012 is included in the table below:

<b><u>Date</u></b>	<b><u>Action</u></b>	<b><u>Amount</u></b>
Pre-2013	Previous environmental work noted above (excluding Piers 24/25)	\$510,000
January 17, 2013	Commission Authorization to enter the Agreed Order DE 9553	\$0
January 17, 2013	Contract Authorization for Crete Consulting for Agreed Order Work	\$400,000 (actuals = \$270,000)*
May 5, 2014	Commission Project Authorization	\$658,000
November 29, 2018	Commission Authorization to sign the Consent Decree to implement the Cleanup	\$825,000



	Action Plan, additional project authorization for Cost Recovery, additional project authorization for Remediation Design.	
<b>TOTAL</b>		<b>\$2,263,000</b>

\*Project costs between January 17, 2013, and the time of project authorization on May 5, 2014, were \$270,000 (+ \$510,000 for environmental work prior to 2013). The remaining cost to complete the Agreed Order was estimated at \$658,000, bringing the total project authorization to \$1,438,00

#### **H. ATTACHMENTS TO THIS REQUEST**

- Computer slide presentation.
- Draft Grant Agreement

#### **I. NEXT STEPS**

We anticipate two additional meetings with Ecology to resolve the current dispute. Possible outcomes are: 1) Ecology's concerns can be addressed by relatively minor changes to cleanup construction design and long term monitoring plans, or; 2) Ecology insists on revisions to the RI, FS, or dCAP, which would require an amendment to the Agreed Order, a vote by Commission to approve the amendment, and additional project funding authorization. Ecology has expressed that they are open to outcome one (1) if the Port concedes on the Site definition and executes the cleanup under an Agreed Order, rather than a Consent Decree. Due to the importance of the Consent Decree to cost recovery and dispute resolution with Ecology (a Consent Decree engages a third-party mediator, vs Agreed Order disputes which are resolved by Ecology), Port staff do not recommend completing the cleanup action under an Agreed Order. We anticipate meeting with Ecology in October, with one or two follow-up meetings as needed, and returning to Commission for a briefing in Q4 2020 or Q1 2021.

Upon Commission approval of the Ecology grant, staff will submit a reimbursement request for past costs of \$243,863. The remaining grant funds will be applied to future work.





Item No.: 7B

Date of Meeting: September 17, 2020

# Project Authorization for the Parcel 1B Earley Business Center Cleanup Action

Sarah Weeks  
Environmental Project Manager





# Project Authorization

## Parcel 1B Earley Business Center



1. Request project authorization in the amount \$100,000, for a total authorized amount of \$2,363,000, for Parcel 1B Earley Business Center, Master Identification No. 095208.
2. Request authorization to enter into a grant agreement with the Department of Ecology for \$1,548,000, for Parcel 1B Earley Business Center, Master Identification No. 095208.

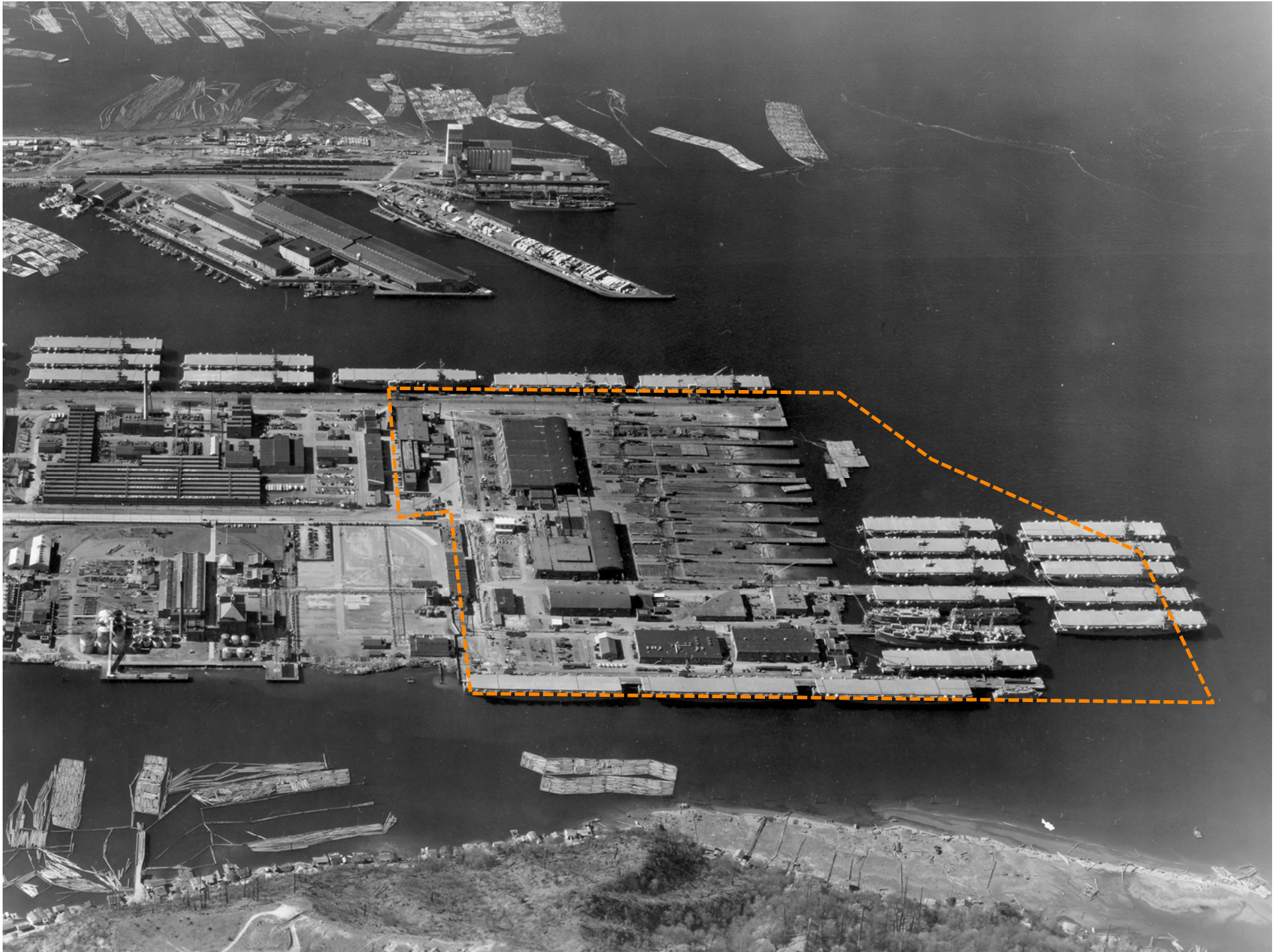


# Project Location

## Parcel 1B Earley Business Center









# Synopsis

## Parcel 1B Earley Business Center



Ecology has changed their expectations for the cleanup of the Earley Business Center.

- 2013 – Ecology and the Port entered an Agreed Order (AO) for completion of a Remedial Investigation, Feasibility Study (RIFS), and draft Cleanup Action Plan (dCAP)
- 2013 to 2017 – RIFS and dCAP completed.
- 2017 – Ecology notification that the provisions of the AO had been fully satisfied.
- 2020 – Ecology rescinded their prior approval of the AO and notified the Port that additional work will be required.



# Agreed Order DE 9553 Parcel 1B Earley Business Center



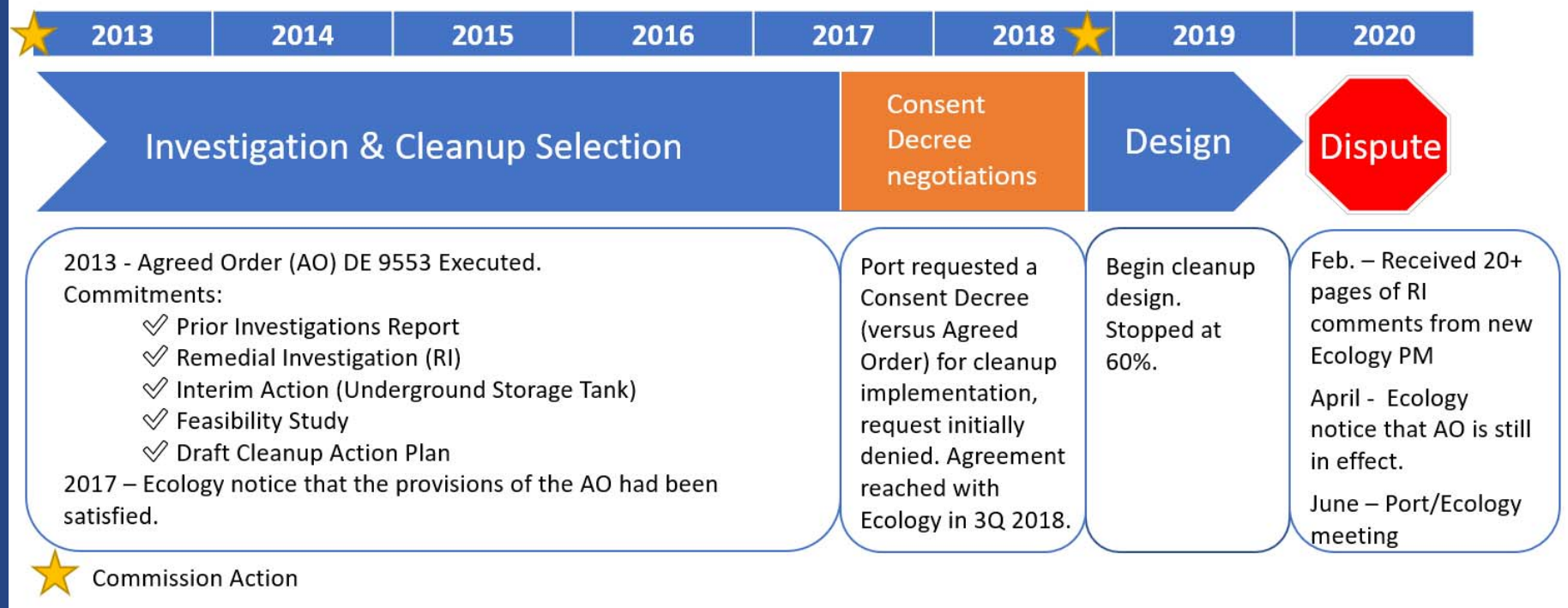
## Agreed Order Commitments (completed from 2013 to 2017):

- Prior Investigations Report
- Remedial Investigation
- Interim Action (UST removal)
- Feasibility Study
- Cleanup Action Plan



# Project Timeline

## Parcel 1B Earley Business Center









# Summary of Dispute

## Parcel 1B Earley Business Center



The Port and Ecology disagree on the following issues:

- Status of the Agreed Order
- Site boundary definition
- Data gaps
- Protectiveness of the selected remedy



## Scope of Work & Source of Funds Parcel 1B Earley Business Center



- Two to three additional meetings with Ecology are anticipated to reach a compromise on a path forward.
- Support from legal counsel and the project's environmental consultant are required.
- Estimated costs = \$100,000.
- The current Capital Investment Plan (CIP) allocates \$15,000 for this project in 2020. The CIP will be updated during the 2021 budget cycle with an additional \$85,000.



# Financial Summary

## Parcel 1B Earley Business Center



Parcel 1B (EBC)	MID	This Request	Total Previous Requests	Total Estimated Project Costs	Cost to date	Remaining Costs
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- \$12,124 has been spent on Port staff time responding to Ecology since the May 1, 2020 notification to Commission.
- The estimated cost for this project through cleanup implementation is \$7,078,000 (\$2,363,000 [see above, Total Estimated Project Costs] + \$4,715,000 [Remediation Construction]).



## MTCA Grant Parcel 1B Earley Business Center



The project was awarded a Remedial Action Grant by the Department of Ecology in the amount of \$1,548,000. Grant funds must be matched by the Port at 100%.

- \$243,863 in past costs are eligible for reimbursement.
- Remaining grant funds will be applied to future work.
- POT has previously received \$450,000 in project grant funding from Ecology.



# Cost Recovery

## Parcel 1B Earley Business Center



Cost recovery claims will be made against the following potential liability parties:

- Todd Shipyard (i.e., Vigor Marine as current successor to Todd)
- US Navy
- Zidell Dismantling



## Look Ahead Parcel 1B Earley Business Center



- Meeting(s) with Ecology to resolve the current dispute.
- Anticipated outcome: Ecology requires revisions to AO documents. The AO must be amended (AO amendments must be approved by Commission). Additional project authorization may be required.
- Port staff will return to Commission for a briefing in Q4 2020 or Q1 2021.



## Conclusion

### Parcel 1B Earley Business Center



1. Request project authorization in the amount \$100,000, for a total authorized amount of \$2,363,000, for Parcel 1B, Earley Business Center, Master Identification No. 095208.
2. Request authorization to enter a grant agreement with the Department of Ecology for \$1,548,000, for Parcel 1B Earley Business Center, Master Identification No. 095208.